

News Corporation

News Corporation/Sky

Outline Response to Issues Letter

1. INTRODUCTION AND OVERVIEW

- 1.1 This submission is made by News Corporation (News) in response to the Issues Letter received from Ofcom on 10 December 2010 (the **Issues Letter**).

Ofcom's role is to report on the relevant media public interest consideration

- 1.2 The Secretary of State, at the same time as issuing his European Intervention Notice concerning News' proposed acquisition of those Sky shares which it does not already own (the **Transaction**) on 4 November 2010, asked Ofcom to investigate and report to him on the relevant public interest consideration (**PIC**) (the **Report**), as he is required under section 4A(1) of the Enterprise Act (Protection of Legitimate Interests) Order 2003 (the **Order**).

- 1.3 As Article 4A(3) of the Order makes clear, Ofcom's role in the administrative process is to report to the Secretary of State on "the media public interest consideration mentioned in the European intervention notice concerned", which, in this case, 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".

Ofcom appears to have identified issues by reference to the wrong legal test (or without reference to any legal test)

- 1.4 News considers that the Issues Letter is seriously flawed. Most importantly, whilst barely acknowledging the relevant PIC in the first paragraph of the Issues Letter, Ofcom appears in substance to identify the issues set out in the Issues Letter by reference to a different (wrong) legal test, focussing almost wholly on the relative strength and influence of News and not on the sufficiency of the plurality of media enterprises serving any relevant audience.

- 1.5 The ultimate purpose of the PIC which the Secretary of State has to determine is clearly set out in the letter from BIS to News of 25 November 2010:

"[The] broadcasting and cross-media public interest consideration, therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality."

- 1.6 None of the concerns identified in the Issues Letter is benchmarked against the need to ensure sufficient plurality/a minimum level of plurality and therefore, as well as being in many respects factually and/or legally inaccurate, the concerns expressed are not ones that the Secretary of State can legitimately rely upon in reaching his decision on whether the Transaction results in insufficient plurality which may be expected to operate against the public interest and therefore requires a reference to the Competition Commission (**CC**) under Article 5 of the Order.

1.7 This lack of regard to the nature of the legal test taints Ofcom's provisional analysis and, if left uncorrected, would fundamentally undermine the advice issued by Ofcom to the Secretary of State which consequently could not be legitimately relied upon by him to decide on a reference in relation to the PIC.

1.8 Alternatively, Ofcom has suggested to News during the Issues Meeting of 15 December 2010 that they have identified the issues set out in the Issues Letter without reference to any conception of the applicable legal test at all. Notably, Ofcom did not consider that it was in a position to (or was not prepared to) explain the relevance of the issues identified in its Issues Letter to an assessment of the sufficiency of plurality. News finds it very difficult to conceive of how Ofcom has come to even a preliminary view on the nature and importance of the issues which apparently cause preliminary concerns without having come to a view in advance of what is required for it to assess whether or not sufficient plurality will remain post-Transaction. On this basis alone, News does not consider that it has been given a proper opportunity to respond to issues that could be relied upon in Ofcom's report and ultimately by the Secretary of State in making a reference decision under Article 5 of the Order. News would argue that, focussing on the legal test, rather than the plethora of unsubstantiated assertions that are made by complainants, the issues in this case are in fact quite well defined and straightforward.

Ofcom should approach its analysis of media voices available to consumers in the UK with a view to coming to a conclusion on whether plurality is "sufficient" pre-Transaction or post Transaction

1.9 A number of detailed analytical deficiencies in the Issues Letter stem from Ofcom's failure to restrict its analysis to issues which are relevant to the PIC on which Ofcom is tasked to report. Nowhere in the Issues Letter does Ofcom attempt to assess whether plurality is sufficient pre-Transaction or whether any of the changes which it believes might be brought about by the Transaction could result in plurality becoming insufficient. At a basic level, it would not be enough for Ofcom to simply say that 'something' has changed and that therefore there may be a threat to the sufficiency of plurality (although we also note that the Issues Letter fails to engage with the issue of sufficiency) – if this was the test, it would be met in relation to all combinations of two media enterprises and there would be no need whatsoever for Ofcom to report.

Ofcom does not engage with the reality of what has changed as a result of the Transaction and how these changes could impact on the sufficiency of plurality

1.10 What is more, throughout the Issues Letter, in identifying the issues which cause it preliminary concerns, Ofcom fails to engage with the reality of what changes as a result of the merger at all. Ofcom appears to assume that Sky and News, pre-Transaction, are entirely separate enterprises. It is clear that this is not correct and Ofcom must, legally, take into account in its analysis the reality of the situation before and after the Transaction (i.e. that pre-Transaction the position is that UK competition authorities have already found that News has material influence over Sky) when it comes to assessing the sufficiency of plurality.

The concerns provisionally identified by Ofcom do not in themselves provide any indication that the Transaction might lead to insufficient plurality and in any event are groundless

1.11 Ofcom identifies four issues – Issue A, Issue B, Issue C and Issue D – in paragraph 17 of the Issues Letter which in its preliminary view: "*may give rise to concerns about the level of plurality arising as a result of the transaction*", each of which purportedly follows from a number of preliminary findings made by Ofcom. Ofcom also presents "*forward looking arguments*" about News' potential future position which apparently also leads Ofcom to have preliminary concerns.

1.12 Even ignoring the lack of relevance of Ofcom's analysis, Ofcom fails to provide any convincing reason why it has identified the issues set out in the Issues Letter as being of preliminary concern. In particular, the various preliminary findings which:

- (i) do not appear to follow from the evidence referred to in the Issues Letter;
- (ii) are simply based on speculative assertions by complainants; and
- (iii) are incapable in themselves of providing any support for a view that the Transaction leads to any material change in the sufficiency of plurality.

1.13 We identify below the main deficiencies in Ofcom's analysis:

Issue A: strengthening of News' ability to influence the cross-media market for news and current affairs

(a) Ofcom's analysis of Issue A is flawed in a number of respects. Indeed, it is most apparent in relation to Ofcom's treatment of Issue A that in identifying the issues on which it (presumably) plans to base its report to the Secretary of State, Ofcom has strayed from a straightforward consideration of whether the Transaction will lead to insufficient plurality for any audience in the UK and is focussing on some other test. Specifically:

- (i) As a starting point, Ofcom identifies a 'headcount reduction' (in paragraph 21 of the Issues Letter) in the number of persons controlling media enterprises and then appears to draw a preliminary conclusion that the reduction in number lead to a corresponding reduction in terms of range and variety without appearing to go beyond a numerical analysis. Moreover in "counting" the number of controllers of media enterprises Ofcom (illegitimately) suggests that it might exclude from its analysis media enterprises who acquire news content from Sky but over which Sky does not exercise control or editorial influence, and also excludes, without giving any reason why this is justifiable:
 - (A) some relevant newspaper enterprises, for instance, Johnston Press publishes numerous titles that cover national news, albeit each serving local audiences;
 - (B) local radio broadcasters who may individually have small shares nationally but are collectively an important voice, with almost 9% market share; and
 - (C) TV broadcasters who are said (on an unspecified basis) to have less than 1% audience shares, but which again may be more important in aggregate.
- (ii) Ofcom conducts a flawed analysis of the relative strength of media enterprises, wrongly identifying (in paragraphs 22 and 26 of the Issues Letter) that a combined News/Sky would have an "*unmatched*" presence and relative standing in cross-media news, ignoring the realities of News' and Sky's current positions and the dominating influence of the BBC in a cross-media environment.
- (iii) Ofcom expresses a concern that the Transaction will result in an increase in News' relative strength of voice in cross-media news (at paragraph 34 of the Issues Letter), purportedly based on an analysis of consumption which fails to analyse the plurality of voices available to a cross-media audience as well as the clear evidence on the patterns of consumption both pre- and post-Transaction.

- (iv) A qualitative analysis of the sufficiency of plurality must include an assessment of the relevant cross media audience. Key issues such as news multi-sourcing – Issue E – and the role of online news – Issue F – cannot be relegated to an afterthought but must be treated as an integral part of an analysis of the sufficiency of plurality available to UK cross media audiences. It is not the case that internet consumption would be relevant only where it replaces traditional media, internet consumption of news sources adds to multi-sourcing and to the plurality of consumption and must be taken into account when assessing relative positions.
- (v) Ofcom fails to consider (at paragraph 37 of the Issues Letter) what is behind the level of trust which consumers put in Sky News and that this is fundamentally linked with a culture of and a regulatory framework ensuring impartiality in news broadcasting in the UK. Ofcom also fails entirely to put News' influence in the context of its low share of TV news broadcasting.
- (vi) Ofcom identifies a concern that there would be an "*imbalance in resources*" between a combined News/Sky and other media enterprises, without any discussion of the current position or the realities of other well-resourced enterprises. It is impossible to see how imbalances of resources can give rise to any legitimate concern, still less that this could feed into a report to the Secretary of State on issues of sufficiency of plurality.

Issues B and C: Internal plurality cannot be relied upon / Regulation does not provide sufficient safeguards

- (b) Similarly, Ofcom dismisses the role of both internal plurality and the Broadcasting Code on the basis that these are matters on which Ofcom cannot properly rely. Ofcom separates these issues even though they are inevitably linked and separating them gives rise to an analytical flaw. Ofcom's role is to take into account the likelihood of continuing internal plurality within a combined News/Sky, bearing in mind in particular the culture and history of TV broadcasting in the UK, together with the provisions of the Broadcasting Code, in assessing overall whether the Transaction may lead to there being insufficient plurality for any audience in the UK taking into account the existing elements of external plurality available to the cross-media audience.
- (c) Ofcom dismisses the role of the Broadcasting Code in safeguarding plurality on the basis that it does not cover selection and prominence of news. News has submitted that the provisions of the Broadcasting Code have a key role in ensuring internal plurality in relation to TV news reporting and therefore in safeguarding also external plurality. The view set out in the Issues Letter is based on an incorrect legal interpretation of the scope of application of the Broadcasting Code. A legal opinion of Lord Pannick QC attached to this response under **Annex 1** confirms News' views previously put to Ofcom.

Issue D: Influence over other media outlets

- (d) Issue D, concerning the ability to influence the news agenda of other media outlets, again appears to be identified based on a wrong conception of the applicable legal test. Moreover, Ofcom's conclusion is astonishingly weak and therefore cannot be the basis for concern: "*the merged entity may be able to exert some influence over the news agenda of other outlets*" (emphasis added). Any media organisation would meet that test and Ofcom puts forward no evidence or argument whatsoever to counter News' arguments as to why a combined News/Sky would not be able to influence the broader news agenda to any material extent.

Issues arising in a forward view market (cross-promotion bundling, wholesale news contracts and operational synergies)

- (e) This section of the Issues Letter amounts to no more than a collection of unsubstantiated assertions that have no bearing on the actual rationale for the Transaction and which, in any event, are entirely speculative and can have no implications for a plurality assessment. To the extent that these commercial issues are subject to regulatory oversight, they fall under the jurisdiction of the relevant competition authority, which is the European Commission in the present case.
- (f) Ofcom's suggestion that it is able to take into account in conducting its analysis and coming to its conclusions **any** speculative future market development which might occur, even though it is unable to identify the timeframe within which such a development might occur or the likelihood of its occurring, is staggering. The Secretary of State could not legitimately rely on such matters in considering whether or not to make a reference.

In News' view it is quite clear that there has been, is, and will continue to be more than sufficient plurality of news provision in the UK

- 1.14 In News' view, any assessment of the sufficiency of plurality must assume that plurality in the UK media was deemed to be sufficient in 2003 (when the media plurality test was introduced by the Communications Act). It could also be assumed that plurality was sufficient in 2007 when, in the context of an analysis where News and Sky were assumed to be under common control (Sky's acquisition of 17.9% of ITV), where the CC determined that plurality was sufficient.
- 1.15 Using the level of plurality in the supply of news content and the plurality of consumption of news content by consumers in 2003 as a benchmark, News' view is that there is significantly greater plurality of news provision today and that the Transaction is demonstrably very far away from creating an insufficiency of plurality. This is partly due to the increased pervasiveness of digital news sources (digital radio, digital TV and the internet), as described in detail in News' initial submission to Ofcom, which, together with other developments, has led to:
 - (i) a greater range and variety of sources of news being more widely accessible to consumers in the UK than was the case in 2003;
 - (ii) increased multi-sourcing by consumers in the UK in their consumption of news than was the case in 2003; and
 - (iii) undoubtedly, on any measure, increased plurality both since 2003, and since 2007.
- 1.16 News' starting point would therefore be that plurality of news provision was sufficient in 2003, that it must be more than sufficient now, and that this Transaction clearly has very little impact on the sufficiency of that plurality. While the Transaction has generated substantial public comment and has led a number of complainants to put forward adverse views, this in itself does not mean that the Transaction raises credible concerns or even that the analysis is complicated. As mentioned above, News would argue that, focussing on the legal test, rather than the plethora of unsubstantiated assertions that are made by complainants, the issues in this case are in fact quite well defined and straightforward.

