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Report for the Secretary of
State pursuant to Section 44A of
the Enterprise Act 2002
of British Sky Broadcasting
plc's acquisition of 17.9%
shareholding in ITV plc

27 April 2007

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Contents

Section		Page
1	Executive summary	3
2	Background	8
3	Audiences	9
4	Sufficient plurality of persons with control of media enterprises	13
5	Recommendations	22
6	Summary of representations	23
Annex		Page
1	ITV and Sky ownership structure	54

Section 1

Executive summary

- 1.1 On 26 February 2007¹, the Secretary of State for Trade and Industry requested Ofcom to conduct an initial investigation into whether the acquisition by British Sky Broadcasting Group Plc (Sky) of a 17.9% shareholding in ITV plc (the relevant merger situation) raises media public interest issues which are or may be relevant to a consideration of that relevant merger situation.²
- 1.2 The public interest consideration specified by the Secretary of State is “the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience”.³
- 1.3 Ofcom’s role in this context is to conduct an initial investigation and report on the effect on the media public interest consideration. This involves providing advice and recommendations to the Secretary of State as to whether the relevant merger situation raises plurality considerations which may be relevant to his decision whether to refer the matter to the Competition Commission for further consideration.
- 1.4 In fulfilling this role, Ofcom has had particular regard to the significance attached by Parliament to media plurality, as being important to the functioning of a healthy and informed democratic society.

Recommendations

- 1.5 Ofcom’s advice for the reasons set out in this report is that there are concerns that, following the relevant merger situation, there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for national⁴ news and the UK TV audience for national news.
- 1.6 In light of its advice and noting that Ofcom’s role is to undertake an initial investigation, Ofcom considers that the creation of the relevant merger situation may be expected to operate against the public interest and accordingly, recommends that a fuller second stage investigation by the Competition Commission is warranted.

Definition of relevant audiences

- 1.7 The Enterprise Act 2002 (the Act) gives Ofcom considerable discretion over how the relevant audiences are defined for the purpose of the public interest test. We have focused on the audience for national news because:

¹ <http://www.dti.gov.uk/files/file38017.pdf>.

² On 12 January 2007, the Office of Fair Trading issued a statement setting out its provisional view that it may be the case that a relevant merger situation has been created. The Secretary of State’s request to Ofcom followed that statement since, as set out in more detail in Section 2, the Secretary of State’s power to require an investigation by Ofcom is based on his having reasonable grounds for suspecting that it may be the case that a relevant merger situation has been created.

³ Public Interest Intervention Notice

⁴ We use the term national news in this report to refer to national and international news, in accordance with the National News genre definition used by BARB (Broadcasters’ Audience Research Board Ltd), providers of the industry standard measure for television viewing.

- it was of particular concern to Parliament when the plurality provisions were introduced. This is reflected in comments by Lord McIntosh of Haringey (Parliamentary Under-Secretary, DCMS) that “[m]edia plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda”⁵; and the DTI’s guidance that “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”⁶; and
- it was the main area of concern identified in stakeholder submissions received by Ofcom in the course of its investigation.

1.8 More specifically, we consider it appropriate to look at the UK cross-media audience for national news. This is because:

- Parliament has been especially concerned about possible links between newspaper enterprises and major TV channels. This is reflected in the cross-media ownership rules⁷, and in the following quote from Kim Howells (Parliamentary Under-Secretary, DCMS)⁸:

“Our key aim is to ensure that there is a range of competing voices readily available to citizens so that they are free to form their own opinions.... If we allow the largest newspaper companies, which are already influential, to buy up Channel 3 – the only commercial public service broadcaster that currently – I stress ‘currently’ – has universal access to a mass audience – we risk a significant reduction in the voices in play in the media, and there would be a risk that one voice could become much louder than the others. This would represent an unacceptable concentration of influence in the current circumstances”; and

- many of the stakeholder submissions raise issues which are cross-media in nature. Those issues, which are discussed further below, cannot in our view be adequately addressed without considering the impact of the relevant merger situation on the cross-media audience for national news.

1.9 In addition, we believe that the impact of the relevant merger situation on plurality should be considered in relation to the UK TV audience for national news. That is because:

- the majority of people rely on TV as their main source of national news; and
- ITV and Sky are the second and third largest providers of national TV news, accounting respectively for 25.8% and 4.8%⁹ of the audience.

1.10 A further reason for focusing on the cross-media and TV audiences for news is that both ITN, in which ITV has a 40% shareholding, and Sky are major suppliers of news services to TV channels and radio stations (see further section 3).

⁵ 2 July 2003, columns 912-913

⁶ DTI Guidance: the Enterprise Act 2002: Public Interest Intervention in Media Relevant merger situations, May 2004, paragraph 7.7

⁷ The media ownership rules in Schedule 14 of the Communications Act 2003

⁸ Commons Standing Committee E, 30 January 2003, col. 860

⁹ Source: BARB/TNS Infosys – 2006 viewing data for all individuals generated on Network Plus

Sufficient plurality of persons with control of media enterprises serving those audiences

- 1.11 We have considered whether there is a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for news and the UK TV audience for news. We have assessed this by identifying the persons with control of the media enterprises serving those audiences, and then by considering whether the control of media enterprises continues to be spread across a sufficient number of persons, taking account of the share of the audiences being served by those enterprises (see further section 4).¹⁰
- 1.12 Sky has submitted that the existing regulatory framework establishes a statutory threshold for appropriate and sufficient plurality (the so called "20/20" rule).¹¹ While the statutory threshold sets a bar on certain levels of media and cross-media ownership, this does not of itself mean that there will be sufficient plurality below that level. It is under a separate regulatory framework that the Secretary of State has issued a media public interest intervention notice requiring Ofcom to report on plurality issues. That framework clearly contemplates that in certain cases there will be a need to consider media ownership issues where the 20/20 rule is not triggered.
- 1.13 In identifying the persons with control of the media enterprises serving the relevant audiences, we have treated all media enterprises under the same ownership or the same control as being controlled by one person.¹²
- 1.14 For these purposes we have assumed that Sky is or may be controlled by News Corporation (39.1% shareholding held through a number of News Corporation subsidiaries). We have therefore considered newspapers in our report.
- 1.15 The Act¹³ requires that, where a relevant merger situation has been created, Ofcom should carry out the public interest test on the presumption that there has been a reduction of one in the number of enterprises serving the relevant audience(s). The purpose of this provision is so it can be assessed whether, as a result of the relevant merger situation, there will still be a sufficient plurality even though the number of enterprises may be unchanged.
- 1.16 Ofcom recognises that Sky's shareholding in ITV is 17.9% and that Sky does not currently have any representation on ITV's Board. However, for the reasons set out below and in detail in section 4, Ofcom continues to be concerned that Sky's acquisition of shares in ITV gives rise to plurality considerations.

UK cross-media audience for national news

- 1.17 Cross-media includes TV, newspapers, radio, internet and magazines. Of these, TV is by some margin the largest and most influential source of news for UK citizens, being cited by 65% of people as their main source of news.¹⁴ Newspapers and radio are the next largest sources. Internet and magazines are somewhat smaller.
- 1.18 We consider that there is a plurality concern taking into account the relative importance of the different media and the audience shares of media enterprises:

¹⁰ Paragraph 7.9 of the DTI's Guidance

¹¹ The media ownership rules in Schedule 14 (the "20/20" rule) of the Communications Act 2003

¹² Section 58A(5) of the Act

¹³ Section 58A(4) of the Act

¹⁴ Source Ofcom research 2006

- The relevant merger situation brings together the second and third largest providers of TV news, with a combined audience share of 30.6%.¹⁵
 - In addition, the relevant merger situation creates an ownership link between ITV, as the second largest provider of TV news, and News International, which is a subsidiary of News Corporation and the largest UK supplier of newspapers (with 35.9% of national newspaper circulation).¹⁶
 - The concern over plurality may be greater in respect of the C2DE socio-economic group than the population as a whole because the audience share of ITV and the readership share of News International's newspapers are larger for this group.¹⁷
- 1.19 While we recognise that radio stations and internet websites are also important sources of news, with the use of the internet growing rapidly, this does not remove our concerns.
- 1.20 In the light of these factors, we consider that the relevant merger situation may give rise to a plurality consideration in relation to the UK cross-media audience for national news, and that this consideration merits further investigation by the Competition Commission.

UK TV audience for national news

- 1.21 The relevant merger situation has reduced the number of significant¹⁸ providers of national news for the UK TV audience from five to four. It has brought together the second and third largest providers of news, with a combined audience share of 30.6%.¹⁹
- 1.22 Sky argues that at most there is a reduction in the number of news providers from 15 to 14. We do not accept this. The channels Sky includes do not have a UK news agenda and are targeted at a small minority of the UK news audience, for example, Russia Today, France 24 and Al Jazeera, NDTV (an Indian channel) and CCTV9 (a Chinese channel). Further, we estimate that, at a maximum, the share of the identified audience for UK TV news served by these additional channels is 2.5% (see section 4 below).
- 1.23 We consider that this increase in the concentration of TV news provision may raise an issue with respect to the plurality of persons with control of media enterprises serving that audience. In addition, we consider that this plurality concern is exacerbated when account is taken of the relationship between News International and ITV/Sky (see above).

¹⁵ Source: BARB/TNS Infosys – 2006 viewing data, all individuals, excludes channels not reported by BARB

¹⁶ Source: MediaTel March 2007, quoting figures from ABC, weighted by frequency of publication, using six month trend

¹⁷ Source: 1) MediaTel National Readership Survey 2006: News International newspapers have 43.6% share of C2DE readership, compared to 36.2% across all adults. 2) BARB: ITV has a 29.9% share of the C2DE audience for news, compared to 25.8% across all individuals

¹⁸ Significant in this context means providers with a share of over 1% of the UK TV audience for national news

¹⁹ Source: BARB/TNS Infosys – 2006 viewing data, all individuals, excludes channels not covered by BARB

Provision of news content

- 1.24 In addition, the relevant merger situation creates an ownership link between Sky and ITN²⁰, both of which have an important role as providers of news services to TV channels and radio stations. Between them, Sky, ITN and the BBC supply news services to the five main TV news providers²¹, and to all seven of the major providers of radio news services.²² Ofcom's view is that as suppliers of TV news services to Channel 4 and Five, and to a number of commercial radio stations, ITN and Sky influence day to day editorial decisions about news coverage. This may further exacerbate the plurality concerns which have been identified in relation to both the cross-media and the TV audiences for news.

Other regulatory provisions

- 1.25 We have considered whether there are regulatory provisions in place which would address the plurality issues identified above. The impartiality provisions of the Ofcom Broadcasting Code²³ require that news is reported with due accuracy and due impartiality and include other protections. In addition, there are quality regulations for public service broadcasters (PSB)²⁴ and quota requirements covering the volume and timing of news output.²⁵ However, we do not consider that these regulations address the plurality concerns raised because they are not designed to remove the ability of broadcasters to set the agenda by selecting the issues and events that are covered in news broadcasting or by determining the relative importance given to each of these.

²⁰ We have not assessed, as part of our review, whether ITV has material influence or control over ITN. However, we believe it possible that, as its largest shareholder with a 40% holding and its largest customer, ITV may have such influence or control

²¹ BBC, ITV, (including GMTV) Channel 4, Five and Sky

²² It should be noted in this context that ITN provides news services to radio stations as a sub-contractor to Independent Radio News (IRN) and that IRN generates much of its material in-house rather than relying solely on ITN material. We understand that some radio stations also self-provide some news content

²³ Contained in section 5 of Ofcom's Broadcasting Code to which broadcasters are required to comply under the terms of their licences (<http://www.ofcom.org.uk/tv/ifi/codes/bcode/undue/>)

²⁴ Communications Act 2003 Section 279 (1)

²⁵ Included in the licences for every licensed public service channel under the Communications Act 2003

Section 2

Background

- 2.1 On 17 November 2006, Sky announced that it had acquired 696 million shares in ITV representing 17.9% of ITV's shares.
- 2.2 On 12 January 2007 the Office of Fair Trading (OFT) issued a statement setting out its provisional view that it believed that it may be the case that a relevant merger situation had been created.
- 2.3 Where the Secretary of State has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created, he may give an intervention notice to the OFT if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of that merger situation (Section 42(2) of the Act).
- 2.4 On 26 February 2007 the Secretary of State gave a public interest intervention notice to the OFT requiring it to report to him in accordance with Section 44 of the Act.
- 2.5 Where the Secretary of State has given a public interest intervention notice and the notice mentions a *media* public interest consideration which may be relevant to a consideration of the merger situation, he may request Ofcom to give him a report on the effect of that media public interest consideration on the case (Section 44A of the Act).
- 2.6 The public interest intervention notice to the OFT states that the Secretary of State believes that it is or may be the case that the media public interest consideration specified in Section 58(2C)(a) of the Act may be relevant to a consideration of the merger situation.
- 2.7 Accordingly, the Secretary of State, requested Ofcom on 26 February 2007 to report to him on the effect of the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience and which is or may be relevant to the Secretary of State's decision as to whether to make a reference of this public interest case to the Competition Commission.
- 2.8 In carrying out its role, Ofcom has been conscious of the debate in Parliament leading to the media public interest provisions in the Act. Ofcom has also had regard to the DTI's Guidance and Ofcom's interim *Guidance for the public interest test for media mergers* dated May 2004.
- 2.9 Ofcom has also taken account of information and representations from third parties and from Sky and ITV which have been received by Ofcom. As required by Section 44A(3)(b) of the Act, a summary of these representations is included in this report.

Section 3

Audiences

- 3.1 In considering the effect of the need for there to be a sufficient plurality of persons with control of media enterprises serving different audiences, we have identified the UK cross-media audience for news and the UK TV audience for news as the appropriate audiences.
- 3.2 Under the Act there is discretion to identify appropriate audiences served by each media enterprise, either taken separately or grouped together or any of them grouped together.²⁶
- 3.3 Further, there is discretion to identify appropriate criteria for deciding who can be treated as comprised in an audience in the circumstances of the case and this may allow for potential members of any audience to be included.²⁷

News

- 3.4 In identifying appropriate audiences, we have taken as our starting point Parliament's purpose behind the media public interest considerations and in particular, the plurality provision. As Lord McIntosh of Haringey (Parliamentary Under-Secretary, DCMS) said "[m]edia plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda".²⁸ The DTI's Guidance on plurality also emphasises this principle, "it would be a concern for any one person controlling 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".²⁹ Further, news was the main area of concern identified in stakeholder representations received by Ofcom. On this basis, we have identified certain audiences for news as being the critical content for influencing opinions and setting the agenda.
- 3.5 We have focused on the audience for national news and not for local and regional news. This is because stakeholders did not raise this as a major issue, and moreover Sky is not involved in the provision of local or regional news. In addition, local and regional news forms a very small component of News International's press business. In the remainder of this report references to news should be taken as references to national news except where indicated otherwise.
- 3.6 While we have considered whether we should include current affairs content, we have not done so because Ofcom research indicates that consumers believe that current affairs is a less important genre than news³⁰ and we do not believe that inclusion of current affairs as well as news would alter our advice in a material way.

