

**Jeremy Hunt evidence to Leveson Inquiry**

**Primary evidence**

**Vol 1 of 3**



**EUROPEAN INTERVENTION NOTICE GIVEN PURSUANT TO SECTION 67  
ENTERPRISE ACT 2002 – ANTICIPATED ACQUISITION OF  
BRITISH SKY BROADCASTING PLC BY NEWS CORPORATION**

Whereas the Secretary of State has reasonable grounds for suspecting that it is or may be the case that:

(a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, as defined in section 23 of the Enterprise Act 2002 (“the Act”) in that:

(i) enterprises carried on by or under the control of News Corporation will cease to be distinct from enterprises carried on by or under the control of British Sky Broadcasting plc; and

(ii) the value of the turnover in the United Kingdom of the enterprise to be taken over exceeds £70million;

(b) a concentration with a Community dimension (within the meaning of Council Regulation (EC) No 139/2004 - “the EC Merger Regulation), or part of such a concentration has thereby arisen or will arise;

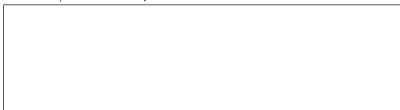
Whereas the Office of Fair Trading is unable to refer the relevant merger situation concerned to the Competition Commission under section 33 of the Act (whether or not it would otherwise have been under a duty to make such a reference) by virtue of article 21(3) of the EC Merger Regulation;

Whereas the Secretary of State is considering whether to take appropriate measures to protect legitimate interests as permitted by article 21(4) of the EC Merger Regulation;

Whereas the Secretary of State believes that it is or may be the case that the public interest consideration specified in section 58 of the Act concerned with the sufficiency of plurality of persons with control of media enterprises is relevant to a consideration of the merger situation;

Now, therefore, the Secretary of State in exercise of his powers under section 67(2) of the Act, hereby gives this intervention notice and requires the Office of Fair Trading to investigate and report in accordance with article 4 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 and Ofcom to investigate and report in accordance with article 4A of that Order, both within the period ending on 31 December 2010.

4 November 2010



An official of the Department for Business Innovation & Skills



Invitation to comment for public  
interest test on the anticipated  
acquisition of British Sky  
Broadcasting plc by News  
Corporation

Invitation to comment

Publication date: 5 November 2010

Closing date for submissions: 19 November 2010

## Introduction

- 1.1 On 3 November News Corporation notified the European Commission of its intention to acquire the shares in BSkyB it does not already own. On 4 November the Secretary of State issued a European intervention notice requesting Ofcom to report on the effects of the proposed acquisition on media plurality by 31 December 2010.
- 1.2 On 4 November Ofcom published a guidance note on our website<sup>1</sup>, setting out the process and timetable for preparing our report on the public interest consideration set out by the Secretary of State.

## The public interest consideration

- 1.3 In respect of the proposed News Corporation acquisition of the shares in BSkyB it does not already own, the Secretary of State for BIS has issued a European intervention notice in relation to the public interest consideration in section 58 of the Enterprise Act 2002 concerned with the sufficiency of plurality of persons with control of media enterprises, which 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”<sup>2</sup>*

- 1.4 In considering the public interest, we do so in light of the relevant statutory framework whereby Parliament has attached significance to the need for sufficient media plurality in the functioning of a healthy and informed democratic society.
- 1.5 In undertaking an initial investigation of this public interest consideration and providing advice and recommendations to the Secretary of State, we will consider the key constituent parts of the public interest issue outlined above. Specifically, we will consider:
  - Content types
  - Audiences
  - Media platforms
  - Control of media enterprises
  - Future developments in the media landscape
- 1.6 **Content types:** we will consider what are the most relevant content types and genres (for example news, current affairs, entertainment, fiction or drama) for the public interest consideration.
- 1.7 **Audiences:** we will consider whether specific consumer or citizen groups (defined by location, demographic, socio-economic group or any other relevant criteria) will be

<sup>1</sup> <http://media.ofcom.org.uk/2010/11/04/guidance-note-for-public-interest-test/>

<sup>2</sup> Enterprise Act 2002, s.58(2c)(a).

affected by the changes to the level of media plurality as a result of the proposed acquisition.

- 1.8 **Media platforms:** We will consider which are the relevant platforms or media enterprises (for example TV, newspapers, radio, internet, etc.) in reviewing the implications of the proposed acquisition.
- 1.9 **Control of media enterprises:** in relation to the issue of control, we will consider:
- 1.9.1 Plurality of persons with control of the relevant media enterprises (external ownership and control)
  - 1.9.2 Plurality in the range of information and views made available to audiences, including the level of independence in editorial control or expression within the relevant media enterprises (internal control)
- 1.10 **Future developments:** we will consider how future market developments, including the convergence of broadcast, print and internet media may affect consumers consumption of relevant media and the current levels of media plurality.
- 1.11 We are seeking views from stakeholders on all the issues set out above and any other issues you think we should consider. We also welcome views on the potential future impact of the proposed acquisition on the sufficient plurality of persons with control of the media enterprises in the UK.

### **Advice and recommendation to the Secretary of State**

- 1.12 Overall, Ofcom will consider how the proposed acquisition may affect the level of plurality of persons with control of the media enterprises serving the relevant audiences taking account of representations and analysis of relevant information.
- 1.13 Given the limited time for Ofcom's initial investigation and report on the effect on the media public interest consideration, we are also interested in third parties' views on potential remedies or mitigations to any public interest concerns identified by third parties. These will be passed to the Secretary of State (and to the Competition Commission in light of a reference) to help inform his decision.

### **How to make submissions**

- 1.14 Ofcom invites written submissions to be made **by 19 November**. We are seeking responses that provide views, supported by evidence, on the specific questions detailed above, or on other considerations stakeholders consider relevant.
- 1.15 Please make representations via:
- 1.16 The online web form at <http://stakeholders.ofcom.org.uk/consultations/public-interest-test/responseform>
- 1.17 By email - especially for larger submissions - particularly those with supporting charts, tables or other data – to [PublicInterestTest2010@ofcom.org.uk](mailto:PublicInterestTest2010@ofcom.org.uk) attaching your

response in Microsoft Word format, together with a consultation response coversheet.

- 1.18 Responses may alternatively be posted or faxed to the address below, marked with 'News Corp / BSkyB public interest test'.

Marco Marini  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Fax: 020 7981 3706

- 1.19 We do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- 1.20 Ofcom strictly observes confidentiality in all aspects of its operations. This applies to material supplied in response to this invitation to comment. We will give the Secretary of State (and the Competition Commission in the event that this acquisition is referred by the Secretary of State) all relevant submissions (including confidential ones) to enable him make his decision. If your submission includes material which is confidential, we will require a full version with confidential information omitted, together with reasons why the submission should be treated as confidential.
- 1.21 Meetings with stakeholders may also be held where appropriate. If you would like to request a meeting with Ofcom to discuss your submission, you should send a request via e-mail to [PublicInterestTest2010@ofcom.org.uk](mailto:PublicInterestTest2010@ofcom.org.uk) explaining why a meeting is required in addition to your written submission. We will consider these requests on an individual basis and as allowed within the timescale set by the Secretary of State.



# Invitation to comment: Public Interest Test – proposed acquisition of BSkyB by News Corporation

November 5, 2010

Ofcom has today published an invitation to comment on the Public Interest Test it will conduct in relation to News Corporation's intention to acquire the shares in British Sky Broadcasting Plc it does not already own.

This document outlines the considerations Ofcom will make as part of its initial investigation and now invites comments from interested parties.

## THE PUBLIC INTEREST CONSIDERATIONS

In considering the public interest, Ofcom will have particular regard to the significance attached by Parliament to sufficient media plurality. And in undertaking an initial investigation of this Public Interest Test Ofcom will specifically consider:

- Content types
- Audiences
- Media platforms
- Control of media enterprises
- Future developments in the media landscape

Ofcom is also seeking views about the potential future impact of the proposed acquisition on the sufficient plurality of persons with control of the media enterprise and on potential remedies or mitigations to any public interest concerns identified by interested parties.

## SUBMISSIONS

Written submissions must be made by 19 November 2010.

Details of how to respond and the full Ofcom Invitation to comment document can be found here:

<http://stakeholders.ofcom.org.uk/consultations/public-interest-test/>

## BACKGROUND

On 3 November News Corporation notified the European Commission of its intentions.

On 4 November the Secretary of State issued a European intervention notice requesting Ofcom reports on the effects of the proposed acquisition on media plurality by 31 December 2010.

On 4 November Ofcom published a guidance note on our website, setting out the process and timetable for preparing our report.

Ofcom's Guidance Note [Published 04 November] can be found here: <http://media.ofcom.org.uk/2010/11/04/guidance-note-for-public-interest-test/>

© Ofcom - see our terms and conditions at <http://www.ofcom.org.uk/terms-of-use/>

003 A

To: Secretary of State

Media Mergers: with specific reference to the current NewsCorp and BskyB case

Issue:

You wanted to know what powers you had in relation to media mergers generally.

Recommendation:

There is no role in the process for the DCMS so we would recommend that you do not have any external discussions on the BskyB media merger nor write to SofS BIS about it. If you want to contribute, you could write a letter stating facts backed up with evidence, provided it recognises the final decision is for the Business Secretary of State acting alone. However this carries risks to the robustness of the decision.

Prevention of undue concentration of media power is achieved in 3 ways:-

1. The statutory media ownership rules are enforced by Ofcom and provide absolute restrictions on ownership. These statutory rules are set by DCMS.
2. Where a merger is not prohibited altogether by these rules, mergers involving newspapers and media enterprises, like all other mergers, are subject to the competition based regulation by the independent competition authorities. BIS's responsibility.
3. The Secretary of State (BIS) has an exceptional power to intervene in media mergers if necessary, if he believes a potential media merger might have an adverse impact on the public interest concerned with ensuring plurality.

A flow chart which sets out the process where the public interest test is involved is attached.

In taking such decisions, the Secretary of State (BIS) is carrying out statutory functions in accordance with the provisions of the Enterprise Act 2002. He is performing a quasi judicial role as the statutory decision maker. It is the same role a regulator such as the Competition Commission would perform in taking determinative decisions about competition cases.

On introduction of the Enterprise Act 2002, the residual powers that are exercisable by the Secretary of State continued to be exercised by the Secretary of State for Trade & Industry who had taken decisions on all mergers under the previous Fair Trading Act 1973 regime.

But such decisions are case specific and must be taken on the individual merits of the case. They are not decisions about broader matters of Government policy such as might be decided by Cabinet collectively and must be taken by the BIS Secretary of State acting alone.

BskyB/NewsCorp example

SofS for Business intervened in this merger, asking Ofcom to provide an independent report that considers the mergers' potential impact on the public interest concerned with ensuring media plurality.

BIS took legal advice on this and the risk of challenge if the SofS (BIS) had not intervened was greater than the challenge if he did intervene. The intervention so far has been merely to say that there may be a case under the public interest test, but we need more information. This was not a policy



decision but a decision of referral; he has yet to decide whether to refer it to the Competition Commission. In the plurality debate in the House of Lords last week all speakers from all sides of the House were positive about the decision to intervene.

DCMS role

There is no DCMS role in the decision making process and the Secretary of State (DCMS) has no locus for intervention.

However, given your interest in the sector as Secretary of State for Media, you are within your rights to give your opinion, so long as the tone makes clear the fact that this is a decision for the Secretary of State for Business alone, and that any opinions are backed up with evidence.

If the Ofcom report is made public, you could write to the SofS (BIS) giving your opinion on the report, though any disagreement with the recommendation would need clear evidence to back it up and such a letter could be cited in any forthcoming judicial review and could create difficulties in the defence of the decision.

As Ofcom are conducting the independent review on the public interest test it would not be appropriate for you to discuss this with them as it could be seen to be exercising your political influence.

There is guidance on Ministers intervening in competition cases and it advises against it on the grounds that it could undermine the final decision in any judicial review proceedings.

Ofcom's role to conduct the review is made under statute in the Communications Act 2003. The review will be conducted within a tight framework as set out in section 377 of the Act. It states that the report shall contain advice and recommendation on any media public interest consideration mentioned in the intervention notice concerned. In this case it was "the sufficiency of plurality of persons with control of media enterprises".