2. KEY FLAWS IN OFCOM'S OVERALL APPROACH TO THE ISSUES SET OUT IN THE ISSUES LETTER

- 2.1 There are three key theoretical flaws which can be identified in Ofcom's overall approach to the issues identified in the Issues Letter. These flaws in themselves mean that Ofcom's preliminary

conclusions are not meaningful and are not relevant to the question of whether there is sufficient plurality (we will go on, in sections 3-7 below, to show why, even ignoring their lack of relevance to the questions that Ofcom should be aiming to answer, the individual findings made by Ofcom in the issues which it believes might be of concern are themselves highly flawed and unreliable and, in many instances, extremely weak):

- (i) Ofcom focuses, throughout the Issues Letter, on the relative strength and influence of News, without explaining how this informs an assessment of the sufficiency of plurality for any relevant audience and without attempting to assess the range and variety of voices available to any audience on a quantitative and qualitative basis.
- (ii) Ofcom ignores the multi-sourcing of news content by consumers and dismisses this as irrelevant in section E of the Issues Paper. It also dismisses the role of online as a future development that "*has not replaced traditional media*" in section F. Both issues are highly relevant and an integral part of a qualitative analysis.
- (iii) Even in the analysis which it does carry out, Ofcom does not engage with the reality of what has changed as a result of the Transaction.

(a) Relative strength is not relevant in itself to the sufficiency of plurality

2.2 Ofcom appears to have decided that if it suspects that News might become 'stronger' as a result of the Transaction, then it will have 'concerns'. This is not the question on which Ofcom is tasked to report. Where two companies are brought under common control it is always possible to point to evidence suggesting that, in theory, they are stronger together. It is not, therefore, enough for Ofcom to simply say that 'something' has changed as a result of the Transaction – otherwise the test would be met in relation to all combinations of two media enterprises and there would be no need whatsoever for Ofcom to report.

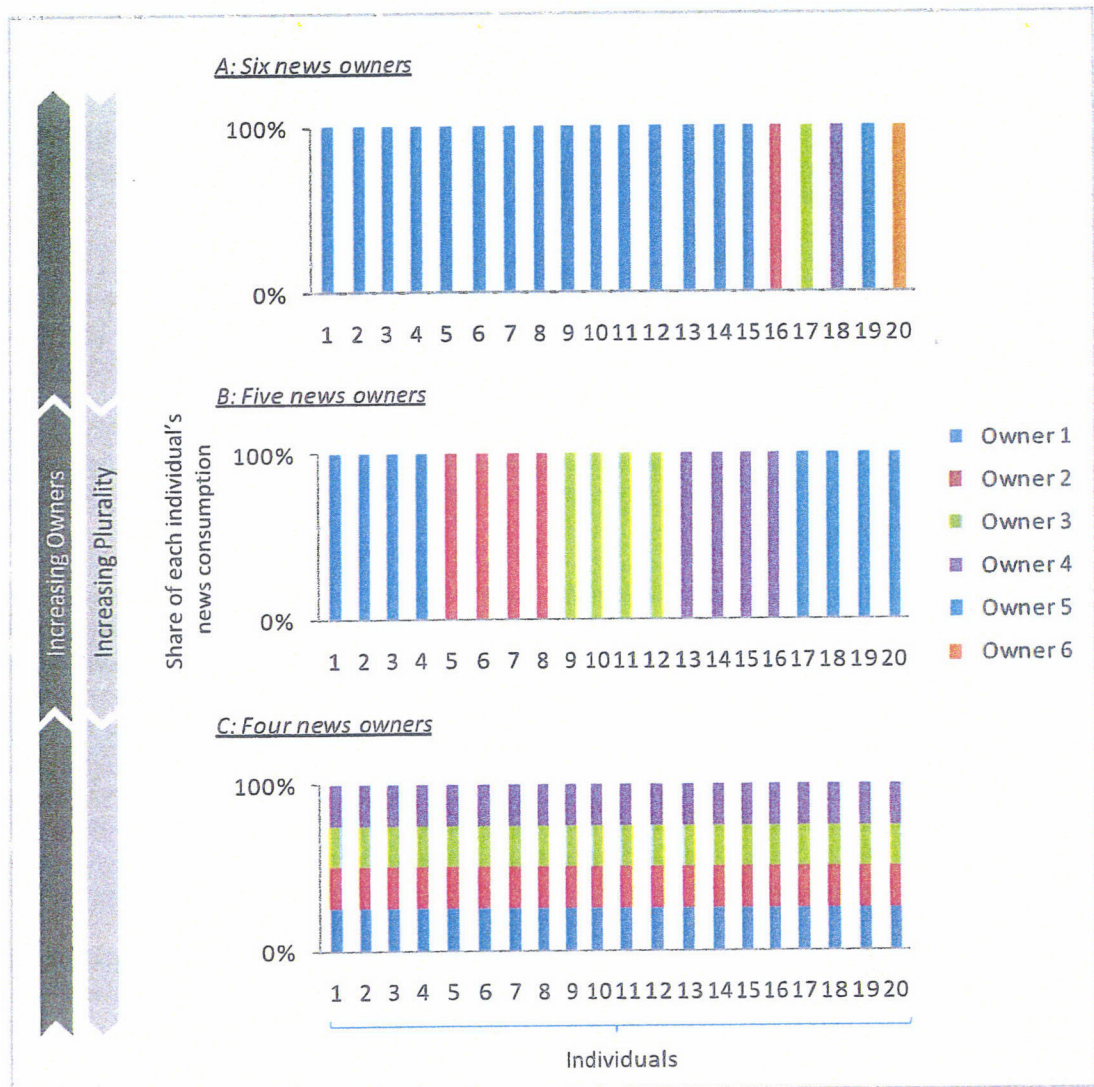
2.3 Rather, Ofcom is required to assess and to advise the Secretary of State as to whether there is a sufficiency of plurality in media enterprises pre-Transaction, and whether anything materially changes as regards the sufficiency of plurality post-Transaction.

(b) Multi-sourcing and the impact of increasing news consumption online is an integral part of assessing the range and variety of voices available to a relevant audience and the sufficiency of plurality

2.4 The multi-sourcing of news, and the increasing sourcing of news online is an essential part of a qualitative analysis of the range and variety of voices available to consumers in the UK and to the sufficiency of plurality. In News' view, assuming an equal number of news voices, it is indisputable that where the relevant audience engages in more multi-sourcing of news rather than less multi-sourcing of news, the environment would be more plural. This idea is illustrated in the following table (taken from Figure 1 of the Perspective Report).

2.5 Carrying out a qualitative analysis, a view might well be taken that scenario B was more plural than scenario A. However both scenarios assume that each individual consumer consumes only one source of news. News would take the view that scenario C, where each consumer consumes multiple sources of news, is a more plural news environment than A or B.

Figure 1: Illustrative Scenarios Of News Consumption



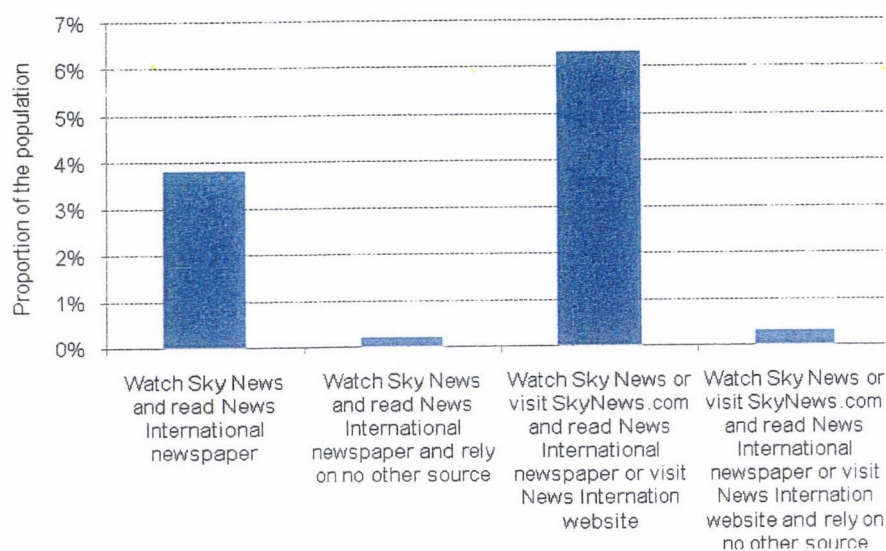
2.6 At Annex 2 News includes a table, adapted from Table 5.5 in the FTI report, showing its view of trends in multi-media consumption and in the relative strength of different media. The more detailed analysis behind this can be found in the FTI Report. News would draw a number of conclusions from the evidence on multisourcing, combined with evidence on the number of controllers of media enterprises today as compared with 2003 (using this as a convenient benchmark) which is set out in more detail at Annex 3:

- (i) An average consumer consumes five different sources of news.
- (ii) Most viewers of TV news view only one source of news. For most of those consumers that one source of news will be the BBC (which represents 75% of news viewing). For only a small percentage of consumers is it likely that that one source of TV news will be Sky (Sky News has only 6% of TV news viewing and many of those consumers are highly likely to view some news on BBC channels as well). There are many more providers of TV news now than in 2003 – 16 in addition to Sky compared with 11 in 2003. The total number of

TV viewers news viewers (total reach) is decreasing. In terms of the importance of the medium as a source of news and in minutes of consumption per day television news consumption overall is steady.

- (iii) Most readers of newspapers read only one or two newspapers (the average is 1.4). News Corporation has a share of 34% of newspaper readership (some of those readers will also read newspaper titles which are not owned by News Corporation). There are the same number of suppliers of UK-wide newspapers now as there were in 2003 – 7 in addition to News. The total number of newspaper readers (total reach) is decreasing. In terms of the importance of the medium as a source of news and in minutes of consumption per day newspaper readership is decreasing.
- (iv) Most listeners to radio news listen to at least two different radio stations. Most of those consumers are likely to have the BBC as one source of news (given that BBC stations in total account for over 50% of radio listening). There are around 97 radio enterprises today (in addition to cross media groups the BBC and GMG). The combined share of radio listening of stations which take wholesale news from Sky is around 43%. However those radio stations retain editorial control over their output. Neither News nor Sky is a radio broadcaster. Radio listening has been on a downward trend. In terms of the importance of the medium as a source of news and in minutes of consumption per day radio listening is decreasing.
- (v) Most people who use internet news sources use 3 or 4 sources of news (average is 3.5). Roughly half of these will have the BBC as one of their sources of news (the BBC has more than double the number of unique views and five times the page views of the next most commonly viewed news website). In combination News and Sky would have only around 6% of page views for news sites. Just in the last year, the number of news and information websites tracked by Comscore in the UK rose 14% to 706. The total number of consumers using the internet as a source of news is increasing rapidly. In terms of the importance of the medium as a source of news and in minutes of consumption per day the internet is increasing rapidly. According to the Oxford Internet Institute, "*Over half (58%) of Internet users said they read a newspaper or news online [in 2009], in comparison to 30% in 2007.*"

- 2.7 In carrying out any qualitative analysis of the sufficiency of plurality, the role of online consumption is crucial. Ofcom appears to dismiss online sourcing on the basis that it has "not yet replaced traditional media". However, this cannot conceivably be a sensible threshold test and misses the point entirely. News has not argued that online has replaced traditional media (although Ofcom's own figures suggests it has for some consumers). However online news provision and consumption **adds** to traditional media and this increases plurality both quantitatively and qualitatively. The internet complements other sources of news, frequently providing access to news sources that are not available in other media.
- 2.8 In light of this overview of trends within media, News does not consider that it can reasonably be asserted that the Transaction will lead to insufficient plurality for any cross-media audience in the UK.
- 2.9 It is in that context the specific impact of this Transaction must be considered. As the chart below shows, only a relatively small percentage of the UK population currently take news from both News and Sky sources and only a minutely small proportion of the UK population (0.3%) currently choose, from the plethora of sources of news available to them, to access news only from News and Sky:

Figure 2: Proportion of UK adults affected by the Transaction

Source: TGI survey data, survey conducted between April 2009 and March 2010, as accessed on 12 November 2010.

(c) News' existing level of control over Sky must, legally, form part of the analysis of the impact of the Transaction on the sufficiency of plurality

2.10 Ofcom appears to assume throughout its analysis that Sky and News, pre-Transaction, are entirely separate enterprises.

2.11 It is clear that this is not correct and Ofcom must, legally, take into account in its analysis the reality of the situation before and after the Transaction (i.e. that pre-Transaction the position is that UK competition authorities have already found that News has material influence over Sky) when it comes to assessing the sufficiency of plurality.

2.12 That it is incumbent on a regulator assessing the PIC to take into account the actual level of influence over another company was clearly established by the Court of Appeal in the Sky/ITV case, where the Court found that:

*"[...] it seems to us that the Commission was correct to hold that, whereas in reckoning the number of controllers of media enterprises for the purposes of section 58(2C)(a) only one controller is to be counted in respect of both or all of the relevant enterprises (here Sky and ITV), nevertheless, when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the Commission may, and should, take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control."*¹

2.13 It is axiomatic that, if it is necessary to consider the degree of control exercisable post-Transaction when considering the sufficiency of plurality, it is also necessary to consider the degree of control

¹ *British Sky Broadcasting Group Plc v Competition Commission*, Court of Appeal (Civil Division), 21 January 2010, [2010] EWCA Civ 2 (Sky/ITV), at paragraph 121.

exercisable pre-Transaction when assessing whether the Transaction has made any material change in the sufficiency of plurality.