²⁶ Section 58A(6) of the Act and paragraph 7.12 of DTI's Guidance

²⁷ Section 58A(7)

²⁸ 2 July 2003, columns 912-913

²⁹ Paragraph 7.7, Enterprise Act 2002: Public Interest Intervention in Media Relevant merger situations, May 2004

³⁰ Public Service Broadcasting Annual Report 2007

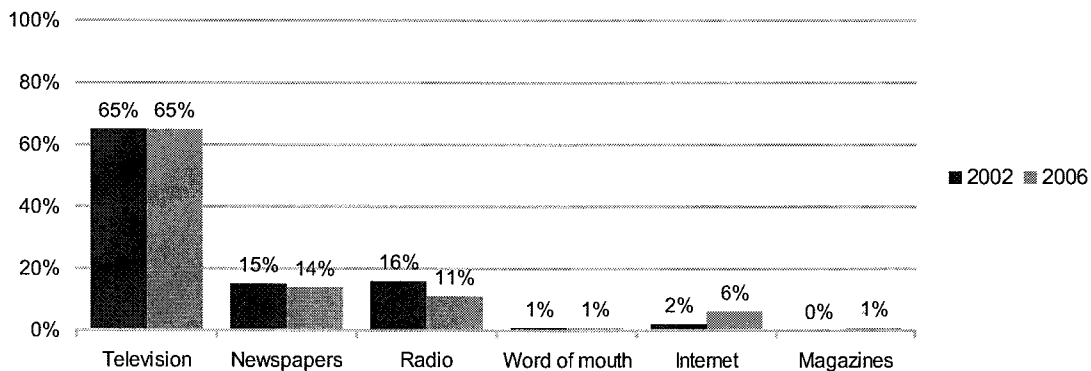
UK cross-media audience for news

3.7 We consider that it is appropriate to identify a UK cross-media audience for news, consisting of TV, radio, newspapers and news services on the internet. This is for the following reasons:

- Parliament considered that media plurality is important for a healthy and informed democratic society and, accordingly, that insufficient media plurality would be dangerous because of the ability for any person through control of too much of the media to influence opinions and set the political agenda.
- Representations received by Ofcom in relation to its consideration of media plurality focus on cross-media concerns.
- Indeed Ofcom research shows that many people obtain their news from a variety of different media, suggesting that opinions are formed through the combined effect of these different sources, as well as through interaction between individuals.

3.8 As shown in Figure 3.1 below, TV, newspapers and radio are the main sources of news for UK citizens. The internet remains less important, although its significance is growing.

Figure 3.1 Main source of news



Source: Ofcom research, 2006

UK TV audience for news

3.9 In addition, we consider that it is appropriate to identify a UK TV audience for news. This is because:

- as Figure 3.1 above shows, the majority of people in the UK rely on TV as their main source of news, and this position has not changed significantly over the last four years; and
- Sky and ITV are two of the main providers of TV news. Further information on the role of Sky and ITV as news providers is set out in section 4 below.

3.10 Ofcom does not consider it is appropriate to identify separate audiences for newspapers, radio or internet news because as can be seen from Figure 3.1 above, fewer people use them as their main source of news.

- 3.11 Nor do we consider it appropriate to identify separate audiences by geography, age or ethnicity. However, we note that, as several stakeholders have stated, the C2DE socio-economic group as compared to the UK population as a whole are higher than average readers of newspapers run by News International and watch more ITV programming than average. Accordingly, when considering the sufficiency of plurality of persons with control of media enterprises serving the UK cross-media audience for news and the UK TV audience for news we have considered in particular the position of the C2DE socio-economic group.

Stakeholder Views

- 3.12 As set out above, Ofcom considers it appropriate to identify two audiences; the audience for cross-media news and the audience for TV news.
- 3.13 In Sky's submission, the Act requires an audience to be construed in relation to a media enterprise essentially as an audience served by that enterprise. According to Sky, the audience for TV news can only include those UK homes where both Sky's news channel (Sky News) and ITV's general entertainment channel, which contains news bulletins (ITV1), are currently accessible. Sky argues that Ofcom should identify audiences for TV news on a platform specific basis (see further below).
- 3.14 Ofcom does not consider that this is a correct reading of the Act. As explained above, it is appropriate to focus on audiences for news. Ofcom's view that is that Parliament's intention behind the specified media public interest consideration – whether one person controls too much of the media because of their ability to influence opinions and control the agenda – gives the Secretary of State (and by implication Ofcom) the discretion to consider different audiences for news served by each relevant media enterprise, either taken separately or all grouped together or any of them grouped together. In this regard, ITV submitted to Ofcom that it believed that Ofcom had generally correctly defined relevant audiences for the purposes of its advice to the Secretary of State.
- 3.15 Further;
- Ofcom considers that account should be taken of the ability of viewers to switch between TV platforms. As noted earlier in this section, the Act allows for persons to be treated as members of an audience if they are only potential members of it. There is some mobility between platforms³¹, associated in particular with the transition from analogue to digital broadcasting. If the audience for TV news was defined on a platform-specific basis, that would suggest for example that the relevant merger situation had no relevance for viewers currently on analogue terrestrial TV. In our view, it would be wrong to draw such a conclusion, especially in the light of the planned switchover to digital TV, which is due to be complete by 2012.
 - Secondly, it is in our view important to recognise that the process by which opinions are formed in society is based not only on the individual consumption of information, but also communication and social interaction between people who may have been exposed to information from a variety of different news media. Seen in this light, viewers of one particular platform may have an interest in the range of news providers available on other platforms, which are used by those with whom they interact.

³¹ For example, the number of households with multichannel television rose from 62.6% in Q4 2004 to 78.6% in Q4 2006 – source: Ofcom's Digital Progress Report on digital television, published 14 March 2007

- 3.16 Sky submitted that the merger did not have a cross-media dimension because Sky was not a newspaper enterprise for the purposes of the Act. Sky stated that Ofcom is required by the terms of the intervention notice to take into account the transaction involving Sky and ITV, not the media interests of Sky's shareholders. In this context, Sky made further submissions about the relationship between News Corporation, News International and Sky and the relevance of the cross media ownership rules as to whether News Corporation and News International's interests should be considered which are both addressed in section 4 of this report.
- 3.17 Ofcom notes that Sky is not a newspaper enterprise as defined in the Act. In Ofcom's view, this does not prevent Ofcom from defining a cross-media news market. As set out above, Ofcom considers that there is a broad discretion in identifying relevant audiences and in this context, notes the DTI's guidance that an audience can include one with cross-media coverage. ITV's submission notes that the plurality test was introduced specifically to address concerns with respect to cross-media ownership and that Ofcom should take particular account in its analysis of the cross-media impact of the merger.

Conclusion

- 3.18 For the reasons set out above, we consider it is appropriate to identify the following audiences: the UK cross-media audience for news; and the UK TV audience for news.

Section 4

Sufficient plurality of persons with control of media enterprises

Introduction

- 4.1 This section considers whether there is a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for news and the UK TV audience for news.
- 4.2 Sky has submitted that the existing regulatory framework ensures sufficient plurality. Specifically, Sky argues that the relevant merger situation remains within the boundaries of the media ownership rules in Schedule 14 (the “20/20” rule) of the Communications Act 2003, which Sky say establish a statutory threshold for appropriate and sufficient plurality.
- 4.3 The 20/20 rule sets an absolute statutory bar on certain levels of media and cross-media ownership. However, that does not of itself mean that there will be sufficient plurality below that level. It is under a separate regulatory framework that the Secretary of State has issued the media public interest intervention notice requiring Ofcom to report on plurality issues. That framework clearly contemplates in certain cases there will be a need to consider media ownership issues where the 20/20 rule is not triggered.

Persons with control of media enterprises

- 4.4 In identifying the persons with control of the media enterprises serving the UK cross-media audience for news and the UK TV audience for news we have looked at the ownership structure of those media enterprises. For these purposes, we have treated all media enterprises under the same ownership or the same control as being controlled by one person.³²
- 4.5 The ownership structure of Sky is that 39.1% of its shares are held by News UK Nominees Limited; the rest being held by what appear to be a series of institutional investors and individuals (see chart 1 in the Annex). News UK Nominees Limited appears to be a subsidiary (held through a number of subsidiary companies) of News Corporation. One of these subsidiary companies is News International Limited which holds the newspaper interests of News Corporation in the UK.
- 4.6 Ofcom has not undertaken control determinations for all the media enterprises in the audiences it has identified. We are required to advise the Secretary of State on whether the specified media public interest consideration is or may be relevant to his decision as to whether to make a reference. We consider that News UK Nominees’ 39.1% shareholding in Sky is or may be relevant to the Secretary of State’s decision on whether to refer. This would give it the ability to block special resolutions of Sky at a minimum. In light of this, we consider that it is appropriate to take account of these newspaper links in our plurality assessment.
- 4.7 Sky’s position is that Ofcom has not analysed the relationship between News Corporation, News International and Sky and, in any event, should not do so

³² Section 58A(5) of the Act

because the merger between Sky and ITV does not involve newspapers. It argues that the definition of media enterprise only includes newspapers where one of the merging parties is a newspaper. However, for the reasons set above, we do consider that it is appropriate to take account of newspapers for the purposes of our plurality assessment.

Sufficient plurality of persons with control of media enterprises

- 4.8 We have assessed the number of persons with control of media enterprises serving the relevant audiences with the object of securing that control of media enterprises continues to be spread across a sufficient number of persons.³³
- 4.9 In making this assessment in relation to the relevant merger situation, there is deemed under the Act to be a reduction in the number of media enterprises for the purposes of this assessment.³⁴ The purpose of this provision is so that it can be assessed whether, as a result of the merger, there will still be a sufficient plurality of persons with control of enterprises serving the relevant audience even though the number of enterprises serving that audience may be unchanged.³⁵
- 4.10 Sky has argued that Ofcom should not make such an assumption and should only look at the actual effect of its acquisition of shares in ITV. Sky has made representations that it has acquired no ability to control or influence ITV's editorial policy for news (or any other programmes). This is considered further below.
- 4.11 Ofcom also notes that the OFT's report on competition issues, delivered to the Secretary of State in parallel to this report, will contain its decision on whether it believes that a relevant merger situation may have been created and that such decision will involve the OFT in a full consideration of the extent of the influence that Sky may have on ITV.
- 4.12 In addition to the number of enterprises, we have also, in considering the sufficient plurality of persons controlling media enterprises, taken into account the relative audience shares that those enterprises hold.³⁶
- 4.13 Ofcom has taken into account the following significant factors:
- The relevant merger situation reduces from five to four the number of persons with control of TV news providers with an audience share of more than one per cent of TV news; namely the BBC (61.9%), ITV/Sky (30.6%), Channel 4 (4.6%) and Five (2.9%).³⁷
 - In addition, there are eight major providers of national newspapers in the UK, which together account for 100% of national newspaper circulation of which the largest is News International, with 35.9% share of circulation.³⁸

³³ Paragraph 7.9 of the DTI Guidance

³⁴ Section 58A(4) of the Act

³⁵ Paragraph 7.13 of the DTI Guidance

³⁶ Paragraph 7.10 and 7.11 of the DTI Guidance

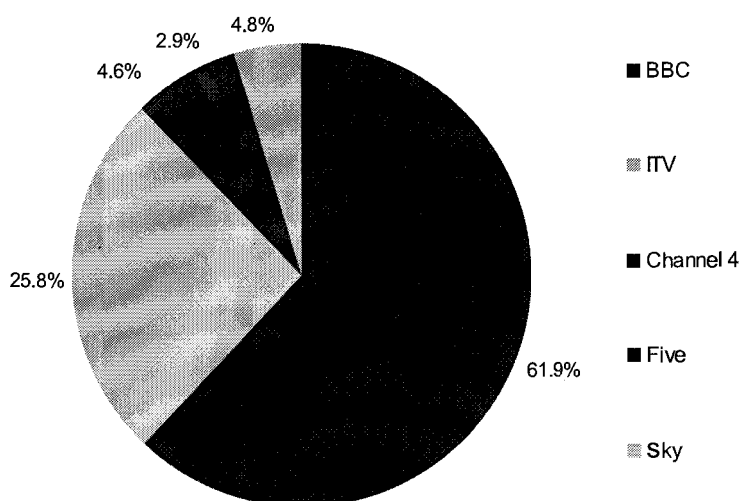
³⁷ Source: BARB/TNS Infosys – 2006 viewing data for all individuals generated on Network Plus

³⁸ Source: MediaTel March 2007, quoting figures from ABC, weighted by frequency of publication, using six month trend

Significant providers of news on television

- 4.14 BARB provides information for the five main providers of news on television (the BBC, ITV, Channel 4, Five and Sky). Figure 4.1 provides a breakdown of audience shares, and for the TV audience for news. It shows that ITV and Sky are the second and third largest providers of news on television, accounting respectively for 25.8% and 4.8% of news viewing across all individuals. ITV has a somewhat larger share of the C2DE audience for news, at 29.9%.³⁹

Figure 4.1: TV news consumption by media enterprise 2006



Source: BARB/TNS Infosys, 2006, all individuals, generated on Network Plus

- 4.15 On the basis of its representation that Ofcom should only consider the audience served by both Sky and ITV news programming, Sky argues that at most there is a reduction in the number of news providers serving this audience from 15 to 14. On this basis it says that, post the relevant merger situation, there would be a sufficient number of media enterprises serving that audience.
- 4.16 As explained above, in considering the sufficient plurality of persons controlling media enterprises, we have taken account of the audience shares that those media enterprises attract, rather than just the number of those enterprises. We note that included in Sky's assessment are a number of additional specialist news channels. These do not have a UK news agenda and are targeted at a small minority of the UK news audience, for example, Russia Today, France 24 and Al Jazeera, NDTV (an Indian channel) and CCTV9 (a Chinese channel). Further, we estimate that, at a maximum, the share of the identified audience for UK TV news served by these additional channels is 2.5%.⁴⁰ We have therefore not included these in our analysis.

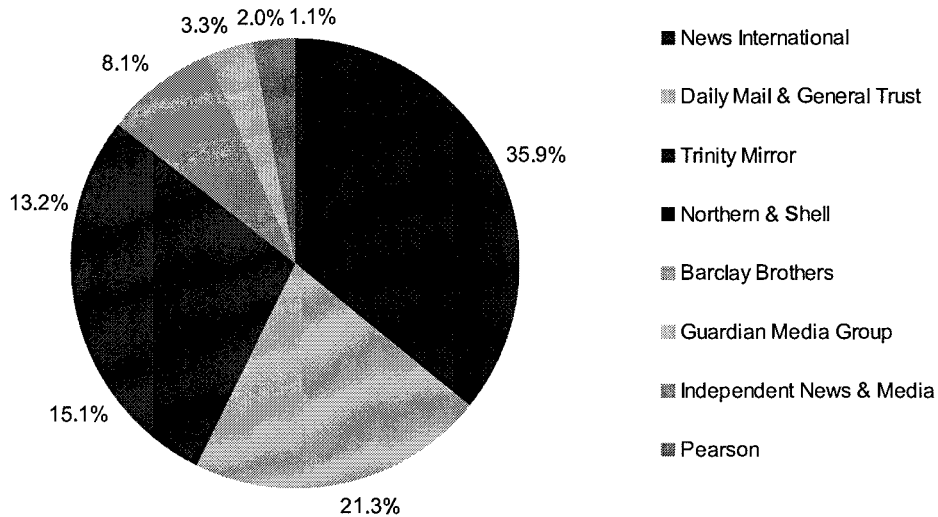
³⁹ Source: BARB/TNS Infosys – 2006 viewing data for all individuals generated on Network Plus

⁴⁰ Ofcom's estimation of the share of the identified audience for UK TV news served by these additional channels is 2.5%, based on information supplied by Sky in relation to these channels (which are not reported by BARB). The information supplied by Sky is that these channels have a 4.8% audience share of TV news on the DSat platform. We have assumed that these channels also account for 4.8% viewing share on cable. On this basis we have estimated the five main enterprises would still account for over 97.5% of the identified audience for UK TV news. Further, we consider that the figure of 4.8% is likely to be an over-estimation as some of the programmes on these channels may be classified as current affairs or other programme genres rather than news. And cable and satellite viewers watch less TV news than those with analogue or digital terrestrial television only (source: BARB/TNS Infosys – 2006 viewing data for all individuals. Analogue terrestrial viewers consume an average of

Significant providers of national newspapers

4.17 There are eight significant providers of national newspapers, publishing 20 national daily and Sunday titles between them, accounting for 100% of total paid-for circulation (see Figure 4.2).

