

POSSIBLE ACQUISITION BY NEWS CORPORATION OF BRITISH SKY BROADCASTING GROUP PLC

**Preliminary Briefing by News Corporation to the Department of Business,
Innovation and Skills and the Office of Communications**

1. INTRODUCTION

- 1.1 This briefing paper relates to the possible offer by News Corporation ("News") to acquire the entire issued and to be issued share capital of British Sky Broadcasting Group plc ("Sky") that News does not already own (the "Transaction").
- 1.2 The Transaction is a concentration with a Union dimension and is therefore subject to mandatory notification to, and approval by, the European Commission (the "Commission") under the EU Merger Regulation ("EUMR"). Pre-notification contacts are underway with the Commission.
- 1.3 The Transaction would be subject to the UK City Code on Takeovers and Mergers. It is therefore important for transaction planning and financeability purposes that News can ensure, as far as possible, an efficient and speedy review of the Transaction under relevant merger control rules. Recognising that the Transaction could be in the interests of Sky's shareholders in the future, and that obtaining any necessary merger clearances would facilitate such an offer, Sky has agreed to co-operate with News in seeking those clearances. In this context, Sky has reviewed this preliminary briefing paper.
- 1.4 The purpose of this preliminary briefing paper is to provide the Department of Business, Innovation and Skills and Ofcom with background information on the Transaction and its UK context. This paper is a summary note of the key points of relevance to the Department's appraisal of the Transaction. The parties would be happy to provide further detail if helpful.
- 1.5 For the reasons set out below, the parties do not consider that the Transaction raises grounds for the Secretary of State for Business, Innovation and Skills ("SoS") to intervene in the Transaction pursuant to Part 3, Chapter 2 of the Enterprise Act 2002 ("EA02"), and in compliance with Article 21 EUMR, in order to protect the plurality of the media, as defined in section 58(2C) EA02.
- 1.6 As you will appreciate, the matters disclosed in this briefing paper are highly sensitive. Therefore, the information provided should not be disclosed to third parties beyond the relevant case teams at the Department and Ofcom who are dealing with this matter without the parties' prior written consent.

2. OVERVIEW OF THE TRANSACTION

The Parties

- 2.1 **News:** News is a diversified global media company with operations in eight industry segments: filmed entertainment; television; cable network programming; direct broadcast satellite television; integrated marketing services; newspapers and information services; book publishing; and other. News has a market capitalisation of approximately US\$35 billion, had total assets as of 31 March 2010 of approximately US\$55 billion and total annual revenues of approximately US\$30 billion for the fiscal year ended 30 June 2009.
- 2.2 The activities of News are conducted principally in the United States, Continental Europe, the United Kingdom, Australia, Asia and Latin America.
- 2.3 News is a Delaware corporation whose shares are listed on the New York and Australian Stock Exchanges. News has a secondary listing on the London Stock Exchange.

- 2.4 News owns 39.1% of the shares in Sky, which entitle it to exercise 37.19% of the voting rights in Sky. News considers that, at present, it enjoys an ability materially to influence the policy of Sky.
- 2.5 Sky is active in a number of economic sectors in the UK and Ireland. In particular, Sky produces and acquires TV content which it uses to create linear TV channels, including the Sky News HD 24 hour rolling news service, and provides wholesale news programming to the commercial public service broadcaster ("PSB") channel, five, as well as providing news content to a number of commercial radio stations; wholesales its TV channels to third party cable and IPTV operators for them to retail to their subscribers; retails its own and third party pay TV channels to its direct-to-home satellite subscribers (including both private and commercial customers), over the internet via *Sky Player* and through mobile technologies, as well as retailing certain of its channels to IP-TV subscribers.
- 2.6 Sky also broadcasts a number of its channels free to air via DTH satellite and via DTT. Sky distributes its own and third party audiovisual programming via the services known as Sky Player and Sky Anytime on an on-demand basis; produces and distributes to its DTH satellite subscribers a number of listings magazines (SkyMag, Sky Sports Magazine and Sky Movies Magazine) featuring editorial about current and future programming on the DTH satellite platform; via its subsidiary Amstrad, manufactures and sells set-top-boxes; provides retail broadband services and telephony services (only in the UK), and certain internet-related services to consumers; through Easynet Global Services Sky provides managed network and hosting services to businesses; through its advertising sales house, 'Sky Media', sells advertising and sponsorship on its own and third party channels, around content available on Sky Anytime and Sky Player, as well as selling advertising space and sponsorship online; provides interactive services on Sky's DTH platform; and provides fixed odds betting services.
- 2.7 Sky is a UK public company whose shares are listed on the London Stock Exchange.