2.14 Indeed, although it is hardly mentioned as part of the public debate surrounding the proposed Transaction, News considers that it is highly relevant that Sky News was launched as a channel in 1988, at a point when the then four-channel Sky Television service was under the sole control of News, having been announced to the British Academy of Film and Television Arts by Rupert Murdoch on 8 June 1988. The assessment to be carried out by Ofcom and by the Secretary of State is thus whether the re-acquisition by News of a broadcast news channel which it established, and in which it continues (indirectly) to own an almost 40% stake, might result in a material reduction in the sufficiency of plurality. News considers that it is quite clear that the answer must be that it will not.

3. FAILURES IN OFCOM'S ATTEMPT TO CONDUCT A "NUMERICAL" AND "QUALITATIVE" ANALYSIS OF NEWS' RELATIVE STRENGTH AND INFLUENCE

3.1 Ofcom reaches the preliminary view that:

"The transaction would further strengthen News Corp's ability to influence the cross-media market for news and current affairs".

3.2 Ofcom comes to this view (according to paragraph 20), having decided that an assessment of the "number, range and variety and strength" of different voices are of importance. Having made this statement, Ofcom proceeds to carry out a purely numerical analysis (and, indeed, a numerical analysis which is itself flawed) in paragraph 21 and to assess the relative strength of News in paragraphs 22 to 39. Ofcom fails to conduct any qualitative analysis of the range and variety of news voices available to audiences. This is a fatal error as it is exactly these aspects which are key to an assessment of the sufficiency of plurality. This was confirmed by the Court of Appeal in *Sky/ITV*, which also confirmed that range and variety must mean more than just number:

*"We agree with the Commission on this and would reject Mr Gordon's argument. The word plurality can connote more than just a number exceeding one. It may carry an implication of range and variety as well. Certainly it has that meaning in subsection (2B). We consider that it does so in subsection (2C)(a) as well."*²

3.3 We identify below the serious flaws which exist in the analysis which Ofcom does carry out.

(a) Flaws in Ofcom's headcount analysis (paragraph 21)

3.4 As indicated above, every merger situation between two controllers of media enterprises would, by definition, result in the number of controllers reducing by one. It is difficult therefore to see what conclusions Ofcom might wish to draw from the fact that there is (arguably) a reduction from 16 to 15 controllers (or 11 to 10 controllers if broadcasters who currently choose to source news content from Sky are excluded). News does not believe that even a reduction from 11 to 10 controllers of media enterprises could be said, on any reasonable basis, to point to a situation of insufficient plurality.

3.5 Ofcom then proceeds to draw the conclusion that because there is one fewer controller there must, by definition be less range and variety. While this might be true in a literal sense (one fewer voice = less variety), Ofcom's approach renders these concepts indistinguishable from number and therefore meaningless. This is clearly not what the Court of Appeal in *Sky/ITV* intended.

² *British Sky Broadcasting Group Plc v Competition Commission (Ibid.)*, at paragraph 90.

- 3.6 Indeed, although Ofcom indicates that it will begin with an assessment of the number of relevant media enterprises, for some reason it fails even to begin from this starting point but immediately begins to exclude media enterprises on a variety of bases, without ever attempting to calculate the total number of controllers of media enterprises in the UK. This total number, measuring the voices potentially available to consumers in the UK as sources of news, taking into account only external plurality, is a crucial starting point when carrying out a quantitative analysis.
- 3.7 News would add to the list, in addition to those identified by Ofcom:
- (i) TV broadcasters whose broadcast news is potentially available to all consumers in the UK. News calculates that there are at least 11 additional controllers of relevant TV broadcast media enterprises, including: France Télévisions (France 24), Al Jazeera, Time Warner (CNN), SOCEMIE (Euronews), RIA Novosti (RT), NBC (CNBC) and CCTV (CCTV News).
 - (ii) Three large local newspaper controllers (Newsquest, Johnston Press and Archant) publishing numerous titles that cover national news, albeit each serving national, regional or local audiences.
 - (iii) At least 81 other smaller local newspaper groups.
 - (iv) 93 local radio broadcasters who may individually have small shares nationally but are collectively an important voice, with almost 9% market share, including Orion Media.
- 3.8 News would calculate therefore that at least 122 controllers of relevant media enterprises in the UK will remain post-Transaction (or 203 if the large number of independent local newspapers is included).³
- 3.9 The Issues Letter is generally dismissive of smaller players. However, one of the key benefits of the transition to digital media has been that it has made available a 'long tail' of greater choice to consumers. Although broadcasters such as Al Jazeera, CNN, CNBC and Bloomberg might have relatively modest audience shares, these and other broadcasters are collectively significant in ensuring that an increasing plurality of views is directly accessible to UK audiences. By definition individual members of the long tail are small, but to dismiss their aggregate impact is to ignore a fundamental development in the market in recent years which has increased plurality.
- 3.10 Ofcom also excludes online-only news providers (and implicitly news magazines such as the Economist and Prospect) on the basis that they are not defined as media enterprises under the Enterprise Act 2002 (the Act). If Ofcom is taking this literal approach, notwithstanding the evident contribution of such entities to plurality, it is puzzling that it so readily departs from a literal approach in excluding numerous players that clearly are media enterprises under the Act simply because they are small.
- 3.11 News believes that when carrying out a qualitative analysis of the sufficiency of media plurality it is relevant to take into account enterprises which are not media enterprises in the terms of the Act. It is impossible to get any meaningful picture of the options available to consumers or the way in which the news agenda is set without taking into account the role of online news providers or news gathering organisations (see also para 3.15 below).

³ This figure excludes online news providers.

- (b) **Ofcom's attempts (in paragraph 21 and later) to ignore media enterprises who currently choose to source wholesale news from News or to attribute their audience share to News are not legitimate**

- 3.12 The CC recognised in its report to the Secretary of State on Sky's acquisition of shares in ITV (the CC Report) that:

"The channel operator remains ultimately accountable (including to the regulator) for the news that is presented on its channels. The presentation of individual news stories may on some occasions be discussed between the programme provider and the channel operator either before or after transmission" (emphasis added).⁴

- 3.13 Thus it is not legitimate to view the provision of wholesale news to a broadcaster in the same way as the provision of news directly to an audience. Most notably, there is nothing permanent at all about these supply arrangements and they can be lost as well as won. The current arrangements represent a choice on the part of the responsible broadcaster, to source wholesale content from Sky for a particular period, on the understanding that the broadcasters will (as they are obliged to do) retain full editorial control over their own stations.

- 3.14 For example, to the extent that competition to supply content to PSB channels (or Five in particular) is relevant to an analysis of plurality, it should be noted that:

- (a) at the time of the CC Report, Five took the view that the most cost-effective way for it to supply news would be to source news from an external provider and not to provide it in-house;
- (b) competition for the contract to supply news to Five was won by Sky following a competitive bidding process.

- 3.15 In considering wholesale provision, Ofcom also does not take into account entities that do not have a significant retail outlet, but are nonetheless highly important from the wholesale perspective. For instance, the Press Association (PA) has 850 staff and is a key supplier to virtually all UK media organisations. Some sources suggest that 30% of broadsheet home news stories are drawn directly from PA.⁵ Reuters and AP are also heavily used. These organisations also undoubtedly influence the news agenda, as discussed further below.

- (c) **Ofcom's finding (at paragraphs 22 and 26) that News would have an "unmatched" presence and relative standing across the main news platforms is unsustainable and the evidence put forward as to News' share of cross-media consumption is selective and unreliable**

- 3.16 At paragraph 22 of the Issues Letter, Ofcom states that the Transaction:

"would give News Corp an unmatched position in terms of presence, scale, ability to influence and resources".

- 3.17 This statement is factually inaccurate, biased and entirely unsupported by the evidence put forward in the Issues paper. Fundamentally, the analysis of Sky's relative position ignores the omnipresence of the BBC as the leading provider in TV news, radio and online provision of news.

- 3.18 While Ofcom makes the simple point that the BBC lacks presence in newspapers, and therefore is not present across the same list of platforms as a combined News and Sky, the point can equally be

⁴ *Acquisition by British Sky Broadcasting PLC of 17.9 per cent of the shares in ITV PLC, Competition Commission Report sent to Secretary of State (BERR) 14 December 2007, at paragraph 5.55(d).*

⁵ *Nick Davies, Flat Earth News, 2008.*

made that News/Sky would not have editorial control over any radio stations. At most, News/Sky would be a supplier of content to radio stations, but it could equally be argued that the BBC is a very important supplier of new stories to newspapers.

3.19 By any test of which News is aware, the BBC is by far the strongest (and the most influential) news organisation in the UK and by a large margin the leading provider of TV, radio and online news. News estimates that BBC's 'share of voice' in news is approximately four times that of News (see **Annex 4**). Even by Ofcom's own analysis at paragraph 29 of the Issues Letter, the BBC represents the main source of news for 54% of UK viewers.

3.20 In its review of Sky/ ITV, the CC took account of the BBC when assessing sufficiency of plurality, noting that:

"We looked at the existing levels of plurality for national television and cross-media news audiences absent the acquisition. We noted the following indicators of plurality of news:

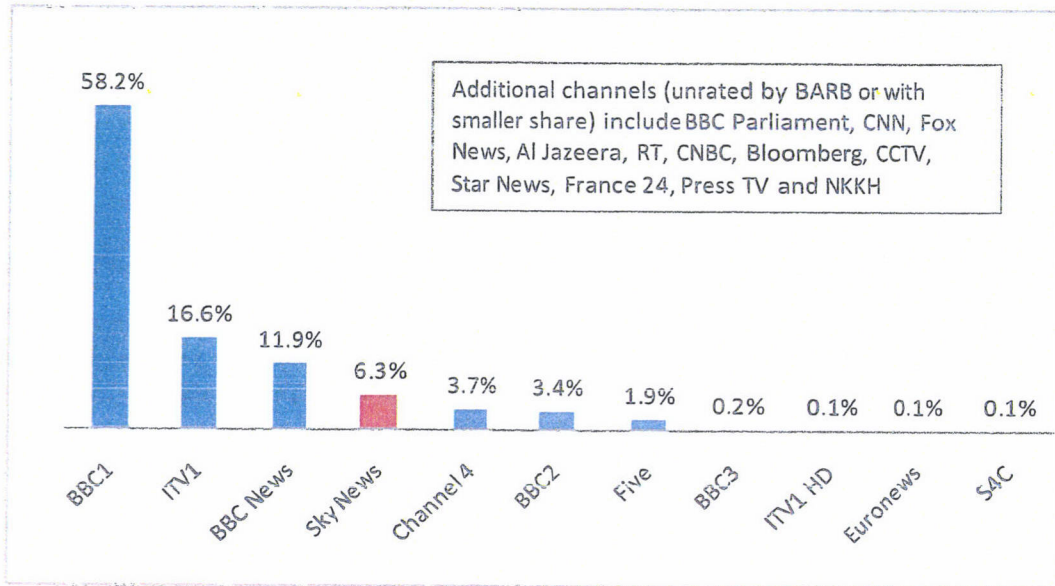
(a) The five main channel providers (BBC, ITV, BSkyB, Channel 4 and Five) account for at least 97.5 per cent of total television news viewing. The BBC is by some margin the most widely viewed channel provider for news, followed by ITV" (emphasis added).⁶

3.21 It is also, on reading the Issues Letter, difficult not to come to the conclusion that Ofcom has used data selectively so as to give an inflated impression of the importance of News and Sky News:

- (i) Ofcom stresses the importance of TV as a medium in the first bullet of paragraph 25, it then gives a 'large number' – 4.8 million – identifying the number of viewers reached by Sky News. Ofcom identifies only in a footnote that this number is calculated on the basis of a very low '3 minute weekly' viewing threshold which hardly seems sufficient to equate with a material degree of influence over viewers' opinions. Ofcom does not attempt to put this in the context of other broadcasters. In fact Sky News is the third largest provider of TV news, by a significant margin, and has a share of news viewing of just 6.3% (even including viewers of Five news would only take this to 8.2%) behind the BBC, which has a 75% share, and behind ITV.

⁶ CC Report, at paragraph 35.