Figure 4.2: Share of UK national newspaper circulation by publisher, March 2007



Source: MediaTel, quoting figures from ABC, weighted by frequency of publication using six month trend. Note: excludes free, regional and sports newspapers

4.18 News International is the largest national newspaper group; its titles, which include the Sun, The Times, The Sunday Times and the News of the World, accounted for 35.9% of national newspaper sales in March 2007. The National Readership Survey for 2006 indicates that News International papers have a readership share of 43.6% among C2DE adults as opposed to 36.2% for all adults.

UK cross-media audience for news

4.19 The relevant merger situation reduces from five to four the number of TV news providers with an audience share of more than one per cent of TV news. It brings together the second and third largest providers of news on television with a combined audience share of 30.6%.

4.20 In addition, the relevant merger situation establishes an ownership link between the second largest provider of TV news and News International, the largest UK supplier of national newspapers with a 35.9% share of circulation.

4.21 As discussed in section 3 above, TV is by some margin the largest and most influential source of news for UK citizens. Newspapers are also an important and influential source of news coverage.

22.4 minutes of TV news per day; DTT-only viewers consume an average of 18.3 minutes per day; digital cable viewers consume 13.5 minutes and Dsat viewers 13.2 minutes

- 4.22 On this basis, Ofcom is concerned that, in light of the relevant merger situation, there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for news.
- 4.23 While Ofcom recognises that radio stations and internet websites are also important sources of news provision for citizens, with the use of the internet for news growing rapidly, this does not remove our concerns arising from the factors set out above that plurality in the provision of cross-media news may not be sufficient.

UK TV audience for news

- 4.24 In light of the facts set out above, Ofcom is concerned that there may also not be a sufficient plurality of persons with control of the media enterprises serving the UK TV audience for news.
- 4.25 This concern is exacerbated when account is taken of the link between News Corporation and Sky and the facts set out above. In our view, opinions are formed not only through the exposure of individuals to opinion-forming content, but also through interaction between individuals who may have been exposed to opinion-forming content from a variety of different sources. A person who watches the news on TV but does not buy a newspaper may benefit from social interaction with another who reads a newspaper but does not watch TV. In addition, many people obtain news from more than one source. The audience for TV news may therefore be negatively affected, in terms of sufficient media plurality, if those who control newspapers acquire influence or control over TV channels.
- 4.26 As noted above, Sky has submitted that it has no ability to influence ITV's editorial policy. In contrast, a number of third parties have made representations that a prudent management of ITV will, in formulating policy, have regard to the interests of the company's major shareholder and that Sky has the ability to influence ITV. We also note that ITV does not argue in its representations that Sky does not have influence over its policy decision-making. Ofcom notes the contrasting representations made as to the likely future ability of Sky to influence ITV. In addition, Ofcom notes the purpose behind the public interest consideration which is to avoid any one person controlling too much of the media through an ability to influence opinions and control the agenda. In light of this, taking into account the level of the shareholding, Ofcom continues to be concerned that Sky's acquisition of shares in ITV gives rise to plurality considerations.

Provision of TV and radio news content

- 4.27 Ofcom has also considered the fact that following the relevant merger situation, there is greater concentration in the provision of news content for TV news and also radio news.
- 4.28 The main suppliers of news content for the significant providers of television news are BBC, ITN and Sky. ITN supplies news content to ITV, which is its largest customer and also to Channel 4. Sky supplies news content to Sky News and Five. ITV has a 40% shareholding in ITN.
- 4.29 A handful of radio stations produce their own news but most take their national news from one of three wholesale providers (Figure 4.3 below).
- The BBC, which supplies news to its own 57 radio stations, which have 54% share of total listening.

- Independent Radio News (IRN), which supplies [Redacted for confidentiality reasons] stations which have [Redacted for confidentiality reasons] listening share. IRN subcontracts the production and provision of some of its news to ITN, which owns 20% of IRN.
- Sky, which supplies 34 stations which have 10% listening share. Sky is a recent entrant into the supply of radio news. Prior to Sky's entry, all commercial radio news which was not self-provided was provided by IRN.

Figure 4.3: Radio News Provision

Group	Share	News supplier	Number of stations*
BBC Network stations	44.0%	BBC	11
BBC Local/Regional	10.4%	BBC	46
Total BBC	54.4%		
Gcap	13.5%	[]	53
EMAP	10.3%	[]	40
Chrysalis Radio	5.2%	[]	9
GMG Radio	3.7%	[]	11
UTV	3.0%	[]	19
Virgin Radio Network	1.7%	[]	2
Other commercial	5.8%	[]	165
Total commercial	43.2%		
Other listening	2.3%		
Total other listening	2.3%		

Source: Ofcom, RAJAR Q4 2006, adults 15+ - note: figures are for total listening: RAJAR does not give genre breakdowns

* January 2007 data for all BBC stations and analogue commercial stations

- 4.30 The relevant merger situation creates an ownership link between Sky and ITN, both of which have an important role as suppliers of news content to TV channels and radio stations. In light of this Ofcom considers that it is relevant that ITV, by virtue of its 40% shareholding and its position as ITN's largest customer, may be able to exert influence over the policy of ITN.
- 4.31 Further, ITN and Sky as suppliers of news content to news providers (in the case of ITN, ITV and Channel 4 and in the case of Sky, Sky and Channel 5) have some influence on day to day editorial decisions about news coverage.
- 4.32 The position in relation to radio outlets may be similar. However, since IRN self-supplies some news and ITN only acts as a sub-contractor of IRN in the provision of news content for radio stations, ITN's influence on radio news may be less significant.
- 4.33 In the light of the above, we consider that the role of Sky and ITN as prominent suppliers of news services to TV channels and radio stations, together with the ownership link which the relevant merger situation has created between Sky and ITN, may exacerbate the plurality concerns that have been identified in relation to both the cross-media and the TV audiences for national news.

Regulatory factors applying to news

- 4.34 We have considered other regulatory factors applying to television and radio news which may be relevant to our consideration of sufficient plurality in news provision. These are: the Broadcasting Code and quality regulations⁴¹ and production quotas.⁴²

Broadcasting Code and quality regulations

- 4.35 The TV news output of Sky and ITV is required to comply with the impartiality provisions of the Ofcom Broadcasting Code (the Code), which require that news, in whatever form, is reported with due accuracy and presented with due impartiality. Special rules apply in respect of General Elections. The Code also contains fairness and privacy rules designed to prevent the abusive treatment of any individual or organisation.
- 4.36 In addition, ITV is subject to a statutory requirement for ITV to produce "high quality" news dealing with "both national and international matters" (Communications Act 2003 s279(1)(b)).
- 4.37 The impartiality provisions are important regulatory controls because they are designed to ensure that, if a broadcaster decides to cover a particular news story, the coverage of that story will be impartial, and will not reflect the views of the person controlling the broadcasting enterprise. They do not, however, address the prior decision as to which news stories to cover.
- 4.38 The quality requirements on ITV are also important regulatory controls as they should prevent the systematic exclusion of important stories and issues on ITV News.
- 4.39 These regulatory provisions, while they represent important controls on impartiality and quality, they are not directly concerned with or a substitute for regulatory provisions aimed at ensuring sufficient plurality. They are not designed to remove the ability of broadcasters to set the agenda by selecting the issues and events that are covered in news broadcasting or by determining the relevant importance that are given to each of these.

Quotas

- 4.40 As a PSB, ITV is required to adhere to quotas covering the volume and scheduling of its news output, and the proportion of its output commissioned from independent producers. Quotas for news apply to ITV1 but not to Sky One.
- 4.41 In our view, these safeguards are relevant to the concerns expressed by some stakeholders, that the relevant merger situation could increase the commercial pressure on ITV to reduce the volume or quality of its news or current affairs output. These provisions do not, however, address the requirements of media plurality.

Stakeholder views

- 4.42 Sky has made a number of submissions which we have taken account of in considering whether there is sufficient plurality of persons with control of media enterprises. In summary, Sky disagrees for a number of reasons:

⁴¹ Broadcasters are required under the terms of their licences to comply with Ofcom's Broadcasting Code (<http://www.ofcom.org.uk/tv/rfi/codes/bcode/undue/>)

⁴² Included in the licences for every licensed public service channel under the Communications Act 2003

- its acquisition of a 17.9% shareholding in ITV is not a merger;
- Ofcom's analysis is based on an incorrect interpretation of the Act and as a result fails to take account of the actual degree of influence acquired by Sky over ITV;
- the existing regulatory framework continues to ensure sufficient plurality; and
- even if Sky and ITV are treated as the same media enterprise there remains a sufficient plurality of persons serving all relevant audiences.

4.43 These points are dealt with above in this report. In short:

- the assessment of whether there has been a relevant merger situation is a matter for the OFT;
- as set out above, the Act requires Ofcom to assume that the number of media enterprise is more immediately before the relevant merger situation than afterwards;
- the existing regulatory framework is not directly concerned with or a substitute for regulatory provisions aimed at ensuring sufficient plurality; and
- in considering the sufficient plurality of persons controlling media enterprises, we have taken account of the audience shares that those media enterprises attract, rather than just the number of those enterprises.

4.44 A number of submissions received from stakeholders express views which are consistent with the conclusions reached by Ofcom. For example:

- ITV states that "[This sets out ITV's acceptance of OFCOM's view that significant media public interest considerations may arise as a result of the relevant merger situation]" ITV agrees that "protections relating to impartiality and output quotas do not of themselves wholly mitigate the reduction in media enterprises serving the TV news audience".
- Virgin Media argues that the relevant merger situation has a negative impact on plurality, stating for example that "[it] is difficult to imagine a combination in the UK media which would be more adverse to plurality in news and current affairs than the combination of News Corp/BSkyB and ITV".
- [A broadcaster] also argues that the relevant merger situation raises issues for cross-media plurality: "[n]ot only does the acquisition result in an unacceptable level of dominance within television news supply and news channel ownership, it also brings under common control; two different major sources of news for consumers: television (and, in particular, mass audience universal access public service television) through ITV, and newspapers and television through News Corporation and Sky".
- [A broadcaster] notes that the same media enterprise effectively controls the programming and strategy of the most popular terrestrial TV channel, pay-TV satellite platform and national newspapers in the UK. It also notes that News International has control of Myspace.com and that Sky has the "power to influence the content of a wide range of the most popular forms of media in the UK".

- The joint submission from the National Union of Journalists (NUJ) and the Campaign for Press and Broadcasting Freedom (CPBF) observes that News International already has a “disproportionate” share of control over the provision of news and current affairs reporting through broadcasting, newspaper and online services.
- Responses from 3 individuals ([a private individual], Ian Cresswell and Francis Pettitt) note concerns about the amount of UK media controlled by Mr Murdoch and Sky.

Conclusion

- 4.45 For the reasons set out above, Ofcom is concerned that there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audiences for news and the UK TV audience for news.

Section 5

Recommendations

- 5.1 Ofcom's advice for the reasons set out in this report is that there are concerns that, following the relevant merger situation, there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for national news and the UK TV audience for national news.
- 5.2 In light of its advice and noting that Ofcom's role is to undertake an initial investigation, Ofcom considers that the creation of the relevant merger situation may be expected to operate against the public interest and accordingly, recommends that a fuller second stage investigation by the Competition Commission is warranted.

Section 6

Summary of representations

BBC

- 6.1 The BBC's submission emphasised that its greatest public interest concern is with regard to plurality of voice in news reporting. Currently, there are three UK providers of news programming: the BBC, ITN and Sky News (a 100% subsidiary of Sky). ITV has a 40% stake in ITN, so through its stake in ITV, Sky and therefore Sky News may be in a position to influence ITN. Any moves to co-operate in news provision, to co-ordinate bidding strategies, or otherwise extract synergies between ITN and Sky News should be viewed as undermining plurality of news provision and hence as detrimental to the public interest. According to the BBC, this could effectively mean a reduction in the number of news providers from three to two.
- 6.2 The BBC stated that: "although we understand that ITV has renewed its contract with ITN for the provision of news, there remains a long-term consideration for the future. If Sky could influence ITV in the future to select Sky News to replace ITN as news provider to ITV, ITN's financial viability would be thrown into doubt. In this scenario, there could also be a reduction in plurality even if there was no co-operation between ITN and Sky News."
- 6.3 Concerns were also raised with regards to regional programming and ITV's investment in UK originated production. The submission notes that, together with the BBC, ITV is both the main provider of regional programming in the UK and the main source of investment in original UK production. Sky has a different culture based on extremely limited investment in UK originations and that, despite Ofcom quotas, the combination of this culture with a very strong profit drive could change the character of ITV.
- 6.4 The BBC also noted that the success of Freeview and Freesat are not broadly in the interest of Sky as they challenge Sky's core satellite service offering. The BBC believed that public interest issues could arise if Sky were to adversely influence ITV's participation in these projects in a way that would harm the competitive process and have an adverse impact on the provision of strong free-to-air digital TV access in the UK.
- 6.5 The BBC therefore considered that the acquisition raises significant public interest concerns; as a pay TV broadcaster, Sky has none of the traditions or obligations which have shaped ITV's behaviour. It could influence ITV both in a way detrimental to the plurality of the media and more broadly damages the public interest in UK broadcasting.

BECTU

- 6.6 BECTU's submission noted that Sky's acquisition of a significant ITV stake would have clear implications for the forthcoming discussions on the ITV news contract - with the ultimate fear that it would be awarded to Sky.
- 6.7 BECTU noted that Sky is owned by News Corporation that also has newspaper interests amounting to 32% of total UK weekly newspaper sales. It stated that in its view this is a degree of concentration of media ownership that is already excessive - not just on economic grounds but also on democratic and cultural grounds. BECTU

concluded that a further extension of News Corporation influence into ITV would be highly undesirable.

- 6.8 The submission also stated that there was a distinct danger of moving from a system of three major news providers to just two (Sky and BBC) - with a potentially detrimental affect on our pluralist democracy: "This is especially significant in the light of News Corporation's newspaper interests and the overtly right-wing rather than impartial agenda of Fox News in the US".
- 6.9 It was also pointed out that influence on ITV's multi-channel business would offer a potentially valuable source of cross-promotion and complementary scheduling for Sky's own channels.
- 6.10 BECTU was also concerned that the merger would allow Sky privileged access to ITV strategic policy thinking in areas of direct commercial interest to Sky including the TV advertising market. The submission noted that Sky and ITV between them control 50% of this market.
- 6.11 There was also concern about the privileged access Sky will be allowed to ITV strategic policy thinking in other areas of direct commercial interest to Sky including bidding for sports rights and film rights. One of the areas of direct commercial interest to Sky is the future disposal of production assets.
- 6.12 In terms of Freeview, Sky has a direct interest in promoting its primary model of subscription TV as a direct alternative to the free-to-air model of Freeview and also, that Sky will have privileged access to ITV strategic policy thinking in the area of Freesat.

[A Broadcaster]

- 6.13 [A broadcaster's] submission focused on the public interest implications of the acquisition in two main areas; news supply and cross-media ownership.