Rationale of the Transaction

- 2.8 Sky has achieved significant success over the years and News believes that the business would continue to have a successful future under News' outright ownership.
- 2.9 News believes that increasing its shareholding in Sky is a sensible step for News at the present time and a good use of News' available cash resources. The Transaction would improve the quality of News' earnings by expanding the geographic diversification of News' earnings base, reducing the concentration on cyclical advertising revenues and increasing News' access to direct consumer subscription revenues.

The Transaction structure

- 2.10 The Transaction contemplates the acquisition by News of up to 100% of Sky's shares. After the implementation of the Transaction, News would exercise sole control over Sky.
- 2.11 The Transaction would be subject to the City Code on Takeovers and Mergers and would be implemented by way of a public offer or court approved scheme of arrangement.

Timetable and regulatory review

- 2.12 On 15 June 2010, News made an announcement pursuant to Rule 2.4 of the City Code on Takeovers and Mergers of a possible offer to acquire the entire issued and to be issued share capital of Sky that News does not already own.

2.13 Pursuant to a Cooperation Agreement entered into by News and Sky on 15 June 2010, Sky has agreed to co-operate with News in seeking any necessary merger clearances in relation to the Transaction from the relevant merger control authorities.

2.14 For further details, please refer to the News press release dated 15 June 2010 at Annex I.

3. JURISDICTION

3.1 The Transaction would be a concentration with a Union dimension which would be subject to mandatory notification to the Commission.

(a) News does not currently exercise decisive influence over Sky for the purposes of the EUMR. Based on the attendance at Sky's last three general shareholder meetings, News' current 37.19% of the voting rights would not allow News to exercise the majority of the voting rights at the next meeting.

(b) The jurisdictional thresholds under the EUMR are satisfied as:

(i) the combined worldwide turnover of News and Sky exceeded Euro 5 billion in the most recent financial year;

(ii) each of News and Sky generated turnover in the European Union exceeding Euro 250 million in the most recent financial year;

(iii) News and Sky did not generate more than two thirds of their Union-wide turnover in one and the same Member State in the most recent financial year.

3.2 News considers that the Commission is the most appropriate authority to review the Transaction in its entirety by reference to its possible effects on competition and that the conditions to request a referral back to the UK under Article 9 of the EUMR are not met in this case because the Transaction does not threaten to affect significantly competition in a distinct market within the UK, nor will it affect competition in any distinct market within the UK that does not constitute a substantial part of the common market. News is engaging with the OFT in order to apprise the OFT of the Transaction and to discuss any concerns which the OFT might identify as to the potential impact of the Transaction on competition in the UK.

4. PUBLIC INTEREST CONSIDERATIONS

Legal framework for plurality assessment

4.1 The Transaction does not raise grounds to justify the SoS intervening on public interest grounds pursuant to Part 3, Chapter 2 EA02 to protect the plurality of the media.

4.2 It is submitted that the Transaction will not give rise to any public interest concerns such as to justify an intervention because:

(a) the Transaction does not fall under any scenarios contemplated by the SoS' policy on intervention in media public interest cases;

(b) there will be no material effect on the range or quality of plurality of news media available to any relevant audience;

(c) even if the SoS were to consider that there would be a reduction in plurality as a result of the acquisition of *de jure* control following the Transaction, there will be a sufficient number and diversity of sources of news to protect plurality; and

(d) the regulatory framework contains further safeguards of plurality.