After receipt of the report on 31 December, the SofS BIS will decide whether to refer this to the Competition Commission.

Legal Advisers and Jon Zeff have cleared this note.

- 12.11.10

CC: Ed Vaizey, Jonathan Stephens, Jon Zeff, Keith Smith,  Special Advisers.

003B

[Redacted]

---

**From:** [Redacted]  
**Sent:** 15 November 2010 19:17  
**To:** [Redacted]  
**Cc:** ZEFF JON; SMITH KEITH; STEPHENS JONATHAN  
**Subject:** Media Mergers

[Redacted]

Many thanks for you note on media mergers.

SoS has noted the advice and asked to see the results of Jonathan's request to the legal advisers as soon as possible.

SoS remains of the view that there are policy implications to these decisions, including the current case before Ofcom.

[Redacted]

003C

[Redacted]

**From:** [Redacted]  
**Sent:** 19 November 2010 14:29  
**To:** [Redacted]  
**Subject:** FW: Specified considerations

Not sure if you have seen this...

[Redacted]

---

**From:** [Redacted]  
**Sent:** 15 November 2010 12:09  
**To:** [Redacted]  
**Subject:** RE: Specified considerations

[Redacted]

Jonathan and Patrick discussion this morning.

Jonathan indicated that he was thinking about possible overlap in circumstances in which the AG or DPP are required to make difficult decisions around whether to prosecute in certain cases – and in doing so consulting with Govt colleagues.

He suggested it could be argued that SofS had a right to be consulted on this issue (particularly if we were in the plurality rather than competition arena), as relevant SofSs would be in instances relating to financial or national security.

Patrick agreed to have a further discussion with colleagues at BIS to ascertain whether there is any scope for movement around providing SofS with a formal opportunity to inform the BIS SofS of our view on this issue.

Thanks,

[Redacted]

[Redacted]  
Department for Culture, Media and Sport  
0207 [Redacted]

---

**From:** [Redacted]  
**Sent:** 12 November 2010 14:57  
**To:** [Redacted]  
**Cc:** SMITH KEITH; ZEFF JON  
**Subject:** FW: Specified considerations

Hi [Redacted]

Please see the advice below from legal. It would still be helpful to have a steer about where to look for the precedents Jonathan was thinking of so we can fully explore those avenues.

Thanks

[redacted]

---

**From:** [redacted]  
**Sent:** 12 November 2010 14:22  
**To:** [redacted]  
**Cc:** SMITH KEITH; KILGARRIFF PATRICK  
**Subject:** Specified considerations

[redacted]

As discussed, I wonder if it's important to emphasise that the ability to intervene is given to the SoS only on "specified grounds". Those are set out in s. 58 of the Enterprise Act and are in relation to (1) national security, (2) plurality, and (3) maintaining the stability of the UK financial system.

In historical terms, the national security consideration is the more ancient, and I would not be remotely surprised if there were formal methods of consulting OGDs. But that seems to be because there are so many who might want a say in national security considerations (MOD, FCO, Home Office, security and intelligence services) that co-ordination would be necessary.

This intervention operates differently anyway, because section 44A has given Ofcom a role in connection with media mergers. That role is expressly to report on the media public interest considerations, and gives Ofcom the power to carry out investigations. Ofcom's role is therefore to report on plurality issues. I daresay that SoS BIS could have asked formally for SoS CMS' views on plurality to inform the decision on whether or not to issue an intervention notice in the first place, but that would be really on whether the initial hurdle of whether to refer to Ofcom had been surmounted and would probably only be useful in a marginal case.

I am not aware of any precedent, nor any formal process of cross-Departmental consultation of the nature which Jonathan is thinking of.

Does that help?

[redacted]

Legal Advisers to the Department for Culture, Media and Sport  
Treasury Solicitor's Department | 2-4 Cockspur Street | London | SW1Y 5DH  
Email: [redacted] Tel: 020 [redacted] fax: 020 [redacted] www.culture.gov.uk

003D

[Redacted]

**From:** KILGARRIFF PATRICK  
**Sent:** 19 November 2010 17:49  
**To:** [Redacted]  
**Cc:** GEIST-DIVVER CAROLA; [Redacted] ZEFF JON; SMITH KEITH; [Redacted]  
**Subject:** Media mergers - plurality - role of SoS  
**Attachments:** 101118 Note on representations (2) (clean).DOCX

[Redacted]

Attached is a note prepared by [Redacted] on the above (and following discussion with lawyers at BIS). I fear it confirms existing advice. Is it what Jonathan had in mind both for himself and to form the basis of a further submission to the SoS. If so, we can go ahead. If not and if something directly from me is required I fear I am at Sunningdale next week (as I suspect is Jon) but I can do something early the following week.

Patrick

Patrick Kilgarriff  
 Legal Director  
 Department for Culture, Media and Sport  
 2-4 Cockspur St  
 London SW1Y 5DH

[Redacted]  
 [Redacted]

**Ability of Secretary of State CMS to intervene  
in relation to mergers raising media plurality issues**

Introduction

1. This note has been prepared following discussion with BIS Legal in order to set out what steps, if any, the Secretary of State CMS can take in connection with a decision to intervene in a media merger. This note has not been formally cleared with BIS Legal (although it will be sent to them for information), but we are aware that they share the conclusions set out.
2. The ability of the Secretary of State to intervene in mergers in response to public interest considerations is set out in section 42 of the Enterprise Act. The specific considerations envisaged are set out in section 58 of the Enterprise Act, and are national security, the need for accurate presentation of news and free expression of opinion in newspapers, a sufficient plurality of views in newspapers, media plurality, and in the interests of maintaining the stability of the UK financial system.

Who exercises the power to intervene?

3. The power to intervene is not, legally, restricted to one particular Secretary of State. However, the power is contained in the Enterprise Act, and it is clear that, as a matter of governance, power to deal with matters arising from the Enterprise Act has been given to the Secretary of State BIS.
4. The ability to intervene in a merger to protect plurality can only be exercised in a case where a relevant merger situation has arisen (section 42). A relevant merger situation is defined in the Enterprise Act, and is a pure competition measure. It is clear therefore, that a case in which a decision in relation to media plurality is necessary, an assessment of the competition effect of the merger will be necessary as a prior consideration. It is for this reason, in addition to the reasons in the preceding paragraph, that the Secretary of State BIS alone is in fact responsible for making the decision.

What is the nature of the decision?

5. The decision to intervene in a merger is a quasi-judicial decision. By this, we mean a decision which is not driven by policy concerns, and has to be taken on the facts before the decision maker. It is not a Cabinet decision, and no collective Cabinet responsibility applies. Similarly, a decision on a planning application, or an application for a harbour revision order would be characterised as quasi-judicial decisions.
6. A decision to intervene is susceptible to challenge (by either party to the merger, or any other person with sufficient interest in doing so) by way of judicial review. The Secretary of State BIS will need therefore to ensure that his decision is robust enough to withstand scrutiny, and takes into account all relevant considerations, and no irrelevant ones. In this particular case, the Secretary of State BIS was advised that it was more likely that a successful challenge could be made to a decision not to intervene than to a decision to intervene.

Consultation requirements in relation to public interest quasi-judicial considerations

7. The Enterprise Act does not require the Secretary of State BIS to consult with any parties before he makes a decision to intervene (or not to). However, he will have to take into account, for the reasons already given, any representations made to him by any party where those representations are relevant. There is no express role for any other Secretary of State to make representations, or to be consulted in respect of any of the specified public interest considerations.
8. The Act does not prevent the Secretary of State BIS from consulting with any other part of government, should he need to, in considering whether to exercise his discretion to issue an intervention notice. It is clear that in relation to national security considerations a number of agencies in government may well have relevant views about intervention, and the Secretary of State may need to consult with those agencies in order to ascertain exactly what the public interest issues are. This may also be the case in relation to the stability of the financial system. In neither of those situations is there one body which could advise the Secretary of State on the gamut of issues.
9. However, the situation in relation to media mergers is different. That is because the Enterprise Act expressly gives Ofcom the duty of reporting to the Secretary of State BIS in relation to the public interest considerations relevant to the merger (section 44A). Once the Secretary of State BIS has received Ofcom's report, he will have to make a further decision on whether to refer the matter to the Competition Commission for a further, and more detailed, consideration of the public interest. The decision making process (and its susceptibility to challenge) will be the same as the above.
10. We have considered whether there are any parallels between the Secretary of State BIS' decision to intervene in a media merger, and cases where the Attorney General's consent is required to prosecute, which is also a quasi-judicial decision. On balance, we do not think that there are sufficient similarities. This is for a number of reasons, set out below.
11. None of the requirements for the Attorney General to give consent that we have considered are expressed to be considered "in the public interest". It is clear that this will be part of the Attorney General's consideration, however. He may need to weigh the public interest over a number of different departments and policy areas, which would mitigate in favour of consultation to assess the effect of a decision on those departments.
12. In some of the offences for which consent is required to prosecute, it is clear that other considerations than a pure public interest consideration will be necessary, and the Attorney General will have to balance this. This is the case, for example, in relation to the Suppression of Terrorism Act 1978, where the Attorney General will have to consider the effect of his decision on international relations. In relation to a prosecution under the Official Secrets Act 1911, the Attorney General may have to balance the public interest considerations with considerations of what information might have to be released in Court, and which is of a confidential (and possible national security) nature. Those decisions are likely to involve the interests of more than one other party in Government, where there is no specialist agency to consider them and advise the Attorney General accordingly.

Can the Secretary of State CMS make representations after receipt of Ofcom's report?

13. Our conclusion therefore is that there is no formal role for the Secretary of State to make representations to the Secretary of State BIS either before a decision to intervene is made, or after receipt of Ofcom's report. The legislation does not invite the making of representations, but it does not preclude them either.
14. It will be a relevant consideration (both for the Secretary of State BIS and the Secretary of State CMS) as to whether any representations which are made are likely to affect the ability of the Secretary of State BIS to resist any challenge to his further decision on whether to remit the matter to the Competition Commission. Representations may give rise to a fear (however ill-founded) that those representations are irrelevant, and, if the Secretary of State BIS considers them, it renders his decision unsafe. Other parties may consider that that, if the Secretary of State BIS does not consider the representations, he should have done and therefore his decision is unsafe. In either event, it runs the risk of increasing the chances of a successful challenge to the decision, when, in any event, a full report on media plurality will be received from Ofcom.
15. It would, in any event, be difficult for the Secretary of State CMS to make representations about the substance of the Ofcom report, since he will not have had access, and will not have been able to analyse, the background information available to Ofcom in the preparation of that report.

It may well be the case that the Secretary of State CMS will be precluded from seeing the Ofcom report in advance in any event, by virtue of the information provisions of Part IX of the Enterprise Act. Section 237 of the Act applies a general restriction on disclosure of information about the business of an undertaking (which would certainly be contained as part of the Ofcom report). There is no provision permitting a general disclosure across government, although section 239 does provide that disclosure may be permitted with consent. Consent would have to be from NewsCorp and BSkyB (and possibly from other parties who made representations). Disclosure of information would be precluded either from Ofcom or from BIS, and would relate to both the report itself and the background information which underpinned the report.

### Conclusion

16. Whilst there is nothing legally which formally precludes the Secretary of State CMS from making representations to the Secretary of State BIS to inform the latter's decision as to whether to refer the public interest considerations in this merger to the Competition Commission, it would be unwise to do so. This is because the task of assessing the impact of the merger on media plurality is expressly given to Ofcom, and because the Secretary of State CMS will almost certainly be able to see neither the report itself nor the underlying materials. Furthermore, and partly as a consequence, any representations made by the Secretary of State CMS are likely to raise the risk of challenge to a decision made by the Secretary of State BIS because it will appear to be purely political in nature (although, of course, it may well not be in fact, and thus be of limited assistance to him in making his assessment).



003E

[Redacted]  

---

**From:** [Redacted]  
**Sent:** 07 December 2010 13:34  
**To:** [Redacted]  
**Subject:** FW: Competition issues

Fyi!