The public interest test and the importance of pluralism

- 6.14 [The broadcaster] stated that the public interest test specified by the Secretary of State as explained in the DTI's Guidance demonstrated that public interest issues relating to both broadcasting and cross-media concentration must be considered. [The broadcaster] said it found it helpful that Ofcom had recently conducted a review of the media ownership rules and had expressed some key concerns:
- Television continues to have a special influence which may require issues such as plurality to be taken into account in deciding whether or not to allow mergers to go ahead.
 - The retention of specific restrictions on cross-ownership in respect of Channel 3 remains justified. [The broadcaster] said while Sky's acquisition may not breach the letter of the law, given Sky's material influence over ITV, the policy behind the rule is relevant in this case.
 - Media ownership rules assume a correlation between viewpoint plurality and ownership plurality – the latter being a proxy for the former.
 - Competition law is not always a proxy for ownership plurality.

Specific public interest concerns

Provision of news

- 6.15 [The broadcaster] said that the two main commercial suppliers of news to broadcaster in the UK have come under common control (ITN – in which ITV has 40% - and Sky News). This means that three out of the four terrestrial broadcasters available to analogue terrestrial viewers are supplied with news by entities controlled by the same person.
- 6.16 [The broadcaster] illustrated the continuing predominance of the main terrestrial broadcasters as news suppliers and the importance of ITV1 in particular. It stated that Ofcom recognised this ongoing predominance in its review; that the public still consume large volumes of television news from the main channels.
- 6.17 It stated that ITV remains the only mass audience public service commercial channel universally available to the UK population and continues to have an especially important role to play in ensuring plurality in the provision of news.
- 6.18 According to [the broadcaster] , in 2006 34% of news viewing occurred via ITV1, Channel 4 and Channel 5 and when the Sky News channel is also taken into account the overall share of viewing to channels supplied by Sky and ITV/ITN increases to 39%.
- 6.19 [The broadcaster] noted that Sky has previously been part of a consortium that has bid for the ITV news contract, which is due for renewal once again in 2008. Although ITV had recently stated that it is not its current intention to put the renewal of its contract for news supply out to tender, this is not an irrevocable decision. By its transformation of the Sky/ITV relationship, Sky's shareholding in ITV enables Sky to change ITV's incentives and makes it more likely that the future contract will be placed with a consortium dominated by Sky News. If ITV were to place its news contract with such a consortium in 2008, this would have a significant impact on ITN's ability to maintain the quality of Channel 4 News as many of its major costs are shared across both contracts. The position is exacerbated by the fact that barriers to entry for news providers are high, so that there is no current nor likely future new entrant who might supply Channel 4 or other broadcasters.
- 6.20 [The broadcaster] said that other outcomes were possible – Sky could influence ITV to withdraw support for ongoing investment in or expansion of ITN leading to a decline in the service it provides over time. There is also the possibility of ITN and Sky News actually seeking to merge or at least cooperate more closely. This would lessen the choices available to [broadcasters] when their news contracts came round again for renewal.
- 6.21 [The broadcaster] claimed that this would result in a major reduction in plurality as every major commercial channel providing news in the UK would be using the same supplier - a supplier that also controls readership of 38% of the UK newspaper market. []
- 6.22 Its concerns as to the plurality of news supply also extended beyond the provision of news to the major terrestrial broadcasters. 10% of news viewing directed towards news programming appeared on digital channels beyond the five major channels – though around 50% goes to channels controlled or with news output supplied by ITV and Sky. The acquisition results in a number of these channels coming under common control.

- 6.23 [The broadcaster] noted that the acquisition has implications for cross-media news supply stating: "Not only does the Acquisition result in an unacceptable level of dominance within television news supply and news channel ownership, it also brings under common control two different major sources of news for consumers: television (and, in particular, mass audience universal access public service television) through ITV, and newspapers and television through News Corporation and Sky." News International continues to command the highest share of circulation (32%) followed by Trinity Mirror at 22%. [The broadcaster] also noted the strength of News International in the C2DE demographic.
- 6.24 [The broadcaster] said in summary that the acquisition will result in significant reduction in plurality of news supply and thus editorial diversity within three major markets:
- The terrestrial broadcast market represents 90% of total television news viewing and which Sky and ITN between them represented 34% of viewing in 2006.
 - The television news channel market, including analogue and digital channels whether wholly or partly news focused within which Sky and ITN between them represented 39% of all viewing in 2006 and over 50% of viewing to dedicated news channels.
 - The cross-media supply of news where the common control of media organisations reaching 18m newspaper reading adults and over 11m weekly news programme views represents a high degree of concentration and could be potentially higher for C2DE.

Wider media and cross-media ownership issues

- 6.25 [The broadcaster] noted that the importance of the plurality test to overall media consumption is reinforced by the Secretary of State noting in his ministerial statement on 26 February 2007 that intervention could be considered in cases where media ownership rules had been removed by the Communications Act 2003. He noted in this case that the acquisition would have been in breach of an ownership rule removed by the 2003 Act – namely the prohibition on certain persons holding two or more Channel 3 licences.
- 6.26 [The broadcaster] observed that ITV and Sky have [] combined television audience reach: "[This contains a quote from the broadcaster's submission that sets out details of ITV and Sky having a combined television audience reach of 47.2m each week and over 84% if television viewers watch more than three consecutive minutes of programming on an ITV, Sky or Fox channel each week.] When these levels of share and reach are added to the 37% share and 17.7m average issue readership of News International newspapers – the full extent of the impact of the consolidation under common control of the UK's largest newspaper publisher and the UK's largest commercial broadcaster becomes apparent. [This sets out that the News International/Sky/ITV combination has a unique position.] Trinity Mirror has nearly 10m newspaper readership but no television affiliation. ITV/Sky has a significantly higher reach than the next highest television broadcaster Channel 4 (reach of 40.5m) which again has no newspaper interests.
- 6.27 [The broadcaster] said that cross media influence does not end with newspapers and broadcast television. Sky owns and controls the Sky pay-TV platform as well as being a channel provider. Sky and ITV are also two of the five shareholders in the company responsible for marketing Freeview. Sky and ITV control a significant share

of the limited DTT capacity on which Freeview is broadcast. Sky therefore has a significant influence over the delivery of television services other than its own broadcast channels to nearly 16m out of the estimated 19.5m UK digital television homes.

- 6.28 [The broadcaster] noted that the acquisition is likely to have an adverse impact in the viewers of premium sports rights and Listed Events as Sky and ITV are the two largest acquirers of sports rights along with BBC. Sky and ITV may well combine forces as a result of which the availability of premium sports and Listed Events to free-to-air audiences is likely to be diminished.

Advertising sales

- 6.29 While it primarily depends on subscription revenues, Sky has a significant, and increasing, share of television advertising revenues according to the broadcaster. In 2006, [the broadcaster] estimated that ITV and Sky controlled between them over 60% of the television advertising market. [The broadcaster] stated that [This sets out details of any potential coordination between the two sales houses] this would obviously have a serious impact on the revenues of other advertiser funded broadcasters, particularly Channel 4 and Five, and would consequently reduce their ability to invest in high-quality UK original programming.

Broadcast capacity

- 6.30 [The broadcaster] said that broadcasters require spectrum to operate. [The broadcaster] said it was concerned that the acquisition will significantly diminish fair and open access to such spectrum [This sets out that such spectrum whether current or allocated in the future will concentrate the ownership of DTT spectrum and certain specific satellite capacity into the hands of too few players and potentially diminish the likelihood of success for media companies seeking access to spectrum in the future.]
- 6.31 In conclusion [the broadcaster] said the acquisition is not in the public interest since it will result in an unacceptable reduction of the plurality of persons with control of media enterprises serving audiences in the UK.

[An MP]

- 6.32 [The] MP stated that Sky's stake gives it influence or control over ITV and ITN. He pointed out that this must at least have possible implications for diversity in news broadcasting.
- 6.33 His submission also noted that it was possible to imagine future circumstances in which Sky encourages or accedes to budget cuts or harmful schedule changes with regard to ITN news provision or (what he considers to be a less likely danger) that Sky news provision is reduced or damaged as Sky's resources and attention focus on ITV or that the confluence of interest between Sky and ITV could result in merged news provision between Sky and ITN.

[A broadcaster]

- 6.34 [The broadcaster] considered that as a result of the acquisition, the same media enterprise will control a large number of news channels broadcasting in the UK, [the broadcaster] considered this to be all the more serious given the media enterprise's

additional interests in the most popular national tabloid and broadsheet newspapers in the UK.

- 6.35 It said that the acquisition provided Sky with material influence over ITV which amounts to control for these purposes. As such, Sky (and its ultimate controlling company News Corporation) has the power to influence the content of a wide range of the most popular forms of media in the UK.
- 6.36 [The broadcaster] noted that the same media enterprise effectively controls the programming and strategy of the most popular terrestrial TV channel, pay-TV satellite platform and national newspapers in the UK. It also note that News International has control of Myspace.com and as such Sky, (and its ultimate controlling company News Corporation) has the: "power to influence the content of a wide range of the most popular forms of media in the UK".
- 6.37 [The broadcaster] raised the concern that newspapers controlled by News Corporation may be more likely to promote ITV's channels and content to the detriment of other UK broadcasters.
- 6.38 It also said that if Sky and ITV coordinate their acquisition of programming, their combined scheduling power could have a massive impact on the advertising sales and audience figures of other commercial broadcasters.
- 6.39 It expressed concern that ITV will be more likely to cooperate with Sky in the acquisition of highly valuable content rights including sports, which will in turn have a significant impact on ITV's already strong position in the UK broadcast market. It also raised the concern that ITV and Sky are more likely to collude over film rights.

ITV

- 6.40 In summary, ITV did not generally dissent from Ofcom's analysis. It said that it believed that Ofcom had generally correctly defined relevant audiences and did not dissent from its conclusions as to the degree of plurality with respect to those audiences. [This sets out ITV's acceptance of Ofcom's view that significant media public interest considerations may arise as a result of the relevant merger situation.] [This sets out that ITV's view is that concerns arising with respect to cross-media plurality may extend beyond those identified by OFCOM in the Issues Letter] and such cross-media concerns are likely to be more significant than those identified by Ofcom with respect to television news in isolation.

Definition of relevant audiences

- 6.41 ITV noted that the Act provides Ofcom with a wide discretion in the definition of relevant audience and that this is supported by the DTI guidance. As the plurality test was introduced specifically to address concerns with respect to cross-media ownership, ITV believes that Ofcom should take particular account in its analysis of the cross-media impact of the merger rather than the impact of television news or indeed news supply within any single media sector considered in isolation.
- 6.42 ITV said it would also contend that plurality of voice is not solely a question of provision of news. In respect to cross-media considerations, and given in addition the limited regulatory controls with respect to the editorial content of national newspapers, potential concerns may extend beyond news in the cross-media context.

- 6.43 ITV clarified that it was IRN rather than ITN that was one of the main providers of news services to commercial radio stations in the UK. ITN is a 20% shareholder in IRN. ITV is a 40% shareholder in ITN. ITN provides its editorial services to IRN as a subcontractor. [This sets out confidential information relating to the relationship between IRN and ITN].

Sufficient plurality of persons with control of media enterprises serving those audiences

- 6.44 ITV agreed with Ofcom that it is required to assume that the number of media enterprises serving the audience for TV news is reduced by one.
- 6.45 ITV said it was unclear from Ofcom's weekly reach figures for television news whether these included audiences for regional television news programming which Sky does not provide. ITV said it did not dissent though from Ofcom's conclusion that ITV is the largest commercial TV news provider and that a combined ITV/Sky would account for an even larger share of the television news audience.
- 6.46 ITV agreed that the protections relating to impartiality and output quotas did not of themselves wholly mitigate the reduction in media enterprises serving the TV news audience.
- 6.47 With regard to cross-media ownership rules, ITV noted that the rules relating to media plurality were introduced in response to change introduced with respect to cross-media ownership rules and that these rules might be argued to be designed to address concerns which are at least at a detailed level distinct.
- 6.48 In relation to Ofcom's assessment of the impact of rules on impartiality and production quotas on sufficiency, ITV believed that the separate provisions highlighted by Ofcom as applying within the television news sector must be relevant. ITV also highlighted additional safeguards:
- ITV is required to offer a news service of high quality dealing with both national and international issues.
 - ITV is subject to further controls in relation to the appointment of a news provider for the Channel 3 service and there are related enforcement provisions. These include additional ownership restrictions applying to ITV1's news provider.
- 6.49 ITV said consequently while there may be concerns that the rules on impartiality and quotas do not prevent the potential ability to influence the selection of issues and events that are covered and the relative importance given to each of them, constraints on public service broadcasters against such behaviour are significant. In contrast, similar obligations are not imposed on print media.
- 6.50 ITV drew Ofcom's attention to section 280 of the Communications Act 2003 which sets out that Ofcom must institute arrangements which provide for the terms on which the news provider is appointed to be appropriate for securing the appointee's finances are adequate to ensure that the Channel 3 news obligations are met rather than as Ofcom stated in the Issues Letter that ITV budget for news provision is subject to regulatory approval.

UK audience for cross-media news

- 6.51 ITV said that the impact of the relevant merger situation on the audience for news across television and newspapers is highly material to Ofcom's review and potentially is more significant than the concerns expressed about cross-media issues involving radio whether neither ITV nor to ITV's knowledge Sky are broadcasting licensees.
- 6.52 Ofcom might seek therefore to ascertain what percentage of the relevant audience relies on TV news in particular from ITV as their primary source of news and what percentage of the same relevant audience relies on newspapers in particular from News International's newspaper titles as their secondary source of news. ITV said it was plausible that this section of the audience might be most vulnerable to a reduction in plurality as a result of the relevant merger situation.
- 6.53 ITV said that such a fuller analysis of the cross-media impact of the relevant merger situation would be likely to bear out Ofcom's view that there are important issues with respect to cross-media plurality.
- 6.54 Concerns over the potential influence on news agendas might apply more acutely to newspapers than to television because newspapers are not subject to the same protections as television news programmes. Ofcom may therefore wish to consider what controls if any there are in place which protect against any direct or indirect influence on the editorial agenda of newspapers within and conceivably beyond the merged entity arising as a consequence of the relevant merger situation.
- 6.55 ITV said examples of coverage by national newspapers which had a very direct impact on television broadcasters including ITV were manifold. []
- 6.56 ITV again drew Ofcom's attention to the fact that IRN is the provider of news services to commercial radio stations in the UK not ITN. ITV holds no radio licences. Nevertheless ITV recognised that Ofcom had identified these as requiring further consideration and investigation and ITV accepted that position.
- 6.57 ITV said it was also relevant that a merger between radio news producers would not by itself trigger examination by Ofcom under the public interest provisions of the Enterprise Act as the Act related to broadcasters rather than producer. It may be therefore appropriate, according to ITV, to attach greater weight to the concerns raised in relation to the provision of TV news as a result of the relevant merger situation.
- 6.58 ITV noted that Ofcom said that the proliferation of internet providers of news services may act as a countervailing factor. ITV stated that it did not take issue with Ofcom's research findings in this context, bearing in mind that the leading online news providers are the internet arms of well- established print, television and radio news sources.
- 6.59 ITV said however, that it believed that internet news providers are increasingly important competitors to traditional news providers. The internet is achieving ever increasing audience share and is rapidly evolving (over mobile phones as well). For example, there is an increasing trend for internet news providers to transmit news bulletins plus video and audio elements – increasingly similar to conventional TV services in many respects. It is likely that a different picture would emerge, showing a greater reliance by the public on the internet as a news source if Ofcom's 2005 research were conducted today or in future.