Absence of plurality concerns

Submission 1: The Transaction does not fall under any scenarios contemplated by the SoS' policy in media public interest cases

- 4.3 The SoS has published guidance¹ on the circumstances in which he would expect to intervene in a media merger on public interest grounds. The guidance makes clear that he would generally expect to intervene only in cases where the transaction would otherwise have been governed by media ownership rules which have been removed by the Communications Act 2003. The cases that come within this category relate to mergers involving:
- (a) owners of national newspapers with a market share in excess of 20% and Channel 5;
 - (b) owners of national newspapers with a market share in excess of 20% and national radio;
 - (c) Channel 3 and national radio;
 - (d) Channel 5 and national radio;
 - (e) two national radio stations; and
 - (f) a takeover of a Channel 3 licensee.
- 4.4 None of the above scenarios would arise as a result of the Transaction.
- 4.5 The SoS's guidance also contemplates intervention in other "exceptional circumstances".² The only such cases cited are ones where:
- (a) a large number of news or educational channels would be coming under single control; or
 - (b) a single person were to take over all the music channels.
- 4.6 The Transaction would not give rise to either of these exceptional outcomes.
- 4.7 Nor is there any other reason to consider the Transaction to be "exceptional" and otherwise warranting intervention. In particular:
- (a) there is no or no material overlap in the parties' activities in UK newspapers or television news; and
 - (b) neither of the parties uses any scarce spectrum resources or otherwise benefits from any special privileges (such as, for example, public funding). They do not, therefore, enjoy advantages which cannot be replicated by others.
- 4.7 Moreover, the legal threshold for an adverse public interest finding is high, and there is no prospect that the Transaction would give rise to concerns which might meet such a threshold. The guidance of the SoS makes clear that an adverse public interest finding would be justified only where a transaction gave rise to "**unacceptable levels** of media and cross-media **dominance**" (emphasis added)³ and/ or a "**significant** reduction in plurality in relation to any relevant audience" (emphasis added).⁴ As explained further

¹ Enterprise Act 2002: Public Interest Intervention in Media Mergers, Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004 ("DTI Guidance").

² DTI Guidance, para. 8.8.

³ DTI Guidance, para. 7.7.

⁴ DTI Guidance, para. 7.11.

below, post-Transaction there would remain a sufficient number and diversity of sources of news to protect plurality.

Submission 2: There would be no material effect on the range or quality of plurality

- 4.8 News is already entitled to exercise 37.19% of the voting rights in Sky, and News considers that it would already be deemed to enjoy an ability materially to influence the policy of Sky (as the Competition Commission ("CC") assumed in *Sky/ITV*⁵). Under the UK thresholds laid out in the UK merger legislation and the plurality test set out by the Court of Appeal in *Sky/ITV*⁶, Sky and News are together already deemed to constitute a single controller of media enterprises. Section 58A(5) EA02 essentially provides that, where there is any degree of control over one enterprise by another (i.e., under any of the three measures of control in EA02, being at minimum "material influence"), both of them have to be treated as under the control of only one person.
- 4.9 However, in *Sky/ITV*⁷, the Court of Appeal also made clear that, in assessing whether a further merger (e.g. News' acquisition of *de jure* control of Sky) has an adverse effect on plurality, it is necessary not just to count the number of independent controllers of media enterprises who are active in the market, but also to evaluate whether the new merger adversely affects the quality of plurality.
- 4.10 News submits that the Transaction cannot be expected to have any adverse effect on the range or quality of plurality of relevant media.
- 4.11 By virtue of its existing interest in Sky, News submits that it is already deemed to exercise some degree of influence over Sky. Support for this contention can be found in the detailed and lengthy review of the Sky/ITV transaction by the OFT, the CC, Ofcom and the Competition Appeal Tribunal ("CAT"), where the UK authorities have assumed that News exercises material influence over Sky within the UK merger control framework:
- (a) The OFT stated that "[BSkyB's] largest shareholder is News Corporation (News Corp) with a 39.02 per cent stake, along with several directorships, which is sufficient to confer control over BSkyB."⁸
 - (b) The CC assumed that, for the purposes of its analysis of the impact of the ITV acquisition on plurality of news, "News Corporation had material influence over BSkyB."⁹
 - (c) Ofcom took into account the links between News and Sky in its plurality assessment.¹⁰
 - (d) The CAT's judgment recites that Ofcom, in its initial report to the SoS, "assumed that Sky is or may be controlled by News Corporation (39.1% shareholding held through a number of News Corporation subsidiaries)".¹¹
- 4.12 Thus, on this basis, as sources of news (via newspapers and TV news coverage), News and Sky may be considered to be not wholly independent from one another even before

