Simrata Bhalla

From:	Ellison, Jordan [redacted]
Sent:	16 November 2010 13:31
To:	[redacted]
Cc:	
Subject:	Article 9 paper
Attachments:	Article9.PDF

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

Dear All

Just to confirm - the Article 9 paper has now been submitted to the OFT (and copied to the Commission).

Best regards

Jordan

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ANTICIPATED ACQUISITION OF BSKYB BY NEWS CORPORATION
OFT BRIEFING PAPER: ARTICLE 9(2) REFERRAL REQUEST

1. Executive Summary

1.1 This Briefing Paper is submitted on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group (together, the "**Concerned Parties**") to the Office of Fair Trading (the "**OFT**") and relates to the anticipated acquisition of British Sky Broadcasting Group plc[1] ("**BSkyB**") by News Corporation[2] ("**News Corp**"), as notified to the European Commission (the "**Commission**") on 3 November 2010 (the "**Transaction**").[3]

1.2 This Briefing Paper sets out the Concerned Parties' submissions in support of a decision by the OFT to make a request under Article 9(2)(a) of Council Regulation (EU) 139/2004 ("EUMR") that the Commission refer all of the UK aspects of the above Transaction to the UK competition authorities so that the OFT may examine such aspects under UK merger control provisions, as provided by the Enterprise Act 2002 ("**EA 2002**").[4] A copy of this Briefing Paper has been sent to the Commission.

1.3 By way of summary, the Transaction satisfies the criteria of Article 9(2)(a) of the EUMR as threatening to affect significantly competition within the UK so that it is appropriate for the UK aspects of the Transaction to be referred to the OFT by the Commission for investigation at the national level. In particular:

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[1] BSkyB is UK-based media company active in the wholesale supply of TV channels, retail distribution of pay TV channels, provision of pay TV technical services, advertising and other services such as the provision of retail telephony and broadband services.

[2] News Corp is a diversified global media company active in the production of filmed entertainment, television programming, newspapers and information services, book publishing and other activities such as outdoor display advertising.

[3] Case No. M.5932 *News Corp / BSkyB*.

[4] The fact that the merging parties have notified the Transaction to the European Commission under Article 3(1) of the EUMR (on the basis that it constitutes an acquisition of sole control) is consistent with the Transaction giving rise to a "relevant merger situation" for the purposes of the UK merger control provisions – i.e., under Section 26(4) of the EA 2002, the Transaction will lead to a change in the level of control exercised by News Corp over BSkyB, from material influence or ability to control, to the acquisition of a controlling interest. Furthermore, the Concerned Parties consider that the OFT would have jurisdiction under Section 23 of the EA 2002 to examine the Transaction were it to be referred back under Article 9 of the EUMR on the basis that the UK turnover of BSkyB exceeds £70 million.

(i) As discussed further below at Sections 3 to 7, the Transaction will give rise to a number of competition issues which threaten to affect significantly competition in a market within the UK. These include:

(a) the reduction of competition in the UK wholesale Pay TV channel market, and consequent foreclosure of the merged entity's competitors in the UK retail Pay TV market;

(b) the restriction in the supply of premium movies to competing Pay TV distributors, leading to foreclosure of the merged entity's competitors in the UK retail Pay TV market;

(c) the leveraging of BSkyB's market power in the UK Pay TV market into the UK newspapers sector, so as to exclude News Corp's competitors in the UK newspapers sector through, *inter alia*, bundled offerings;

(d) the leveraging of News Corp's market power in the UK market for the supply of advertising in national newspapers into the TV advertising market through the offering of bundled rates for advertising across Sky TV and News Corp newspapers; and

(e) the consolidation in the supply of the merging parties' respective news-gathering infrastructure resulting in the merged entity obtaining an advantage in the supply of news which cannot be replicated by competitors, harming the ability of competitors to deliver equivalent offers to consumers post-merger in relevant downstream markets.

(ii) The above competition concerns arise in respect of distinct UK markets.

1.4 In light of the significance of the above competition issues (and their likely impact upon the relevant distinct UK markets), the Concerned Parties request that the OFT make a request under Article 9(2) of the EUMR for referral back to the OFT of the UK aspects of the Transaction for consideration under the UK merger control provisions.