John Grogan MP

- 6.60 John Grogan MP wrote as the main signatory of an Early Day Motion on the acquisition by Sky of 17.9% of ITV which was signed by 106 of his colleagues. He said his comments were based on discussions he had had with a large number of those colleagues who had signed the motion.
- 6.61 He said that the starting point of his representation was the dominance of Sky in the UK media. He noted that News International is already a dominant force in the UK media through its existing newspaper, broadcasting and on-line interests. He said News International has a 32.7% share of circulation of all national newspapers, a 52.8% share of circulation of all popular UK national newspapers, a 53.6% share of popular dailies and a 36.2% share of all quality national newspapers.
- 6.62 He noted that a linked ITV and Sky accounts for 32% of all TV news viewing (via ITV, Sky News, Channel 4 News and Five) and that the only other material provider is the BBC. In his submission (dated 15 March 2007), he also claimed that over the last seven days over 33 million people (67% of the adult population) have read a News International paper, watched Sky News or one of ITV1's main evening news bulletins and that this reach increases to 68.8% of those aged 55 - 64.
- 6.63 He said that despite the rise of online media, there was no doubt that traditional media still influences how readers think, vote and act. Since 1979 general elections have without exception been won by the political party receiving the support of News Corporation. He said Ofcom's own analysis shows that for every 1% of broadband growth, newspaper circulation drops 0.2%.
- 6.64 He was most concerned about the ITV news contract which is due for renewal in 2008. His submission observes that there is a real chance that Sky could use their inside track to the boardroom to gain an advantage over the current contract holders ITN: "A quiet word at the Christmas do, a phone call or conversation at a company party may be enough for Sky to exert influence over the company. What's more, in relation to the news contract, I am not convinced that safeguards are in place to ensure that Sky do not use their share in ITV to gain an inside track on the race to provide news to the company when it is renewed in 2008."
- 6.65 He expected the race for the contract in 2008 to be fierce. Given Sky's decision to pull its basic channels from Virgin Media, cutting its potential audience by 3 million, the separate decision to pull its free to view channels from Freeview, cutting the number of channels able to view Sky News by at least another 7 million, Sky News will only be accessible to Sky's 8.4m customer base which is half its current reach. This will have a massive impact on advertising revenue and could make the 2008 bid critical for Sky to win.
- 6.66 He raised the question of how Sky's presence in the ITV boardroom will affect future bids by ITV for sports rights. He asks: "will they collude to hand sports rights to each other or will ITV be blocked from bidding for certain rights by a Sky vote in the boardroom?"
- 6.67 His submission also expressed concern that Sky will use its ITV stake to enhance its influence over the digital switchover process by frustrating the joint BBC/ITV Freesat project and the development and growth of Freeview. If Sky is able to undermine Freesat so that it fails – by persuading ITV not to participate, Sky would then control the only television services (DTH and Freesat from Sky) available to 2% of UK TV

homes. Following digital switchover, these homes will be unable to receive multi-channel TV through terrestrial. The acquisition will also give Sky the ability to influence marketing and strategy of Freeview and thereby influence ITV's policy as regards digital channels shown on DTT.

- 6.68 He said Sky's ability to materially influence Freeview raises plurality concerns. The practical choice of television platform for viewers not in cable areas will be between DTH and DTT. The ITC was in the past concerned to ensure that Sky was not in a position to control DTT. This reflects both the broader plurality objective of securing that control of media enterprises continues to be spread across a sufficient number of persons and the need for the service to appeal to a variety of tastes and interests. This concern was expressed by prohibiting Sky from holding a DTT multiplex licence or providing more than three channels of content in respect of the one multiplex in which its involvement was envisaged.
- 6.69 Finally, he raised a further concern which he believed demonstrated Sky's appetite for dominating the digital television market in the UK. The announcement by Sky that it intended to withdraw the three free to air Sky channels from Freeview in order to deliver four pay TV MPEG-4 based channels through a news set top box was "frankly alarming". Sky's concern was obviously to increase market share further by moving towards a pay TV corner of the Freeview market by possibly crushing smaller pay TV broadcaster such as Top UP TV and Setanta. If ever there was a time to ensure plurality and diversity in UK broadcasting it was now.

The National Union of Journalists and the Campaign for Press and Broadcasting Freedom

- 6.70 The joint submission from the National Union of Journalists (NUJ) and the Campaign for Press and Broadcasting Freedom (CPBF) observed that News International already has a 'disproportionate' share of control over the provision of news and current affairs reporting through broadcasting, newspaper and online services. The NUJ and CPBF submission stated that News International has a 52.8% share of circulation of the most popular dailies and a 32.7% share of national newspaper circulation.
- 6.71 Their submission also expressed concern regarding "The UK audience for sport, especially with regard to the acquisition of broadcasting rights". It was also observed that Sky has gained further influence over the process of digital switchover and that it could use its position to impede development of Freesat or impede the progress of the Freeview service.

Private individuals

- 6.72 Michael Conroy stated that Sky's stake in ITV is "bad news for consumers". He expresses concern that ITV will slowly be drawn into a subscription service or run down by Sky.
- 6.73 Ian Cresswell noted that the media should be open to as many competitors as possible and that Rupert Murdoch has gained "perhaps too much ground within both terrestrial and pay-per-view markets".
- 6.74 A submission from Mike Fitzsimons stated that the acquisition is not in the public interest. He noted that the: "position of Sky as a major broadcaster in the UK, with an international sphere of influence clearly reduces the ability of others to compete and

places Sky in an advantageous position re strategic media decisions that have the potential to narrow the available content and cope of views expressed in a free media environment”.

- 6.75 Steve Hinds objected to the acquisition of 17.9% of ITV by Sky. He believed that this will cause a conflict of interest between the independent broadcasting of ITV and the programming of Sky.
- 6.76 Terence O'Brien requested that Ofcom extends its current investigation over the Sky purchase of a 17.9% stakeholding in ITV to review the consumer interest in Sky's move to "manipulate the market" by withdrawing its channels from the Freeview platform. His member of parliament Stephen Hammond MP wrote to [highlight] Mr O'Brien's complaint about the decision of BSkyB to withdraw its television services from Virgin Media.
- 6.77 [A private individual] wrote that: "SKY already muscle all of the other stations out of the market such as on digital and now virgin."
- 6.78 A submission from Francis Pettitt stated that the acquisition gives Sky the ability to influence the content broadcast by ITV.
- 6.79 [A private individual] stated: "It is not [sic] about time that Ofcom or the Secretary of State did something about how much Media Monopoly Mr Murdoch and the British Sky Broadcasting PLC have here in the United Kingdom...I was always under the impression there was only so much Media that could be controlled by an Individual or a Corporation and that this included Newspapers and Television Media".
- 6.80 This submission notes that: "Sky took this stake in order to prevent Virgin Media... from gaining control of ITV". The submission expressed concern about sports events and Freeview and concluded: "If Sky is allowed free license to do what they wish, and without intervention will control everything" [sic].
- 6.81 Tony Smith stated that Sky took the stake in ITV in order to prevent Virgin Media from doing so. He noted that Sky controlled most sports events and expressed concern that: "given a chance they would also make this a pay service".
- 6.82 Mark Taylor stated that he cannot see how the Transaction can be in the public interest.
- 6.83 Alan Timbrell noted that there are currently two dominant TV organisations within the UK (the BBC and Sky). He argued that any weakening of the BBC position would put Sky in a wholly unacceptable strong position and that Sky's 17.9% purchase of ITV should be: "rejected in creation of a third force, that being the proposed takeover of ITV by Virgin Media".

Sky

(1) Sky's submission in response to Ofcom's Invitation To Comment of 1 March 2007 (23 March 2007)

- 6.84 Sky noted that the exercise being undertaken by Ofcom was entirely hypothetical. This was because it considered that the thresholds for jurisdiction on media public interest intervention had not been met. It did not repeat its views on the thresholds, saying they had been made to Ofcom already and separately to OFT and DTI.

6.85 Sky also commented that Ofcom's report to the Secretary of State had to take into account the regulatory framework which was designed to protect media plurality through cross-media ownership rules and rules on change of control. Sky said that its investment in ITV did not breach either of these rules and therefore there was established a firm regulatory presumption that plurality in media was unaltered as a result of the transaction.

No reduction in viewpoint plurality

6.86 Sky said that its investment in ITV did not result in a reduction of viewpoint plurality under the media ownership rules. It said that in the interests of legal certainty, the media ownership rules are only engaged where there is a change in ownership. Sky referred to its submissions to Ofcom on the change in ownership – that the transaction did not result in a change of control.

6.87 Sky said there was no reduction in viewpoint plurality because the transaction had no bearing on ITV's editorial decision making. It said that:

- ITV's editorial decision making is shaped and determined by ITV's editorial, production and commissioning staff under the strategic supervision of its Board.
- Together they control ITV's editorial policy on its channels.
- Sky's investment does not enable it to participate in or otherwise influence ITV's editorial, production or commissioning deliberations or decisions.
- And that that is the case whether such deliberation or decisions are made by editorial, production or commissioning staff at a day to day level or at Board level.

6.88 In particular, Sky said it had no ability to influence the appointment of ITV staff nor does Sky have representation or the ability to obtain such representation on the Board.

6.89 Sky said it had no intention of seeking representation on the Board or accepting it if it were offered which it noted would be highly unlikely in any event.

There is sufficient broadcast plurality

6.90 Sky said that there was sufficient broadcast plurality which is guaranteed by law and is delivered in practice. It said that the question for Ofcom to decide was whether there are sufficient substantive plurality concerns to justify a recommendation to the Secretary of State to refer the transaction to the Competition Commission. It said that the threshold for a reference was high and would only be met if the transaction gave rise to (as set out in the DTI guidance) unacceptable levels of media and cross-media dominance or a significant reduction in plurality. Fundamentally, the concern was with the ability of any one person to influence opinions and control the agenda.

Plurality is guaranteed by the continued application of a media ownership rule

6.91 Sky noted that the rules on change of control in section 351 of the Communications Act 2003 and the 20% rule in schedule 14 of that Act should be considered.

- 6.92 On change of control, it referred to earlier submissions to Ofcom. On the 20% rule, they noted that the rule applied to Sky by virtue of News Corporation's newspaper interests and shareholding in Sky but that it had not been breached by this transaction.
- 6.93 It said the rule was cleared considered by Parliament and recently endorsed by Ofcom in its review of the media ownership rules in 2006 to be sufficient and in and of itself a protector of plurality and of broadcasting plurality in particular.
- 6.94 Sky said that the fact that the rule which considers media plurality to be guaranteed up to 20% which is not breached in this case raises a very strong presumption that regulatory intervention is not necessary.
- 6.95 Sky also noted that the transaction would not have breached any of the previously existing ownership rules and as recognised in the DTI's guidance, this creates a presumption that the transaction does not give rise to plurality or any other public interest issue.

There is sufficient broadcast media plurality in practice

- 6.96 Sky went on to consider, despite the clear view of Parliament, whether the transaction gave rise to any substantive broadcasting issues that could justify Ofcom recommending a referral to the Secretary of State. It said that there was significantly more than a minimum level of plurality and that there can be no question of broadcast media dominance nor a significant reduction in broadcast plurality.
- 6.97 As a starting point, Sky said that analogue terrestrial audiences could not be relevant audiences because they do not have access to Sky's channels. The only relevant audience was those in homes with multi-channel television where both Sky and ITV's channels are available.
- 6.98 Even if Sky and ITV's channels were under common ownership, this would not lead to a significant reduction in plurality in relation to multi-channel audiences because such audiences have a multitude of independently controlled channels to choose from:
- Multi-channel homes with DTT have access to a broad range of programming on over 30 channels. Sky referred to a comment from Baroness Blackstone, the then Minister of State for Culture, Media and Sport who said in 2003 that (in contemplation of a combination of control over Channel 3 and Channel 5) there would still be three separately controlled free to air public service broadcasters. In this case, there would be four even if Sky and ITV's channels were under common ownership.
 - Multi-channel homes with cable have access to over 260 digital TV channels and 40 radio channels in a wide variety of genres.
 - Multi-channel homes with DSat have access to well over 500 channels of which more than 180 digital TV channels and 90 digital radio channels are available on freesat from Sky including across a wide variety of genres. They also include the channels available on DTT as well as a range of new free to air channels that have recently been launched. A range of successful pay television channels are also available and a number of high definition channels. The rate of new channel entry has been rapid: 89 channels launched on DSat between November 2005 and November 2006.

- Consumer will soon have the option of receiving the channels to be made available on BBC's Freesat service.
- In 2003, Baroness Blackstone recognised the contribution of multi-channel television to plurality when she said that the growth in the number of digital channels and audience figures means plurality is becoming integral to our broadcasting ecology.
- Sky noted also that multi-channel audience requirements are also delivered by an increasing range of technologies which make a profound contribution to plurality in UK broadcasting.

There is no reduction in plurality for broadcast news audiences in multi-channel homes

6.99 Sky noted that the Secretary of State has no basis for a concern that a large number of news channels may have come under single control as a result of the transaction.

- It said Sky does not control ITV or any of ITV's channels. Sky does not control ITV nor does it have the ability to control the editorial policy, content or composition of any of ITV's channels.
- ITV does not operate a news channel. Sky said it does not consider that this includes general entertainment channels that broadcast news bulletins. This was on the basis that news channels was discussed in Parliament in the context of removal of the ownership rules as cable and satellite channels. Giving the words "news channels" their ordinary meaning would also relate to specialist channels devoted to news coverage. ITV could not properly be described as a news channel.
- Even if ITV were considered to operate a news channel, it could not be said that the transaction affects a large number of news channels as Sky only have two dedicated news channels; Sky News and Sky Sports News. ITV has no dedicated news channel. Sky only broadcasts additional news on Sky One and ITV only broadcasts ITV news on ITV1.

6.100 Even if it were accepted that news channels included general entertainment channels which include news and Sky could be said to control the editorial content of ITV's news programming, it could not be reasonably argued that significant plurality concerns arise:

- Multi-channel channels would continue to have access to a wide range of specialist/dedicated news channels leaving aside those on Sky News and ITV; with access to BBC News 24 (whether on DTT, DSat or cable), BB Parliament, Bloomberg, CNBC, CNN, Euronews, Al Jazeera Eng, France 24, CCTV-9, NDTG, 24x7, Russia Today, S4C2 (depending on the platform) – all owned and controlled by media enterprises wholly independent of both Sky and ITV.
- Multi-channel homes would also continue to have access to a wide range of news programming provided as part of a general entertainment or multi-genre channel.

The supplier of raw news data or content is not the regulated owner or broadcast service provider

- 6.101 Sky said it had been suggested by ntl (now Virgin Media) that because ITN is the news provider for Channel 4 and ITV, Sky could now be said to control ITN. Sky said it was entirely fanciful to suppose Sky could control ITN by virtue of its minority shareholding in ITV. Sky does not have the ability to control ITV and even accepting it did, Sky's interest in ITV is too indirect to give it control over ITN. In any event, ITV's shareholding in ITN is 40% which means the majority of shareholders in ITN would remain under independent control (60%). Sky said it understood similar concerns had been raised in respect of the provision by Sky News of the news content for Channel Five and major commercial radio stations.
- 6.102 Sky said the issue here was not the provider of the underlying data or content – for example the person licensed and regulated under the Communications Act is the person with general control over which programmes and other services and facilities are comprised in the broadcasting service. In relation to media ownership, the focus is on the owner of channels and programming in the first instance and on the person with editorial control in the second.
- 6.103 In the case of ITN, ITN does not control or determine the editorial policy of Channel 4 or ITV. Nor is ITN considered to be and thereby regulated as the broadcast service provider under the Communications Act. Channel 4 and ITV determine their own editorial policy and are considered to be the broadcast service provider and are therefore regulated.
- 6.104 Although Sky provides raw news data and content to Channel Five, Five owns and controls the editorial policy of its channels and news programming and is the regulated broadcast service provider under the Communications Act.
- 6.105 Sky stated that the same point applies to the provision of news content by Sky to commercial radio broadcasters. The radio broadcaster owns and controls its own editorial policy and is the regulated service provider. Sky said that in any event there was a range of dedicated radio news services and a wide range of news programming available on non-dedicated radio services which are independently owned.

