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Victoria Kaye  
Department for Culture, Media and Sport  
2-4 Cockspur Street  
London SW1Y 5DH

**Allen & Overy LLP**  
One Bishops Square  
London E1 6AD United Kingdom

Tel +44 (0)20 3088 0000  
Fax +44 (0)20 3088 0088  
Direct [REDACTED]

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24 January 2011

Dear Victoria,

**News Corporation - British Sky Broadcasting Group Plc**

On 18 January 2011, News Corporation (**News**) submitted to the Secretary of State for Culture, Olympics, Media and Sport (the **Secretary of State**) proposed undertakings in lieu (**UIL**) of a reference to the Competition Commission (the **CC**) of its proposal to acquire the shares in British Sky Broadcasting Group plc (**Sky**) that News does not already own (the **Transaction**) under paragraph 3 of Schedule 2 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (the **Order**) (the **UIL Proposal**).

Following our meeting on 21 January 2011 News has prepared draft undertakings reflecting and expanding on News' initial UIL Proposal (the **Draft Undertakings**) which will be sent to you by courier shortly.

A decision by the Secretary of State to clear the Transaction or to accept UIL and start consultation on the Draft Undertakings can be taken promptly at this stage. The decision on UIL rests with the Secretary of State under paragraph 3 of Schedule 2 of the Order and the Secretary of State has a broad discretion if he decides to accept undertakings. If, contrary to News' submission, the Secretary of State were minded to refer the Transaction to the CC, the Secretary of State should, taking into account the Draft Undertakings, have all the necessary information to take a decision in principle that he is minded to accept News' UIL Proposal in order to remedy, mitigate or prevent such of the potential effects adverse to the public interest which Ofcom identifies as potentially resulting from the Transaction in its report dated 31 December 2010 (the **Ofcom Report**) which the Secretary of State still believes to be of concern.

Given the extent of the Secretary of State's statutory discretion in accepting UIL, News believes that any judicial review challenge to a decision by the Secretary of State to accept UIL would be most unlikely to succeed. This is confirmed by the attached legal opinion from Lord David Pannick QC.

Moreover, on the basis of the Draft Undertakings, the Secretary of State is in a position to carry out the public consultation provided for under Schedule 10 of the Enterprise Act 2002 (**EA**) and Schedule 3, paragraph 2(3) of the Order.

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Given that the UIL Proposal, together with the Draft Undertakings, provide the Secretary of State with a comprehensive and clear cut solution to any perceived concerns, and for the reasons set out below, News submits that the most transparent, expeditious and procedurally sound way for the Secretary of State to proceed is to:

- (i) publish a preliminary decision that he is minded to accept undertakings from News based on the UIL Proposal and the Draft Undertakings; and simultaneously
- (ii) publish the Draft Undertakings for public consultation; and simultaneously
- (iii) publish the Ofcom Report in respect of the Transaction.

The Secretary of State has the legal power to accept undertakings and that no statutory consultation is envisaged prior to the Secretary of State taking a decision in principle, therefore not consulting the OFT or Ofcom in advance does not in any way weaken the Secretary of State's decision or leave it open to a successful challenge on the basis of procedural error. As discussed below, this is indeed how the relevant statutory provisions are designed to be applied. The Secretary of State would be at liberty to involve the OFT or Ofcom in parallel with or subsequent to the public consultation process, should he be so minded.

### **Role of the OFT**

We understand that you are considering whether the Secretary of State should involve the OFT based on s.93 EA which states:

*"(1) Subsections (2) and (3) apply where—*

*(b) the Secretary of State is considering whether to accept undertakings under paragraph 1, 3 or 9 of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.*

*(2) The Secretary of State (in this section "the relevant authority") may require the OFT to consult with such persons as the relevant authority considers appropriate with a view to discovering whether they will offer undertakings which the relevant authority would be prepared to accept under paragraph 1, 3 or 9 of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.*

*(3) The relevant authority may require the OFT to report to the relevant authority on the outcome of the OFT's consultations within such period as the relevant authority may require.*

*(4) A report under subsection (3) shall, in particular, contain advice from the OFT as to whether any undertakings offered should be accepted by the relevant authority under paragraph 1, 3 or 9 of Schedule 2 to the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.*

*(5) The powers conferred on the relevant authority by subsections (1) to (4) are without prejudice to the power of the relevant authority to consult the persons concerned itself.*

*(6) If asked by the relevant authority for advice in relation to the taking of enforcement action (whether or not by way of undertaking) in a particular case, the OFT shall give such advice as it considers appropriate."*

Section 93 EA provides that the Secretary of State "may", but is not required to, involve the OFT. Section 93 (5) EA makes it clear that *"The powers conferred on the relevant authority [i.e. the Secretary of State] by subsections (1) to (4) are without prejudice to the power of the relevant authority [i.e. the Secretary of State] to consult the persons concerned itself."*