2. Satisfaction Of Criteria For Article 9(2)(a) Referral Request

(A) <u>Applicable legislation and guidance</u>

2.1 Under Article 9(2)(a) of the EUMR, a Member State may request that the Commission refer to it a concentration with a Community dimension, or part thereof, which has been notified to the Commission and which *"threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market"*.

2.2 The Commission's Notice on case referral in respect of concentrations[5] (the "**Referral Notice**") provides further guidance on the additional principles that a Member State should take into account when determining whether to make an Article 9(2)(a) request, including the following:

(i) *More Appropriate Authority* – i.e., jurisdiction should be re-attributed to another competition authority where the latter is the more appropriate for dealing with the merger (having regard to the specifics of the case and the tools and expertise of the authority, as well as the likely locus of any impact on competition).

In this regard, importantly, the main effects of the Transaction are UK-centric (the merging parties' main areas of overlap are in the UK). Consequently, any possible competition concerns will be felt largely by consumers in the UK such that the principle of subsidiarity therefore supports a referral to the UK authorities.

Furthermore, the UK authorities have a significant body of experience and expertise in this sector. In particular, the OFT has reviewed several mergers in the relevant markets (for example, the Pay TV market has previously been considered by the OFT in its decision on the completed acquisition by BSkyB of the TV channel business of Virgin Media Television ("***BSkyB / Virgin Media TV***") (2010)[6], *BSkyB / ITV* (2007) and *BSkyB Broadband Services Ltd / Easynet Group* (2005), as well as by the Competition Commission (the "**CC**") in *BSkyB / ITV* (2007); the newspaper sector has previously been considered extensively by the OFT in its investigation into newspaper and magazine distribution (2005-2009)). Furthermore, as noted further below, the CC is currently conducting a market investigation into the market for premium Pay TV movies, following Ofcom's 2010 decision to refer the matter to the CC for further investigation (following its own investigation into the sector).

(ii) *One-stop Shop* – The Commission might be expected to retain jurisdiction over issues arising from the merged entity's position as a purchaser of sports rights.[7] However, this is a stand alone issue such that there would be little if any potential efficiency in the handling of the Transaction by a single competition

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[5] Commission Notice 2005/C 56/02.

[6] ME/4568/10 (14 September 2010).

[7] In addition to its interest in BSkyB, News Corp owns Sky Italia and a 45% stake in Sky Deutschland. As a result of the Transaction, the merged entity would become a more important purchaser of sports rights, a key driver of subscriptions on the retail Pay TV market (see, for example, Case 38173 Joint Selling of Media Rights to the FA Premier League (2006). Post-merger, this combined purchasing power for the various Sky entities in connection with sports rights (e.g., through bundled bids) would increase the merged entity's ability to secure sports rights and therefore deny competing Pay TV distributors the supply needed to compete effectively in the retail Pay TV markets.

authority. Given the prior experience and expertise of the UK authorities in the affected markets, the UK authorities would be in a better position to ensure that competition in the UK markets affected by the Transaction are effectively protected.

(iii) *Legal Certainty* – The merging parties must have envisaged the possibility of an Article 9 reference in this case (given the UK-centric potential competition concerns that arise), such that legal certainty would not be significantly distorted by a referral in this instance.

(B) Application of Article 9(2)(a) of the EUMR and the Referral Notice to the Transaction

2.3 As set out below (see Sections 3 to 7), there are a number of issues which give rise to a real risk that the Transaction will have a significant adverse impact on competition within distinct national (UK) markets and deserve close scrutiny. As recognised by the guidance in the Commission's Referral Notice[8], for the purposes of applying Article 9(2) of the EUMR such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

2.4 Furthermore, the geographic markets affected by the Transaction are at most national in scope (and the UK aspects of the Transaction are sufficiently distinct to be considered separately by the OFT).

2.5 The legal conditions for referral stipulated in Article 9(2)(a) of the EUMR are therefore satisfied.

(C) Additional factors relevant to an Article 9(2) request

2.6 Moreover, in addition to the UK competition issues outlined above, there are two other important factors which strongly militate in favour of the Transaction being assessed in the UK.