Conclusion

- 6.106 Sky said in conclusion that the transaction did not give rise to any plurality concerns. Sky's investment in ITV does not enable Sky to influence or control ITV's editorial decision-making and cannot be considered to reduce viewpoint plurality.
- 6.107 Even if Sky and ITV's channels were considered to be under entirely common ownership and editorial control, there continues to be more than sufficient plurality. There is a clear indication that no plurality concerns arise because there continues to be a media ownership rule designed to apply to Sky in exactly the present circumstances which Parliament considered to be sufficient to guarantee plurality which Sky has not breached. There is indeed a vast range of independently owned channels and programming that are now available to multi-channel homes and well as the expanding range of technologies used to deliver them.
- 6.108 The transaction does not give Sky control over any news channel or any news programming controlled by ITV. Even if it did that would not amount to a large number of news channels coming under common control. The provider of raw news data and content is not relevant to Ofcom's assessment.

- 6.109 There are therefore no substantive plurality concerns that would justify a recommendation to the Secretary of State to refer to the Competition Commission.
- 6.110 Finally, there is a multitude of other sources, of information and programming available online in print and on radio in addition to the vast range of television channels and programming and independent owners of such channels and programming.

(2) Sky's submission in response to Ofcom's Issues Letter of 11 April 2007 (17 April 2007)

Summary

- 6.111 Sky said the transaction was not a merger. It did not change the status quo in any event and ITV remains a commercially and editorially independent enterprise. Sky has acquired no ability to control or influence ITV's editorial policy for news and the transaction can therefore raise no plurality concerns.
- 6.112 Ofcom has taken an erroneous interpretation of section 58A(4) of the Enterprise Act 2002. It therefore fails to take account of the actual degree of influence acquired by Sky over ITV.
- 6.113 The existing regulatory framework continues to ensure sufficient plurality, in particular the 20/20 rule which establishes a statutory threshold for appropriate and sufficient plurality.
- 6.114 Even if Sky and ITV are treated as the same enterprise, post transaction there is sufficient plurality:
- The transaction has no effect on cross-media plurality as Sky is not a newspaper enterprise, the 20/20 rule protects plurality and the cross-media audience for news experiences no appreciable reduction in plurality as a result of the transaction.
 - No TV news audience served by both enterprises experiences a reduction in plurality below that currently experienced by analogue terrestrial viewers.
 - Even on the basis of a TV news audience that includes viewers of all platforms, there is no material reduction in the number of media enterprises serving such audience (15 to 14 approximately) which is not insufficient plurality.
- 6.115 Sky said that the transaction could not be expected to operate against the public interest.
- 6.116 Sky also raised a number of process points against Ofcom: the assessment process had been inadequate and that the issues letter failed to address a number of representations made by Sky.

Ofcom's approach

- 6.117 Sky's position is that Sky and ITV have not ceased to be distinct. Sky however bases its submission on the assumption Sky may have material influence. Ofcom cannot ignore the degree of actual influence Sky has over ITV.

- 6.118 Sky said that Ofcom may feel constrained by section 58A(4). The purpose of the section is to ensure whenever there is a merger situation (whether in the context of an acquisition of control or an increase in the level of control, the Secretary of State would still be allowed to carry out a reduction in plurality assessment. Sky submitted that this does not alter the fact that the Secretary of State and Ofcom are not required to extend this legal fiction to the actual level of control acquired.
- 6.119 Sky submitted that Ofcom must report to the Secretary of State on the effect of the plurality consideration on the case. This means Ofcom must consider the actual facts of the case and their effect on the public interest. The first step is to consider the effect of the degree of control that is acquired as a result of the merger situation. This says Sky is consistent with the DTI Guidance which states that the Secretary of State will assess whether there is likely to be a significant reduction in plurality.
- 6.120 Sky said this interpretation is confirmed by the explanatory notes to section 375 of the Communications Act. If any merger situation under the Enterprise Act was deemed to give rise to an acquisition of full control, one would not expect the Secretary of State to be entitled to scrutinise plurality issues arising at each incremental change in the level of control.
- 6.121 It would be contrary to principle and the express terms and clear purpose of the Enterprise Act for the Secretary of State to base his assessment of the public interest consideration on a legal fiction rather than on actual facts and effects of the transaction. It would be particularly absurd to consider the transaction on the basis of full control when such an acquisition would be expressly prohibited by law under the 20/20 rule. It has been the invariable practice of the Competition Commission (CC) when considering the effect on the public interest of mergers giving rise to material influence to assess the actual effects of the level of influence acquired rather than on any legal fiction. It referred to a paper submitted by Sky to the OFT on 16 March 2007 to demonstrate this point.
- 6.122 Sky also noted that its approach would be in line with the approach that the OFT and CC would take in relation to the parallel SLC assessment. An SLC assessment is based on the fact that the merging parties have ceased to be distinct, the level of control acquired calibrates the effect on competitive behaviour and the dynamic of the alleged theory of harm. Sky concluded from the OFT's issues paper and meeting that its analysis was based on actual degree of influence.
- 6.123 Sky's position is that the transaction does not enable it to exercise control and even less so editorial control over ITV. It would be inconsistent with the purpose of the plurality of control test in section 58(2C)(a) not to have regard to the fundamental distinction between a transaction which confers control or influence over the editorial policy of the acquired undertaking and one that does not.
- 6.124 All editorial decisions of ITV that may have an effect on plurality are taken by management under the overall supervision of the ITV board. Sky has no direct or indirect ability to influence ITV's board or management. Ofcom has therefore failed to identify in practice how Sky might be able to influence the editorial policy of ITV in any way that would give rise to a potential reduction in plurality.
- 6.125 Sky has confirmed to the OFT that it is prepared to undertake [] and this excludes the risk of any degree of influence being exercised over ITV.

Regulatory framework ensures plurality

- 6.126 According to Sky, Ofcom has failed to give proper weight to the effects of the regulatory provisions on maintenance of sufficient plurality.
- 6.127 The 20/20 rule of schedule 1, part 1 of the Communications Act is a media ownership rule which was designed specifically to safeguard broadcast and cross-media plurality. In summary, the rule was designed and renewed with Sky and its current shareholding in mind; it continues to apply specifically to Sky but is not breached by the transaction and was clearly considered by Parliament and recently Ofcom to be sufficient and in and of itself, a protector of plurality in general and broadcasting plurality in particular.
- 6.128 The fact that Sky has not breached the rule raises a very strong presumption that regulatory scrutiny is not necessary. Ofcom needs to show on the basis of compelling evidence how the level of influence acquired as a result of the transaction can produce a significant reduction in plurality which requires further regulatory scrutiny beyond the 20/20 threshold. This policy is enshrined in the DTI guidance after full consultation. Moreover the fact that the transaction does not breach the rule means that there cannot be insufficient plurality in this case. Ofcom's issues letter fails to address the point.
- 6.129 Another rule designed to safeguard plurality is the rule on change of control of Channel 3 licensees in section 351 of the Communications Act. Sky's position is that it does not but Ofcom has not provided Sky with a draft determination and that is not in accordance with the timetable set out in its change of control guidance. Sky also noted that Ofcom's issue's letter is also silent on the matter even though Sky considers the point is highly material to its report to the Secretary of State.
- 6.130 Sky said that the test of control under the Communications Act under section 351 and schedule 14 is the same as in the Broadcasting Act 1990. In Sky's submission, there should be a presumption that a transaction which does not represent a change of control for the purposes of the media ownership rules specifically designed to protect plurality of control, does not give rise to a public interest concern.
- 6.131 Sky noted that Ofcom's Issues Letter rejects the relevance of the provisions of its Broadcasting Code which ensure, inter alia, due impartiality, due accuracy and fairness and avoid undue prominence of views and opinions. Sky's submission was that the Code and rules 5.4 and 5.12 in particular provide important safeguards that no broadcaster has the ability to influence the agenda.
- 6.132 Sky accepts that the quota regime for programming by public service broadcasters do not of themselves guarantee plurality. Nevertheless, Sky submits that these requirements provide further evidence of the minimal scope for anyone acquiring control of ITV to make changes to its editorial content.

There remains sufficient plurality of persons with control of media enterprises serving the relevant audiences

- 6.133 Sky made the point that the Issues Letter distinguishes between the audience for TV news and cross-media news and the analysis is influenced by fact that Sky's major shareholder News Corporation has an interest in a news publisher, News International Ltd. Sky's position is that this is misplaced as it disregards commercial reality and fundamental legal considerations.

The transaction does not have a cross-media dimension involving a newspaper

- 6.134 Sky noted that it is not a newspaper enterprise. It said that the intervention notice related only to Sky and ITV and not the media interests of Sky's shareholders, including News Corporation. It said Ofcom had not analysed the relationship between Sky and News Corporation.
- 6.135 Sky said the Issues Letter did not attempt to explain how News International might be able to control or influence ITV through Sky, given Sky's lack of influence over ITV. Sky's submission was it could not control ITV and neither News Corporation or News International could either. The Issues Letter provided no basis for treating News International and ITV as having ceased to be distinct and no analysis whether ITV and News International share the same audience.
- 6.136 It is not appropriate, according to Sky to consider News International's newspaper publishing interests as the 20/20 rule has not been breached. This would undermine the validity of the regulatory regime approved by Parliament.
- 6.137 Sky submitted that Ofcom had not provided sufficient evidence to support its view that the C2DE audience for TV news and cross-media news is a relevant audience. Given the issue is based on the alleged link between News International and ITV not Sky and ITV, it should be disregarded. In any event a C2DE audience is not differently affected from a TV audience as a whole as members of the audience experience the same choice and plurality as the population as a whole.

UK audience for TV news

- 6.138 Sky's position is that Ofcom needs to take into account TV audiences served by both Sky and ITV because the Act says to construe an audience in relation to a media enterprise as one served by that enterprise. It is only in relation to such an audience that the transaction has resulted in a reduction in the number of enterprises serving that audience. Therefore, in relation to the UK audience for TV news the analysis must be based on those UK homes where both Sky's news channel and ITV's general entertainment channel containing news bulletins is accessible.
- 6.139 Sky reserved its position as to whether it is correct to take into account first and foremost the number of enterprises serving those audiences and where appropriate, audience shares – as set out in the DTI's guidance. Sky accepted however that the analysis of plurality requires but is not limited to an evaluation of the number of enterprises serving an audience served by Sky and ITV.
- 6.140 Sky said viewers would not be affected in relation to the analogue terrestrial audience for TV news as viewers would not be affected as Sky does not broadcast on this platform.
- 6.141 In relation to cable audiences for TV news, there is also no reduction as Sky is not carried in cable in any material way.
- 6.142 In relation to DTH, post transaction there is a sufficient number of persons with control of media enterprises as DTH continues to have access to a wide range of specialist and dedicated news channels owned and controlled by a number of different media enterprises, including BBC News 24, BBC Parliament, Bloomberg, CNBC, CNN, Euronews, Al Jazeera Eng, France 24, CCTC-9, NDTV 24x7, Russia Today and S4C2 and DTH homes will continue to have access to a wide range of news programming provided as part of a general entertainment channel.

- 6.143 Ofcom is incorrect therefore to say there will be a 5 to 4 reduction. At most, the transaction reduces the number of news providers from 15 to 14 which is not a significant reduction. Nor could it be said there would be an insufficient number of media enterprises as according to Sky, the combined share of viewing of the specialist/dedicated news channels, excluding BBC News 24, BBC Parliament and Sky News is 0.303%.
- 6.144 In relation to the DTT audience for TV news, there remains a sufficient number of persons with control post the transaction as DTT homes will continue to have access to a wide range of specialist/dedicated news channels and news programming provided as part of a general entertainment or multi-genre channels which are owned and controlled by a number of different media enterprises.
- 6.145 Ofcom should also take into account that DTT accounts for only a third of UK homes; Sky News Freeview audience is minimal (less than 0.5%) and Sky has already announced its intention to cease providing Sky News free-to-air on DTT []. The correct counterfactual for assessing the effect of the transaction is []. Ofcom should not assume that [] if Sky's plans to launch a pay TV service on DTT were not to proceed.
- 6.146 The purpose of the plurality consideration is to ensure a minimum level of plurality not to ensure that viewers of multi-channel homes have access to greater plurality of news broadcasters than viewers in analogue terrestrial homes. A platform by platform analysis shows that no relevant TV audience experiences a reduction in plurality below a level experienced by analogue terrestrial homes.
- 6.147 Even if Ofcom (incorrectly) took the view that the relevant audience should include viewers of all TV platforms, it is incorrect to assume there would be a reduction of 5 to 4. Sky submits that the number is 15 to 14. If Ofcom wants to consider relative audience shares, then it should note that Sky's share of total TV news audience is only 2.3% and not 5% as submitted by Ofcom.
- 6.148 Sky stated that it was unclear why Ofcom distinguished between commercial providers of news content and what the relevance of the distinction is given the DTI guidance states that other players to be taken into account should also be the BBC and the Welsh Authority as well as owners of broadcasters established abroad.

Provision of news to broadcasters is not relevant

- 6.149 Sky submits that Ofcom is only required and entitled to take into account the question of plurality of persons with control of media enterprises. An enterprise is not a media enterprise if it consists in or involves the provision of a service such as news content to broadcasters. It is the broadcaster not the news provider which exercises editorial control over the content of its news programmes. It is incorrect to assume that Sky becomes a controlling shareholder in ITN due to its investment in ITN's largest shareholder. Sky has no control over the activities of ITN.

UK audience for cross-media news

- 6.150 Sky's submission is that this is not audience which is served by any particular media enterprise for the purposes of section 58. It is an amalgamation of smaller audiences each served by a particular media enterprise(s).
- 6.151 To the extent that Sky or ITV serves consumers of news by a variety of media, not limited to television, they experience a greater degree of plurality as respects news

than is the case for consumers of TV news only. They are therefore less affected by the transaction. They have access to news from a variety of sources, all the TV broadcasts accessible to them; all the national and local radio services broadcast in their area; all the paid for and free morning and evening daily and weekly regional newspapers circulating and distributed in their area; all news magazine and all news available on the internet.

- 6.152 Sky refers to a report published by the ITC/BSC in 2002 “New News, Old News” which contains the following observations under the heading “Ambient News and Staines Man: old news meets new news” that the decisive feature of today’s news landscape is that news is very easily available through a host of different media and is usually free at the point of consumption. That is even more true today according to Sky – in such a rich and diverse media landscape, it cannot be argued that the transaction gives rise to issue under plurality.

Annex 1

- 6.153 This Annex set out the legal basis on which Sky believes that OFT should investigate the transaction. Sky said in summary, the OFT and the Competition Commission must first establish jurisdiction and then substantive analysis. It must be based on the facts and not any legal fiction.