⁵ Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, para. 5.64.

⁶ *BSkyB v Competition Commission* [2010] EWCA Civ 2 – Case Nos C12008/3053 and 3066.

⁷ *BSkyB v Competition Commission* [2010] EWCA Civ 2 – Case Nos C12008/3053 and 3066.

⁸ Acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc, OFT Report to the Secretary of State for Trade and Industry, 27 April 2007, para. 25.

⁹ Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, para. 5.64.

¹⁰ Ofcom Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting plc's acquisition of a 17.9% shareholding in ITV plc, 27 April 2007, paras. 4.4-4.7.

¹¹ *British Sky Broadcasting v Competition Commission and Secretary of State and Virgin Media Inc v Competition Commission and Secretary of State*, ([2008] CAT 25), judgment of 29 September 2008, para. 247.

the Transaction. Accordingly, due to the existing links between News and Sky, the Transaction will not result in a material change in the range or quality of plurality.

Submission 3: There will remain a sufficient number and diversity of sources of news to protect plurality

- 4.13 Even if the SoS were to conclude that there might be a reduction in plurality as a result of the Transaction, any reduction in the range and diversity of the sources of news provided to audiences served by News and Sky cannot be expected to be qualitatively significant such as to justify intervention.
- 4.14 Post-Transaction there will remain a sufficient number and diversity of sources of news to protect plurality. In particular:
- (a) there is no overlap between the parties in the supply of newspapers;
 - (b) there is no material overlap between the parties in the supply of UK television news¹²;
 - (c) Sky News has a very small share of overall viewing¹³ and accounts for a relatively small share of television news viewing. In considering any potential reduction in the number of controllers of media enterprises serving relevant audiences for news, account should be taken that:
 - (i) Sky News itself accounts for only 4.9% of television news viewing¹⁴;
 - (ii) Ofcom recognised that Sky News' share of UK television news remained "small in comparison to PSB news broadcasters."¹⁵ This remains the case today. Audiences for all rolling news channels are, at any one time, a small fraction of those attracted to news on PSB channels;
 - (d) neither Sky nor News will in the future determine the editorial policy of any other major broadcaster. Although Sky provides raw news data and content to five, Channel 5 Broadcasting Limited owns and controls the editorial policy of its channels, including any news programming, and is the regulated broadcasting service provider under the Communications Act 2003;
 - (e) there is a strong culture of editorial independence within UK television news production, which will continue to be effective in preventing any prejudice to independence and diversity of views. In assessing the Sky/ ITV transaction, the CC noted in relation to that transaction that the "evidence ... received suggested to [the Competition Commission] that there was a strong commitment to editorial independence across television news broadcasting which would lead to editors resisting any direct board intervention or intervention from shareholders to set the news agenda"¹⁶;
 - (f) in any event, when analysing plurality in relation to any relevant audiences, the parties would draw attention to several facts which suggest that, even after completion of the Transaction, there would remain a sufficient degree of plurality

¹² The Fox News channel is available on Sky's DSat platform; however, this channel is a re-transmission of the US channel and does not produce or comprise any UK specific news programming. See para 3.80 of New News, Future News. The challenges for digital news after Digital Switch-over, 26 June 2007 (Ofcom).

¹³ For each of April to June 2010, Sky News' share of monthly multi-channel viewing was 0.7%, 0.9% and 0.6% respectively (source: BARB http://www.barb.co.uk/report/monthlyViewing?_s=4).