2.7 First, on 4 November 2010, the Secretary of State issued a European Intervention Notice[9] in respect of the merger, on the basis that the Secretary of State believes that the Transaction may threaten media plurality within the UK. Following this European Intervention Notice, both the OFT and Ofcom are required to investigate and report to the Secretary of State on the issues allocated to each of them by 31 December 2010 (in

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[8] Paragraph 35 of the Referral Notice.

[9] European Intervention Notice Given Pursuant To Section 67 Enterprise Act 2002 - Anticipated Acquisition Of British Sky Broadcasting Plc By News Corporation, dated 4 November 2010.

accordance with Articles 4 and 4A of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 respectively).

2.8 Although a distinct issue, the consideration of media plurality issues will be related to, and directly informed by, the competitive assessment of the Transaction. For example, to the extent that (as set out further below at Section 7) the acquisition of BSkyB by News Corp gives the merged entity the ability and incentive to exclude media competitors, this would clearly operate to reduce media plurality in the UK. Therefore, in order for the UK authorities' analysis of the effects of the transaction on media plurality in the UK to be consistent with and informed by the competitive assessment of the Transaction, it is essential that both issues be reviewed in parallel by the UK authorities (as opposed to the Commission).

2.9 By way of further information, the Concerned Parties attach (at Annex 1) a Briefing Paper submitted to the Secretary of State on 7 October 2010. This Paper, submitted in connection with the issuance by the Secretary of State of a European Intervention Notice, sets out in greater detail the media plurality issues that arise as a result of the Transaction.

2.10 Second, one of the key competition concerns (i.e., restriction of the supply of premium movies to Pay TV distributors[10]) has already been the subject of a recent decision by Ofcom in respect of the UK market[11] and, following Ofcom's decision, is now the subject of an ongoing market investigation by the CC. As outlined further below at Section 4, by merging BSkyB with Fox (owned by News Corp and one of the six "major" studios), the Transaction would threaten to pre-empt the CC's findings and render potential envisaged remedies ineffective. It is therefore essential that both issues are reviewed by the UK authorities. Furthermore, given the vast amount of investigative work already performed by the UK authorities in respect of this national market, efficiency considerations would also support the conclusion that the merger is best reviewed by the UK authorities.

2.11 We now consider each competition issue that arises in the UK in greater detail.

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[10] Discussed further in Section 4 below.

[11] In its Decision, Ofcom concluded that a combination of current features of the market give rise to an adverse effect on competition such that it was appropriate to make a reference to the CC in this case. See Decision of Ofcom In respect of Premium pay TV movies, dated 4 August 2010.

3. Consolidation In The Supply Of Basic Pay TV Channels

(A) Relevant competition concerns

3.1 Based upon information provided in the OFT's recent merger decision in *BSkyB / Virgin Media TV*, BSkyB (together with its Joint Ventures[12]) already accounts for a large share (over 40%) of the wholesale market for the supply of "basic Pay TV channels" to Pay TV distributors[13].

3.2 News Corp is also active in the wholesale supply of Pay TV channels, including, for example, the FX (including FX+1 and FX HD) channels.

3.3 The merger will therefore give rise to both horizontal and vertical competition issues in the Pay TV sector.

3.4 At the horizontal level, given the existing market power of BSkyB as a supplier in the wholesale Pay TV channel market, the removal of News Corp as an independent supplier would inevitably lead to a reduction in competition and increased risk of, *inter alia*, higher prices being imposed by the merged entity post-merger.