[Redacted]

---

**From:** KILGARRIFF PATRICK  
**Sent:** 07 December 2010 13:33  
**To:** [Redacted] PARKER WENDY  
**Subject:** RE: Competition issues

[Redacted]

Thanks – I appreciate that the advice is not what JS and possibly JH wanted to hear – but I think it amounts to – “do nothing, do not try to convey your thinking to VC, he must act quasi-judicially and only through formal processes”. Further and in any event, the clear legal advice to VC would be that you cannot hear JH on this matter and VC shows all the signs of taking that advice, so the matter would be academic.

Patrick

---

**From:** [Redacted]  
**Sent:** 07 December 2010 13:26  
**To:** KILGARRIFF PATRICK; [Redacted]  
**Subject:** Competition issues

Hi both,

I’m very conscious that I’ve not come back to you with a definitive view from Jonathan following the additional advice you provided a couple of weeks ago.

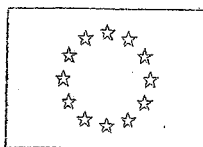
I mentioned to him briefly and I think we just have to proceed as advised – I’ve not managed to get formal views from him and I’m conscious that time is marching on.

I will obviously let you know if I get any further in the coming days but otherwise take this as a green light from here (I fully expect you were in any event!!).

Thanks,

[Redacted]

[Redacted]  
Department for Culture, Media and Sport  
[Redacted]



EUROPEAN COMMISSION

Brussels, 21/12/2010

SG-Greffe(2010) D/  
C(2010) 9684

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION**To the notifying party:**

Dear Sir/Madam,

**Subject: Case No COMP/M.5932 – News Corp/ BSKyB  
Notification of 3 November 2010 pursuant to Article 4 of Council  
Regulation No 139/2004<sup>1</sup>**

1. On 3 November 2010, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which News Corporation ('**News Corp**', United States of America, hereinafter the '**notifying party**'), acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of the undertaking British Sky Broadcasting Group ('**BSkyB**', United Kingdom) by way of public bid.
2. After examination of the notification, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the internal market and the EEA agreement<sup>2</sup>. After having been informed that it could not be excluded at that stage of the procedure that the notified operation might raise serious doubts as to its compatibility with the

<sup>1</sup> OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> This is without prejudice to the ongoing UK media plurality review (see Section V below).

internal market given the absence at that stage of certain data with respect to advertising, on 1 December 2010, the notifying party submitted commitments pursuant to Article 6, paragraph 2 of the Merger Regulation. Specifically, News Corp offered commitments involving [access remedy] to advertising space in [newspaper] in the UK for a period of [...] from the completion of the proposed transaction. On the basis of the additional elements provided by the notifying party and third parties, the Commission considers that no serious doubts arise from a possible input foreclosure of BSkyB's pay-TV competitors as regards advertising space in News Corp's newspapers (as explained below), so that the commitments submitted by the notifying party are not necessary.

## **I. THE PARTIES**

3. News Corp is a diversified global media company which is active in the following fields: production and distribution of filmed entertainment, TV programming, TV satellite and cable broadcasting, the development of conditional access and subscriber management systems and the creation and distribution of online programming. News Corp is active in the following sectors in the United Kingdom and Ireland: (i) licensing of feature films and TV programmes; (ii) wholesale supply of TV channels; (iii) publishing of print and online newspapers; (iv) book publishing; (v) advertising on TV channels, websites and printed press; and (vi) provision of pay-TV technical services. News Corp is also a leading pay-TV operator in Italy (through Sky Italia), and Germany and Austria (through Sky Deutschland).
4. BSkyB is the holding company of a number of subsidiaries which are active in a variety of sectors in the UK and Ireland, namely: (i) creation and wholesale supply of TV channels; (ii) retail distribution of pay-TV channels; (iii) provision of pay TV technical services; (iv) advertising on BSkyB and third party TV channels, and on BSkyB's online media properties; (v) provision of retail telephony and broadband services; (vi) enhanced and interactive services; and (vii) gaming and betting.

## **II. THE OPERATION**

5. On 15 June 2010, News Corp announced pursuant to Rule 2.4 of the UK Takeover Code, that it had approached the board of directors of BSkyB and, proposed to make an offer to acquire the entire issued and to be issued share capital of BSkyB not already owned by News Corp. News Corp and BSkyB have so far been unable to reach a mutually agreeable price. However, both parties entered into a Cooperation Agreement on 15 June 2010 agreeing to proceed with the regulatory process to facilitate the transaction.
6. The announcement made by News Corp on 15 June 2010 along with the Cooperation Agreement concluded between News Corp and BSkyB on 15 June 2010 are sufficient to meet the relevant legal standard to constitute a notifiable concentration within the meaning of Article 4(1) of the Merger Regulation.
7. News Corp is already a shareholder in BSkyB via News Nominees Limited ("News"). The current shareholder structure of BSkyB is the following: News: 39.14%; Capital Research and Management Company: 5.02%; Brandes Investment Partners L.P.: 3.12%; The Capital Group Companies, Inc.: 3.1%; Other (free float): 49.62%.

8. In order to establish whether the proposed acquisition by News Corp of the remaining 60.86% of the shares in BSKyB that it does not already own constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation, the Commission must assess whether the proposed transaction would bring about a change of control over BSKyB (from a situation of no control to a situation of sole control by News Corp).
9. The legal test to be applied in this context is whether News Corp (through News) already has the possibility to exercise a decisive influence on BSKyB (Article 3(2) of the Merger Regulation). It must be assessed whether, on the basis of the shareholding structure and the corporate governance rules of BSKyB, News Corp could be deemed to be already exercising a decisive influence on the strategic business decisions of BSKyB.
10. Notwithstanding its shareholding of 39.14% in BSKyB, News Corp's voting rights are restricted to 37.19% as a result of a voting agreement (the "Voting Agreement") of 21 September 2005, which became effective on 4 November 2005<sup>3</sup>.
11. The fact that News Corp indirectly holds 37.19% of the voting rights in BSKyB does not confer it sole control over the company, as it would not have the majority of the votes at the shareholders' meetings and it does not hold any special rights attached to its shareholding<sup>4</sup>.
12. A limited number of decisions require a supermajority of 75% of the total voting rights which could grant News Corp a veto right. The actions for which a majority of 75% of the total voting rights of the members who voted on the resolution are established by the Companies Acts 2006, by the Insolvency Act 1986 and by the Articles of Association of the company. These decisions, however, have no bearing on the strategic decisions of BSKyB<sup>5</sup>, but rather refer to the protection of minority shareholders or to administrative matters related to the "off-market purchases of own shares" or to possible winding up of the company. None of these decisions would have an impact on the strategic commercial conduct of BSKyB.
13. On the basis of an analysis of the attendance rates of the annual general meetings of BSKyB for the past 4 years (since 2006), News Corp did not hold more than 50% of the total of the present shares that voted. This is true both in relation to News Corp's restricted voting rights (37.19%) and also in relation to its shareholding without restriction (39.14%).
14. In general, directors are nominated by the board and then appointed by a vote at the shareholders' meeting, which decides by simple majority<sup>6</sup>.
15. The composition of BSKyB's board of directors is as follows: 8 "independent" directors and 6 "non-independent" directors<sup>7</sup>. Of the 6 non-independent directors, 4

---

<sup>3</sup> [...].

<sup>4</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.04.2008, p. 1, paragraph 57

<sup>5</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.04.2008, p. 1, paragraph 58.

<sup>6</sup> Articles of Associations of BSKyB, article 69, and UK Companies Act 2006.

are affiliated with News Corp and do not have executive positions within BSkyB, while the 2 directors who are not affiliated with News Corp are, respectively, CEO and CFO of BSkyB. Therefore, only 4 out of 14 directors have a connection with News Corp.

16. The board of directors takes its decisions by simple majority<sup>8</sup>.
17. The minutes of the board meetings provided by BSkyB also confirmed that in matters involving relationships with any of the companies belonging to the News Corp's group, the 4 directors affiliated with News Corp are excused from the discussion and the voting.
18. There also are no other elements on the basis of which News Corp could be deemed to de facto control BSkyB.
19. For the year ending 30 June, 2009, BSkyB supplied programming, telephony, airtime sales, transmission and EPG services, marketing, brand and other IPR licensing, network hosting services, and consultancy services to News Corp, in addition to receiving revenues from certain joint ventures (National Geographic International and National Geographic Latin America, and Tour Racing limited, which supports the "Team Sky" professional road cycling team) with News Corp companies, for a value of around GBP 40 million.
20. During the same period, BSkyB purchased programming (including content and channels), digital equipment, smartcards and encryption services, set top box technologies, advertising and IT services from News Corp companies for a value of GBP 212 million.
21. Revenues achieved by BSkyB from dealings with News Corp's entities account for less than [0-5]% of BSkyB's total revenues. News Corp does not therefore seem to be a key customer of BSkyB.
22. Similarly, BSkyB is not in any way dependent upon News Corp as a supplier. TV content and TV channels provided by News Corp only represents a very limited percentage of the total content acquired by BSkyB in the UK and Ireland. For the year ending 30 June 2009, BSkyB's spend on the News Corp TV channels represented approximately [...] of BSkyB's total spend on third party TV channels. With respect to BSkyB's spend on content for its wholly-owned channels, its spend on TV content from News Corp made up approximately [...] of BSkyB's total spend on content during the same time period. Similarly, while BSkyB currently sources pay-TV technical services from NDS, which is jointly controlled by News Corp and Permira, BSkyB could source similar services from NDS' competitors. In any event, the relevant agreement was, according to the notifying party, negotiated at arm's length between BSkyB and NDS, also in view of the presence of Permira as a co-controlling shareholder of NDS.

---

<sup>7</sup> A non-independent director in this context is one who has either a connection to BSkyB operations (namely the CFO and CEO in this case) or who has a connection to News Corp.

<sup>8</sup> Art. 116(3) of the Articles of Association of BSkyB group plc.

23. In any event, BSkyB submitted that it conducts all business transactions with companies that are part of the News Corp group on an arm's length basis. This is ensured by the "related party transactions" provisions of BSkyB's corporate governance policies, which specifically provide that arrangements with News Corp require either the approval of BSkyB's Audit Committee (which comprises Independent Directors only), or both Audit Committee and the board approval, depending on materiality.
24. In view of the above, it can be concluded that News Corp does not currently exercise sole control, whether de jure or de facto, over BSkyB.
25. Through the proposed transaction, News Corp will therefore acquire sole control of BSkyB. The proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

### III. EU DIMENSION

26. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>9</sup> (News Corp: EUR 23 499.9; BSkyB: EUR 6 635.4). Each of them has an EU-wide turnover in excess of EUR 250 million (News Corp: EUR [...]; BSkyB: EUR [...]). BSkyB achieved more than two-thirds of its EU-wide turnover in one Member State (the United Kingdom), but News Corp did not.
27. The notified operation therefore has an EU dimension.

### IV. COMPETITIVE ASSESSMENT

28. News Corp and BSkyB are active in various sectors in the UK and Ireland, namely the audiovisual sector; advertising; and newspaper publishing. The assessment of the competitive impact of the proposed transaction is carried out in relation to the markets where the parties are active at the same level of the value chain (horizontal overlaps) or to the markets where the parties have activities that are upstream or downstream of each other (vertical relationships).