Merger review under the Enterprise Act and the Fair Trading Act

- 6.154 Under the Enterprise Act, the OFT has a duty to refer a completed merger to the Competition Commission if the OFT believes that a relevant merger situation has been created and the created of that situation has resulted or may be expected to result in a substantial lessening of competition
- 6.155 If a relevant merger situation is created, this will establish the OFT’s jurisdiction to review the merger. If the OFT determines that Sky has the ability materially to influence the policy of ITV then this will mean that Sky and ITV may be treated as having ceased to be distinct enterprises for the jurisdictional purpose of establishing whether a relevant merger situation has been created.
- 6.156 If jurisdiction has been established, the OFT must undertake its substantive analysis. The OFT’s test for referring a relevant merger situation to the Competition Commission will be met if the OFT has a reasonable belief, objectively justified by relevant facts that there is a realistic prospect that the merger will lessen competition substantively. Sky submits that Sky’s acquisition and any influence over the policy of ITV which may flow from such an acquisition are clearly relevant facts and it would be wrong for OFT or the Competition Commission to ignore these or substitute for such facts any other hypothetical or deemed facts during its substantive analysis.
- 6.157 The role of the OFT in relation to mergers was less precisely defined by the Fair Trading Act than under the Enterprise Act. Further nothing in the Enterprise Act requires or permits the OFT or the Competition Commission to assume that any finding for jurisdictional purposes that Sky has the ability to materially influence ITV’s policy means that Sky is deemed to have control or influence over ITV other than that which flows from the transaction itself.
- 6.158 Even if it were not clear from sections 22 and 35 of Enterprise Act that the OFT and the Competition Commission are to carry out their substantive assessment on the actual facts of the transaction, this is unavoidable on a construction of section 26(4). This permits several types of transaction involving the control of enterprises which

have already ceased to be distinct to be considered as merger situations. It would be inconsistent with the statutory scheme for the OFT or the Competition Commission to substantively assess the effects of the relevant merger situation created by material influence as if either de facto or legal control has been acquired. That would anticipate a subsequent review which is required if such a level of control is achieved and render such a review nugatory since the previous review would have assessed the effects of the transaction on which the subsequent review should be based.

- 6.159 The competition authority concerned will need to form a view based on the evidence before it whether the transaction will influence the behaviour of the parties and if so, in what particular respects and with what resultant effects on competition in any relevant market.

OFT/Competition Commission Case Practice

- 6.160 OFT and Competition Commission practice supports the point that they appraise mergers by reference to particular facts which that case presents. There is a narrower economics based substantial lessening of competition test under the Enterprise Act than compared to the broader public interest test under the Fair Trading Act. This may lead to different conclusions being reached on similar facts but it does not render reports of the Competition Commission under the Fair Trading Act irrelevant.

- 6.161 Sky referred to First Milk/ Robert Wiseman Dairies OFT case of April 2005 to show that the conclusions were based closely on the particular facts before it and not upon any assumption of a level of control or influence by First Milk other than flowing from the rights it acquired through this transaction.

- 6.162 Sky also referred to Fair Trading Act cases. These were:

- SRH/GWR/VRSL/Galaxy (Competition Commission May 2003)
- Scottish Radio Holdings/Kingdom FM Radio (OFT May 2003)
- SMG/Scottish Radio Holdings (OFT June 2001)
- Icopal/IKO and others (Competition Commission March 2001)
- Vivendi/Sky (Competition Commission April 2000)
- Stagecoach/Mainline (MMC March 1995)
- Stora/Gillette/Swedish Match (MMC March 1991)
- Government of Kuwait/BP (MMC October 1988)

- 6.163 The cases above showed (according to Sky) a consistent approach on the part of the Monopolies and Merger Commission (MMC) and the Competition Commission under the Fair Trading Act and on the part of the OFT under the Enterprise Act to the substantive assessment of cases in which material influence is found to exist.

- 6.164 In considering cases under the Fair Trading Act, it is important to bear in mind that the MMC and the Competition Commission were not applying the same test as

applies under the Enterprise Act. There is nonetheless, according to Sky, consistency in identification of factors relevant to the assessment of effects on competition in material influence cases. Sky noted that if the transaction does not create a single pricing unit, it is likely to have less effect on competition than a full merger between the parties. In the First Milk/ Robert Wiseman Dairies case, the characteristics of the markets were such that the transaction did not create the incentive and ability for the parties to increase prices to the detriment of consumers. Sky submitted that factors such as changed incentives to coordinate should be treated with caution in material influence cases.

- 6.165 As the OFT and Competition Commission practice supports the approach that they adhere to particular facts of the case when conducting substantive analysis, there is no reason to make an exception in the present case. Sky and ITV remain independent of each other.
- 6.166 The statute provides no basis for assuming that a person subject to a statutory limit on its shareholding in another company will proceed to acquire the maximum permissible shareholding in that company when it has neither done so nor acquired the right to do so.

Annex 2

- 6.167 This Annex sets out share of viewing and reach performance of news channels on the DTH platform.

Channel	Individuals 4+	
	Share of Viewing (%)	Average 3-Min Weekly Reach (000s)
BBC News 24	0.430	2,011
BBC Parliament	0.018	109
Bloomberg	0.037	135
CNBC	0.013	99
CNN	0.049	270
Euronews	0.024	178
Al Jazeera	0.003	10
CCTV9	0.008	54
NDTV	0.022	119
Russia Today	0.005	50
Sky News	0.890	3,200
Star News	0.074	195
Fox News	0.068	320
France 24*	n/a	n/a
Total Share / Cumulative Reach	1.641	4,716

Source: Skyview/Infosys 03/07/06-31/12/06 (figures calculated in line with BARB methodology)

* France 24 not currently monitored via SkyView due to recent launch.

- 6.168 Sky noted that the combined share of viewing of the news channels excluding BBC News 24, BBC Parliament and Sky News is 0.303%. This represents in excess of 70% of the share that BBC News 24 attracts and therefore clearly demonstrates the importance of these channels.

Virgin Media ('VM')

Summary

News Corporation's position in the UK prior to the acquisition

- 6.169 VM stated that News Corporation/Sky already has a considerable grip over media businesses in the UK with 21m people (44.1% of the population) having either read a News International paper or watched Sky News in the last seven days. News International's share of circulation of daily and Sunday papers amount to 31.2% (and rising to 55.9% if popular daily and Sunday papers are considered).
- 6.170 VM said that it was well documented that News Corporation and Rupert Murdoch exercised direct influence over the businesses that they control – demonstrated by the universal support of the Iraq war in News Corporation's newspapers worldwide. VM said that this coverage and influence has been used to exert influence on UK government policy.

The reduction in plurality arising from the acquisition

- 6.171 VM said the concept of plurality was fragile and was binary – reflected in the Enterprise Act which assumed that where one media enterprise falls under common ownership or control of another, they are treated as one. Either plurality exists or it does not.
- 6.172 VM said News Corporation/Sky's influence over ITV was significantly in excess of the material influence threshold. Even if the Enterprise Act did not provide that News Corporation/ITV should be treated as under single ownership, for plurality purposes the reality of the situation meant that News Corporation/Sky has the ability to influence ITV and subvert plurality.

The impact of the reduction in plurality on the audience for news and current affairs

- 6.173 VM said it would be difficult to imagine a combination in the UK media that would be more adverse to plurality in news and current affairs than the combination of News Corporation/Sky and ITV. ITV is the largest commercial news provider. ITV determines the scope and agenda of the news output of ITN.
- 6.174 VM said the reduction in plurality will have a significant adverse impact on the UK audience for news and current affairs:
- There is a reduction in the number of significant independent providers of UK news channels from 3 to 2 (Sky and ITV on the one hand and BBC on the other).
 - The only significant alternative news channels in television news are Channel 4 and the BBC.
 - The share of the UK population that relies on News Corporation's media enterprises for their news is increased by some 11 million people to 32 million which amounts to 66% of the UK adult population.
- 6.175 This is precisely the situation the plurality provisions were intended to address – from debates in Parliament it is clear – and it requires further investigation by the Competition Commission.

The impact of the reduction in plurality on the audience for multi-channel television services

- 6.176 VM said that the acquisition reduces plurality in respect of the audience for digital multi-channel television as regards the impact on the operation and independence of Freeview. Sky will have the ability to influence overall marketing and strategy of Freeview and influence channels on it. It is estimated that by 2010 over 80% of the UK population will receive their primary television source through DTH or DTT.
- 6.177 VM also stated that the acquisition means that Sky has acquired further ability to influence the technical and strategic implementation of the digital switchover programme (over and above that it has a control of DTH).
- 6.178 Following switchover, a proportion of UK homes will be unable to receive multi-channel television through terrestrial means. BBC and ITV have therefore been considering Freesat. There are two plurality concerns here: [firstly, if Freesat is launched as an offering in which] ITV plays a significant role, Sky will have a significant level of influence over it; [secondly, there is a significant risk that] Sky/ITV will cease to be at the heart of [the Freesat project which] will undermine its viability.

Remedies

- 6.179 VM considered that there was no rule of thumb which determines the level below which a shareholding cannot be considered to give rise to a loss of plurality. At the first stage of analysis, a divestment which left Sky with anything more than a de minimis level of shares in ITV (below 3-4%) could not be certain to address the detriment caused by the loss of plurality. VM considered the only remedy to provide a comprehensive solution would be for Sky to divest its entire shareholding in ITV.

Control of News Corporation/Sky over media enterprises

News Corporation and Sky's media interests

- 6.180 In particular, News Corporation owns approximately 38% of Sky with Rupert Murdoch as non-executive director. His son was the youngest ever CEO of a FTSE 100 company. Sky produces Sky News and the Five news service. Through its subsidiary News International, News Corporation is the largest publisher of newspapers in the UK with extensive coverage. In addition, News Corporation group produces and distributes news on a global basis through, inter alia, Fox Broadcasting Company, Fox News and Star Group.

News Corporation and Murdoch exercise direct influence over the businesses that they control

- 6.181 VM said that there can be little doubt that News Corporation and in particular Rupert Murdoch set the agenda for News International publications. For example, Mr Murdoch was a key supporter of the Iraq war. A Guardian article from 2003 noted that this is what the Prime Minister must "have fantasised about". VM noted that Mr Murdoch was astute in utilising his influence over companies even where he only had a minority shareholding, such as STAR.

The ability of News Corporation to influence the public and set the political agenda

- 6.182 The level of penetration of News Corporation's media interests noted by VM allows it a high degree of influence over the perceptions of the British public and a material influence on the forming of their views. According to VM there is a perception amongst UK politicians that the support of Murdoch and News Corporations is important and that Tony Blair and Gordon Brown have been "assiduous in coveting

his support". A number of sources have suggested that Mr Murdoch was instrumental in changing government policy as regards the European Constitution and entry into the Euro. VM quotes from a selection of articles to illustrate its point and says that they are not merely based on speculation by journalists but are supported by the views of politicians and current and former editors of News International newspapers, referring to Radio 4's programme *A very special relationship* broadcast on 5 February 2007.

The reduction of plurality arising from the acquisition

6.183 VM said the provision in the Enterprise Act regarding media enterprises under common control being treated as one is confirmed in the DTI's guidance. This recognises the real risk to the maintenance of plurality which would arise if a different approach were taken.

6.184 VM said that it is inevitable that the senior management of ITV will have close regard to the wishes and interests of Sky and News Corporation when determining its strategic and commercial behaviour. According to VM this is for the following reasons (as set out in its submission to the OFT of 14 March 2007):

- Commercial reality – the risks of upsetting its largest shareholder are such that a prudent management of ITV will be looking over its shoulder to Sky.
- Decisions of the Competition Commission in similar cases (in particular *Gillette/Wilkinson Sword/Swedish Match*) make it clear that prudent management will in formulating policy have regard to the interest of the company's major shareholder;
- Empirical analysis – according to VM a number of economic studies show that shareholders with interests comparable to Sky's are able to exercise not only negative control but actual control (*Leech 2002, Becht and others, Klein and Zur*)

6.185 In summary, it is only logical where one person has control over another to treat them together for the plurality test. The ability to exert even subtle influence over another is likely to compromise their absolute independence.

The impact of a reduction on the audience for news and current affairs

ITV's distinct and separate voice

6.186 ITV broadcasts a number of news and current affairs programmes on ITV1:

- Produced by ITN such as ITV News and London Tonight;
- ITV produces "Tonight with Trevor McDonald", "The Sunday Edition" and others;
- GMTV is 75% owed by ITV.

6.187 Ofcom's report in July 2006 *The Provision of Current Affairs* found that ITV's first run current affairs scheduling and peak hours current affairs scheduling had both increased since 1998. ITV's present current affairs scheduling exceeds the minimum required by its public service broadcasting commitments.

The ability of ITV to determine its news and current affairs output

- 6.188 VM said the key issue was the extent to which management of ITV is able to influence and/or determine the agenda and content of its news and current affairs programming.
- 6.189 ITV retains complete editorial control over programmes broadcast and produced by ITV. It also retains the ability to determine the agenda for programmes produced by it for it by ITN.
- 6.190 ITV is the largest shareholder in ITN and ITN would be expected to pay very close regard to the wishes and desires of its largest shareholder (and VM understands is considerably more active than the other shareholders).
- 6.191 In addition, ITV retains a considerable degree of influence over the output of ITN.
ITV is ITN's largest customer; ITV's website states that the editor-in-chief of ITV news works jointly for ITV and ITN; ITV's new director of news and sport will report directly to ITV's new Director of Television, Simon Shaps – the news release, according to VM, made it clear that ITV expects to have material ability to determine the scope and content of its news output; and ITN's chief executive, commenting on ITN provision of news to ITV for the next 8 years said job cuts would come in areas but not those where ITV wanted it to invest more heavily.
- 6.192 The editorial control exerted by ITV over ITN is well demonstrated by the fact that the output of ITN for its two largest customers ITV and Channel 4 News is completely different.
- 6.193 VM said that the influence exerted by ITV over the output of ITN may take place at more than one stage of the process for the production of news but will most likely take place at the programme production stage. ITV is also likely to be able to influence the output of ITN through influencing its news gathering process. If for example, ITV said to ITN that it did not value the news content derived from certain overseas bureaux, there would be considerably less incentive for ITN to invest in those news gathering resources. Closing down such bureaux would have a permanent and ongoing impact on the news provided by ITN to ITV as the original source material is essentially what determines what is considered to be news on any given day.
- 6.194 VM said it was therefore clear that ITN is executing a news agenda which is determined and set by ITV. There can be no doubt, according to VM, that the loss of plurality arising from the acquisition will have the ability to influence the programmes received by the UK audience for news and current affairs.

The effect of that loss of plurality on the audience for news and current affairs

- 6.195 VM said the acquisition reduces the plurality of channels through which UK news is provided by compromising the independence of ITV's news provision – reducing significant independent broadcasters of UK news from 3 to 2.
- 6.196 Regulatory requirements for accurate and impartial presentation of news do not address these concerns. Parliament rejected that they did; impartiality is an imprecise concept so there is scope for subtle changes to editorial policy without obligations on impartiality being challenged; and the requirements do not limit editorial decisions as to which stories should be broadcast or not.

- 6.197 The acquisition also reduces the number of independent news providers in the UK. Broadcast news over which Sky exerts direct or indirect control would increase from a 9% share (Sky News and Five) of all TV news to 37% (Sky News, Five and ITV).
- 6.198 VM said it was also appropriate to consider the aggregate shares held across both broadcasting and newspaper interests. In this sense, VM considered that the acquisition resulted in a significant and unacceptable concentration of the extent to which news, in either broadcast or print means is provided to the UK audience by News Corporation and the companies under its control.
- 6.199 VM stated that these effects are compounded in practice when regard is had to specific audiences in the UK:
- The increase in the sphere of influence for that part of the population aged 65 and above doubles from 32.6% to 65.1%.
 - The influence of Sky News and ITV1 is skewed towards the C2DE audience. This audience is more likely to also read newspapers produced by News International.
 - The proportion of the population that regularly watches Sky News, ITV1 or reads a News International newspaper is particularly high for certain demographics – 89.5% of C2DE adults aged over 55 spent at least 30 minutes per month watching Sky News or ITV News or reading a News International newspaper.
 - Particular demographics rely more heavily on News Corporation and ITV than others. For example, 61% of 16-34 females and 58% of 16-34 males rely on Sky News or ITV News for more than half of their television news viewing compared to the national average of 48%. Likewise for C2DE audiences 55% get more than half of their news from Sky/ITV compared to 40% of ABC1s.
 - A significant proportion not only obtain more than half their television news from News Corporation controlled sources but also read News International newspapers, amounting to 23.9% of 16-34 females and 26.2% of 16-34 males, compared to the national average of 17.8%. For C2DE, the equivalent figure is 22.4%. Accordingly, certain demographics are particularly reliant on Sky News, ITV and News International for their news.
- 6.200 In summary, the risks to plurality in respect of news channel provision, news providers and the aggregate position across broadcasting and newspaper interests require that a reference to the Competition Commission is made.