3.5 Moreover, at the vertical level, BSkyB's position of market power on the upstream wholesale market would, post-merger, give the merged entity increased ability to restrict the wholesale supply of Pay TV channels to competing Pay TV distributors on the downstream Pay TV market (where BSkyB already enjoys market power). Furthermore, the merged entity would also have the incentive to pursue such a strategy in order to foreclose competition from the downstream market. Indeed, BSkyB has a track record of withholding supplies. BSkyB interrupted supplies of wholesale basic Pay TV channels to Virgin Media between March 2007 and November 2008[14] and has previously been the subject of an investigation by Ofcom into the withholding of key content (i.e., sports rights) from downstream competitors.[15] In addition, BSkyB has chosen to withdraw Sky Sports News (previously available as a free-to-air channel on

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[12] Based upon information provided in BSkyB's Annual Report 2010, BSkyB holds at least a 25% interest in the following Joint Ventures / Subsidiaries: 365 Media, Virgin Media Television Limited (including the channels Living, Bravo, Virgin 1 (now Channel One) and Challenge), Virgin Media Television Rights Limited, Nickelodeon (active in the transmission of children's TV programmes), AETN UK (formerly The History Channel) (active in the transmission of history, biography, crime and investigation TV programmes), Paramount UK partnership (active in the transmission of general entertainment and comedy channels), MUTV Limited (active in the transmission, production and marketing of the Manchester United football channel), Attheraces Holdings Limited (active in the transmission of a horse racing channel and related online activities), Chelsea Digital Media Limited (active in the transmission, production and marketing of the Chelsea Football Club football channel and website, and MGM Channel (UK) Limited (active in the transmission of classic movies in High Definition format).

[13] See Paragraph 31of the OFT's decision in *BSkyB / Virgin Media TV (2010)* (calculated on a revenue basis).

[14] See Paragraph 5.506 of Ofcom's Pay TV Statement.

[15] See Ofcom's Investigation Into the Pay TV market and its Pay TV Statement, published 31 March 2010.

the digital terrestrial platform, Freeview) and make it available only to its subscribers. Such behaviour would likely result in the risk of significant consumer harm being caused.

(B) National scope of affected geographic markets

3.6 As already noted above, in order to satisfy the criteria for an Article 9(2) it must be shown that distinct UK markets are affected by the Transaction.

3.7 With regard to the competition concerns outlined in Section 3(A) above, the question of geographic market definition has previously been considered by both the UK competition authorities and the Commission:

(i) *Wholesale supply of Pay TV channels*: The market for the wholesale supply of television channels in the UK was recently considered by the OFT in its decision on *BSkyB / Virgin Media TV*. In relation to geographic market definition, the OFT concluded that the relevant geographic market was national in scope.[16] In addition, the Commission has also recently concluded in previous merger decisions that the wholesale market for Pay TV channels is national in scope.[17]

This conclusion is further supported by Ofcom's Pay TV Statement of 31 March 2010, which proceeds on the basis that the relevant Pay TV market is national in scope.

(ii) *Retail supply of Pay TV channels*: In its final report on the *BSkyB / ITV* merger (20 December 2007), the CC concluded that the geographic market for "all-TV" (which includes free to air, pay TV and video on demand) is national in scope. This conclusion is supported by the previous decisional practice of the Commission at the European level as well.[18]

3.8 The Concerned Parties consider that the previous decisional practice of both the UK authorities and the Commission in respect of geographic market definition for the above-mentioned markets accords with their own commercial experience and understanding of the national scope of these sectors.

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[16] Further support for the conclusion that the geographic scope of the market for the wholesale supply of Pay TV channels in the UK is national in scope may be found in the following OFT/CC merger decisions: *BSkyB Broadband Services Limited / Easynet group plc* (30 December 2005), *Vivendi SA / BSkyB* (CC Report of April 2000) and *NTL / Cable & Wireless* (CC Report of March 2000).

[17] See, for example, Case No. COMP/M.5734 *Liberty Global Europe / Unitymedia* (25 January 2010) and Case No. COMP/M.5121 *News Corp / Premiere* (25 June 2008).

[18] Ibid.

3.9 In light of the above, the second requirement of the Article 9(2)(a) test is therefore met with respect to these competition concerns, since the Transaction affects geographical markets that are national in scope.

4. Restricting Supply Of Premium Movies To Pay TV Competitors

(A) Relevant competition concerns

4.1 BSkyB distributes premium movies at the retail level.[19] News Corp (through its Fox subsidiary) is a wholesale supplier of premium movies[20] to Pay TV distributors (accounting for around 15% of relevant releases for the six major studios, based on UK Box Office revenues in 2009 and 2010).