Figure 3: Share of TV news consumption: 2010 year to date (Figure 8 of Perspective Report)



Source: BARB, Perspective Associates analysis

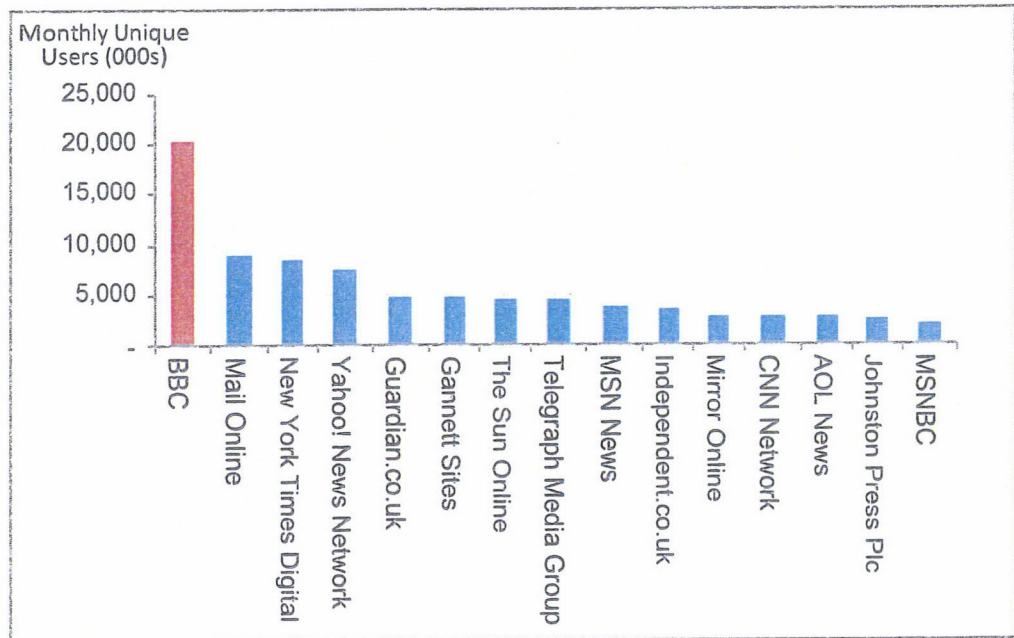
Notes: Channels include viewing of their +1 where appropriate
Volume of Viewing calculated based on DurMin and 000s

- (ii) Assessing newspapers (where it can attribute a meaningful share to News by treating all of the News International titles together) Ofcom reverts to market shares. It then supports these with measures of readership which fail to capture unduplicated readership and are therefore unreliable. Ofcom compares readership of 7.7 million for The Sun and 1.6 million for The Times to a total unduplicated readership of 19.8m. However, this compares title figures that will include overlap with each other to the unduplicated total, and thus overstates News' market position. The gross readership of national dailies (as opposed to the net figure used by Ofcom) is 24.9 million (however, even this materially understates the wider market in which News operates, since it ignores, for instance, titles such as the Evening Standard and Metro, both of which provide substantial national news and have a combined readership of a further 4.8 million). On the most conservative basis, looking at its titles against gross newspaper readership, News would have a share of readership of national daily newspapers not more than 37%. Taking into account the Evening Standard and Metro, News would have a share of newspaper readership of around 31%.
- (iii) Online is dismissed on the basis that it has "not yet replaced traditional media"⁷ however, this cannot conceivably be a sensible threshold test and misses the point entirely. News has not argued that online has replaced traditional media (although in some cases it might). Rather it argues that online news provision and consumption adds to traditional media and evidence of consumers' multisourcing of media consumption shows that this increases plurality both quantitatively and qualitatively. The internet complements other sources of news, frequently providing access to news sources that are not available in other media.

⁷ At paragraph 25 of the Issues Letter.

- (iv) When online is discussed, News' position is portrayed in a biased and inaccurate manner. Ofcom says that News is 'prominent' with the third highest reach among news websites. We note that Comscore places News (The Times, The Sun and Sky News added without reducing for duplication) fourth, far behind the BBC, and also lagging the Mail and the New York Times, and just slightly ahead of Yahoo! News Network. More importantly, News' share (including Sky) is just 6.2% of total page views. Finally, Sky News' website (which is what defines the difference to News' online market position after the Transaction) has only the 17th highest reach, and a share of 1.3%.

Figure 4: Monthly unique UK audience for news sites, (000s) (Figure 17 of Perspective Report)



Source: ComScore top news sites, UK, July 2010

- (v) Ofcom says its research found 24% of consumers 'regularly' use the internet to access news. With 50.6 million UK adults, this implies 12.1 million news users. However, the actual usage tracked by UKOM cited later in the same paragraph says 23.6 million users. This is a substantial difference. Either the research is flawed, or the usage tracked by UKOM is not 'regular' – if the latter, Ofcom has overstated News' influence by using the UKOM reach metrics.

3.22 Again, Ofcom does not make any reference to the fact that consumers access multiple sources of news. To equate a growth in a particular company's market share with a reduction in plurality is simply illegitimate. Consumers multi-source news and even if everyone in the UK began tomorrow to read the Guardian and/or the Guardian website in addition to their existing sources of news, while this would massively increase the reach, the share of mentions and the market share of the Guardian, it is hard to see how plurality would be harmed. Ofcom also fails to take account of the relative strength of the different media components. As discussed at para 2.6 above, News has a strong position in a declining platform – newspapers - (that is 'overweighted' in Ofcom's analysis), a weak position in TV as the third player by some margin ('underweighted' in Ofcom's analysis) and a relatively weak position in online (which is expanding).

- 3.23 Indeed, it is hard to see how Ofcom's finding at paragraph 26 of the Issues Letter that News and Sky would have "a presence and relative standing across the main news platforms that would be unmatched by any other news provider" even if it were true (which News would deny) could have any relevance to an assessment of the sufficiency of plurality.
- 3.24 News' view is that: (a) just because one provider is bigger than another, this does not provide evidence that plurality is insufficient; and (b) just because one provider grows its readership or audience does not mean that plurality falls and thereby becomes less sufficient.
- (d) Ofcom's assessment of share of consumption (paragraphs 27-34) is flawed, based on unreliable evidence, and in any event identifies no obvious basis for concern**
- 3.25 News has provided Ofcom with an analysis based on TGI and Touchpoints data which are reliable sources on cross-media news consumption. These sources were used and relied upon by the CC in Sky/ITV. On the contrary, Ofcom has chosen to rely on: (i) its own consumer survey conducted for the purposes of this investigation to measure cross-media consumption; and (ii) a submission by Enders Analysis (**Enders**) showing news consumption in minutes.
- 3.26 Various of the findings based on this evidence differ markedly from equivalent findings in other data sets published by Ofcom and independent third parties, as described in more detail below. The evidence is also presented in the Issues Letter in a way which seems designed to emphasise the importance of News and Sky and to downplay other media voices.
- (i) Ofcom ignores the importance of multi-sourcing**
- 3.27 The essential problem with Ofcom's analysis and understanding of this evidence is that Ofcom is almost exclusively focused on share (as is the Issues Letter), making no attempt whatsoever to understand plurality of consumption – e.g. how many news sources the average individual is drawing from – and what difference, if any, the Transaction makes to that plurality.
- 3.28 Again, Ofcom fails fundamentally to engage with the heart of an analysis of plurality which is the range and variety of voices available to audiences. Specifically, it appears to have failed to consider whether consumers would experience a reduction in the number of voices they receive as a result of the Transaction and whether this would result in there being insufficient plurality post-Transaction.
- 3.29 News provided Ofcom with extensive evidence as to the extent to which UK consumers consume multiple sources of news and the range of providers of news with which those audiences are actively engaged. (See section 5 of the FTI Report) Ofcom indicates at paragraph 62 of its Issues Letter that it did not find that information instructive, whereas News submits that that evidence is central to any analysis applying the correct legal test. As News made clear in its submission of 23 November 2010, only 6% of the UK population actively rely on both News International newspapers and Sky News for news content and of that 6%, 96% also actively use other sources, and therefore only 0.3% of the UK population receive news from only Sky and News International.
- (ii) Critique of Ofcom survey evidence**
- 3.30 Ofcom's survey question⁸, "what is your main source of news", starts by assuming a non-plural scenario where consumers have a clear hierarchy of news providers, rather than drawing simultaneously from a number of different sources.
- 3.31 Moreover, the survey's results are significantly different from those included in the latest Ofcom media tracker – implying a jump in consumers citing newspapers from 8% to 14% (contrary to the

⁸ As provided to News by email on 15 October 2010.

steady downward trend since 2005), and a drop for TV from 73% to 67%⁹ in a single year. Strikingly, when Ofcom is seeking to emphasise the importance of TV, it uses the higher 73% figure from the 2009 research.¹⁰ It is also notable that later in the Issues Letter, when it is seeking to downplay the importance of the internet relative to newspapers, it switches to using the more recent research, citing the 14% figure for newspapers.¹¹ Other independent sources show that the internet is as important or more important than newspapers.¹²

3.32 In addition, the 6% of respondents identifying Sky News as their main source of news in Ofcom's survey seems at odds with pre-existing TV consumption data. Even the 3 million individuals (roughly corresponding to 6% of UK adults) who watched the most Sky News watched approximately 60% more BBC news than Sky News. As such, it seems highly surprising that 6% of Ofcom's survey respondents would say Sky News was their *main* source of news. (There is the potential for confusion in this regard if consumers identify that they watch news on the Sky platform – which could well be BBC news – rather than that they watch the Sky News channel.)

3.33 Moreover, it is puzzling that:

- (i) Ofcom emphasises, on the basis of the survey, that News and Sky would be the second largest main provider with 15%, since the difference between this and ITN's figure of 14% is so narrow that the statistical margins of error are such that Ofcom in fact can not know if ITN leads News/Sky or vice versa.
- (ii) Radio is almost certainly underreported at 32% of respondents getting the news this way each week. Radio reach per RAJAR is 91%, and the average listener listens to 22.6 hours – even listening to just a fraction of this will inevitably involve exposure to some radio news .
- (iii) Internet is also low (at 36% per month), in light of commonly used data from Comscore which suggests a figure of around 70%.
- (iv) Ofcom has chosen to split "*internet on a computer*" and "*internet on a mobile phone*" and has apparently used only data with respect to the former in the Issues Letter. For the purposes of this exercise it is not clear why this split is any more relevant than splitting 'newspaper at the kitchen table' and 'newspaper on the train'.
- (v) the Guardian scored 2% as a main source of news, and yet the Mirror (with a circulation almost four times that of the Guardian) was apparently mentioned less than 1% of the time.

(iii) Critique of Enders' Analysis

3.34 As with Ofcom's own survey, the Enders' analysis is almost exclusively focused on share, making no attempt whatsoever to understand plurality of consumption. Moreover, while time spent consuming news media by medium is a useful indicator of the *trend over time* of consumers increasingly taking their news from the internet (in addition to other sources), it is less clear that this is an appropriate metric on which to assess media plurality; intuitively, it is clear that one can consume a lot of news in a relatively short period of time on an online news website (let alone surfing between different online news providers). Conversely, viewers may consume relatively few news stories while watching a 30 minute TV news broadcast (though those stories may be presented in more detail). This flaw feeds through to the results of Enders' analysis which purports to show that consumption

⁹ This figure is calculated by deducting the newspaper, online and radio figures from 100%, since Ofcom has not provided the actual figure. Given that the 2009 research appears to have had 5% responding 'don't know/other', the actual TV figure in the latest research could be even lower.

¹⁰ Paragraph 25 of the Issues Letter, 'TV' bullet.

¹¹ Paragraph 25 of the Issues Letter, 'Online' bullet.

¹² See for instance: Mintel, *Consumer Perceptions of News Media*, September 2010; Philipp Nattermann, "A glimmer of hope for newspapers", *McKinsey Quarterly*, April 2010; and FD, *Media Monitor*, October 2010.

of online news is trivial, whereas Ofcom's own research says 10% of respondents cite online news as their main source.

3.35 The limitations of an application of Enders' data to an assessment of plurality can also be seen in the over-weighting given to the consumption of news from newspapers (given the relatively longer time required to 'consume' news from a paper as opposed to TV broadcast or online and the fact that a proportion of the time spent reading newspapers will not involve news consumption – e.g. completing a crossword): of the various news media, readers of newspapers are among the most likely groups to consume news from a plurality of different sources.

3.36 However, the most crucial point is that, even using the Enders data as presented, but stripping out wholesale provision, Sky's share falls to just 2%. News would argue that an increment of 2% could not conceivably involve a material change in the sufficiency of plurality.

(iv) Neither analyses give rise to any plausible cause for concern re plurality

3.37 Even on the basis of Ofcom's data, the combined share of News plus Sky is suggested to be – as a maximum – in the region of 22%. Ignoring wholesale provision, the combined share is around 17%. This is hardly suggestive of market power and it is far from evident why it should lead to any concern.

(e) Ofcom's analysis of News' 'influence' and its resulting concern that News would have an increased ability to influence the news agenda and public opinion (paragraphs 35-37) on its face confuses 'trust' and 'influence on the news agenda', fails to acknowledge how the news agenda is set and ignores the BBC

3.38 The Issues Letter appears to confuse the analysis of two issues: (a) the ability of a news source to influence its audience and (b) the ability of a news source to influence the broader news agenda. The two issues are not necessarily linked. To take an example, Al Jazeera would have almost no influence on audiences in the UK and would be unlikely to be viewed as a trusted source but its coverage has a disproportionate impact on the broader news agenda.

3.39 Given that Ofcom has subsequently indicated that, although paragraph 37 of the Issues Letter refers to the news agenda, it intended, in this section, to analyse influence over public opinion. In any event, as Ofcom focuses on the issue of influencing the news agenda in "Issue D", News will address arguments about the broader news agenda at that point.