Under the EA, the OFT has only a limited potential role with respect to UIL offered under Schedule 2 of the Order, which relates only to issues regarding the *implementation* of any such UIL. Typically, the Secretary of State would only require the OFT to advise on UIL once the views of the relevant authority in relation to remedies were known. Since News has offered the Draft Undertakings, the Secretary of State would have to provide first a decision setting out the undertakings that would be acceptable *before* the OFT is engaged under s.93(2) EA. This is consistent with the literal reading of s.93(2) EA which envisages that the OFT would consult with the relevant parties on the "*undertakings which the relevant authority would be prepared to accept*" (emphasis added). This requirement postulates that the Secretary of State has expressed at least a view in principle on such undertakings and such view would guide the OFT in discharging its duty to assist the relevant authority under s.93 EA.

In this case, News submits that the essence of this statutory role should be respected and, should the Secretary of State wish to involve the OFT, the most appropriate, expeditious and transparent approach would be for the OFT to be involved only *after* the Secretary of State's decision in principle to accept undertakings has been published. In addition, the advice of the OFT could be sought in parallel with the public consultation on the Draft Undertakings.

Should the Secretary of State be minded to seek advice from the OFT before the decision in principle to accept undertakings and before the start of the statutory consultation on the Draft Undertakings, he should, at the minimum, indicate to both the OFT and the parties the nature of the undertakings that he would be minded to accept, and request the OFT to advise on that basis as to whether the Draft Undertakings offered by News would meet his requirements. This would guide the discussions between the OFT and the parties and is what s.93 EA envisages.

### **Role of Ofcom**

You have also indicated that you are considering whether the Secretary of State should seek Ofcom's advice on this matter.

Ofcom does not have any defined statutory role in relation to undertakings. This stands in clear contrast to Ofcom's role in advising the Secretary of State on the media public interest consideration under Article 4A of the Order, where Ofcom's report is a necessary step in the administrative process (albeit that it is not binding on the Secretary of State). This is also in contrast with the EA provision relating to the role of OFT which gives the OFT (but not Ofcom) a specific potential role in relation to the implementation of the undertakings. In fact Ofcom has given no advice on undertakings in the Ofcom Report. Had Parliament envisaged a role for Ofcom in relation to this stage of the process, it would have included this in the statutory framework.

On that basis, seeking advice from Ofcom at this juncture would complicate and slow down the decisional process, which News believes is neither necessary nor appropriate. Should the Secretary of State be minded to seek advice from Ofcom, News submits that the most appropriate, expeditious and transparent approach would be for him to do so during the required public consultation period.

### **Publication of the Ofcom Report**

We also understand that the Secretary of State is now considering publication of the Ofcom Report in advance of taking a decision in principle on the issue of UIL and/or consulting on the Draft Undertakings.

In the previous case in which media plurality was concerned (Sky/ITV), Ofcom's report was published simultaneously with the Secretary of State's decision on substance. In this case the Secretary of State has recently indicated to Parliament on 20 January 2011 that he was in fact "*doing nothing different to what* [the then Secretary of State] *did* [in Sky/ITV]".

News is seriously concerned that departing from this precedent and taking the step of publishing the Ofcom Report at an interim point in discussions between News and the Secretary of State when neither the offer of

undertakings by News nor their content are public would only harm the process, producing an unfair outcome and giving unfair advantage to complainants. Given the level of press speculation about News' likely approach to undertakings, publishing the Ofcom Report at this stage would merely increase speculation and adverse comment enabling third parties to make uninformed representations. News believes that the publication of the Ofcom Report in isolation at this juncture would not assist the Secretary of State in his decision making (including on UIL) and would not promote constructive and informed public debate.

### **Conclusions**

The UIL Proposal and Draft Undertakings provide the Secretary of State with a comprehensive and clear-cut solution to any perceived concerns and a decision can be taken promptly at this stage. If the Secretary of State adopted the course of action suggested by News of a simultaneous publication of the Ofcom Report, his decision in principle to accept undertakings and a notice of consultation on the Draft Undertakings, this would provide third parties with an informed opportunity to comment, as envisaged under the EA. This would be the most appropriate, expeditious and transparent course of action. There would be no possible basis to suggest that such an approach would involve procedural impropriety.

We would be grateful if you could confirm as a matter of urgency the process that DCMS will adopt and your proposed timeline. If the Secretary of State is minded to publish the Ofcom Report in advance of the publication of his decision in principle, News requests that he confirms this to News as soon as possible so that a non-confidential bundle of News' submissions can be provided to the Secretary of State for publication at the same time.

Should the Secretary of State make a public statement that he is considering an offer of undertakings by News prior to the public consultation, News requests confirmation that the Secretary of State will clarify that he will issue a public consultation inviting the views of third parties on any draft commitments that are offered by News and in accordance with the relevant statutory procedure.