4.2 Post-merger, therefore, the wholesale operations of News Corp and the retail operations of BSkyB would both be operated by the merged entity. This gives rise to potential significant vertical competition issues.

4.3 As confirmed by Ofcom in its decision on premium Pay TV movies, premium movies are particularly important to competition in the retail pay TV sector because they are highly attractive to a large number of consumers, and shown only on Pay TV during the relevant windows. It is therefore clear that such premium movies are a key driver of Pay TV subscription deals and essential to a retail Pay TV competitors' product offering. Indeed, in order to build a sufficiently compelling and competitive Pay TV proposition for customers, retail Pay TV suppliers need to be able to provide access to all content from all six major studios. Furthermore, the key premium movie content (i.e., major blockbusters grossing above £5 million per year) comes from all of the six major studios, including Fox, and the volume of movies produced by each studio is relatively evenly distributed[21].

4.4 As a result of the Transaction, the merged entity would have the ability to restrict access to its premium movie offering to its downstream competitors in the retail Pay TV market. Without Fox's content (which, by way of example, in 2009/10 included key premium movies such as Avatar and Night at the Museum 2), retail Pay TV suppliers would not be able to provide as compelling or competitive a Pay TV package. Indeed, this is one

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[19] BSkyB currently has exclusive rights to show premium movies during the first Pay TV window. The CC is currently investigating, *inter alia*, whether this arrangement allows BSkyB to restrict competition in the Pay TV market.

[20] Defined by Ofcom as movies from the Major Hollywood Studios (Disney, Fox (owned by News Corp), Paramount, Sony, Universal and Warner). See Decision of Ofcom in respect of Premium pay TV movies, dated 4 August 2010.

[21] Based on data analysing the source of the 128 movies released in 2009 by the six major Hollywood studios.

of the issues currently being considered as part of the CC's ongoing market investigation into Premium Pay TV movies.[22]

4.5 Furthermore, post-merger, the merged party would in fact be incentivised to restrict such supply to BSkyB's current competitors, thus foreclosing competition by reducing the competitiveness of its competitors' product offerings (by reducing their premium movie coverage). Again, as noted above, BSkyB has previously been the subject of an investigation by Ofcom into the withholding of key content (i.e., sports rights) from downstream competitors.[23] Such behaviour would likely result in the risk of significant consumer harm being caused.

(B) National scope of affected geographic markets

4.6 Again, as noted further above, in order to satisfy the criteria for an Article 9(2) reference it must be shown that distinct UK markets are affected by the Transaction.

4.7 With regard to the competition concerns outlined in Section 4(A) above, the Concerned Parties have already provided evidence above (see Paragraphs 3.7 et seq.) that the relevant retail market for Pay TV channels is national in scope.

4.8 In light of the above, the second requirement of the Article 9(2)(a) test is also therefore met with respect to these competition concerns, since the Transaction affects geographical markets that are national in scope.

5. Bundling Pay TV And News Content To Consumers

(A) Relevant competition concerns

5.1 It is clear that BSkyB already possesses significant market power in the retail Pay TV channel market. According to Enders Analysis, BSkyB enjoys a 67% share of total UK subscribers for Pay TV (comprising of a subscriber base of c. 10 million households in the UK) and a c. 80% share of total revenues generated in the UK retail Pay TV market.[24] Indeed, BSkyB's presence in Pay TV continues to grow rapidly, with net customer additions of 418,000 in the 12 months to June 2010.[25]

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[22] See, for example, the CC's Statement of Issues for its Movies on Pay TV Market Investigation, dated 3 September 2010.

[23] See Ofcom's investigation into the Pay TV market and its Pay TV Statement, published 31 March 2010.

[24] Enders Analysis, "News Corp's proposed takeover of BSkyB" (2010).

[25] BSkyB Annual Report 2010.

5.2 Given BSkyB's very significant position in this market, post-merger, there is a significant risk that competition concerns could arise due to the bundling of the merged entity's Pay TV and news products.

5.3 Specifically, the merged entity would be able to leverage its strength in the Pay TV sector into the newspaper sector, with the objective of diverting consumer demand from News Corp's current competitors in the newspaper sector to its own titles, foreclosing competition in the market.