3.40 Ofcom appears, in paragraph 36 of the Issues Letter, to suggest that because Sky News is "trusted" by its viewers, it is able to influence public opinion and that the Transaction would therefore give News a greater ability to influence public opinion. There are a number of flaws in this argument:

(i) Fundamentally, the reason that TV news is reported as more 'trusted' in the UK is because regulation of TV news broadcasting ensures that reporting is impartial and (as News has previously explained) means that the accepted 'culture' of TV news reporting in the UK is different from newspapers and other media. Continued effective regulation would prevent News from changing this. Even if News did change this, one could anticipate that the result would be a sharp reduction in the percentage of Sky News' audience that trusts Sky News.

(ii) An ability to influence the audience of Sky News does not equate with an ability to influence public opinion. Sky News share of news consumption is only 6.3% and its reach is 2.3 million adults¹³.

¹³ Based on 15 minute non-consecutive weekly reach, 1/11/2010-28/11/2010.

- (iii) By contrast with Sky, the BBC has around 75% of TV news viewing, and Sky News's influence over public opinion can in no way be compared to an operation with the scale and reach of the BBC and fails to reflect reality (see also Annex 4).
- 3.41 In News' view, even if News did gain a greater ability to influence public opinion there is no reason why this should impact on the sufficiency of plurality in the UK.
- (f) **Arguments based on the allegedly disproportionate "resources" of News and Sky (paragraphs 38 and 39) are incongruous and worrying in a market economy**
- 3.42 The Issues Letter appears to suggest, in paragraph 39, that an imbalance in resources between different media enterprises is itself bad and a cause for concern. It is hard to conceive of a situation where there would not be an imbalance in resources, absent centralised state planning and it is clear that in the current climate, where decisions are required to be based on a rigorous and supported analysis, the OFT and the European Union would both dismiss theories of harm based on access to economic resources as lacking any credible economic support. It is still less clear how an imbalance in resources relates to an assessment of the sufficiency of plurality. For these reasons we trust that Ofcom will not give any serious weight to this apparent "concern".
- 3.43 The proposition put to Ofcom that no media enterprise in the UK other than (apparently) News, Sky or the BBC is or will be in a position to invest or innovate does not hold any credibility. Ofcom appears to be relying on self-serving statements from third party industry participants, which should play no role in a plurality assessment.
- 3.44 Ofcom identifies 14 media enterprises (in addition to News and Sky) in the "headcount" it conducts at paragraph 21 of the Issues Letter.
- (i) The BBC has recently reached agreement with the Government which secures its funding for the next six years until the end of the Charter 2016/2017.¹⁴
- (ii) ITV's adjusted cash flow in the financial year ended 2009 was £358 million, an increase of £200 million from 2008, and it is expected to increase both its sales and operating profits in 2010. ITV has announced that it intends to invest around £50 million in the next two years in increasing internet revenue and developing programme formats to be sold abroad.¹⁵
- (iii) Channel 4 had total assets of around £559 million and revenue of £830.3 million in 2009. Its digital profits were at an all time high.¹⁶
- (iv) DMGT plc (the parent of Associated Newspapers and Northcliffe) is also performing strongly, having recently announced an increase in total adjusted pre-tax profits of 23% to £201 million in the year to 3 October 2010. Both the Daily Mail and Metro recorded their highest ever operating profits. DMGT has announced that it foresees further growth and development in digital and online products in 2011.¹⁷
- (v) Guardian Media Group (GMG)/The Scott Trust exists for the sole purpose of safeguarding the journalistic freedom and liberal values of the Guardian. GMG's existing portfolio of investments ensures that it has "sufficient resources to meet the immediate funding requirements of [the Guardian's] journalism, to invest in its development, and to provide it

¹⁴ http://www.bbc.co.uk/aboutthebbc/therealstory/licencefee_settlement.shtml.

¹⁵ <http://www.itvplc.com/investors/reports/?year=2009>; http://www.ft.com/cms/s/0/8b4d2d22-4f07-11df-b8f4-00144feab49a,dwp_uuid=6c86e83a-b739-11de-96f2-00144feab49a.html#axzz1862LZVJt.

¹⁶ http://2009report.channel4.com/pdf/C4_Annual_Report_09.pdf.

¹⁷ <http://www.guardian.co.uk/media/2010/nov/25/daily-mail-and-general-trust>.

with long-term financial security".¹⁸ GMG's cash reserves in 2010 exceeded £260 million and its assets were worth some £586 million.

- (vi) Telegraph Media Group, the newspaper, magazine and online publisher, made pre-tax profits of £53.1 million in 2009. Its assets as at January 2010 amounted to £181.9 million.¹⁹
- (vii) Northern & Shell (N&S) had net assets of £89 million and a turnover of £484 million in its latest financial statements. Earlier this year, N&S confirmed plans for a £1.5 billion investment in Channel 5's programme and content development over the next five years.
- (viii) Pearson (the parent company of the FT) has assets of over £10 billion. Its FT Group business has grown by both sales (11%) and profits (18%) last year as a result of investment in fast-growing digital formats and new product launches.
- (ix) The Independent was purchased in March of this year by Alexander Lebedev (who also purchased the Evening Standard in 2009) and whose fortune was recently estimated at more than \$2 billion by Forbes magazine. Investments this year include the launch of 'i', the first quality daily paper to launch in Britain since 1986.
- (x) Trinity Mirror plc, one of the UK's largest newspaper publishers, had assets worth some £1.6 billion and group revenue of £763.3 million in 2009.²⁰ Its portfolio of digital brands increased by 41% from 2008.
- (xi) Global Radio UK Limited, of the UK's leading commercial radio with over 19.8 million listeners, had assets of £456 million and made a profit of £170 million in 2009.²¹
- (xii) Bauer Radio is a subsidiary of Bauer Media Group, Europe's largest privately owned publishing Group, offering over 300 magazines in 15 countries, as well as online, TV and radio stations.²² Bauer Media Group had assets of €1.4 billion in 2009 and sales from radio more than tripled, reaching a total of €166.5 million.²³
- (xiii) Absolute Radio's ultimate parent is The Times Group, India's largest media conglomerate. Its 2007 turnover was estimated at around \$700 million USD.
- (xiv) UTV Media plc, the UK and Ireland based TV, Radio and new media enterprise had revenue of £59.2 million and assets worth some £318 million in 2009.²⁴

3.45 The idea that any perceived imbalance in resources may lead to exit (paragraph 39) is pure speculation and cannot be cause of a serious concern. There is no reasonably foreseeable likelihood that any of these enterprises will exit the market in the near term. A future market development which cannot be said at the very least to be reasonably foreseeable within a reasonable timescale cannot validly be taken into account by Ofcom or the Secretary of State. Moreover, such hypothetical developments (to the extent that they will occur at all) would be totally unrelated to the Transaction. Ofcom appears to link this proposition to its speculative forward-looking theories which are discussed further below and to which News will respond in that context.

(g) **Role of online is relegated to a future development and effectively dismissed**

¹⁸ is http://www.gmgannualreview2010.co.uk/files/review-of-the-year/GMG_Financial_Highlights.pdf.

¹⁹ Report and Accounts for the period ended 3 January 2010, obtained from Companies House.

²⁰ <http://www.trinitymirror.com/pdf/2009PreliminaryAnnouncementFinal.pdf>.

²¹ Directors' Report and Consolidated Financial Statement 2009, obtained from Companies House.

²² <http://www.bauermedia.co.uk/About>.

²³ http://www.bauermedia.com/uploads/tx_hbvdownloadelement/Bauer_Media_Group_Gesch_ftsbericht_2010_Engl.pdf.

²⁴ http://www.utvmedia.com/resources/documents/U/T/V/UTV_Media_plc_Interims_2010_Final.pdf.

- 3.46 The limited role attributed to online news provision and consumption throughout Ofcom's analysis is baffling. This is relegated to "Issue E" and presented as a future development. News has presented on 23 November compelling evidence to show that online news provision and consumption is already a key form of distribution and consumption of news. This has **already** had transformational effects on news provision and consumption and this trend is clearly set to continue. Indeed, Ofcom itself has noted that:

"The web offers the potential for almost limitless diversity in news, discussion and debate...In future there will be ever more outlets for audiovisual news including through the internet with its almost limitless capacity for information, analysis and opinion...The unprecedented availability of such a huge range of traditional and new sources of news opens up possibilities for real diversity of opinion to be heard ... in future, this new environment may expose limitations in the traditional notion of plurality on PSB television news, which was originally based around a simple BBC/ITV duopoly".²⁵

"As we complete the first phase of our second statutory review, consumers and citizens are also turning to interactive media to fulfil many of the needs historically served by public service television broadcasting. The internet has emerged as a significant source of information, educational content and entertainment, particularly for younger audiences. Interactive technologies are beginning to play a key role in informing us and supporting participation in democratic processes. Other television channels play a role too, with significant numbers of viewers now seeing digital-only channels as their primary source of entertainment, sports and knowledge about other topics that interest them.

[...] The growth of digital television and the internet has broken down geographic boundaries and allowed audiences to see much more of the world's best content. Digital channels offer acquired programming with high production values, often from the US. The internet creates a platform for new talent, and for niche providers and individual voices to reach an audience. Consumers and citizens today have a huge digital opportunity: greater access than any previous generation to information from around the world and about the topics that interest them."²⁶

- 3.47 News has **not** argued that online will *replace* traditional media (although in some cases it might), rather online news is mostly additive to traditional media and therefore it does (and will continue to) increase plurality substantially. As Ofcom notes:

"The growth in the availability and take-up of the internet has provided another platform over which a variety of content types can be delivered to consumers. Rapid take-up of broadband by consumers means that the majority (71%) of households now have instant access to this content (though by no means all choose to). In recent years the internet has had a significant impact on how people can consume content:

it allows existing forms of content such as TV-like programming and radio to be consumed in new ways (for example, on demand, or interactively); and

it has allowed new, internet-only content types to emerge (such as social networking sites, blogs and other user-generated content)."²⁷

²⁵ *New News, Future News: the challenges for television news after Digital Switch-over*, Ofcom, 26 June 2007, at page 2.

²⁶ Ofcom's Second Public Service Broadcasting Review, Phase One: The Digital Opportunity, 10 April 2008, at paragraphs 1.3 and 1.4.

²⁷ *Ofcom Communications Market Report 2010*, at page 235.

4. ISSUES B AND C: INTERNAL PLURALITY AND ROLE OF REGULATORY CONSTRAINTS

4.1 On Issue B – the role of internal plurality – the Issues Letter appears entirely dismissive of this and of the considerations put forward by News in the initial submission of 23 November.

4.2 News has **not** argued that internal plurality is a substitute for external plurality, but it does play a role in the overall sufficiency of plurality assessment taking into account the existing elements of external plurality available to the cross-media audience. In its submission of 23 November News explained why a number of considerations which are specific to TV news broadcasting mean that internal plurality within Sky News will remain post-Transaction. In particular, TV news broadcasting must be assessed within the particular regulatory context in the UK including the Broadcasting Code.

4.3 The CC in Sky/ITV did believe that these issues were relevant to its analysis:

"[W]e concluded that the regulatory mechanisms, combined with a strong culture of editorial independence within television news production, were likely to be effective in preventing any prejudice to the independence of ITV news" (emphasis added).²⁸

"In television news, existing regulatory mechanisms—including quality controls (eg in the Broadcasting Code), requirements for impartiality and quotas for television news and current affairs programming—reduce the scope for influence over editorial decisions by owners of television channels which broadcast news".²⁹

"There are fewer regulatory restrictions on newspapers than on television news and, in particular, newspapers are able and expected to take an explicit editorial position in relation to topical issues. All respondents to our questionnaires told us that day-to-day editorial decisions for newspapers and allied websites were made by editors and journalists, and not by board directors or shareholders. However, boards usually play some role in the appointment of editors, and may also determine the overall political stance in line with the target audience for a particular newspaper title".³⁰

4.4 In relation to Issue C, the Issues Letter dismisses the role of the Broadcasting Code in safeguarding plurality on the basis that it does not cover the selection and prominence of news. News has submitted that the provisions of the Broadcasting Code have a key role in ensuring internal plurality in relation to TV news reporting and therefore in safeguarding also external plurality. The view set out in the Issues Letter is based on a wrong legal interpretation of the scope of application of the Broadcasting Code. A legal opinion of Lord Pannick QC attached to this response under **Annex 1** confirms News' views previously put to Ofcom. The fact that Ofcom has received what it describes as "*conflicting representations*"³¹ on this issue does not dispense with the need to form a view based on the strength of those representations. As you will see from the attached opinion, the impartiality rules in the Communications Act 2003 help to ensure that, in practice, the owner of a television station (or the news editor) could not intervene to require news items to receive lesser (or indeed greater) prominence for political reasons, or no coverage at all for political reasons. They advise that the concept of 'due impartiality' imposes duties in relation to the choice of stories for inclusion in the news programme, and the prominence given to a story. Such duties demonstrate that the concept of 'due impartiality' itself makes an important contribution to maintaining plurality.

²⁸ CC Report at paragraph 41.

²⁹ CC Report at paragraph 5.54.

³⁰ CC Report at paragraph 5.58.

³¹ At paragraph 41 of the Issues Letter.

