

 News Corporation



News Corporation/ BSkyB

Meeting with DCMS
20 January 2011

Confidential

Overview

1. Ofcom's report contains serious legal and analytical errors, shortcomings and deficiencies and therefore is no legitimate basis for a reference to the CC.
2. The SoS is not bound to follow Ofcom's recommendation.
3. The UIL proposal involves a robust structural commitment.
4. The UIL proposal fully addresses Ofcom's perceived concerns and therefore a reference to the CC is unnecessary.

Ofcom's report contains serious legal and analytical errors

Serious legal and analytical errors in Ofcom's report

Should the SoS decide to make a reference to the CC on the basis of Ofcom's report, these serious flaws would taint his decision:

- Ofcom does not address the statutory question of whether plurality may be rendered "insufficient" as a result of the Transaction.
- Ofcom confuses the permissive nature of a first stage review with an ability to stop short of analysing whether the Transaction will result in insufficient plurality.
- Ofcom's mistreatment of Sky's wholesale activities leads it dramatically to overstate the potential impact of the Transaction.
- Ofcom's approach to assessing plurality, based primarily on measures of reach and share, contains a number of serious deficiencies and analytical errors.
- Ofcom's forward looking "dynamic assessment" is speculative and, by Ofcom's admission, provides no basis for a decision for a reference to the CC.

Serious legal and analytical errors in Ofcom's report

Ofcom fails to draw the requisite conclusion that the Transaction raises no cause for concern on the basis of a number of key factors:

- Ofcom accepts that the UK consumer group currently consuming news from Sky and News only is minimal, less than 1%, (which is a similar finding by the CC in Sky/ITV): *"Across the population as a whole, we found that few regular news consumers rely solely on Sky titles or solely on News Corp titles"* (paragraph 4.79)
- Ofcom acknowledges that the multi-sourcing of news is of relevance to plurality and even *"important"* (paragraph 5.115). It is hard to see how increased access to news sources, including the internet, does not enhance plurality.
- Ofcom finds that News Corp's ability to influence the setting of the wider news agenda will not be enhanced by the Transaction: *"the available evidence does not point to a conclusion that News Corp's ability to influence through other media would be materially enhanced by the acquisition"* (paragraph 5.123)

Serious legal and analytical errors in Ofcom's report

- Ofcom avoids taking a position on internal plurality, despite the evidence:
- Sky News is a TV broadcaster operating within the culture of editorial independence and impartiality in TV news, which is reflected in the Broadcasting Code and has been accepted by the CC in Sky/ITV.
- Ofcom recognises that these factors play a role in the analysis: *We recognise that the impartiality rules may contribute as a safeguard against potential influence on the news agenda by media owners* (paragraph 1.41); *It is our view that cultural safeguards maybe expected to go some way to maintaining the editorial impartiality of Sky News* (paragraph 5.96).

The SoS is not bound to follow Ofcom's recommendation

The SoS is not bound by Ofcom's recommendation

- The Secretary of State is obliged to take his own decision taking account of the public interest consideration and considering whether the Transaction may be expected to operate against the public interest.
- The Secretary of State has a power rather than a duty to refer. He may make a reference to the CC if he believes that the Transaction may operate against the public interest, but he is not obliged to do so.
- Therefore, there can be no presumption that rejecting Ofcom's recommendation for a reference to the CC, on the weight of evidence available to him, would be unreasonable.
- On the contrary, for the reasons given in News' Submission of 14 January, the Report provides no legitimate basis for a decision that the Transaction should be reviewed by the CC in more detail.

**The UIL involves a robust structural
commitment**

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- Sky News will be spun off as an independent UK public limited company (**Newco**), with its shares publicly traded

Pre-Transaction



39%



61%

Post-Transaction



39%



61%



The UIL involves a robust structural commitment

- Sky News will be spun off as an independent UK public limited company (**Newco**), with its shares publicly traded
 - Shares in Newco would be distributed to the existing shareholders of Sky in the same proportions as their existing shareholding.
 - News will retain only the same shareholding in Sky News as it currently has in Sky, 39.1%.
 - The corporate governance structure of Newco will also replicate the effect of the existing governance structure of Sky, which has been in place for a number of years.

The UIL involves a robust structural commitment

- The remedy safeguards the *status quo*:
 - The voting agreement dated 21 September 2005 between the Sky and News which prevents News from exercising more than 37.19% of the votes in Sky will be replicated in respect of Newco;
 - A majority of the board of Newco shall comprise non-executive Directors determined by the board to be independent;
 - Material transactions between Newco and News/Sky will require the approval of Newco's Audit Committee, which will consist exclusively of independent non-executive Directors.
 - Newco's constitutional documents will provide that such transactions may, depending on materiality, require an independent fairness opinion or Newco independent shareholder approval (by virtue of Newco applying controls that have equivalent effect to those imposed by Chapter 11 of the Listing Rules).

The UIL involves a robust structural commitment

- An independent Sky News will be a financially viable company
- [INSERT RELEVANT EXTRACT FROM BUSINESS PLAN]

The UIL proposal fully addresses Ofcom's perceived concerns and a reference to the CC is unnecessary

The UIL proposal fully addresses Ofcom's perceived concerns

- Ofcom stated in paragraph 5.46 of the Report that: "*As a result, today [Sky News] makes a strong and positive contribution to plurality. [...] The proposed transaction would result in Sky ceasing to be a distinct media enterprise from News Corp.*"
- The UIL proposal will fully **safeguard the status quo** as regards the editorial independence of Sky News.
- Sky News will remain as a **distinct media enterprise and independent broadcast voice**.
- The remedy fully addresses all of the concerns identified by Ofcom in its Report and relied upon by Ofcom in recommending to the Secretary of State that he refer the Transaction to the CC.

The UIL proposal fully addresses Ofcom's perceived concerns

- Ofcom has not provided the Secretary of State with advice on remedies.
- Ofcom repeats a number of third party views on possible remedies at paragraph 7.3 to 7.6 of its Report but it has not endorsed these views. Remedies **were not** discussed with Ofcom.
- It is for the Secretary of State to take his own decision on whether or not to accept UIL in place of a reference to the CC, exercising his discretion.
- With such a robust structural remedy being offered by News, it is clear that a reference to the CC would serve no purpose.
- The only reasonable course in light of this offer of remedies is for the Secretary of State to accept UIL.