5.4 This could be achieved by the merged entity through offering consumers a bundled price for Sky TV and a News Corp newspaper subscription (either print or online) with an implied price for the newspaper element that is fixed so low that other competing newspapers would find it too difficult to compete. Given BSkyB's high market share (and the fact that a significant proportion of its customers are likely to be non-contestable) and the large common pool of actual and potential customers across two markets, this strategy would have the potential to reduce significantly overall demand for competing newspapers. The merged entity would have the incentive to pursue such a strategy in order to increase News Corp's market share in the newspaper market post-merger.

5.5 The possibility of BSkyB adopting a bundling strategy is a very real risk. This assessment is supported, in particular, by the fact that BSkyB already bundles its own broadband and telephony offerings with Pay TV packages (24.8% of its customers also purchase broadband from BSkyB and 21.8% also purchase telephony services from BSkyB)[26].

(B) National scope of affected geographic markets

5.6 Again, in order to satisfy the criteria for an Article 9(2) it must be shown that distinct UK markets are affected by the Transaction.

5.7 As noted above at Paragraphs 3.7 et seq., there exists compelling evidence that the retail market for the supply of Pay TV channels is national in geographic scope. With regard to the newspaper sector, the question of geographic market definition has previously been considered by both the UK competition authorities and the Commission in the following cases:

(i) *UK precedent*: Following its extensive review of the newspaper and magazine sector, the OFT recently confirmed in its Opinion on Newspaper and Magazine Distribution in the UK that the geographic market for newspaper publishing is (at widest) national in scope (i.e., the UK), since the content of newspapers will typically be targeted at a UK audience. This approach has also been confirmed

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[26] Enders Analysis.

by the UK authorities in the following cases: (i) *Trinity Mirror plc / Guardian Media Company plc*[27]; and (ii) *Johnston Press plc / Trinity Mirror plc*[28].

(ii) *Commission precedent*: The Commission's decisional practice also supports the conclusion that the relevant geographic market is (at widest) national in scope.[29]

5.8 The Concerned Parties consider that the previous decisional practice of both the UK authorities and the Commission in respect of geographic market definition for the above-mentioned market accords with their own commercial experience and understanding of the national scope of this sector.

5.9 In light of the above, the second requirement of the Article 9(2)(a) test is also therefore met with respect to these competition concerns, since the Transaction affects geographical markets that are national in scope.

6. Bundled Pay TV And News Content To Advertisers

(A) Relevant competition concerns

6.1 News Corp has market power on the national newspaper market in the UK[30]. The Concerned Parties would expect that also to translate to a position of market power on a market for the supply of advertising in national newspapers. BSkyB is active on the market for the supply of advertising by television. As a result of the Transaction, the merged entity would possess the ability to leverage its position in the newspaper advertising market to offer bundled rates for both TV and newspaper advertiser customers. This is a real risk, in particular, since advertising agencies typically purchase advertising space (on behalf of advertisers) for both media (such that there is a common pool of customers).

6.2 Furthermore, the merged entity would have the incentive to pursue such a strategy in order to direct sales away from competing TV advertising businesses and increase its market share in the TV advertising market.

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[27] OFT Decision of 4 May 2010.

[28] CC Report of May 2002.

[29] See, for example, Case No. COMP/M.3917 *Wegener/PCM/JV* (7 July 2005).

[30] In 2009, News Corp's newspapers accounted for over 37% of national newspaper circulation in the UK, the same share as the next two competitors, Trinity Mirror and Daily Mail and General Trust (DMGT), combined. Indeed, News Corp's share of national press circulation is forecast to increase by over 3% by 2014. See ABC and Enders Analysis forecasts.

6.3 In addition, the merged entity would have the incentive to withhold advertising from companies that compete with it in the newspaper and retail Pay TV markets. For example, BSkyB will not allow BT Vision to advertise to its Pay TV customers on Sky channels that carry advertising. There is a real risk that this strategy would be extended to its newspaper offering as well.

(B) National scope of affected geographic markets

6.4 Again, in order to satisfy the criteria for an Article 9(2) it must be shown that distinct UK markets are affected by the Transaction.

