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Proposed acquisition of BSkyB by News Corp

Dear Sheldon,

I refer to your letter of 9 February 2011 and to our subsequent telephone call of the same date.

Unless expressly stated otherwise, defined terms in this letter have the same meaning as in News' response to the OFT's questions of 1 February (the **First OFT Response**) and in its response to the OFT's questions of 7 February (the **Second OFT Response**).

1. Non-reacquisition obligation

News notes that the main explanation indicated by OFT relates to an OFT policy consideration with regard to "*the improper use of public resources on a repeated public investigation*". Whilst this is may generally be regarded as a "practical justification" for restrictions of this type, this justification does not specifically relate to the practical viability of the UIL proposed by News in the present case. The Secretary of State would want to decide whether this is as a relevant consideration. News notes however that any hypothetical reacquisition of NewCo shares by News would not automatically trigger a substantive review on issues of media plurality.

As News explained in question 12.1 of the First OFT Response, any such reacquisition would lead to a 'relevant merger situation' and would therefore be *reviewable* – in light of the circumstances pertaining at that time – under the Enterprise Act 2002 (the **Act**). A media plurality review would be triggered only to the extent that the then Secretary of State decided such a review is merited on the basis of plurality-related public interest concerns. An acquisition by News would therefore not automatically result in a substantive review (or indeed any improper use of public resources).

As discussed in our call on 9 February 2010 with the OFT, News' main concern in relation to any such obligation is that it would not be able to respond sufficiently quickly to an offer by a third party to acquire control of NewCo were it required to secure the Secretary of State's prior approval before purchasing additional NewCo shares.

We also note that the standard practice of both the Competition Commission (as set out in paragraph 3.8 of its Merger Remedies Guidelines) and the European Commission (the EU Commission's Model Divestiture Commitments, paragraph 3) is that any undertaking for a non-reacquisition should be limited to 10 years.

Without prejudice to News' views, to the extent that the Secretary of State does regard such a commitment as necessary for remedying, mitigating or preventing public interest concerns, News is prepared to undertake that it shall not, for a period of 10 years from the Effective Date (as defined in the draft UIL submitted to the Secretary of State on 24 January 2011 (the **Draft UIL**)), except with the prior written consent of the Secretary of State, acquire shares in NewCo that will result in News holding more than 39.14% of the shares in NewCo other than in circumstances where an independent third party has made an offer or proposed a merger (including by way of scheme of arrangement) or has otherwise indicated an intention to acquire 50% or more of NewCo's voting shares (in which case, News will promptly inform both the OFT and the Secretary of State, on confidential basis, of any acquisition by it of shares in NewCo).

2. Termination rights in the Carriage Agreement and Brand Licensing Agreement

News refers to the arguments made in questions 14.1.2 of the First OFT Response and 2.2 of the Second OFT Response. News further notes that both parties will have only limited contractual rights to terminate the Carriage Agreement and Brand Licensing Agreement set out in respectively, clause 4.4(iii) and 4.6(iii) of the Draft UIL. News has also clarified in response to questions 2.2 of the Second OFT Response that it will ensure that both the Carriage Agreement and the Brand Licensing Agreement (as well as any agreement with NewCo) will contain a dispute resolution mechanism (e.g. arbitration).

Without prejudice to these arguments, however, and to the extent that the Secretary of State regards it as necessary for remedying, mitigating or preventing the public interest concerns, News will also ensure that each of the Carriage Agreement and the Brand Licensing Agreement provides that News should not be permitted to terminate the relevant agreement prior to a formal and final determination having been made under that dispute resolution mechanism applicable under the relevant agreement. Moreover, News is prepared to commit in the relevant agreements that it would bear its and NewCo's costs of any dispute resolution originating from News' proposed termination (irrespective of the outcome).

Should the Secretary of State believe that this is necessary, News would be prepared to commit in the UIL not to terminate pending the final determination of the dispute resolution (as described above) and to include these provisions in the relevant agreements.

News' view , as discussed with the OFT, is that such an undertaking should be preferable to the OFT's suggested undertaking, in that it would provide considerable comfort for NewCo that News could only terminate the relevant agreements where permitted under the terms of the relevant agreement while also avoiding the position where the OFT would itself have to make a determination on a contractual dispute between two independent parties before it is adjudicated under the applicable dispute resolution mechanism.

3. Interim protection

News refers to the arguments made in questions 11.2 of the First OFT Response.

Without prejudice to these arguments, however, and to the extent that the Secretary of State regards it as necessary for remedying, mitigating or preventing the public interest concerns, News is prepared to undertake from the Closing Date (as defined in the Draft UIL) to give standard interim protections in respect of the Sky News business.

4. Duration of the Carriage Agreement and Brand Licensing Agreement

News refers to the arguments made in questions 5.1 of the First OFT Response. A 10 year agreement in this highly dynamic sector would represent an unusually long term agreement. Most broadcasters operate in circumstances where their main revenue streams are secured for periods significantly shorter than 10 years. A business plan that ensures viability for such a long period of time is most certainly "long-term" and goes beyond what is standard practice.

The OFT asked what would be the likely position of NewCo at the end of the initial carriage agreement. By the time of the expiry of the Carriage Agreement (in 2021), NewCo will no doubt have considered (and where relevant pursued) all opportunities to maintain and develop its business of news provision in light of market evolution. NewCo will be well placed to do so given Sky News' current market standing and reputation, the investments that have already been made by Sky in Sky News (and which would be acquired by NewCo, including HD capability), and the long term committed revenue stream that it will have a result of the Carriage Agreement.

Crucially, by that time, NewCo will still be able to rely on a four year period of the (extended) Brand Licensing Agreement [redacted] It would be irrational for News/Sky not to renew the Carriage Agreement and leave with NewCo the use of a highly valued brand – Sky News – which can be used to provide services on rival media platforms. Moreover, at that time, NewCo can continue to use the Sky News studio for another 5 years given that News would commit to a lease on the Sky News studio of up to 15 years.

Sky has always taken the view that the provision of Sky News (a high quality, Sky-branded news service) is an important part of its offering. It is on that basis that Sky has invested in Sky News over the last two decades and continues to fund the approximately £[redacted] net cost after advertising and syndication revenues of providing the channel. The 10 year Carriage Agreement will secure Sky News as part of Sky's offering, provided by an independently-viable NewCo.

If NewCo continues to produce a high quality and distinctive news service over the next 10 years, it is likely that Sky will wish to ensure that it can continue to offer Sky News as part of its offering, and renew its funding commitment to NewCo in a way that ensures NewCo's continued independent economic viability over the foreseeable future. In particular:

- Sky is unlikely to seek to replicate NewCo with an in-house news service of a similar nature. This is because the start-up costs of a standalone news channel are likely to be substantial, particularly in view of NewCo's lease on the Sky News studio which can be of up to 15 years.

- Sky is unlikely to seek to provide only a very short-term renewal of the Carriage Agreement, because in such circumstances NewCo would be unable to provide security of employment to key talent, or security of payment to key suppliers, which would negatively impact the quality of the news service.

To the extent that OFT feels it necessary to form a tentative view on possible scenarios on or around 2021, a renewal by Sky of the Carriage Agreement is by far the most likely counter-factual against which the OFT should consider the viability of NewCo.

We trust that you will find the clarifications contained in your letter helpful in finalising your advice to the Secretary of State and we remain at your disposal should you have any further questions.

Yours sincerely

[redacted]

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