Yours sincerely

A large black rectangular redaction box covering the signature of Antonio Bavasso.

**Antonio Bavasso**  
Partner

cc: Jeff Palker and Andrea Appella - News Corporation; John Pheasant and Suzanne Rab - Hogan Lovells International LLP; Cerry Darbon and Dominic Long - Allen & Overy LLP

Enc.





## OPINION

1 I am asked to advise News Corporation in relation to the transaction by which it wishes to acquire the shares in British Sky Broadcasting Group plc that it does not already own.

2 In my opinion :

(1) The Secretary of State has power to accept undertakings from News Corporation in lieu of a reference to the Competition Commission.

(2) If the Secretary of State were to accept the undertakings offered by News Corporation, a third party would be most unlikely to succeed in a judicial review of that decision.

### The background

3 Now that the Secretary of State has received the advice from OFCOM, Article 5(3) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 SI No. 1592 confers power on the Secretary of State to make a reference to the Competition Commission if he

"believes that it is or may be the case that -

∴  
(c) taking account only of the relevant public interest consideration or considerations concerned, the creation of the situation operates or may be expected to operate against the public

interest".

4 Paragraph 3(2) of Schedule 2 to the Order adds :

"The Secretary of State may, instead of making such a reference and for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have or may have resulted, or which may be expected to result, from the creation of the European relevant merger situation concerned accept from such of the parties concerned as she considers appropriate undertakings to take such action as she considers appropriate".

5 News Corporation has offered undertakings to the Secretary of State. Those undertakings would mean (in particular) that

- (1) Sky News would become an independent United Kingdom public limited company.
- (2) Shares in the new company would be distributed to the existing shareholders of Sky, as far as possible, in the same proportions as their existing shareholding (so News Corporation would have 39.1%).
- (3) The corporate governance structure of the new company would also replicate the effect of the existing governance structure of Sky.
- (4) There would also be a number of commercial agreements,

including a long-term carriage agreement.

**The power of the Secretary of State to accept undertakings**

- 6 I am asked whether the Secretary of State has power to accept undertakings in lieu of a reference despite the advice of Ofcom under Article 4A of the Order that a reference should be made to the Commission.
- 7 In my opinion, the Secretary of State has a broad discretion to decide to accept undertakings in lieu even where OFCOM have advised that there should be a reference:
- (1) Paragraph 5(3) confers a power on the Secretary of State ("may make a reference"). It does not impose a duty to make a reference.
  - (2) Parliament deliberately chose not to impose a duty on the Secretary of State to make a reference :
    - (a) The Secretary of State is addressing public interest considerations.
    - (b) The Secretary of State may be satisfied that the undertakings address the public interest concerns which informed the OFCOM advice.
    - (c) The Secretary of State will wish to consider this matter in the context that, at this interim



stage, he is concerned only with possible damage to the public interest if the transaction proceeds, and not with any established mischief.

**A judicial review by a third party**

8 I am also asked about the prospects of a third party being able to bring a successful judicial review to challenge a decision by the Secretary of State to accept the undertakings offered by News Corporation. In my opinion, any such claim would, in principle, face formidable difficulties and have weak prospects of success. That is because :

(1) The breadth of the discretion enjoyed by the Secretary of State is suggested by the language of paragraph 3(2) of Schedule 2 to the Order. The Secretary of State is given power to accept undertakings in lieu for the purpose of "mitigating" the possible adverse effects, as well as for the purpose of "remedying" or "preventing" such effects. The Secretary of State is given a power to accept undertakings even if they only mitigate the possible adverse effects because they are only possible adverse effects and the Secretary of State has a duty to consider the public interest as a whole.

(2) Paragraph 3(2) also refers to the judgment of the

Secretary of State as to what he considers is "appropriate", language which emphasises the breadth of the discretion.

(3) Whether the undertakings offered are "appropriate" to address the potential mischief (and given that it is only a potential mischief) is a matter of degree for the judgment of Secretary of State. A court would be most reluctant to intervene.

9 OFCOM was concerned about the loss of Sky News as an independent news broadcaster. See paragraph 5.46 of its report. The undertakings offered by News Corporation appear to me to address the concerns identified by Ofcom as to the risk to plurality. They would maintain Sky News as a distinct enterprise. If the Secretary of State were to accept the undertakings as "appropriate" in all the circumstances, I do not see how a third party could realistically expect to succeed in a judicial review application.

**LORD PANNICK QC**

**BLACKSTONE CHAMBERS,**

**TEMPLE,**

LONDON EC4Y 9BW

20 January 2011

IN THE MATTER OF

NEWS CORPORATION

and

UNDERTAKINGS TO  
THE SECRETARY OF STATE

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OPINION

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