- 4.5 By way of illustrative example, the joint opinion considers that a TV channel owner ordering his news channel to report a news story that is very damaging to the Government of the day as the last item on the evening news for 20 seconds, rather than as one of the lead items – which it would deserve on any objective assessment of the news agenda – would be in breach of a number of the rules set out in section 5 of Ofcom's Broadcasting Code, including rules 5.5, 5.11 and 5.12 (imposing additional "*special impartiality requirements*" on television broadcasters in relation to the coverage of "*matters of political or industrial controversy and matters relating to current public policy*") and rule 5.7 (the requirement to ensure that views are represented with due weight). The criterion of 'due impartiality' therefore prevents undue or improper influence on the (lack of) prominence of the story and, a fortiori, on a decision whether to report the story at all.
- 4.6 The same conclusion would follow if the news editor were to adopt the same approach of not giving a news item its due weight and prominence for political reasons, for example because he believes (rightly or wrongly) that this is the wish of the owner, without the owner having made any express statement.
- 4.7 Moreover, Ofcom fails to recognise the reality of TV news reporting on which the CC has already found clear evidence:

"The board of the channel provider would only be involved in decisions relating to particularly controversial stories. We were told that it was rarer still for individual shareholders of the channel provider to be involved in relation to the content of news provided over that channel. ITV told us that it was not aware of any occasion on which its shareholders had sought to influence the content of its news programming and that it was not conceivable that a shareholder could successfully influence it as to the content of its news programming."³²

5. ISSUE D: INFLUENCE OVER THE NEWS AGENDA OF OTHER MEDIA OUTLETS

- 5.1 Paragraph 47 of the Issues Letter appears to confuse two issues: (i) whether News will, post-Transaction, have influence over Sky News' editorial agenda and (ii) whether News will, post-Transaction, gain a level of influence over the broader news agenda in the UK such as to lead to insufficient plurality.
- 5.2 News submits that it will not achieve (i) for the reasons set out in its submission of 23 November and again in section 4 above. However, regardless of the level of influence News would have over Sky News, News has already put forward evidence as to why any impact on the broader news agenda would be minimal because of the way in which, in reality, the news agenda is set. Ofcom summarises part of this at paragraph 46 of the Issues Letter but does not attempt to react to it. Indeed, although the setting of the news agenda is critical to this case, nowhere does Ofcom seek to discuss how it believes the agenda is set, or seek to quantify the influence of different parties, or analyse how this would change as a result of the transaction. It implicitly makes the assumption that influence on the news agenda stems directly from audience size, but this is self evidently not the case - if this were true, the FT's news agenda would be driven by The Sun.
- 5.3 Figure 4 of the Perspective report attached to News' initial submission to Ofcom of 23 November 2010 showed that the BBC was by far the most influential source of news.

6. OFCOM'S FORWARD VIEW OF THE MARKET

- (a) **The Secretary of State has no jurisdiction to apply a competition law test or to second-guess the European Commission**

³² CC Report at paragraph 5.56.

- 6.1 Ofcom appears to have concerns that a combined News/Sky would enjoy market power to the extent that it would be able to manipulate market outcomes post-Transaction.
- 6.2 These theories of harm are competition law theories of harm which, so far as they are credible at all, fall to be considered by the European Commission.
- 6.3 The Transaction can only proceed once the European Commission has reached a formal decision that it will not lead to a significant impediment to effective competition in any relevant market. If the combined firm might somehow be in a position to force market exit (as Ofcom appears to be postulating) then Ofcom should trust that the European Commission would have taken that into account when assessing its impact on relevant markets and would have decided that such concerns were not credible.
- 6.4 Ofcom emphasised in its meeting with News on 15 December 2010 that its concerns are about "economic power" and somehow different, or beyond competition concerns. This is also stated overtly at paragraph 49 of the Issues Letter, where Ofcom states that it has concerns in relation to:

"[...] the effect on plurality of the merged entity's relative economic power. Essentially, the argument is that in light of its market position across media platforms, the combined entity may be disproportionately able to respond to market developments and further challenges, increasing its market power compared to other news providers, while not necessarily behaving anti-competitively."

- 6.5 This issues are precisely the issues that fall to be assessed by the European Commission in its review of the Transaction under the EU Merger Regulation (EUMR), Article 2 of which expressly states that:

"1. [...] the Commission shall take into account: [...]"

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market" (emphasis added).

- 6.6 Furthermore it is legally incorrect to imply, as Ofcom does at paragraph 49 of the Issues Letter and as it did in the meeting of 15 December 2010, that the European Commission's review of the Transaction under the EUMR is restricted to entities "*behaving anti-competitively*". The European Commission will look at the Transaction's potential affects on competition in the round, not simply with respect to the post-Transaction behaviour of the merging parties. In considering whether a particular merger might give rise to a significant impediment to effective competition, the European Commission assesses not only the prospect that a competitor might exit but also "whether competitors are disadvantaged and therefore able to compete less effectively" (see para 29 of the European Commission's Non-Horizontal Guidelines).
- 6.7 Ofcom has not credibly articulated how This Transaction can give rise to concerns on the sufficiency of plurality based on forward looking concerns absent a competition problem. News would suggest that no such "lacuna" exists.

- (i) If there is a realistic risk of market exit, the matter falls properly within the jurisdiction of the European Commission as a competition question.
 - (ii) To the extent that there is no such risk, by definition there is no quantitative reduction in the number of other media controllers.
- 6.8 To the extent that the Transaction could be regarded as increasing the strength of the merged group's proposition to consumers (e.g. through bundling), by implication consumer choice will be expanded which cannot be expected to have a detrimental effect on the sufficiency of plurality.
- 6.9 As Ofcom is aware, under Article 21(3) of the EUMR, "*No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.*" The Secretary of State's European intervention notice in respect of the Transaction expressly states that a concentration with a Community dimension has arisen or will arise. Ofcom's jurisdiction to assess the Transaction is therefore exclusively confined to the PIC specified in the Secretary of State's European intervention notice (as provided for under Article 21(4) of the EUMR).
- (b) These issues are irrelevant to the question of whether the Transaction leads to insufficient plurality**
- 6.10 If Ofcom believes that market changes will lead to an insufficiency of plurality, it must only take into account those effects which can be directly linked to the Transaction.
- 6.11 Unsubstantiated and theoretical future harm, depending on possible future behaviour by News/Sky (which is uncertain) and which will have future impacts (that are uncertain) that will lead to market exit (that is uncertain) and without any market entry (that is uncertain) are far too remote to be used as part of the analysis. Ofcom's theories lack any direct or reasonably foreseeable connection with the Transaction. Ofcom does not even attempt to predict how far into the future the effects it foresees are likely to occur and therefore does not satisfy legal requirements of remoteness of consequences.
- 6.12 Ofcom cannot simply raise the hypothetical possibility of a situation – whose existence is entirely unconnected to the Transaction – in which third party media enterprises are not able to match the quality or functionality of a combined News/Sky and from there conclude that the Transaction *could* (let alone might reasonably be expected to) *weaken* (let alone render insufficient) plurality. Nor can Ofcom legitimately raise a hypothetical situation – again without any explanation of its connection to the Transaction – in which there is a mere possibility of news wholesalers being replaced by Sky News and from there make an entirely unsupported assertion that the risk of a change in wholesale news provision so as to reduce plurality (to an unspecified level) is increased by an asymmetry of economic power between providers.
- (c) Even taking its analysis at face value, Ofcom's theories of future harm are exceedingly weak**
- 6.13 Even if it was part of Ofcom's task in this context to conduct such a speculative future looking exercise assessing the likely development of media markets (which News does not accept) the concerns identified by Ofcom are in any event unrealistic.
- 6.14 Ofcom identifies four possible strategies which the merged News/Sky entity might adopt and which might result in it becoming stronger at some unspecified point in the future:
- (i) News and Sky could cross-promote each other's products which "*could increase the share of the merged group's titles*";³³

³³ At paragraph 50 of the Issues Letter.

- (ii) News could offer customers bundled products and competing providers could find that they "could not offer customers a similar quality of product or level of functionality";³⁴
- (iii) News could win additional wholesale news contracts and its chance of winning is assumed to be greater where "there is an asymmetry in the economic power between possible providers";³⁵ and
- (iv) News and Sky could achieve operational synergies through merged newsrooms and reduce fixed costs.³⁶

6.15 It is important to understand that, even in its own terms, what Ofcom is suggesting is (respectively): (i) that a combined News/Sky might more effectively advertise their products and that consumers would react to that advertising and discover new sources of news provision which they like; (ii) that a combined News/Sky might offer attractive products to consumers for which there is significant demand; (iii) that a combined News/Sky might offer attractive services at the wholesale level which would customers choose to buy; and (iv) that a combined News/Sky might save costs.

6.16 Ofcom appears to believe that by strengthening a combined News/ Sky the strategies and outcomes it alludes to must necessarily be bad for competition and bad for plurality. This is, of course, entirely untrue and it is possible to take the opposite view of these speculative future scenarios and to regard each and every one of these outcomes as both pro-competitive and good for plurality.

6.17 Ofcom notes that its concern is based on an assumption that "other news providers found they could not offer customers a similar quality of product or level of functionality".³⁷ No concern can arise as such because a combined News/Sky would offer better or more attractive products. Ofcom needs to explain why increases in quality should be denied to consumers on the grounds that other providers may not be able or may choose not to match them. This seems an extraordinary argument against innovation and improvement. Moreover, this assumption is totally unrelated to an assessment of the sufficiency of plurality.

6.18 In reality, as well as falling far short of demonstrating a credible risk of harm to competition (or, necessarily, plurality), Ofcom's theoretical 'scenarios' are not even credible in and of themselves.

(i) Cross-promotion

6.19 In relation to cross-promotion Ofcom finds that:

"[...] the proposed acquisition would create greater ability and incentive for Sky to reciprocate through either overt cross-promotion (e.g. direct references to sister titles) and more subtle forms (e.g. the use of Sky News audio-visual content on The Times website; sharing on-screen/visible "talent", such as correspondents, trailing stories). Both are potential ways to influence consumers of one news source to increase consumption of commercially related sources."³⁸

6.20 Ofcom does not assess why existing incentives are weak, i.e. why News does not employ cross-promotion strategies today.

6.21 Ofcom notes in this context that overt cross-promotion "would however be limited by the controls on commercial references in the Broadcasting Code".³⁹

³⁴ At paragraph 54 of the Issues Letter.
³⁵ At paragraph 55 of the Issues Letter.
³⁶ At paragraph 57 of the Issues Letter.
³⁷ At paragraph 54 of the Issues Letter.
³⁸ At paragraph 50 of the Issues Letter.
³⁹ At footnote 22 of the Issues Letter.

6.22 In identifying "potential ways to influence consumers of one news source to increase consumption of commercially related sources",⁴⁰ Ofcom does not provide evidence that such strategies would be likely to be effective in influencing consumer purchasing habits; that they would result in a significant migration of consumers to News at the expense of rivals; and that insufficient plurality would result for the relevant cross-media audience.

6.23 The only evidence that Ofcom offers in support of this theory is from another jurisdiction in relation to other parties, where it notes: "[f]or example, stakeholder representations reference a US report which showed that the CBS network (then owned by Viacom) was more than twice more likely to cover stories from other Viacom outlets than NBC and ABC".⁴¹ This observation is inconclusive for a proper assessment of sufficiency of plurality and the impact of the Transaction.

(ii) **Bundling**

6.24 As Ofcom recognises in paragraph 54 of the Issues Letter, bundling strategies would be available to News and Sky today. Ofcom does not assess why existing incentives are weak, i.e. why News does not employ bundling strategies today.

6.25 The Transaction does not materially enhance News' ability and incentives to engage in bundling and Ofcom does not explain why it believes the contrary to be true. Even if this were the case, there is no evidence that this would be likely to lead to the exit of other provider(s) (or, indeed, of which other provider) or that it would result in insufficient plurality. Ofcom does not explain why it believes exit would be likely.

6.26 Ofcom states that "there may be types and forms of bundling that build on Sky's unique presence in the platform market, its ability to bundle a range of services into a single product proposition drawing on multiple distribution channels, and its direct relationship with a significant base of customers that were less replicable by other news providers".⁴²

6.27 However, even on the basis of Ofcom's own analysis:

- (a) it is not the case that Sky occupies a "unique presence" such that others cannot offer competing propositions, either alone or in collaboration with other media providers; and
- (b) as Ofcom notes at paragraph 25 of the Issues Letter, "six of the top ten online news providers are also providers of UK newspapers", illustrating how providers of traditional (print) news have expanded into other areas.

6.28 Moreover, when considering combined offers:

- (a) other providers are actively offering so-called triple play options in terms of TV, internet and phone access;
- (b) large enterprises such as telco providers (Virgin, O2, Vodafone etc) are able to tap into their customer base to provide cross-sell opportunities; and
- (c) projects such as Canvas/YouView illustrate the potential for collaboration in the media industry. There is no reason to believe that such possibilities do not exist in relation to news allowing smaller players to develop a market presence and Ofcom does not address this possibility.

⁴⁰ At paragraph 50 of the Issues Letter.

⁴¹ At paragraph 52 of the Issues Letter.

⁴² At paragraph 54 of the Issues Letter.