¹⁴ October 2006. Source: BARB/TNS Infosys, Magentum analysis, all hours. Cited in New News, Future News, The challenges for digital news after Digital Switch-over, 26 June 2007 (Ofcom), Figure 3.2.

¹⁵ New News, Future News, The challenges for digital news after Digital Switch-over, 26 June 2007 (Ofcom), para. 3.36.

¹⁶ Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, para. 5.68.

in the provision of news to any relevant audience to obviate the need for any public interest intervention:

- (i) in an increasingly diverse all-media market place, there is and will remain post-Transaction a variety of sources of news and viewpoints, including traditional print media, the internet, radio and TV (both free-to-air and pay TV);
- (ii) even where TV is the main source of news for some audiences, it is not the only source. The great majority of TV viewers of news rely on multiple sources for their news including traditional print media, the internet, radio and TV¹⁷;
- (iii) even within each specific medium, individuals tend to draw on multiple sources. For example, the average person who uses the internet for news will visit several different news websites each week, whilst a third of viewers actively watch television news from more than one source¹⁸;
- (iv) many other significant players (including the BBC and ITV) will remain as significant providers of news to the relevant audiences. As explained above, Sky's share of audience viewing is small by comparison with that of other providers;
- (v) with further innovations in the distribution of news and other media including specialist/ dedicated news channels and news programming provided as part of general entertainment services owned and controlled by a number of media enterprises, it cannot be said that, post-Transaction, there would be an insufficient number of media enterprises serving relevant audiences.

Submission 4: The regulatory framework safeguards plurality

- 4.15 Television news provision is subject to separate regulatory mechanisms that impose specific standards relating to the quality of news provision.
- 4.16 In television news, regulatory mechanisms, including 'quality controls' and obligations to present news with 'due impartiality' contained in Ofcom's Broadcasting Code and in relevant broadcasting licences¹⁹, reduce the scope for influence over editorial content by owners of television channels which broadcast news.
- 4.17 The parties submit that the Transaction should be viewed against this regulatory environment. In this context, the range of information and views available to relevant audiences would not be adversely affected following the Transaction. Such safeguards will continue to operate in addition to the strong culture of editorial independence within news production which is well accepted (see, further, Submission 3).

5. CONCLUSION

- 5.1 The parties submit that the Transaction has no adverse effect on the range of information and views available to the relevant audiences on the basis that:

¹⁷ For example, see Figure 5 of Appendix I to the CC's Report in SkyB/ITV (Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007).

¹⁸ See Figure 6 of Appendix I to the CC's Report in SkyB/ITV (Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007).

¹⁹ For example, Channel five is obliged by its DTPS licence to include "Not less than 408 hours in each calendar year ... of news programmes ... between 6 am and midnight Such news programmes shall be of high quality and deal with both national and international matters."

- (a) the Transaction does not fall under any scenarios contemplated by the SoS' policy on intervention in media public interest cases;
 - (b) there will be no material effect on the range or quality of plurality of news media available to any relevant audience;
 - (c) even if the SoS were to consider that there would be a reduction in plurality as a result of the acquisition of *de jure* control following the Transaction, there will be a sufficient number and diversity of sources of news to protect plurality; and
 - (d) the regulatory framework contains further safeguards of plurality.
- 5.2 Therefore, the Transaction does not give rise to any potential concerns which would justify the SoS intervening in the Transaction on public interest grounds.
- 5.3 The parties would be happy to provide further information in relation to any of the points raised above and to meet with staff, if helpful.
- 5.4 Should you have any questions, please do not hesitate to contact John Pheasant (on direct line [REDACTED] or email at [REDACTED] or Suzanne Rab (on direct line [REDACTED] or email at [REDACTED], or Andrea Appella at News (on direct line [REDACTED] or email at [REDACTED]

20 July 2010

Annex I

News Press release dated 15 June 2010

News Corporation Proposes To The Board Of British Sky Broadcasting Group Plc A Cash Offer Of 700 Pence Per Share For The British Sky Broadcasting Group Plc Shares It Does Not Already Own