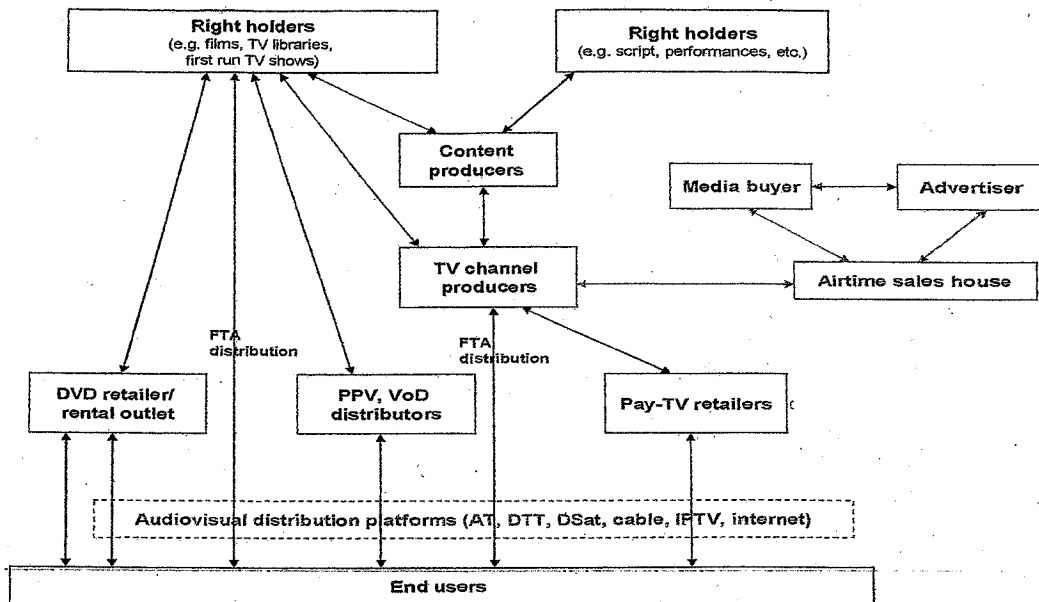
#### 1. The Audiovisual Sector

##### *1.1. Introduction: the audiovisual value chain and the parties' activities in the audiovisual sector in the UK and Ireland*

29. The pay-TV supply chain in the UK and Ireland consists of the following layers: (1) licensing and acquisition of audiovisual content; (2) wholesale supply of TV channels; (3) provision of pay-TV technical services (conditional access technology, set-top box); (4) provision of platform services (such as terrestrial, cable, satellite, ADSL); and (5) retail pay-TV services (linear and non-linear). BSkyB is active at each of these levels (except for the provision of pay-TV technical services).

---

<sup>9</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation.

**Table 1 – Audiovisual supply chain**

#### 1.1.1. Content – production, licensing and acquisition

30. Upstream in the audiovisual chain are the holders of broadcasting rights for audiovisual content such as (i) premium films, (ii) sport events and (iii) other content (such as TV series and documentaries).
31. As regards premium films in the UK and Ireland, the six Hollywood majors<sup>10</sup> usually license different categories of broadcasting rights, corresponding to an exhibition window. Following the exhibition windows for cinematic release, for DVD retail/rental and for 'download to own' ('DVO'), films are made available for TV broadcast in the following sequential order: (i) Pay-Per-View (PPV)/Video On Demand (VOD); (ii) first and second pay-TV windows; and (iii) free-to-air (FTA) window. A motion picture licensor typically agrees to license all of its non-library<sup>11</sup> motion picture "output" over a fixed number of months for a fixed number of runs (through so-called "output deals") and generally on an exclusive basis<sup>12</sup>. Film broadcasting rights may be licensed for the entire territory of the UK and Ireland, or separately between the two countries, and may include a variety of rights.

<sup>10</sup> 20th Century Fox (controlled by News Corp), Warner Bros, Paramount, Sony, Universal and Walt Disney.

<sup>11</sup> After films have run this course of exhibition, they become known as 'library films'.

<sup>12</sup> A licensor typically grants exclusive broadcasting rights when it believes that the revenue that it can achieve from one single licensee would likely exceed the revenue that it would achieve by licensing its content more broadly to various different licensees. A licensee's interest in obtain exclusive rights lies in the fact that competition between TV broadcasters is driven by product differentiation. The principal means of product differentiation is to acquire or produce programming for their channels that is, as far as possible, unique to the channel.

32. Broadcasting rights are licensed to: (i) broadcasters which then incorporate them into linear TV channels; or (ii) content platform operators which retail the content to end users on a VOD/PPV basis.
33. News Corp licenses rights to the following content in the UK and Ireland:
- (i) *US films*. News Corp's subsidiary, 20th Century Fox, is one of the Hollywood majors.
  - (ii) *Sport events*. News Corp's licensing activities in relation to sport events in the UK and Ireland are very limited and relate mainly to rugby union and league matches from South Africa, New Zealand and Australia.
  - (iii) *Other TV content*. News Corp's licensing activities in relation to other content are limited in the UK and Ireland with shares of approximately [0-5]% and [0-5]% in terms of hours of programming.
34. BSkyB produces (or commissions) its own audiovisual content<sup>13</sup>. It also acquires rights to third party content:
- (i) *Premium films*. In the UK and Ireland, BSkyB holds exclusive first pay-TV window rights and exclusive subscription VOD rights ('SVOD') in the first pay-TV subscription window<sup>14</sup> to films from the Hollywood majors via output deals (as well as from a number of independent film distributors). BSkyB also holds non-exclusive licenses to approximately [50-60]% of transactional VOD ('TVOD')/PPV rights. BSkyB accounts for approximately [50-60]% of total spend on acquisition of broadcasting rights for all films in the UK and Ireland<sup>15</sup>.
  - (ii) *Sport events*. BSkyB is the acquirer of most of the live matches of the UK Premier League football matches (considered as key content in the UK in order to attract viewers). BSkyB accounts for approximately [50-60]% of total spend on acquisition of broadcasting rights for sport events in the UK and Ireland.
  - (iii) *Other TV content*. BSkyB's acquisition of broadcasting rights for other TV content represents, according to the notifying party, approximately [5-10]% of total spend in the UK and Ireland.

1.1.2. Linear TV channels – wholesale supply and acquisition

35. TV channel suppliers (such as BSkyB, BBC, ITV and ESPN) license their channels to providers of retail TV services for incorporation into broader TV channel bouquets that are in turn sold to viewers.
36. Some TV channel suppliers (such as BSkyB) are vertically-integrated as they own a technical platform and/or are active as a retail pay-TV operator. They broadcast their own

---

<sup>13</sup> With the exception of some news content and a limited amount of sports content, BSkyB does not generally license its own audiovisual content to third parties.

<sup>14</sup> Both types of exclusive rights are sold together by the Hollywood majors to BSkyB.

<sup>15</sup> Total spend includes PPV, VOD, second pay-TV window, FTA and library rights.



channels together with third party channels via their own platform. Other TV channel suppliers (such as Discovery channels) are not vertically-integrated and depend on platform operators or retail pay-TV operators to broadcast their channels.

37. FTA channels<sup>16</sup> are mainly financed by advertising and sometimes, public funds. Pay-TV channels<sup>17</sup> are primarily financed by subscription fees paid by viewers; other sources of finance are carriage fees paid by retail operators and advertising.
38. News Corp licenses its pay-TV channels (National Geographic, Fox, Baby TV and Star TV) to a number of retail pay-TV operators (including BSkyB).
39. BSkyB acquires third party pay-TV channels in the UK and Ireland for inclusion in its retail pay-TV offering. BSkyB accounts for approximately [80-90]% of total spend on acquisition of TV channels in the UK and [70-80]% in Ireland.
40. BSkyB also licenses some of its basic and premium TV channels to cable operators (such as Virgin Media in the UK and UPC in Ireland) for retail to their subscribers, as well as to IPTV operators (Talk Talk TV in the UK), or DTT operators (BT Vision and Top Up TV in the UK).
41. The notifying party submits that BSkyB has a clear preference for self-retail, as in such case BSkyB has a direct customer relationship and is able to better market its premium channels and other services to end customers. The notifying party submits that BSkyB has nevertheless a strong incentive to also distribute its channels to other retail operators in order to reach subscribers that it would not be able to reach via its digital direct to home satellite ("DTH") platform (subscribers may have a preference for the platform of another operator due to its characteristics such as superfast optic fibre cable broadband or due to planning restrictions which may prevent installation of a satellite dish).
42. On 31 March 2010, Ofcom issued a decision requiring BSkyB to offer its premium channels Sky Sports 1 and Sky Sports 2 to qualifying retailers (currently Virgin Media, BT Vision and TopUp TV) on platforms other than BSkyB's at reduced prices determined by Ofcom. BSkyB has appealed the decision. In addition, on 4 June 2010, as part of the sale by Virgin Media of some of its TV channels<sup>18</sup> (Virgin Media TV Channels - "VMtv") to BSkyB, BSkyB reached an agreement with Virgin Media by which Virgin Media will have the option of carrying any of Sky's basic High Definition ("HD") channels, Sky Sport HD 1 and Sky Sport HD 2, and all Sky Movies HD channels. Virgin Media will also make available through its on-demand TV

---

<sup>16</sup> In the UK: the BBC, ITV, Five, some Channel 4, three BSkyB channels; and in Ireland, TG4, TV3, the RTE channels and the BBC.

<sup>17</sup> Such as BSkyB's basic channels (for example Sky News and Sky Sports News) and premium channels (for example Sky Movies Premiere and Sky Sports channels), UKTV's channels, ESPN's channels and Disney's channels in the UK.

<sup>18</sup> The channels acquired are LIVING, LIVINGit, Challenge, Challenge Jackpot, Bravo2 and Virgin1. The operation did not include the acquisition of Virgin Media's participation in UKTV, a joint venture with BBC.

service a range of content from Sky's basic and premium channels, including the newly acquired VMtv channels<sup>19</sup>.

### 1.1.3. Retail TV services

43. Retail pay-TV services essentially comprise the provision to end-users of (i) packages of linear TV channels; and (ii) non-linear PPV/VOD services<sup>20</sup>.
44. The following pay-TV retailers are present in the UK: BSkyB (DTH), Virgin Media (cable), Top Up TV (DTT), Talk Talk TV (IPTV), and BT Vision (DTT and IPTV).
45. The main pay-TV retailers present in Ireland are BSkyB (DTH) and UPC (cable). Others include Casey Cablevision (cable), Crossan Cable (cable – analogue only), Magnet Networks, 3Play Plus and Smart Telecom (all limited IPTV players).
46. There are six main technical means of delivering audiovisual content to end users: (i) via analogue and digital terrestrial televisions; (ii) satellite; (iii) cable; (iv) IPTV<sup>21</sup>; (v) the internet more generally; (vi) 3G mobile technologies.
47. All technologies are used in the UK and Internet TV is evolving rapidly there, due, inter alia, to increasing amounts of content becoming available online<sup>22</sup>, improvements in compression technologies and increasing penetration of fast broadband services and internet-enabled devices. A recent development in the UK is the BBC-backed joint venture<sup>23</sup> to develop an internet-connected television platform (previously known as Project Canvas, now marketed as 'YouView') to provide both linear and on-demand content on a hybrid DTT/IPTV platform (via a set-top box connected to viewers' TV sets) on a free and pay basis. YouView is currently intended to launch in April 2011.

---

<sup>19</sup> <http://corporate/sky/com/page.aspx?pointerid=6123cbfe61d648e38fb10a1e7a2024e5>.

<sup>20</sup> Programming supplied on VOD can be offered on a subscription basis (periodic fee for access to a pool of programming - SVOD); a transactional/PPV basis (TVOD); or at no additional charge to an existing pay-TV subscriptions (such as 'Sky Anytime' for BSkyB). There are several types of VOD services, including: (i) *Push VOD* – programmes selected by the service provider broadcast and automatically saved on the customer's personal video recorder (like 'Sky Anytime' - available to BSkyB subscribers with an appropriate set-top-boxes in the UK and Ireland; or Top Up TV's UK VOD service); (ii) *Pull VOD* – libraries of programming stored externally to the home available for viewing upon request (BSkyB will be launching a pull VOD service, 'Sky Anytime +' later this year to BSkyB subscribers having a Sky+HD box and a BSkyB broadband service). DTH and DTT technologies, which are "uni-directional" technologies, cannot support pull services. However, cable and IPTV networks, being "bi-directional" technologies, are ideally suited for such services.

<sup>21</sup> IPTV involves the distribution of audiovisual content over the Internet (via a telecommunications or DSL network). Such service requires that the end-user be in possession of a DSL modem and a (proprietary) set-top-box.

<sup>22</sup> 'Catch up TV' (for example, the ITV Player), archive TV content (for example, the TV series available on Apple's iTunes), streamed simulcasts of TV channels (for example live sports events streamed by BBC) and movies are becoming increasingly available for viewing online. Such content is available via (i) TV broadcasters' websites (for example ITV.com, 4OD) and player applications (for example BSkyB's 'Sky Player'); and (ii) aggregator services (for example, You Tube showing TV programmes provided by Channel 4 and Five and clips from programmes provided by the BBC and Blinkbox (an online VOD service)).