(iii) Wholesale provision

6.29 When considering the relevance of wholesale provision, Ofcom notes that its "preliminary view is that wholesale news provision is relevant for the purposes of reporting on the effects of the specified public interest consideration, although **our preliminary view is also that this would not materially affect the analysis set out below.** This is because we are concerned with the sufficiency of plurality of persons with control of media enterprises serving the audiences we consider relevant" (emphasis added).⁴³

6.30 On this basis:

- (a) even accepting the suppositions set out in the Issues Letter in paragraph 55, a consideration of wholesale provision would not materially affect the analysis on Ofcom's own assessment;
- (b) ultimately, and as required by the relevant PIC, it is necessary to consider the sufficiency of plurality remaining after the Transaction; and
- (c) even on Ofcom's analysis, the Transaction can result, at most, in a 15% share of a cross-media audience including wholesale news provision, with the BBC accounting for 54% and ITN 14%.⁴⁴

6.31 In any event, the CC Report acknowledged that wholesale news provision is a dynamic market and that contracts are contestable, with a number of credible bidders:

"Five told us that, in its experience, the costs of news provision are falling, due to advances in digital technology and distribution. This could mean many more companies being potential news providers to Five when its contract is next up for renewal. In addition to Sky News and ITN, this could include international news organizations such as CNN, Reuters and APTN. Should they feel inclined, Five considered that any one of these organizations could recruit the staff to provide the dedicated 'front end' resources for a high-quality news programme, while relying on its own infrastructure to support this".⁴⁵

6.32 See also paragraphs 3.8-3.10 above.

(iv) Operational synergies and merged newsrooms

6.33 Ofcom does not explain why operational synergies would lead to a reduction of internal plurality. There is a range and variety of voices within News International today. Any operational synergies would not automatically mean a reduction in such range and variety.

6.34 In any event:

- (a) Ofcom recognises various impediments to merged newsrooms:

"News Corp has indicated that it has no plans to integrate its news facilities at present and has not done so in the past.... We note representations that such integration is difficult, notably in TV and newspaper mergers in part due to internal constraints created by the existing cultures of press and TV newsrooms" (emphasis added).⁴⁶

⁴³ At paragraph 10 of the Issues Letter.

⁴⁴ At paragraph 64 of the Issues Letter.

⁴⁵ At Appendix H of the CC Report.

⁴⁶ At paragraph 56 of the Issues Letter.

- (b) Ofcom cites no evidence in support of the implication of "a tendency towards concentration to reduce, where possible, the fixed costs of news production".⁴⁷
- (c) The fact that integration may be easier at an indeterminate future date (unspecified by Ofcom) does not present a basis for concluding that insufficient plurality would result from the Transaction.
- (d) Considerable barriers to integration remain:
 - (A) there are few actual examples of sustained successes;
 - (B) competing personalities, empires and executives of TV and newspaper operations tend to present challenges for operational integration;
 - (C) not all print reporters carry over well to TV;
 - (D) narrative text and graphics will tend to be in a support role for broadcasters;
 - (E) different TV and newsrooms cultures and rigours suggest integration will not happen overnight; and
 - (F) different regulatory requirements for TV and print suggest, if anything, that successful integration would require the TV culture to predominate. The TV regulatory landscape and culture brings added regulatory safeguards for impartiality, which reinforces plurality.
- (d) **Ofcom is not legally entitled to take into account effects which are not (at the very least) reasonably foreseeable and which have no direct nexus with the Transaction**

6.35 Furthermore, it is noted that Ofcom's forward view of the market presented in paragraphs 48 to 57 (as well as the resources issues at paragraphs 38 and 39) of the Issues Letter lists each issue without making any attempt to establish its credibility, the likelihood that it would occur or the time period within which it would occur. Although Ofcom's report to the Secretary of State is in the context of a "first phase" review of media plurality, Ofcom must restrict itself to considering only those theories of harm which can be demonstrated to have some direct or, at the least, reasonably foreseeable connection with the Transaction. Ofcom cannot base its report on the sufficiency of plurality on potential future market developments which are purely speculative and which, even putting Ofcom's case at its highest, could be detrimental to plurality only in a way which is very remote from this transaction.

6.36 These issues would only conceivably be relevant for plurality purposes if it could be established:

- (a) that the hypothetical scenarios would result from or be rendered materially more likely as a result of the Transaction and within a proximate time frame;
- (b) that, consequently, market exit would be likely to result; and
- (c) that the remaining plurality would be insufficient.

6.37 Ofcom does not take into account or analyse the legal implications for any assessment of the effect (if any) of the Transaction on sufficiency of plurality in terms of remoteness of alleged adverse consequences. Ofcom apparently relies on a series of hypothetical assumptions concerning what "could" occur, speculating that this raises "additional future risks" given the "prospect of market

⁴⁷ At paragraph 57 of the Issues Letter.

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exit". Each of these suppositions is increasingly vague. In particular, there is no identification of specific effects on specified entities with credible and likely consequences for plurality and, ultimately, for sufficiency of plurality.

Allen & Overy LLP

Hogan Lovells International LLP

17 December 2010

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ANNEX 1

LEGAL OPINION OF LORD PANNICK QC

(Contained in a separate document)

ANNEX 2

SUMMARY OF CROSS-MEDIA NEWS CONSUMPTION

PLATFORM	TELEVISION	INTERNET	NEWSPAPERS	RADIO	CROSS-MEDIA
PLURALITY					
- today	Sufficient	Sufficient (high)	Sufficient	Sufficient	High
- trend	Increasing	Increasing	Steady	Steady	Increasing
PLAYERS	BBC (74%), ITV (17%), Sky News (6%), Channel 4 (4%) and Five (2%)	BBC attracts the most UVs but there are no dominant players and a very large number of players	News Corporation (34%), Daily Mail & General Trust (21%), Trinity Mirror (15%) and Northern and Shell (15%)	BBC (55%), Global (17%) and Bauer (11%)	A significant number of voices available excluding online; literally thousands if online is included
CONSUMPTION					
Importance of source					
- today	1st	2nd	3rd	4th	
- trend	Steady	Increasing	Decreasing	Decreasing	Internet increasing part of the cross-media mix
Impartiality					
- today	42%	21%	17%	35%	
- trend	Steady	Steady	Steady	Steady	
Reach					
- today	98%	75%	59%	89%	
- trend	Increasing	Increasing	Decreasing	Decreasing	Internet and digital TV penetration expected to increase
Usage (hrs/ day)					
- today	0.36	0.29	< 0.57 *	Not available	1.2
- trend	Steady	Increasing	Decreasing	Decreasing	Increasing
Sources **					
- today	1.1	3.5	1.4	2.2 ***	5
- trend	Steady	Increasing	Steady	Steady	Increasing
CROSS-MEDIA SHARE OF VOICE					
- today					Cross-media consumption mix has changed. Consumption has shifted away from press and radio towards TV and online. Plurality continues to increase in TV and online; online has thousands of voices
- trend	Steady	Increasing	Decreasing	Decreasing	Trend of increasing shift away from press and radio towards TV and online expected to continue

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Sources: Perspective analysis of BARB data; Communications Market Report, Ofcom, 19 August 2010 p 204; ABCs: national daily newspaper circulation August 2010, Guardian, 10 September 2010; TouchPoints Super Hub 2010 survey data, as accessed 12 November 2010; Newspaper Marketing Agency; Media Ownership Rules Review, Ofcom, 31 July 2009 p 26; TGI survey data, survey conducted between April 2009 and March 2010, as accessed 12 November 2010; A glimmer of hope for newspapers, McKinsey Quarterly, April 2010; Media Monitor Report, FD, 2010; Monthly total unduplicated unique visitors accessing news/information, Comscore, as accessed on 11 November 2010; FTI analysis.

* this figure corresponds to time spent reading any newspaper which overestimates the time spent reading the news.

** we note that the number of platforms used is 3 to 4 and this may increase in line with internet penetration.

*** this figure corresponds to total number of radio channels listened to rather than just the number of news radio channels.

ANNEX 3

LIST OF UK MEDIA ENTERPRISES

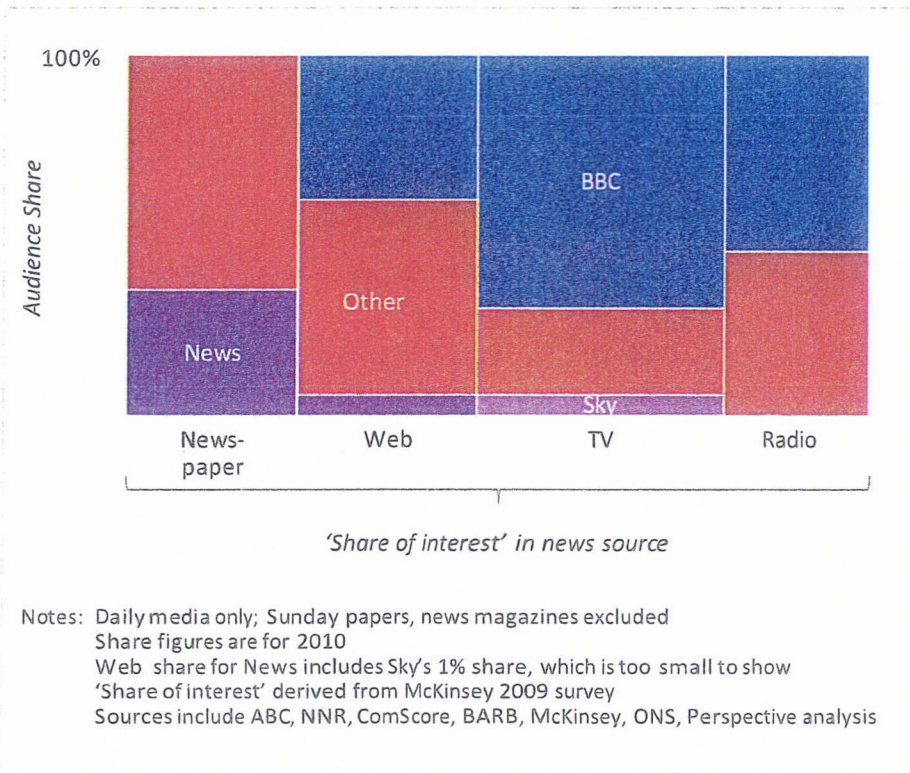
(Contained in a separate document)

ANNEX 4

BBC'S 'SHARE OF VOICE'

1. By considering News/Sky and the BBC's share of news consumption within particular media, and then scaling these media by the relative consumer interest in them as a news source, a picture can be developed of the 'share of voice' for each group:

2010 cross-media 'share of voice' for news providers



2. From this picture it is self-evident that News' share of voice (with or without Sky) is a fraction of the BBC's – approximately one quarter, even including Sky. Moreover, since the web's share of interest is growing, and News/Sky is relatively weak in this segment, News' share of voice has and will continue to decline.
3. Note that in using 'share of interest' to scale the horizontal axis we have taken a very conservative approach. If instead it was scaled by consumers' stated 'main source for news', the BBC's share of voice would grow dramatically from this picture, since the TV 'vertical' would take 73% of the horizontal axis (as opposed to 33% in the above picture).
4. Moreover, this analysis doesn't take into account differences in influence between different media outlets. However, BBC TV is seen as authoritative by 60% of consumers, compared to 3% saying the same of the Sun. Thus this factor too means that the above picture likely understates the influence of the BBC and overstates that of News.

JOINT OPINION

- 1 We are asked to advise News Corporation concerning the scope of the impartiality rules in the Communications Act 2003 and the Ofcom Broadcasting Code. Our advice is sought in the context of the decision of the Secretary of State to seek Ofcom's views on the News Corporation bid to take control of British Sky Broadcasting Group plc.
- 2 In our opinion, the impartiality rules help to ensure that, in practice, the owner of a television station (or the news editor) could not intervene to require news items to receive lesser (or indeed greater) prominence for political reasons, or no coverage at all for political reasons. We advise that the concept of "due impartiality" imposes duties in relation to the choice of stories for inclusion in the news programme, and the prominence given to a story. Such duties demonstrate that the concept of "due impartiality" itself makes an important contribution to maintaining plurality.

The background

- 3 At present, News Corporation owns (approximately) 39% of the shares in British Sky Broadcasting Group plc.
- 4 News Corporation wish to acquire the remaining (approximately) 61% of the shares in British Sky

Broadcasting Group plc.

5 On 4 November 2010, the Secretary of State issued a European intervention notice in relation to the proposed transaction under section 67(2) of the Enterprise Act 2002.

6 The Secretary of State has requested that Ofcom investigate and provide him with a report under Article 4A of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 SI No. 1592. The report is to be provided by 31 December 2010.

7 The Secretary of State has identified section 58(2C)(a) of the Enterprise Act 2002 as the basis of his concern. It refers to

"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".

8 Section 58(2C) was added to the 2002 Act by the Communications Act 2003. Plainly it was intended to address issues other than those raised by competition inquiries into market concentrations.

9 In the Submission to Ofcom dated 23 November 2010, News Corporation and British Sky Broadcasting Group plc state,

at paragraph 5.5 :

"News Corp does not currently exercise influence over Sky News' editorial agenda (despite the degree of control it already has over Sky). This would not be changed by the Transaction".