The impact of a reduction in plurality on the audience for multi-channel television services

- 6.201 VM summarised its observations from its 5 December Submission to OFT, Ofcom and DTI. It said that two key public interest considerations arise in connection with the audience for digital multi-channel television; a reduction in plurality in connection with the UK audience for digital multi-channel television as a whole and for the UK audience for digital satellite television services.
- 6.202 VM said that the acquisition reduces plurality in respect of the audience for digital multi-channel television as regards the impact on the operation and independence of Freeview. Sky will have the ability to influence overall marketing and strategy of

- Freeview and influence channels on it. It is estimated by 2010 over 80% of the UK population will receive their primary television source through DTH or DTT.
- 6.203 VM also stated that the acquisition means that Sky has acquired further ability to influence the technical and strategic implementation of the digital switchover programme (over and above that it has a control of DTH).
- 6.204 Following switchover, a proportion of UK homes will be unable to receive multi-channel television through terrestrial means. BBC and ITV have therefore been considering Freesat. There are two plurality concerns here: [firstly, if Freesat is launched as an offering in which] ITV plays a significant role, Sky will have a significant level of influence over it; and [secondly, there is a significant risk that] Sky/ITV will cease to be at the heart of [the Freesat project] which will undermine its viability.
- 6.205 VM said there can be no doubt that a reduction in plurality in relation to providers of a particular genre of broadcast services such as news and current affairs can give rise to public interest concerns. A reduction in plurality as regards the television platforms that provide the entire spectrum of broadcast services made available to viewers must also be capable of giving rise to public interest concerns. In other words, VM said platform operators may profoundly influence the overall plurality of services, through the ability to determine or influence the channels broadcast on the relevant platform.

Remedies

- 6.206 VM considered that as long as Sky is able to exert any influence over ITV there is a risk of a loss of plurality. VM said that the Secretary of State should use the same standard as required under section 73 of the Enterprise Act when the OFT is considering undertakings in lieu of a reference i.e. to “achieve as comprehensive a solution as is reasonable and practicable”. Ofcom should therefore consider whether any proposed undertakings in lieu clearly and comprehensively remove the possible loss of plurality brought about as a result of the acquisition.
- 6.207 VM did not consider that divestment leaving Sky with more than a de minimis investment shareholding would clearly remedy the effects of the acquisition:
- The starting point should be that divestment of the entire stake is required. Where there is a loss of plurality only very good reasons could justify Sky retaining any stake in ITV.
 - ITV has a disparate shareholder base. Allowing Sky to retain say 9.9% would still leave Sky as the largest shareholder and able to vote 15% in shareholder meetings.
 - An activist shareholder may profoundly influence the commercial and strategic behaviour of a company – as set out in VM’s submission to OFT of 14 March 2007.
- 6.208 Given the combination of factors which give Sky the ability to exercise influence over ITV, VM considers that the only undertaking in lieu that would provide a comprehensive solution would be for Sky to be required to divest its entire shareholding in ITV.

Virgin Group of Companies

- 6.209 A submission was made on behalf of the Virgin group of companies – separate from Virgin Media which had been licensed to use the Virgin brand. Virgin has a around a 10.6% share of Virgin Media.
- 6.210 Virgin said it believed that the acquisition raised serious concerns in respect of cross-media ownership and plurality.
- 6.211 Virgin set out how the public interest rules in the Enterprise Act operate. It said the acquisition brought under common control the newspapers of News International and the largest commercial broadcaster in the UK and therefore raised clear plurality issues.
- 6.212 Virgin said that Ofcom must consider how all audiences might be affected by the acquisition in order to allow the Secretary of State to carry out his statutory duties properly. In this regard Virgin said:
- Newspapers owned by News Corp account for 36.3% of all national newspaper readership – almost twice the readership for the next largest newspaper group, Trinity Mirror, whose titles have a readership share of 20.4%.
 - Amongst the C2DE sector of the population, titles owned by News Corp account for over 40% of newspaper readership. ITV1 is the channel that attracts the largest single audience figures amongst that population demographic and to that the Sky viewing figures must be added as section 58A(5) of the Act requires audience shares of News Corporation, Sky and ITV to be aggregated.
 - It is important to give due consideration to the disparity between the combined audience shares of News Corporation/Sky and ITV vis-à-vis other media enterprises. The DTI guidance speaks of relative audience shares.
- 6.213 Other audiences may be adversely affected by the acquisition, including audiences for the reporting of sports events and wider issues relating to sports, involving who should be the manager of the England football team in connection with which the view of News Corporation titles, commentators on Sky Sports and Sky Sports News and ITV can all be very influential.
- 6.214 Ofcom should define relevant audiences with caution and define all possible relevant audiences that may be affected by the acquisition. Ofcom should also note the Secretary of State's comments about a large number of news channels coming under single control.
- 6.215 Virgin stressed the importance of ensuring that News International/Sky has no ability as a result of this acquisition to compromise accurate and impartial presentation of news across all media. Virgin said this was highlighted by two factors: first the way regulatory issues in connection with the acquisition were reported (The Times reported that the OFT's line on "the Sky swoop is a blow for NTL" whereas non-News Corporation titles were more measured); and secondly anecdotal evidence regarding certain instructions about the way Sky News is to cover stories involving Virgin and in particular Sir Richard Branson. [].
- 6.216 Virgin said the plurality concerns go much further than a simple case where an entity with more than 20% of the national newspaper market acquires a stake in a Channel 3 licensee just below the 20% level that is per se illegal. Even without Sky's

broadcasting interests, the acquisition of 17.9% of ITV by an entity controlled by News Corporation would raise serious plurality issues. Sky has become the largest broadcaster in ITV as a result of the acquisition. Ofcom's comments in connection with the cross-media ownership rules relating to ITV1 and national newspaper are noteworthy in this regard.

- 6.217 As Sky cannot increase its shareholding to 20% or more for plurality reasons, the fact that its stake is so close to that level necessarily means that it must by definition fall into the area of concern in respect of which the cross-media public interest provisions were enacted even without addressing the nature of Sky's interest in ITV.
- 6.218 Ofcom should err on the side of caution, against this background and the absence of previous jurisprudence on the issues in question. It took the Secretary of State over three months to issue an intervention notice and this highlights the complex nature of questions involved and this militate in favour of a full Competition Commission investigation.
- 6.219 Virgin believed that Ofcom must advise the Secretary of State that the acquisition raises serious public interest concerns.

[A third party]

- 6.220 [A third party] noted that Sky is a major provider of commercial interactive television services through its subsidiary Sky Interactive and ITV is one of the largest purchasers of services in the interactive sector. It voiced concern that as a major shareholder Sky would be in a position to influence ITV to source its interactive services directly through Sky. The submission pointed out that the loss of such a large purchaser would have a serious affect on the market.

DRAFT

Annex 1

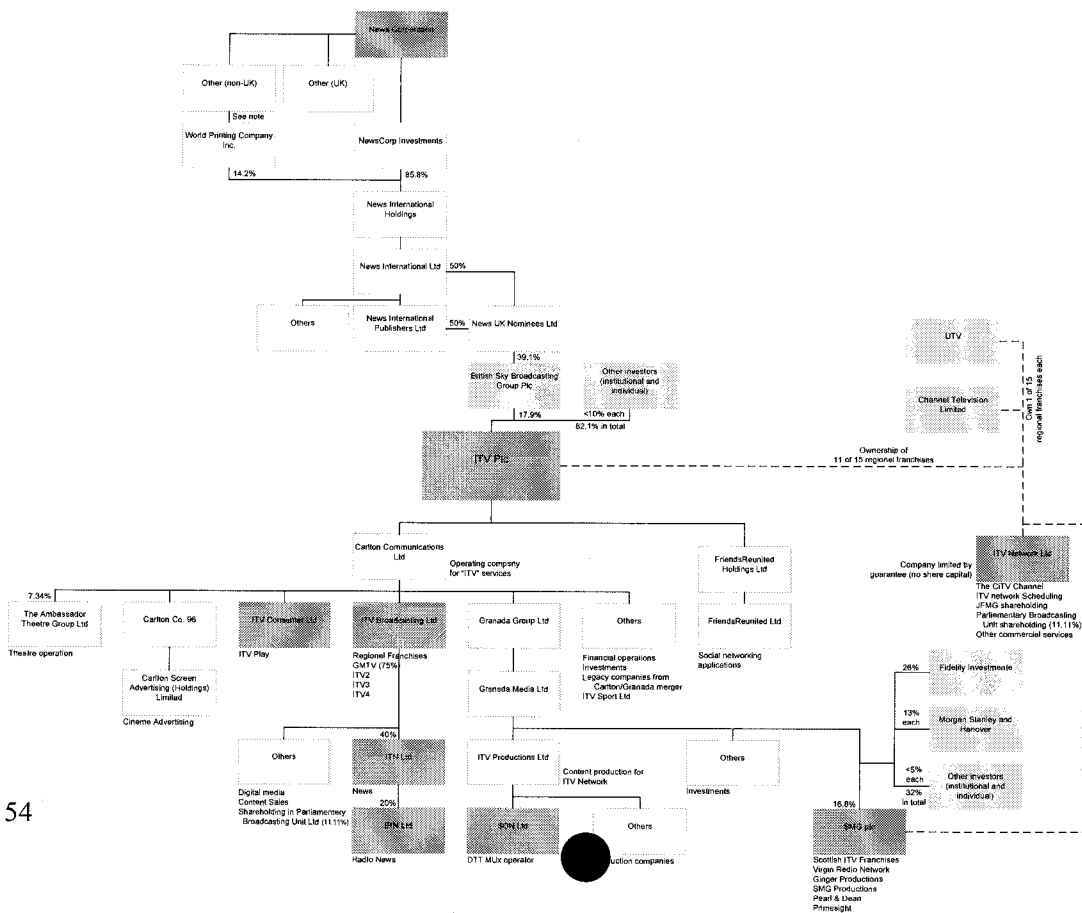
ITV and Sky ownership structure

Provided to Ofcom by PricewaterhouseCoopers who assisted us by researching and compiling group structure diagrams using stakeholders' responses to our requests for information together with other databases.

ITV ownership structure

Note: World Printing Company inc is listed as a US subsidiary of News Corp in its latest 10K dated 23 Aug 2006. We assume that it is wholly owned.

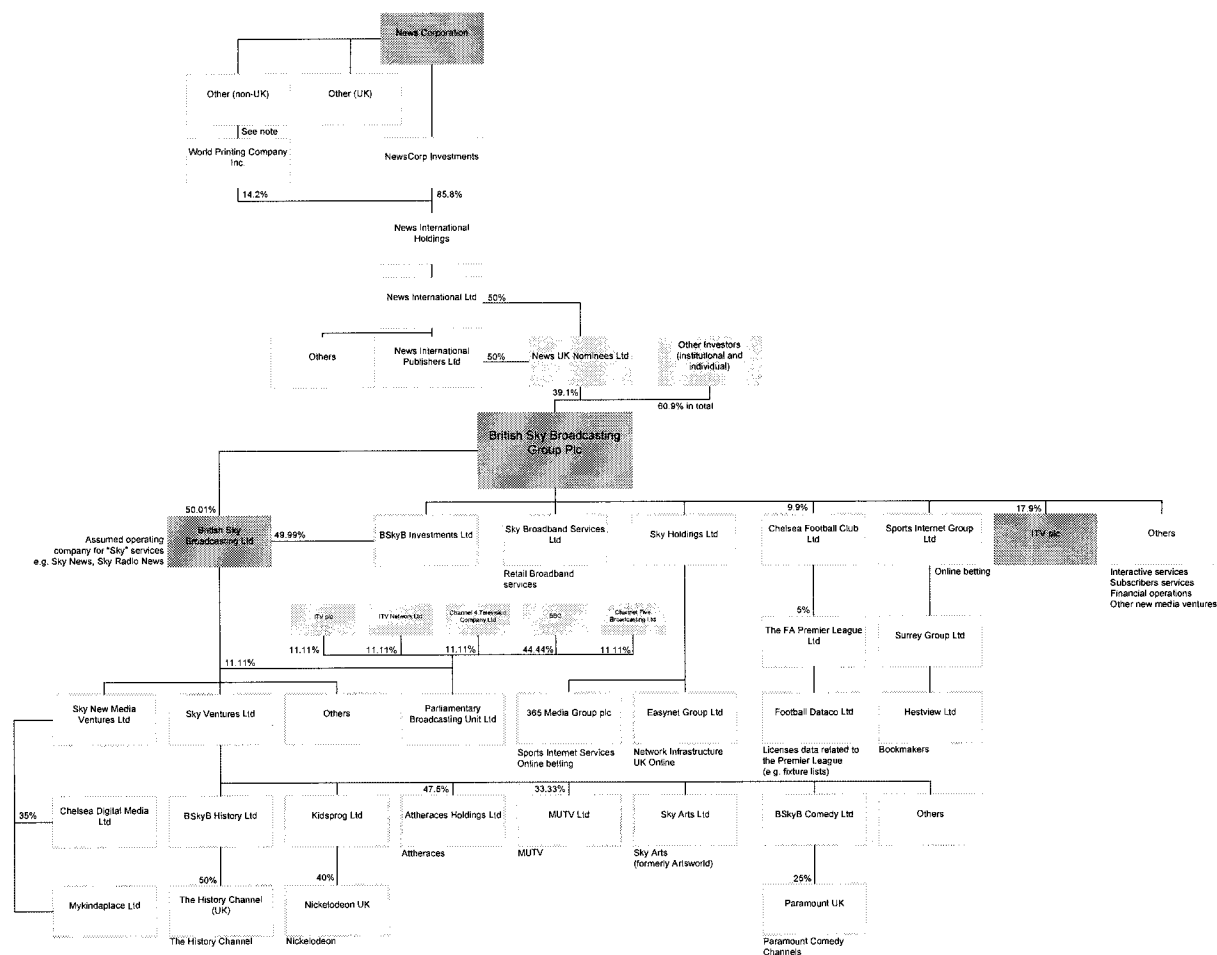
Sources: Stakeholders' returns to Ofcom data request, ICC Juniper, Companies House Filings, Factiva Companies, Thomson Financial, Bloomberg, Regulatory News service



BSkyB ownership structure

6.221 Note: World Printing Company inc is listed as a US subsidiary of News Corp in its latest 10K dated 23 Aug 2006. We assume that it is wholly owned.

6.222 Sources: Stakeholders' returns to Ofcom data request, ICC Juniper, Companies House Filings, Factiva Companies, Thomson Financial, Bloomberg, Regulatory News service



News Corporation ownership structure

Note: World Printing Company inc is listed as a US subsidiary of News Corp in its latest 10K dated 23 Aug 2006. We assume that it is wholly owned.

Sources: Stakeholders' returns to Ofcom data request, ICC Juniper, Companies House Filings, Factiva Companies, Thomson Financial, Bloomberg, Regulatory News service