<sup>23</sup> Other joint venture partners are ITV, Channel 4, Five, BT, TalkTalk TV and Arqiva.

48. DTT is not yet commercially available in Ireland. The IPTV sector in Ireland has yet to develop significantly (three operators are currently present to a limited extent: Magnet Networks, 3Play Plus, and Smart Telecom).
49. In the UK and Ireland, BSkyB retails packages of its own and third party pay-TV channels and audiovisual programming (i) to its DTH subscribers; (ii) via IPTV/cable; (iii) via the Internet; and (iv) via mobile technologies:
- (i) *DTH*. BSkyB's DTH packages include different combinations of the 26 basic and premium BSkyB channels and third party channels, totalling 160 channels. BSkyB also offers HD subscription (to access HD variants of BSkyB and third party channels), 'Sky Box Office' service (a PPV service) and a 3D channel. BSkyB subscribers with compatible set-top boxes can access the 'Sky Anytime' service.
  - (ii) *IPTV/cable ('Sky By Wire')*. BSkyB retails certain premium channels to customers on Talk Talk TV's IPTV platform. BSkyB has similar arrangements in place with a number of small cable and IPTV platform operators in the UK and Ireland.
  - (iii) *Internet TV ('Sky Player')*. BSkyB also offers an Internet TV service available to both Sky subscribers and non-DTH customers<sup>24</sup> and allowing customers to watch movies, sports and other entertainment via their PC or other Internet-connected devices on an SVOD and TVOD basis.
  - (iv) *Mobile TV ('Sky Mobile TV')*. BSkyB retails BSkyB and third party 'made-for-mobile' channels in the UK on certain mobile telephony operators' networks/on certain devices.

#### 1.1.4. Pay-TV technical services

50. The operation of pay-TV platforms requires a special technical infrastructure in order to ensure that only authorized viewers access the content. The components of this infrastructure include systems for conditional access ("CA"), middleware technology and set-top-boxes.
51. CA systems include encryption and decryption software aimed at preventing unauthorized access of television signals. Also, some CA systems use smart cards<sup>25</sup>. Middleware is software running on the operating systems of the set-top-boxes which facilitates the interoperability and proper functioning of hardware technologies, such as set-top-boxes and smart card components of CA systems. In addition, middleware enables certain functionalities of the set-top-boxes, such as electronic program guides and other interactive applications. Set-top-boxes are hardware devices responsible for decoding the television signal transmission into a format that is viewable on screen.
52. News Corp, through its jointly controlled subsidiary NDS<sup>26</sup>, is active in the provision of pay-TV technical services and, in particular, CA systems and middleware. BSkyB, through its wholly owned subsidiary Amstrad, currently produces set-top-boxes [...].

<sup>24</sup> BSkyB's stand-alone 'Sky Player' subscriber base currently amounts to [...] customers.

<sup>25</sup> Smart cards are credit card sized hardware devices that are inserted into the set-top-box.

<sup>26</sup> The investment fund Permira is the other controlling shareholder.

53. BSkyB currently sources from NDS a number of pay-TV technical services, among which CA systems (smart cards included) and part of its middleware needs.

**1.2. Market definition**

54. The activities to be considered in the audiovisual sector are (i) the licensing and acquisition of broadcasting rights; (ii) the wholesale supply of TV channels; (iii) the retail supply of audiovisual content to end users; and (iv) the provision of pay-TV technical services.

1.2.1. Licensing/acquisition of broadcasting rights to audiovisual content

**a. Product market definition**

55. Audiovisual content comprises all the 'entertainment products' (for example films, sports, TV programmes) that can be broadcast via TV<sup>27</sup>. TV broadcasting rights belong to the creators of these products, who license them to broadcasters (which then incorporate them into a linear stream of content – TV channel) or content platform operators which retail directly to end users on a VOD/PPV basis.
56. The notifying party submits that there is a single product market for the acquisition of all TV content rights, which encompasses all types of content, as well as both FTA and pay-TV rights. However, for the purposes of assessing the proposed transaction, the notifying party agreed to distinguish between the licensing of (i) films; (ii) sport content; and (iii) TV programmes.
57. The notifying party submits that further sub-segmentation of the market for the licensing of broadcasting rights for films is not appropriate in the present case. Firstly, the distinction between the windows mentioned above (paragraph 31) is not relevant, because, according to the notifying party, customers generally acquire rights for all the windows mentioned above. Secondly, the notifying party submits that US films compete with other productions, in particular local European productions. In addition, the boundaries between US and non-US productions are becoming increasingly blurred. Thirdly, the notifying party submits that US-produced content forms only a relatively small proportion of the content shown on pay-TV.
58. The Commission has previously distinguished between the licensing of broadcasting rights for pay-TV and the licensing of broadcasting rights for FTA TV<sup>28</sup>.
59. In particular, the Commission has found that, from both a demand-side and a supply-side perspective, certain types of content bought by pay-TV operators are not substitutable with each other. Accordingly, in past decisions the Commission has also considered a further segmentation into separate markets of the licensing of

---

<sup>27</sup> See Case COMP/M.5121 – *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 28.

<sup>28</sup> See in particular Case COMP/M.5121 - *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 35.

broadcasting rights for: (i) sports events, (ii) premium films and (iii) other TV content (such as documentaries)<sup>29</sup>.

60. In past decisions, the Commission has considered distinguishing between US-produced films and other films,<sup>30</sup> indicating that the relevant market for films was mainly composed of commercially 'successful films', which in general tends to correspond to films produced by the Hollywood majors<sup>31</sup>. As regards the licensing of broadcasting rights for premium films for pay-TV, in past decisions, the Commission has identified separate markets for the following different exhibition windows: (i) PPV/VOD; (ii) the first pay-TV window; and (iii) the second pay-TV window<sup>32</sup>.
61. As regards sports, the Commission has previously found that the market for football broadcasting rights should be distinguished from the market for other sports broadcasting rights due to football's pre-eminence as the singularly most popular sport across most Member States and beyond<sup>33</sup>. The Commission has considered (but ultimately left open) that the market for football broadcasting rights may be subdivided in a number of ways (for example on the basis of the type of event concerned, that is whether (i) it is a regular event (such as the domestic leagues, the UEFA Champions League and the UEFA Cup) or (ii) an event that is played more intermittently (such as the FIFA World Cup and the EURO Cup)<sup>34</sup>.
62. A majority of right holders<sup>35</sup> responding to the market investigation did not confirm a segmentation of broadcasting rights for audiovisual content into films, sport content and other TV programmes. Similarly, a majority<sup>36</sup> of right holders did not confirm a possible distinction between premium and non-premium audiovisual content. Content distributors by contrast tended to consider that a segmentation of broadcasting rights for audiovisual content into films, sport content and other TV programmes is appropriate<sup>37</sup>. Moreover, a majority of content distributors also consider that a

---

<sup>29</sup> See in particular Case COMP/M.5121 - *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 30.

<sup>30</sup> See Case COMP/M.2876 - *News Corp/ Telepiù*, Commission decision of 2 April 2003, paragraphs 58 and 61.

<sup>31</sup> See Case COMP/M.2845 - *Sogecable/CanalSatélite Digital/Via Digital*, Commission decision of 14 August 2002, paragraph 25.

<sup>32</sup> See Case COMP/M.2050 - *Vivendi/Canal+/Seagram*, Commission decision of 13 October 2000, paragraphs 18 et seq.; Case COMP/M.2845 - *Sogecable/CanalSatélite Digital/Via Digital*, Commission decision of 14 August 2002, paragraph 25.

<sup>33</sup> See Case COMP/M.4519 - *Lagardère/Sportfive*, Commission decision of 18 January 2007, paragraph 9.

<sup>34</sup> See Case COMP/M.4519 - *Lagardère/Sportfive*, Commission decision of 18 January 2007, paragraph 10.

<sup>35</sup> Questionnaire to right holders of 5 November 2010 - question 3 - 3 out of 4 respondents.

<sup>36</sup> Questionnaire to right holders of 5 November 2010 - question 4 - 3 out of 4 respondents.

<sup>37</sup> Questionnaire to content distributors I of 5 November 2010 - question 8 - 6 out of 10 respondents.

distinction should be drawn between premium and non-premium audiovisual content<sup>38</sup>.

63. As regards films, all the Hollywood majors responding to the market investigation claim that all films (whether US or European) are interchangeable from a viewer's perspective<sup>39</sup>. Content distributors by contrast consider that films produced by the major Hollywood studios are not substitutable with British, Irish or other European films<sup>40</sup>.
64. The Hollywood majors generally confirm the release window structure outlined in paragraph 31 above<sup>41</sup> and confirm that PPV/TVOD rights are licensed on a non-exclusive basis and separately from SVOD rights which are licensed together with first window pay-TV rights and on an exclusive basis<sup>42</sup>.
65. The market investigation was therefore not conclusive as regards the possible segmentation of the market for licensing of audiovisual content in relation to the UK and Ireland. In general, it seems that right holders do not agree with a segmentation of the rights, while content distributors, which are present at a lower level of the value chain, attribute more importance to the various segments (premium and non-premium, all movies and US majors movies, sports and other content) as each segment has a different appeal on viewers or subscribers.
66. For the purposes of the present decision, it is not necessary to conclude on the exact product market definition as the proposed transaction does not raise any competition concerns under any alternative market definition for the licensing and acquisition of broadcasting rights to audiovisual content.

#### **b. Geographic market definition**

67. The notifying party submits that the geographic scope of the market is generally national, and in certain cases, regional (with a region potentially comprising more than one national territory, where there is a larger single language group), in this case the UK and Ireland together.
68. In past decisions, the Commission has considered that the market for the licensing/ acquisition of audiovisual content (film and other content) is national in scope or relates to linguistically homogeneous areas<sup>43</sup>.

---

38 Questionnaire to content distributors I of 5 November 2010 - question 9 - 6 out of 10 respondents.

39 Questionnaire to right holders of 5 November 2010 - question 5.

40 Questionnaire to content distributors I of 5 November 2010 - question 10 - 8 out of 10 respondents. A few respondents explicitly refer to Ofcom's pay-TV statement in this regard.

41 Questionnaire to right holders of 5 November 2010 - question 7.

42 Questionnaire to right holders of 5 November 2010 - questions 15 and 16.

43 See for example Case COMP/M.2876 - *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraph 62.

69. As regards the acquisition of rights to premium films, in its *News Corp/Telepiù* decision, the Commission noted that "*nothing prevents operators from acquiring rights for more than one territory at the time*". However, in that case, the Commission ultimately found that broadcasting rights were divided and sold on a mainly national basis or, at most, by language area.
70. As regards rights for football events that are played regularly throughout the year, in past decisions, the Commission has found that such rights are sold on a national basis. Also from past Commission decisions, it appears that only the potential sub-market for football broadcasting rights to events that are played more intermittently (that is, FIFA World Cup and European Championship of Nations) might be wider than national. In its *News Corp/Telepiù* decision, the Commission noted that the UEFA broadcasting regulations reflect the fact that the market for broadcasting rights to football events is national since such broadcasting rights are generally sold on a national basis, even for pan-European events such as the UEFA cup and the UEFA Champions league<sup>44</sup>. In that decision, the Commission found that, as regards broadcasting rights to national league and national cup matches, the specificity of the product due to cultural factors linked to demand and national references implies that the geographic scope corresponds to the country where the matches are played<sup>45</sup>.
71. As regards other (non-football) sport events, in the past, the Commission has found that the rights are acquired on an exclusive basis for the whole European territory and are thereafter re-sold on a per-country basis. The Commission has also found that major sport events, such as the Olympic Games, have a pan-European interest from the viewers' perspective<sup>46</sup>. Another example of sports rights sold on a pan-European basis cited by the Commission in its *News Corp/Telepiù* decision are those acquired by the Eurosport channel, broadcast all over Europe<sup>47</sup>. In that decision, the Commission concluded that, given that the vast majority of sports rights acquired by broadcasters are limited to a specific country or linguistic territory, the market for acquisition of sports rights to be broadcast is national or delineated along linguistic areas.
72. The market investigation largely confirmed the past Commission decisional practice of defining the geographic scope of markets for the licensing/acquisition of audiovisual TV content (film and other content) as national or relating to linguistically homogeneous areas.
73. Particularly as regards broadcasting rights to premium films, the market investigation confirmed that these rights are only rarely negotiated simultaneously for different territories. According to the respondents, broadcasting rights are generally negotiated and concluded on a country-by-country basis, with the only exceptions appearing to be licensing in relation to a linguistic area (for example rights for Germany, Austria

---

<sup>44</sup> See Case COMP/M.2876 – *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraph 67.