6.5 With regard to the competition concerns outlined in Section 6(A) above, the question of geographic market definition for both the relevant TV advertising and newspaper advertising markets has previously been considered by both the UK competition authorities and the Commission:

(i) *TV advertising*: The market for TV advertising was recently considered by the OFT in its *BSkyB / Virgin Media TV* decision, in which the OFT confirmed that the geographic market for television advertising is national in scope. The CC's decisional practice supports a similar conclusion on the market being national in scope.[31] Furthermore, this conclusion is supported by the previous decisional practice of the Commission at the European level as well.[32]

(ii) *Newspaper advertising*: According to the Commission's previous decisional practice at the European level, due to cultural barriers, the relevant geographic market for the sale of advertisement space for newspapers is national in scope.[33]

6.6 The Concerned Parties consider that the previous decisional practice of both the UK authorities and the Commission in respect of geographic market definition for the above-mentioned markets accords with their own commercial experience and understanding of the national scope of these sectors.

6.7 The second requirement of the Article 9(2)(a) test is also therefore met with respect to these competition concerns, since the Transaction affects geographical markets that are national in scope.

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[31] See, for example, *Project Kangaroo* (CC Report of 4 February 2009), *BSkyB / ITV* (CC Report of 20 December 2007), and *Carlton Communications plc / Granada plc* (CC Report of October 2003).

[32] See, for example, Case No. COMP/M.1958 *Bertelsmann / GBL / Pearson TV* (29 June 2000).

[33] Case No. COMP/M.3917 *Wegener/PCM/JV* (7 July 2005).

7. Consolidation In The Supply Of News Content

(A) Relevant competition concerns

7.1 News Corp and BSkyB both create and supply news content. As a result of the merger, the merged entity will be able to consolidate its news-gathering operations, with the same newsrooms, reporters etc. supplying content to both its newspaper products and to its Sky News TV (for broadcast on the Sky News Channels and others, e.g., C5)[34], thus reducing costs in the upstream market.

7.2 This scale advantage will give the merged entity a cheaper supply of news, meaning that competitors are no longer able to compete effectively in the downstream markets. For example, since the merged entity's news supply would become cheaper, the merged entity's newspaper and online products could be priced more cheaply than its competitors' product offerings, thus foreclosing such competition from the market. The provision of content is already a highly significant cost in the supply of newspapers – increasingly so as the market moves from paper to online.

7.3 The merging parties would no doubt seek to characterise these cost-savings as efficiencies. By analogy with Article 101(3) of the Treaty for the Functioning of the European Union, however, such efficiencies will be detrimental to competition in circumstances where they lead to the elimination of competitors in the relevant market.

(B) National scope of affected geographic markets

7.4 Again, as noted further above, in order to satisfy the criteria for an Article 9(2) it must be shown that distinct UK markets are affected by the Transaction.

7.5 With regard to the competition concerns outlined in Section 7(A) above, the Concerned Parties have already provided evidence above (see Paragraphs 5.6 et seq.) that the geographic market definition in the primary relevant market of newspaper publishing is national in scope.

7.6 In light of the above, the second requirement of the Article 9(2)(a) test is therefore met with respect to these competition concerns, since the Transaction affects geographical markets that are national in scope.

8. Conclusion

8.1 The Transaction gives rise to significant competition concerns on a national level within distinct UK markets (as explained further in Sections 3 to 7 above). Moreover, as noted

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[34] By way of background, the Concerned Parties understand that BSkyB is the second biggest TV news provider in the UK by hours broadcast and the third biggest by total hours viewed. See Ofcom Media Ownership Rules Review (July 2009). It also operated the second most popular 24 hour news channel after the BBC.

further above at Paragraphs 2.2 et seq., the UK authorities have considerable experience of looking at the product markets in question (and, indeed, are currently already doing so for certain markets – e.g., the CC's ongoing market investigation into premium movies on Pay TV) and are therefore best placed to investigate such areas of competition concern.

8.2 Consequently, it would be more appropriate for the competitive assessment of the UK aspects of the Transaction to be conducted by the UK authorities under Article 9 of the EUMR.

Slaughter and May
16 November 2010

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