

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

1. Introduction

1.1 This paper contains submissions on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group (together, the "**Concerned Parties**") in response to the Department for Culture, Media and Sport's second Notice of Consultation on the proposed acquisition by News Corporation of up to 60.9% of British Sky Broadcasting Group PLC ("**BSkyB**") (the "**Takeover**").

2. Fundamental Flaws in UILs

2.1 The Concerned Parties' response to the first consultation on the Takeover identified several fundamental flaws in the proposed UILs.¹

2.2 First, the structure created by the UILs meant Sky News would be almost entirely dependent on News Corporation and thus incapable of providing an independent news voice to remedy the plurality concerns identified by OFCOM. For example, Sky News would be:

- (i) Dependent upon contracts with News Corporation for 85% of its revenues (and 25% of its costs);
- (ii) Dependent upon News Corporation for effective distribution of its TV news output; and
- (iii) Dependent upon News Corporation for its future existence – since Sky News would be unviable if the Carriage Agreement was not renewed.

2.3 Secondly, the UILs relied on governance provisions which are ineffective to ensure editorial independence in the absence of genuine financial, commercial and operational independence.

2.4 Thirdly, the UILs offered no remedy beyond the 10 year term of the Carriage Agreement. The Secretary of State provided no evidence to suggest that a lasting remedy is unnecessary.

3. Fundamental Flaws Remain Unaddressed

3.1 The Concerned Parties are disappointed to learn that the revised UILs published on 30 June do not address any of the fundamental flaws identified above. Crucially, under the revised UILs Sky News would remain financially, commercially and operationally

¹ See the Concerned Parties response dated 11 March 2011.

dependent on News Corporation. In these circumstances, none of proposed adjustments to the behavioural obligations can overcome the structural flaws in the remedy. For example, the revised UILs:

- (i) Will require that the Sky News independent director with senior editorial/journalistic experience is present for board meetings to be quorate. However, the presence of such a director provides little assurance given Sky News' dependence on News Corporation. In those circumstances, that director's commercial incentives (and legal obligation) to promote the success of Sky News will mean he/she cannot act as a genuinely impartial guardian of editorial independence;
- (ii) Will entail News Corporation undertaking not to attempt to cause Sky News to breach its Articles of Association. However, this fails to address the clear risk that Sky News will self-censor its news agenda in light of its almost total dependence on News Corporation; and
- (iii) Include an obligation on News Corporation to cross-promote Sky News. This only emphasises the extent to which Sky News will be commercially and operationally dependent on News Corporation and the extent to which the Secretary of State has departed from normal UK merger control practice (which requires that, in the long term, a divestment business can operate viably independent of the merging parties).

3.2 The Secretary of State states that OFT and OFCOM's earlier advice was that "*the undertakings in lieu addressed OFCOM's media plurality concerns and were viable for 10 years*".² In reality, the earlier advice of both the OFT and OFCOM was that the viability of the remedy will be in doubt before the expiry of the ten year period. The OFT stated that "*uncertainty about the prospects for renewal of the carriage agreement on equivalent terms may begin to affect Newco some years before its term date*"³ and OFCOM stated that the effectiveness of the UILs "*may start to diminish in the run up to the end of 10 year period*"⁴ (emphasis added). OFCOM repeats this concern in its advice to the Secretary of State dated 22 June 2011.⁵

3.3 As regards the period following the expiry of the Carriage Agreement, the OFT has again highlighted the lack of a lasting remedy in its latest advice to the Secretary of State: "*none of the amendments made to the Revised UIL in light of the Reviewed Responses addresses the essential structural limitation identified in the Report, that the*

² Press Release dated 30 June 2011.

³ Paragraph 1.13 OFT letter dated 11 February 2011.

⁴ Paragraph 24, OFCOM letter dated 11 February 2011.

⁵ Paragraph 10 OFCOM letter dated 22 June 2011.

*UIL offered are unlikely to be practically and financially viable over the long term.*⁶ The Secretary of State has still not provided any evidence to justify this lack of a lasting remedy.

- 3.4 The revised UILs provide for the appointment of a monitoring trustee but only for an initial period. Following that initial period there will be no active monitoring of compliance with the UILs. Given Sky News' incentive to maintain News Corporation's approval (and thus not report breaches of the UILs), there is a high risk that any breach will go undetected.
- 3.5 Finally, the Concerned Parties still have not been provided with access to key information on the post-Takeover relationship between News Corporation and Sky News. For example, neither the Carriage Agreement nor the Brand Licence have been made available (even in redacted form). These are key documents underpinning the viability of Sky News and the consultation process is seriously compromised by the failure to make such documents available. The Concerned Parties consider that the Carriage Agreement, Brand Licence and Articles of Association must be published in finalised form and consulted upon before any decision to accept UILs.

4. Conclusion

- 4.1 The revised UILs fail to address any of the fundamental flaws previously identified by the Concerned Parties. News Corporation has now had ample opportunity to offer an effective remedy. Its continuing failing to do so suggests that, when the Secretary of State decides on this matter, the proper course would be to refer the Takeover to the Competition Commission for a thorough review of the serious plurality concerns identified by OFCOM.
- 4.2 However, the Concerned Parties believe that any decision must also properly consider the important information currently emerging in respect of the behaviour and governance of News Corporation and News International. These matters could have an important impact on the assessment of news plurality and therefore any decision should be delayed until all relevant inquiries and investigations are completed.

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⁶ Paragraph 15 OFT letter dated 22 June 2011.