<sup>45</sup> See Case COMP/M.2876 – *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraph 67.

<sup>46</sup> See Case COMP/M.2876 – *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraph 72.

<sup>47</sup> See Case COMP/M.2876 – *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraphs 72 and 73.

and the German speaking parts of Switzerland and Luxembourg) or in relation to areas with a particular common socio-cultural background (for example Scandinavia)<sup>48</sup>. Two respondents cited a number of factors which prevent cross-border negotiation/licensing, including: availability of materials in each language; differences in the availability dates for content in different territories; and the fact that each country and region reflects local preferences in programming<sup>49</sup>.

74. As regards pan-European/international sport rights, the market investigation generally revealed that such rights are acquired by content distributors on a national basis<sup>50</sup>. One respondent to the market investigation noted that broadcasting rights for sport events are increasingly marketed by sport rights agencies, which tend to offer broadcasting rights (such as Olympic Games and UEFA Champions League) on a national basis first to maximize their profits<sup>51</sup>. The market investigation revealed only limited examples of acquisitions of rights to sport events with a geographic scope wider than national or linguistic borders in the EEA (notably by the EBU)<sup>52</sup>.
75. In light of the above and for the purposes of the present decision, it may be concluded that the geographic scope of markets for the licensing/acquisition of broadcasting rights to audiovisual content (film and other content) is national or, at most, relates to linguistically homogeneous areas.

#### 1.2.2. Wholesale supply of TV channels

##### a. Product market definition

76. According to the notifying party, the wholesale supply of TV channels is the market in which broadcasters and distributors negotiate the terms and conditions for the distribution of pay-TV channels to end-users. pay-TV channels can be of a general nature (general interest channels) or concentrate on a specific genre (thematic channels).
77. As regards product market definition, the notifying party departs from the Commission's findings in past cases and submits that the relevant product market is at least as broad as the wholesale supply of TV channels (including both FTA and pay-TV channels), and possibly larger.
78. First, the notifying party considers that wholesalers of pay-TV channels face intense competition from major, well-established FTA broadcasters such as the BBC. Second, it notes that the appropriate relevant market may in fact be wider and also include, for example, the supply of *individual* programmes and films at the wholesale level (which

---

48 Questionnaire to right holders of 5 November 2010 - question 8, 19 and 22.

49 Questionnaire to right holders of 5 November 2010 - question 17.

50 Questionnaire to content distributors II of 5 November 2010 - question 3(c) and 4 - 6 out of 7 respondents.

51 Questionnaire to right holders of 5 November 2010 - question 9 - Only a limited number of replies covered licensing/acquisition of rights to pan-European/International sport events.

52 Questionnaire to right holders of 5 November 2010 - question 7.



are then distributed to end users – for example via PPV/VOD services or directly via DVD sale and rental).

79. In any event, the notifying party submits that the definition of the relevant product market as regards the wholesale supply of TV channels can ultimately be left open since, regardless of the market definition ultimately retained, the proposed transaction will not give rise to any competition concerns.
80. In past decisions, the Commission has identified pay-TV and FTA TV as belonging to separate markets. In its *SFR/Télé 2* decision, the Commission considered that in the intermediate market for the distribution of TV channels, a distinction must be made between FTA and pay-TV channels<sup>53</sup>.
81. In the past, the Commission has also generally left open whether the market should be further segmented by thematic content (such as premium films, sports, news, youth channels, etc.)<sup>54</sup>. It should be mentioned that in the context of its investigation into UK pay-TV, Ofcom has identified a distinct market for “*the wholesale of pay-TV packages including core premium movies channels*”<sup>55</sup>.
82. As regards the submission of the notifying party that the relevant product market may be larger than the wholesale supply of TV channels, in the *SFR/Télé 2* and *News Corp/Premiere* cases, the Commission left open whether a distinction could be envisaged between the classical or 'linear' TV channels and the non-linear services (VOD, PPV), as well as within the non-linear services<sup>56</sup>.
83. The market investigation conducted for the purpose of this case generally confirmed that pay-TV and FTA channels still belong to two separate product markets as regards the wholesale supply of TV channels<sup>57</sup>.
84. In addition, a majority of respondents to the market investigation indicated that premium content TV channels (such as Sky Sports and Sky Movies) are not substitutable with other TV channels as they broadcast exclusive content unavailable

---

<sup>53</sup> See Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 40.

<sup>54</sup> See Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù*, paragraph 76; Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraphs 41-42; Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraph 35.

<sup>55</sup> See Ofcom Decision of 4 August 2010, *Premium Pay TV movies*, paragraph 4.3.

<sup>56</sup> See Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 43; Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraph 21.

<sup>57</sup> Questionnaire to TV channels of 5 November 2010 - question 9.3 - 4 out of 6 respondents confirmed that pay-TV subscribers are attracted by the premium content and additional services and are unlikely to switch to FTA channel offers in case of a 5-10% price increase of their pay-TV subscription; another respondent indicated that FTA channels content was similar to much of the other content available in pay-TV homes, but that the recent price increases by BSkyB and Virgin Media which did not result in a significant churn rate show that the majority of pay-TV customers are immune to price increases; and the last respondent did not know.

elsewhere<sup>58</sup>, thereby giving a strong indication that there is a differentiation within the market for the wholesale supply of pay-TV channels between basic pay-TV channels and premium pay-TV channels (namely sports and movies channels). Some replies also refer to Ofcom's recent investigation on the pay-TV market, which concluded that a differentiation between premium and non-premium movie channels exists.

85. In light of the above and for the purposes of the present decision, the Commission considers that FTA and pay-TV channels (both basic pay-TV and premium pay-TV) constitute two separate product markets, in line with the precedents of the Commission. The market investigation also provided strong indications that the premium pay-TV channels belong to a separate product market from basic pay-TV channels. However, for the purpose of the present decision, the possible distinction between premium and basic channels is left open, given that the transaction would not raise serious doubts as to its compatibility with the internal market under any alternative market definition.

#### **b. Geographic market definition**

86. The notifying party submits that in line with the Commission's past decisions, the relevant geographic market for the wholesale supply of TV channels is national or, potentially, regional, delineated along the language area encompassing the UK and Ireland.
87. In past decisions, the Commission has consistently found that the markets for the wholesale supply of TV channels were national or delineated along the linguistic areas<sup>59</sup>. The market investigation conducted for the purpose of this case did not contradict these findings.
88. In light of the above and for the purposes of the present decision, it may therefore be concluded that the geographic scope of markets for the wholesale supply of TV channels is national or, at most, relates to linguistically homogeneous areas.

### **1.2.3. Retail supply of audiovisual content to end users**

#### **a. Product market definition**

89. According to the notifying party, the relevant product market for the retail provision of audiovisual content to end-users encompasses at least the provision of FTA and pay-TV channels via all distribution channels (satellite, DTT, cable, IPTV and others), as well as the provision of non-linear services and pre-recorded media (such as PPV, VOD or DVD).

---

<sup>58</sup> Questionnaire to TV channels of 5 November 2010 - question 4 - 2 respondents replied that premium sport and movie channels are in a separate market from all other TV channels, 1 respondent replied that the level of substitutability was inversely proportional to the volume of exclusive content (citing as example Sky Sports which cannot be substituted with another channel), 1 respondent replied that there is a clear difference between general interest TV channels, thematic TV channels, and premium content TV channels, 1 respondent replied that no TV channel can be substituted by another, and 1 respondent replied that TV channels are generally substitutable, except for some which have different content (e.g. a sport channel cannot substitute a science channel).

<sup>59</sup> See Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù*, paragraph 62; decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 48; Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraph 27.

90. The notifying party considers that consumers in the UK and Ireland have a wide range of choices in accessing audiovisual content at home and could generally: (i) buy a DVD of a film; (ii) rent a DVD of a film from a store or by post; (iii) use a PPV/VOD service to watch a film at a convenient time (including free VOD services such as the BBC iPlayer); (iv) download a film via an Internet download service; (v) watch a film that is broadcast on any of a number of FTA channels; or (vi) pay for a subscription to a linear pay-TV service through which the consumer could watch a film at one of the times that it is shown or record the film and then watch it at a later time convenient to the consumer.
91. Furthermore, it submits that DVDs constitute an important constraint on the supply of pay-TV content and, in particular, on movie channels, because (i) the uptake of DVD hardware in the UK has been extensive, (ii) accessing content via DVD holds a number of advantages, particularly in terms of timing (a motion picture may be available on DVD for almost a year before pay-TV), (iii) online DVD rental (including subscription-based) allows easy access to content and (iv) the pricing of DVDs is particularly competitive.

*Pay-TV and FTA*

92. The notifying party submits that at retail level, the provision of FTA and pay-TV services belongs to the same relevant product market.
93. First, the notifying party argues that in cases where the Commission defined separate relevant product markets for pay-TV and FTA services in the past<sup>60</sup>, it made such a distinction on the basis of the specific market conditions prevailing in the individual Member States concerned.
94. Moreover, it submits that the rate of technological change in the TV sector mandates the re-examination of the approach to market definition in light of the technological and market conditions that exist now, at the time of the proposed transaction. In particular, according to the notifying party, the peculiarities of the UK and Irish TV sector, taken together with the recent developments in TV technology and the fact that both FTA and pay-TV broadcasters compete for the same content and audience all point towards the existence of an overall market for all TV offerings to end users in the UK and Ireland.
95. Furthermore, the notifying party considers that if the Commission in some of its earlier decisions<sup>61</sup> identified differences in content type and programme schedules as a distinguishing feature between pay-TV and FTA TV channels, these differences increasingly diminish as pay-TV and FTA content is often similar and FTA platforms/channels also show attractive content in the UK and Ireland.

---

<sup>60</sup> See Commission decision of 27 May 1998 in Case IV/M.993 - *Bertelsmann/Kirch/Premiere*; Commission decision of 13 October 2000 in Case COMP/M.2050 - *Vivendi/Canal+/Seagram*; Commission decision of 5 November 2002 in Case COMP/M.2996 - *RTL/CNN/Time Warner/N-TV*.

<sup>61</sup> See Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newseorp/Telepiu*, paragraph 112.

96. Finally, it submits that the advancement of digitisation in the TV sector has promoted further convergence between pay-TV and FTA TV, with digital TV achieving a high penetration rate in the UK and being currently developed in Ireland.
97. The market investigation of the Commission in the *NewsCorp/Telepiù* decision revealed that FTA TV exercises a certain constraint to pay-TV and that there is an interaction between both markets, in particular in countries such as Italy "where free-TV offers a wide choice of channels, some containing what would be considered as attractive contents"<sup>62</sup>. However, the Commission concluded, also based on the results of the market investigation, that in Italy, FTA and pay-TV are two separate markets<sup>63</sup>. In its *SFR/Télé 2* decision, the Commission also concluded that because of the different type of financing between FTA and pay-TV and the fact that, from the standpoint of the viewers, these offerings are not substitutable (in one case the service is provided at no specified cost, in the other it requires a subscription), both belong to separate product markets<sup>64</sup>. Finally, in its *NewsCorp/Premiere* decision, the Commission also concluded that pay-TV and FTA TV are still clearly distinct markets in both Germany and Austria because of the different type of content and programme schedules offered by pay-TV and FTA TV, because of limited demand-side substitutability due to the absence of subscription fee in FTA TV and of limited supply-side substitutability due to the different business model of the two types of broadcasters<sup>65</sup>.
98. The majority of the pay-TV retailers<sup>66</sup> and TV channels<sup>67</sup> who responded to the market investigation conducted for the purpose of this case considered that pay-TV and FTA continue to be in separate markets.
99. In conclusion, for the purpose of the present decision, the Commission considers that the retail supply of pay-TV and FTA TV belong to separate markets.