- 10 Plainly there are many reasons for disputing that the News Corporation bid to take control of British Sky Broadcasting Group plc would have an adverse effect on plurality, given the variety of voices that are heard across the media, the fact that the bid (if successful) would not reduce the number of those voices, and the culture of journalistic editorial independence.
- 11 We are asked to focus on one matter : the extent to which the legal requirements as to impartiality would, in any event, prevent News Corporation from interfering in the editorial judgment of Sky News.
- 12 We note that in paragraph 5.54 of its report dated 14 December 2007 to the Secretary of State concerning the acquisition by British Sky Broadcasting Group plc of 17.9% of the shares in ITV plc, the Competition Commission ("CC") considered that the impartiality rules imposed on television news broadcasters were a relevant factor in safeguarding media plurality, but that they left room for controllers of television channels to influence the news agenda. The CC stated that the legislative provisions and

the Code

"may not, however, necessarily prevent owners of television channels from influencing the news agenda by setting the overall strategy for news, the prominence of particular stories or types of news stories within that agenda or through the choice of editorial staff".

The provisions relating to impartiality

13 The United Kingdom has a long history of imposing impartiality requirements on news broadcasters. The current provisions are set out in sections 319-320 of the Communications Act 2003, which require Ofcom to set standards for the content of television and radio programmes, including news content.

14 Section 319(2)(c) states that one of the standards objectives is

"that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with".

15 Section 319(2)(d) adds a further standards objective :

"that news included in television and radio services is reported with due accuracy".

16 These requirements apply to "news", as defined in section 319(8) to mean

"news in whatever form it is included in a service".

17 Section 320 adds "special impartiality requirements" which

apply to television and radio services :

- "(1) The requirements of this section are :
- (a) the exclusion, in the case of television and radio services ..., from programmes included in any of those services of all expressions of the views or opinions of the person providing the service on any of the matters mentioned in subsection (2);
 - (b) the preservation, in the case of every television programme service ... of due impartiality, on the part of the person providing the service, as respects all of those matters;
- ...
- (2) Those matters are -
- (a) matters of political or industrial controversy; and
 - (b) matters relating to current public policy.
- ...
- (4) For the purposes of this section -
- (a) the requirement specified in subsection (1)(b) is one that (subject to any rules under subsection (5)) may be satisfied by being satisfied in relation to a series of programmes as a whole;
- ...
- (5) OFCOM's standards code shall contain provision setting out the rules to be observed in connection with the following matters -
- (a) the application of the requirement specified in subsection (1)(b);
- ...
- (6) Any provision made for the purposes of subsection (5)(a) must, in particular, take account of the need to ensure the preservation of impartiality in relation to the following matters (taking each separately) -
- (a) matters of major political or industrial controversy, and

(b) major matters relating to current public policy,
as well as of the need to ensure that the requirement specified in subsection (1)(b) is satisfied generally in relation to a series of programmes taken as a whole".

18 The current version of Ofcom's Broadcasting Code is dated 2009 and took effect on 1 September 2010.

19 Section 5 of the Code states the "principles" applicable to "due impartiality and due accuracy and undue prominence of views and opinions" :

"To ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality.

To ensure that the special impartiality requirements of the Act are complied with".

20 Section 5 of the Code then defines "due impartiality" :

"'Due' is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. 'Due' means adequate or appropriate to the subject and nature of the programme. So 'due impartiality' does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context ... is important".

In R v Secretary of State for the Home Department ex parte Brind [1991] 1 AC 696, the Court of Appeal considered (on a point which was not argued before the Appellate Committee of the House of Lords), similar requirements of

due impartiality imposed on broadcasters by the Broadcasting Act 1981 and similarly emphasised the word "due". See Lord Donaldson of Lynton at p.723B and McCowan LJ at pp.731H-732B.

21 Section 5 of the Code then sets out a number of provisions designed to ensure due impartiality and due accuracy in news. These provisions include :

"5.1 News, in whatever form, must be reported with due accuracy and presented with due impartiality".

22 Rules 5.4 to 5.12 of the Code impose additional "special impartiality requirements" on television broadcasters in relation to the coverage of "matters of political or industrial controversy and matters relating to current public policy". This covers all programme content, and not only news. The Code defines such matters as follows:

"Matters of political or industrial controversy are political or industrial issues on which politicians, industry and/or the media are in debate. Matters relating to current public policy need not be the subject of debate but relate to a policy under discussion or already decided by a local, regional or national government or by bodies mandated by those public bodies to make policy on their behalf, for example non-governmental organisations, relevant European institutions, etc".

These provisions include :

"5.4 Programmes in the services ... must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking in a legislative forum or in a court of law). Views and opinions relating to

the provision of programme services are also excluded from this requirement.

5.5 Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service This may be achieved within a programme or over a series of programmes taken as a whole.

...

5.7 Views and facts must not be misrepresented. Views must also be presented with due weight over appropriate timeframes.

...

5.11 In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service ... in each programme or in clearly linked and timely programmes.

5.12 In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented.

...".

23 Ofcom has also published a Guidance Note which addresses the concept of "the person providing the service", as stated in Rules 5.4, 5.5 and 5.11 of the Code :

"'The person providing the service' is a concept used in connection with the legal requirements for the licensing and compliance of broadcasting services. In this rule [ie Rule 5.4], it refers to the licensee, the company officers and those persons with an editorial responsibility for the service or part of the service rather than, for example, the programme presenter".

Analysis

- 24 In our opinion, the impartiality rules do apply to the relative "prominence" given to a news story or type of news story, one of the matters addressed by the CC (see paragraph 12 above).
- 25 To take a hypothetical example, suppose there is a news story very damaging to the Government of the day (a Bank of England Report on its mismanagement of the economy, or the Home Secretary criticises the Prime Minister) and the owner of the channel - who supports the Prime Minister - orders the news channel to report this story accurately and impartially, but as the last item on the evening news, for 20 seconds, rather than as one of the lead items which it would deserve on any objective assessment of the news agenda. Or suppose - to take an even more extreme example - the owner ordered that the story not be broadcast on the news channel at all.
- 26 In our view, this would breach the impartiality rules, since stories damaging to the Opposition would be given their proper prominence. Rules 5.5, 5.11 and 5.12 would be relevant (see paragraph 22 above). The person providing the service (for this purpose, the owner) would not be respecting due impartiality, and he would not be ensuring that views critical of the Government were "given due

weight". See also Rule 5.7 on "due weight". The criterion of "due impartiality" prevents undue or improper influence on the (lack of) prominence of the story and, a fortiori, on a decision whether to report the story at all.

27 The same conclusion would follow if the news editor were to adopt the same approach of not giving a news item its due weight and prominence for political reasons, for example because he believes (rightly or wrongly) that this is the wish of the owner, without the owner having made any express statement. The news editor is also a "person providing the service" as defined in Ofcom's Guidance Note (see paragraph 23 above). Due impartiality prohibits the news editor from giving the story a lower priority, or excluding it altogether from the news broadcast, for political reasons. That is a breach of due impartiality because a similar story involving another political party would be reported, and reported high up the news agenda, and the story in question is not receiving such coverage for political reasons.

28 The CC Report dated 14 December 2007 states at paragraph 31 of the Summary :

"We note that the regulation of media enterprises in relation to plurality and impartiality are distinct. Impartiality relates to the fair and balanced treatment of differing viewpoints in relation to particular news stories but does not address the relative prominence given to each story. ...".

For the reasons set out in paragraphs 24-27 above, we do

not accept that such a distinction can properly be drawn. The concept of "due impartiality" does impose duties in relation to the choice of stories for inclusion in the news programme, and the prominence given to a story. Such duties demonstrate that the concept of "due impartiality" itself makes an important contribution to maintaining plurality.

29 We recognise, of course, that selection of the news agenda is not an objective matter. Editorial discretion is enjoyed and necessarily so since "impartiality" is not and cannot be absolute, but is "due". See R (Boyd Hunt) v ITC [2002] EWHC 2296 (Admin) (6 November 2002, Newman J) at paragraph 25.

30 Nevertheless, a very great deal of the mischief which the public interest consideration of plurality seeks to achieve is addressed by the regulatory regime and the requirement of due impartiality.

31 In section 58(2C)(a), the statutory concern for "sufficient plurality" is not confined to news reporting. However, the CC said in paragraph 5.10 of its report dated 14 December 2007

"We concluded that a plurality of control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences".

The CC focused on news in conducting a plurality review in

paragraph 5.32 of its report because, it said,

"news and current affairs are the genres most closely connected with the formation of public opinion about issues of national significance through the communication of a range of information and views".

So if Ofcom is satisfied about news reporting, it is difficult to see what concerns about plurality would remain in the present context.

32 We also note that in British Sky Broadcasting Group plc v Competition Commission [2010] 2 All ER 907, paragraphs 80 and 121, the Court of Appeal considered the meaning of the words in section 58(2C)(a) of the Enterprise Act 2002 :

"a sufficient plurality of persons with control of ... media enterprises ...".

The Court of Appeal stated at paragraph 80 that the view of the CC was that

"what was required was not just an exercise of counting heads, and that it was proper and necessary to have regard to the actual degree of control exercised by one enterprise over another. If the control was less than complete, and if in practice it would not enable the controlling enterprise to dominate the policy and the output of the controlled enterprise, that was something that should be taken into account".

The Court of Appeal agreed with this approach at paragraph 121 :

"when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the commission may, and should, take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another".

So Ofcom is required not just to count heads but also to

consider the practical effect.

33 In the present context, as we have noted, News Corporation has disputed that the bid would reduce the number of media outlets. The concept of "a sufficient plurality of persons with control of the media enterprises serving that audience" in section 58(2C)(a) of the 2002 Act focuses on the overall news agenda in the United Kingdom, not on the ability in practice of the owner to influence the agenda of their own television news service. In any event, we advise that the provisions in the 2003 Act and the Code governing impartiality help to ensure that, in practice, the owner of a television station (or the news editor) could not intervene to require news items on their own television news service to receive lesser (or indeed greater) prominence, or no coverage, for political reasons.

[REDACTED]

LORD PANNICK QC

[REDACTED]

DAVID LOWE

BLACKSTONE CHAMBERS,

TEMPLE,

LONDON EC4Y 9BW

15 December 2010

IN THE MATTER OF

NEWS CORPORATION

and

THE SCOPE OF THE IMPARTIALITY
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2003 AND THE OFCOM BROADCASTING CODE

JOINT OPINION

Allen & Overy
One Bishops Square
London E1 6AD
Tel : 0203 088 0000
Fax : 0203 088 0088
Ref : Antonio Bavasso

ANNEX 3 - LIST OF UK MEDIA ENTERPRISES

UK Media enterprises (Sky + News treated as one)

1	Sky/News	Sky News Star News Fox News		Times Sunday Times Sunday Times News of the World
2	BBC	BBC1 BBC2 BBC3 BBC4 BBC News	[Numerous stations]	
3	ITV	ITV1		
4	Channel 4	Channel 4		
5	Northern & Shell	Five		Express Sunday Express Daily Star
6	GMG		Smooth Radio Real Radio Rock Radio	The Guardian The Observer
7	DMGT			Daily Mail Mail on Sunday Metro Local titles (Northcliff)
8	Telegraph Group			Daily Telegraph Sunday Telegraph
9	Pearson			Financial Times
10	Evgeny Lebedev			The Independent i Independent on Sunday Evening Standard
11	Trinity Mirror			Daily Mirror Sunday Mirror Daily Record Local Titles
12	Global Radio		Heart Capital FM etc...	
13	Bauer Radio		Magic Kiss etc...	

UK Media enterprises (Sky + News treated as one)

14	Absolute Radio		Absolute Radio	
15	UTV		talkSPORT	
16	Orion Media		Various local	
17	Newsquest			Numerous local/nat'n'l
18	Johnston Press			Numerous local/nat'n'l
19	Archant			Numerous local/nat'n'l
20-100	81 other local groups*			Numerous local/nat'n'l
101	France Télévisions	France 24		
102	Al Jazeera	Al Jazeera Eng		
103	Time Warner	CNN		
104	SOCEMIE	Euronews		
105	RIA Novosti	RT		
106	Bloomberg	Bloomberg		
107	NBC	CNBC		
108	CCTV	CCTV News		
109	IRIB	Press TV		
110	NDTV	NDTV 24x7		
111	NHK	NHK World		
112	Adventure Radio		Various local	
113	Andover Sound Limited		Various local	
114	Celador Radio Broadcasting		Various local	
115	CN Group Ltd		Various local	
115-184	69 Independent stations		Various local	
185	Kingdom Radio Group		Various local	
186	KM Radio Ltd		Various local	
187	Laser Broadcasting		Various local	
188	Lincs FM Group		Various local	

UK Media enterprises (Sky + News treated as one)

189	Media Sound Holdings	Various local	
190	Midland News Association	Various local	
191	Midwest Radio	Various local	
192	Murfin Music International	Various local	
193	New Wave Media	Various local	
194	Northern Media Group	Various local	
195	One Gold Radio Limited	Various local	
196	Quidem	Various local	
197	Sunrise Group/ LMC	Various local	
198	The Local Radio Company	Various local	
199	TIML Golden Square	Various local	
200	Tindle Radio Ltd	Various local	
201	Total Broadcast	Various local	
202	Town and Country	Various local	
203	UKRD Group Ltd	Various local	

* House of Commons Culture, Media and Sport Committee reports 87 prior to GMG acquisition