#### *Distribution channels*

---

<sup>62</sup> See Commission decision of 2 April 2003 in Case COMP/M.2876 - *NewsCorp/Telepiù*, paragraph 37.

<sup>63</sup> See Commission decision of 2 April 2003 in Case COMP/M.2876 - *NewsCorp/Telepiù*, paragraph 47.

<sup>64</sup> See Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 45.

<sup>65</sup> See Commission decision of 25 June 2008 in Case COMP/M.5121 - *NewsCorp/Premiere*, paragraphs 17 to 20.

<sup>66</sup> Questionnaire to content distributors of 5 November 2010 - question 13.3 - 8 respondents considered that in case of a 5-10% price increase for pay-TV subscriptions, the proportion of viewers switching to FTA would not be significant, while only one expressed a different view.

<sup>67</sup> Questionnaire to TV channels of 5 November 2010 - question 9.3 - 4 out of 6 respondents confirmed that pay-TV subscribers are attracted by the premium content and additional services and are unlikely to switch to FTA channel offers in case of a 5-10% price increase of their pay-TV subscription; another respondent indicated that FTA channels content was similar to much of the other content available in pay-TV homes, but that the recent price increases by BSkyB and Virgin Media which did not result in a significant churn rate show that the majority of pay-TV customers are immune to price increases; and the last respondent did not know.

100. The notifying party submits that the market for the provision of TV services to end-users in the UK and Ireland encompasses all technical means of TV distribution, as TV channel providers and TV retailers (including FTA providers) compete to distribute their channels to reach the largest possible number of TV viewers. It submits that in previous decisions<sup>68</sup>, the Commission correctly noted that customer preferences essentially depend on the TV content provided, regardless of the distribution mode.
101. The notifying party further considers that the different TV means of distribution compete with each other in terms of geographical reach. In the UK, satellite and DTT are the most important distribution channels, with satellite having a technical reach of 98% and DTT a reach of 73%<sup>69</sup>. The UK cable network has a technical reach of 49% and IPTV has a technical reach of 39%. In Ireland, the notifying party submits that cable and satellite are the most important distribution channels, with around 78% of TV households using satellite or cable/MMDS (multi-channel multi-point distribution service<sup>70</sup>) services.
102. With regard to switching costs, the notifying party considers that the investment costs associated with the choice of a given distribution channel have decreased over recent years, both in the UK and in Ireland, and that there are thus no material disincentives for viewers to switch to another form of TV reception. It also submits that decoders and satellite dishes are becoming increasingly cheap, that cable providers supply decoders on a rental basis, thereby reducing substantially any switching costs, and that even in Ireland where IPTV requires the viewer to purchase a dedicated set-top box, no additional fee is charged for that set-top box when an IPTV subscription is purchased.
103. In past decisions, the Commission has only identified pay-TV and FTA TV as belonging to separate markets, without distinguishing between terrestrial, satellite cable or other means of transmission<sup>71</sup>.
104. The market investigation conducted for the purpose of this case showed that content distributors consider the different means of delivery as substitutable from the viewers' point of view<sup>72</sup>. The TV channel suppliers who responded to the market investigation were less conclusive<sup>73</sup>.

---

<sup>68</sup> See Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, Commission decision of 4 March 2005 in Case COMP/M.3609 - *CINVEN/France Telecom Cable - NC Numericable*; Commission decision of 17 May 2004 in Case COMP/M.3411 - *UGC/Noos* and Commission decision of 2 June 2006 in Case COMP/M.4217 - *Providence/Carlyle UPC Sweden*.

<sup>69</sup> This will grow to cover the entire UK territory by the time the full switchover will be completed in 2012.

<sup>70</sup> MMDS is a wireless telecommunications technology, used usually in sparsely populated rural areas, where laying cables is not economically viable.

<sup>71</sup> See Commission decision of 27 May 1998 in Case IV/M.993 - *Bertelsmann/Kirch/Premiere*, paragraph 21; Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù*, paragraph 40, 47; Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 40; and Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraph 20.

<sup>72</sup> Questionnaire to content distributors of 5 November 2010 - question 19 - 7 respondents considered that from the perspective of end users, the audiovisual content offered through the different technical

105. For the purposes of the present decision, and in line with past Commission decisions, it is considered that different distribution modes are part of the same product market for the retail distribution of content to consumers.
106. Finally, the market investigation confirmed that non-linear services comprising (i) DVDs<sup>74</sup> and (ii) PPV/VOD<sup>75</sup> are not substitutable with the retail supply of pay-TV linear channels at this point in time in the UK.
107. Based on the above and for the purpose of the present decision, the Commission considers that, within the pay-TV market, the retail supply of non-linear services and linear channels belong to two separate markets.

**b. Geographic market definition**

108. The notifying party submits that the market for the retail provision of TV services to end users is national in scope.
109. In a previous decision<sup>76</sup>, the Commission considered that TV broadcasting is generally organised on a national basis. The market investigation conducted for the purpose of this case did not contradict these findings.
110. In light of the above and for the purposes of the present decision, it may therefore be concluded that the geographic scope of markets for the retail distribution of content to consumers is national or, at most, relates to linguistically homogeneous areas.

---

platforms is substitutable, with 2 respondents noting an exception as regards Internet as mode of delivery, while 3 respondent replied that the extent of substitutability is limited by the degree of availability of content.

<sup>73</sup> Questionnaire to TV channels of 5 November 2010 - question 8 - 3 respondents did not view the different distribution modes as readily substitutable by viewers, 2 replied that different distribution services may be regarded as substitutable by viewers, 2 linked substitutability to access to content and 2 distinguished between FTA and pay-TV.

<sup>74</sup> Questionnaire to TV channels of 5 November 2010 - question 9.1 - 4 out of 6 respondents confirmed that DVDs cannot substitute watching (pay-)TV, as the content offered is much narrower (e.g. does not offer live events such as Premier League football, or even other content), and pay-TV subscriptions also offer a wider range of services such as triple-play offers with telephony and internet; one respondent indicated that it was possible that DVDs could substitute for (pay-)TV, and one respondent did not know.

<sup>75</sup> Questionnaire to TV channels of 5 November 2010 - question 9.2 - 4 out of 6 respondents indicated that PPV/VOD services cannot substitute for watching (pay-)TV, as the content offered is much narrower and the business model is different (pay-per-view versus free at the time of consumption, even with a pay-TV subscription); one respondent indicated that they could be substitutable, but not for e.g. live TV, and one respondent did not know.

<sup>76</sup> See Commission decision of 27 May 1998 in Case IV/M.993 - *Bertelsmann/Kirch/Premiere*, paragraph 24.

1.2.4. Supply of pay-TV technical Services

111. The notifying party submits that the provision of pay-TV technical services constitutes a single relevant product market including CA systems, middleware and set-top-boxes. The Commission defined in previous decisions a single product market for the provision of pay-TV technical services<sup>77</sup>. In the *News Corp/Premiere* decision, the Commission however considered that the provision of CA solutions is a separate product market<sup>78</sup>.
112. The majority of respondents to the market investigation considered that, from a supply-side perspective, it is not necessary for providers of pay-TV technical services to offer all three components (namely CA systems, middleware and set-top-boxes) together in order to be able to compete. The Commission cannot therefore exclude that these constitute three different markets.
113. With regard to the geographic scope of the market, the notifying party argues that this is at least EEA-wide, if not global. Concerning CA systems, the Commission noted in the *News Corp/Premiere* decision<sup>79</sup> that the market investigation revealed that providers of CA systems usually offer their encryption systems on a global basis, but ultimately left the question open. Also in the *News Corp/Premiere* case<sup>80</sup>, the Commission noted that the market investigation revealed no elements<sup>81</sup> on the basis of which the geographic scope of the middleware market would not have to be defined as at least EEA-wide or even worldwide, but ultimately left the question open.
114. For the purposes of this decision, the exact scope of the product and geographic market definition may be left open, as the proposed transaction does not raise competition concerns under any alternative product market definitions.

**1.3. Competitive assessment**

115. The Commission investigated possible anti-competitive effects of the proposed transaction both from a horizontal and from a non-horizontal perspective. As News Corp and BSkyB are generally active at different levels of the audiovisual chain in the UK and Ireland, the analysis focuses on vertical relationships.

---

<sup>77</sup> See Commission decision of 27 May 1998 in Case IV/M.993 - *Bertelsmann/Kirch/Premiere*, paragraph 25 and Commission decision of 27 May 1998 in Case IV/M.1027 *Deutsche Telekom/BetaResearch*, paragraph 18.

<sup>78</sup> In the *News Corp/Premiere* decision, the Commission noted that the market investigation confirmed that the supply of middleware could also be considered as a separate segment within the market for technical services for pay-TV, but ultimately the question was left open. See Commission decision of 25 June 2008 in Case COMP/M.5121- *News Corp/Premiere*, paragraphs 44-46.

<sup>79</sup> See Commission decision in the *News Corp / Premiere* Case, paragraph 47

<sup>80</sup> See Commission decision in the *News Corp/Premiere* Case, paragraph 48.

<sup>81</sup> The Commission made reference to a previous decision adopted in Case COMP/M.5080 - *Oracle/BEA*, where the scope of the geographic market for middleware software had been defined as worldwide, albeit in a different context.

## 1.3.1. Horizontal assessment

116. The proposed transaction results in a limited horizontal overlap in the wholesale provision of TV channels.
117. In the overall market for the supply of TV channels (FTA and pay-TV), the merged entity's combined market share<sup>82</sup> in terms of viewing shares would be [10-20]% in the UK and [5-10]% in Ireland. In terms of revenues, the market share of BSkyB is significantly higher ([20-30]%) - given that it already controls the premium movies channels and sports channels - but the increment of News Corp's TV channels would be minimal ([0-5]%).
118. The Commission considers that, given the outcome of the market investigation, the most appropriate market to take into account in order to assess the relative competitive strength of the parties to the transaction is the market for the supply of "basic pay-TV channels". This is in line with the product market definition considered by OFT in the *BSkyB/Virgin Media* decision and with Ofcom's findings in its 3 year investigation in the Pay-TV market in the UK.
119. In 2009, BSkyB's market share based on the revenues from the wholesale supply of its basic pay-TV channels in the UK was [30-40]% (comprising the Sky branded channels and proportionate share of revenue from Sky's joint venture channels) and [...] for the channels of Virgin Media TV (VMtv) that BSkyB has acquired (and therefore excluding Virgin Media's 50% share in UKTV). [...] BSkyB estimated that Fox's market share in terms of revenues was [0-5]% (for FX and Fox News, along with an allocation of National Geographic channel wholesale revenues in proportion to News Corp's shareholding). As regards Ireland, the estimated market share of BSkyB in 2009 was [30-40]% [...]. Fox channels' share would be [0-5]%.
120. Even when considering the market for the overall supply of pay-TV channels<sup>83</sup>, BSkyB's market share by revenue in 2009 in the UK was approximately [40-50]% (including the newly-acquired Virgin Media channels). In the same year, its market share by revenue in Ireland was around [30-40]%. This strong position resulted from its control of the premium movie and sports channels, for which it charges premium prices. In this market, however, News Corp's position is limited: its market share is around [0-5]% in the UK and [0-5]% in Ireland. In addition, there are a number of other players on the market such as UKTV, Viacom, MTV, Disney, NBC Universal/Sparrowhawk and Turner.

---

<sup>82</sup> The calculation also takes into account the Virgin Media channels that BSkyB has recently acquired. These channels are LIVING, LIVINGit, Challenge, Challenge Jackpot, Bravo2 and Virgin1. The transaction whereby BSkyB acquired these channels was approved by the OFT by a decision of 14 September 2010 (ME/4568/10) published on the OFT's website on 5 October 2010, [http://www.of.gov.uk/shared\\_of/mergers\\_ea02/2010/sky-virgin.pdf](http://www.of.gov.uk/shared_of/mergers_ea02/2010/sky-virgin.pdf)

<sup>83</sup> The Commission requested the notifying party to supply market share data "excluding notional carriage fees", that is excluding the internal sales between the wholesale business and the retail business of the vertically integrated broadcasters (as BSkyB and Virgin Media). The calculation of the market shares of 2009 take into account the acquisition of VMtv channels by BSkyB, whereas the overall value of the market has changed (BSkyB has internalized the acquisition of VMtv channels while Virgin Media has externalized the purchase of those channels).



121. Given that the addition of market shares derived from News Corp's channels is very limited under any alternative market definition, it is unlikely that the proposed transaction will bring anticompetitive effects of a horizontal nature in the market for the wholesale supply of TV channels in the UK and in Ireland.

1.3.2. Non-horizontal assessment

122. The main vertical relationships arising from (or reinforced by) the proposed transaction relate to News Corp's activities upstream as a licensor of broadcasting rights to premium movie content (via its subsidiary, 20th Century Fox), pay-TV channels and other TV content and BSkyB's activities as a TV channel producer and retailer of pay-TV services (linear pay-TV or on-demand services).
123. The Commission examined four separate issues in this regard.
124. First, it examined whether the proposed transaction could give rise to a possible risk of input foreclosure for News Corp's content to the detriment of BSkyB's downstream competitors.
125. Second, it assessed any possible risk of customer foreclosure for News Corp's competitors in the licensing of broadcasting rights to audiovisual content and in the wholesale supply of pay-TV channels due to BSkyB's strong presence on the market for the acquisition of broadcasting rights and as platform operator and retail supplier of audiovisual content to end users in the UK and in Ireland.
126. Third, given that News Corp is also active in three other EU countries on the market for acquisition of broadcasting rights to film and sport content as it has pay-TV businesses in Germany, Austria and Italy, the Commission also verified whether the addition of the UK and Ireland pay-TV businesses could negatively affect the position of News Corp's competitors in the different countries as a result of a possible increase of News Corp's negotiating power in a potential scenario of pan-European licensing for broadcasting rights.
127. Fourth, the Commission considered whether the proposed transaction would give rise to a risk of input foreclosure by the merged entity as regards the pay-TV technical services provided by NDS.

**a. Input foreclosure - access by competing TV channel producers and retail content distributors to News Corp content (movies, other TV content and TV channels)**

128. The proposed transaction will bring about a vertical relationship with regard to the licensing of broadcasting rights. BSkyB operates as a purchaser of pay-TV broadcasting rights and News Corp is active at the wholesale level as a licensor of TV content (such as films through 20th Century Fox and TV channels as FX channels, National Geographic, Baby TV and STAR).
129. In a merger between companies which operate at different levels of the supply chain, anti-competitive effects may arise when the merged entity's behaviour could limit or eliminate competitors' access to supplies (input foreclosure).
130. In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines (i) whether the merged entity would have post-merger the

ability to substantially foreclose access to input; (ii) whether the merged entity would have the incentive to do so; and (iii) whether a foreclosure strategy would have a significant detrimental impact on effective competition downstream<sup>84</sup>.

131. As recognised by the Non-Horizontal Merger Guidelines, in order to be *able* to foreclose competitors, the vertically integrated firm resulting from the merger must have a significant degree of market power (which does not necessarily amount to dominance) in the upstream market<sup>85</sup>. In particular, the Non-Horizontal Merger Guidelines note that the merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality<sup>86</sup>.
132. The following sections examine any possible input foreclosure with respect to movie content and TV channels. As regards "other TV content", News Corp's market share is below [5-10]% both in the UK and Ireland. Given this very strong indication of an absence of market power in this segment, and the lack of alternative elements pointing to the contrary during the market investigation, the possibility of input foreclosure in relation to "other TV content" is not further discussed.

#### **i. Movie content**

133. In relation to movie content, the notifying party submitted market share data according to different possible categorizations and according to various calculation methods (box office revenues, consumer spend, programming hours) for the years 2007 to 2009.
134. News Corp's share in the markets for the licensing of broadcasting rights for all feature films in terms of box office revenues<sup>87</sup> in 2009 was approximately [10-20]% for 2009 in each of the UK and Ireland, with the other Hollywood studios (Warner Bros, Disney, Sony, Paramount and Universal) having market shares between [10-20]% and [10-20]% in both countries. The market share held by News Corp in 2009 is particularly high by comparison with the previous two years. In 2008, the box office market shares for UK and Ireland were as follows: News Corp [5-10]%, Disney [10-20]%, Sony [10-20]%, Warner Bros [10-20]%, Paramount [10-20]% and Universal [10-20]%. In 2007, they were as follows: News Corp [10-20]%, Disney [10-20]%, Sony [5-10]%, Warner Bros [10-20]%, Paramount [10-20]% and Universal [10-20]%.

---

<sup>84</sup> See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, p. 11, paragraph 32.

<sup>85</sup> See Non-Horizontal Merger Guidelines, paragraph 35.

<sup>86</sup> See Non-Horizontal Merger Guidelines, paragraph 36.

<sup>87</sup> Source: Nielsen data. The market investigation confirmed that the rate of success of films at the box office can be used as a reliable indication of the relative strength of right holders in this category.

It seems evident that the shares of each of the Hollywood studios fluctuate year over year depending on the relative success of the various movies they issue. For instance, News Corp had the largest share in 2009 due to the success of the 3D title "Avatar", which in the UK earned largely more than the second best selling title, "Harry Potter and the half-blood prince" (Warner Bros).

135. The notifying party also submitted market shares according to narrower definitions, namely based on licensing only by Hollywood studios. In this segment, in 2009, News Corp had the largest market share ([20-30]%), with Warner Bros and Paramount both having a market share of [10-20]%, Universal [10-20]%, Disney [10-20]% and Sony [10-20]%. Other minor US studios have together a market share of around [10-20]%. Also in this case, when contrasted with the market shares from the previous years, it appears evident that 2009 was a particularly successful year for News Corp. Its market share in 2008 was [10-20]%, behind Universal ([20-30]%), Paramount ([20-30]%), Sony ([10-20]%), Warner Bros ([10-20]%) and Disney ([10-20]%). In 2007, News Corp's market share of [10-20]% placed it behind Warner Bros ([20-30]%) Paramount ([20-30]%) and Universal ([10-20]%).
136. On the basis of the market share data, it seems unlikely that News Corp could have market power in relation to the market for licensing of movie content, whether in general or strictly in relation to US studio productions. Apart from News Corp's limited market share, there are a number of other players on this market which are of equivalent size to News Corp. It is therefore unlikely that the merged entity could be seen as having a "significant degree of market power" within the meaning of the Non-Horizontal Merger Guidelines.
137. Nevertheless, with respect to the merged entity's ability to substantially foreclose access to an input, the market investigation also aimed at verifying whether News Corp content might have specific qualities that would render it an "important input", within the meaning of the Non-Horizontal Merger Guidelines, for downstream competitors, both pay-TV producers and distributors of content on a PPV/TVOD basis<sup>88</sup>.
138. The movie rights that right-holders license are purchased by pay-TV retailers for inclusion in their TV channels and by PPV/TVOD content distributors for supply on a title-by-title basis. Therefore the investigation aimed at verifying whether News Corp content could be considered "important input" in either of the two different distribution channels.
139. In this respect, the Hollywood majors which responded to the market investigation all take the view that no specific content (movies, Hollywood movies, 20th Century Fox movies or other content) is important for success at downstream level.
140. The pay-TV retailers which responded to the market investigation stated that Hollywood majors' premium movie content in general (therefore, referring to all the Hollywood majors, and not specifically to 20th Century Fox) is relevant and important, and even essential according to BSkyB's largest competitors. However, no element in the market investigation revealed reasons why 20th Century Fox' content could be singled out for being individually important. One competitor also submitted

---

<sup>88</sup> See Non-Horizontal Merger Guidelines, paragraph 34.

that at least three major Hollywood studios' content would be sufficient to build a viable offer competing with that of BSkyB's Sky Movies channels.

141. In addition, the respondents which consider 20th Century Fox content "essential" mostly refer to the license for "first pay-TV" window in the UK, which also includes rights for subscription VOD (SVOD). However, BSkyB already has exclusive deals in this regard for premium movies with all the Hollywood majors. The proposed transaction does not change the structure of this long-established network of contracts. It should be noted that Ofcom has already found that this pre-existing network of contracts creates a limit to the development of competing SVOD services in the UK. Therefore the concerns raised by BSkyB's largest competitors do not relate to substantiated merger-specific issues.
142. As regards content distributors of PPV/TVOD content, some players take the view that 20th Century Fox movie content is very important. However, there is nothing in the replies which explains whether the importance of content is related to 20th Century Fox itself or to the content of Hollywood majors as a whole. Half of the replies indicate that Hollywood majors' content is important for a PPV/VOD offer, but the market investigation did not yield any concrete element on the basis of which it should be concluded that any offer should include each and every major's content in order to be competitive<sup>89</sup>. Significantly, FilmFlex, a PPV/TVOD service offered by Virgin Media, does not consider 20th Century Fox content to be important for a PPV/TVOD offer and, in general, submitted that no content (whether movie content or TV channel) is a "must have". Overall, the market investigation did not show that 20th Century Fox content alone would be an important input for downstream competitors of BSkyB in the PPV/TVOD market.
143. In addition, with respect to the licensing for PPV/TVOD, the licensing systems currently in place tend to indicate that the merged entity would not have an incentive to engage in input foreclosure. Specifically, the market investigation confirmed that the licensing for PPV/TVOD takes place on a non-exclusive basis and that there is a well-established structure of licensing windows which has been developed in order to maximize the right holders' revenues from licensing to TVOD/PPV distributors. The right holders tend not to strike "output" deals with PPV/TVOD players, but rather seem to license movies on a "title-by-title" basis. It follows that right holders have an interest in licensing to as many purchasers as possible. News Corp is also currently licensing its 20th Century Fox movie content on a non-exclusive basis for PPV/TVOD, and it seems unlikely that News Corp would have an incentive to forego these revenues by supplying exclusively BSkyB's TVOD service.

## ii. TV channels

144. The notifying party submitted market shares based on viewing shares and revenue shares on the market for the overall supply of TV channels (FTA and pay-TV) in the UK and Ireland (see paragraph 117 above). It also supplied market share data for the wholesale supply of all pay-TV channels and basic pay-TV channels (see paragraphs

---

<sup>89</sup> For instance, it has been submitted that a PPV offer could not be attractive if it does not include "Avatar" or "The A-team" titles from 20th Century Fox: however this argument implies that the viability of a PPV business might depend on one or two premium titles per season.

119 and 120 above). In all cases, the addition of Fox channels would have a very limited impact on BSkyB's market position at the upstream level.

145. When considering the wholesale supply of pay-TV channels, News Corp is only active as supplier of basic pay-TV channels, and not in premium movie or sports channels. Given the minimal increment brought about News Corp's TV channels in a potential narrower market for the wholesale supply of basic pay-TV channels, it is unlikely that the proposed transaction would change the merged entity's (News Corp's and BSkyB's) current behaviour in relation to the supply of basic-pay TV channels to downstream competitors of BSkyB.
146. In any case, the market investigation did not reveal any element on the basis of which Fox channels would be considered an important input for a pay-TV basic package, as most respondents considered them substitutable with other channels. Although Fox channels have a recognizable brand name (in particular, National Geographic), the majority of the respondents<sup>90</sup> indicated that the "must have" channels are Sky1, Living and other Sky channels<sup>91</sup>.

### iii. Conclusion

147. It can therefore be concluded that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to a possible input foreclosure for BSkyB competitors for News Corp's movie and TV channel content.

#### b. Customer foreclosure

148. The proposed transaction will result in the vertical integration of News Corp's upstream activities as a licensor of broadcasting rights to audiovisual content and wholesale supplier of basic pay-TV channels and BSkyB's downstream activities as a purchaser of pay-TV broadcasting rights, platform operator and retail supplier of pay-TV channels.
149. The Commission has examined whether the proposed transaction would lead to a risk of customer foreclosure for the competitors of News Corp.
150. In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines (i) whether the merged entity would have post-merger the ability to foreclose access to downstream markets by reducing its purchases from its

---

<sup>90</sup> Only two pay-TV retailers consider that Fox channel's content is "key". However, one of these retailers acknowledges that the addition of News Corp's channels to the current wholesale offer by BSkyB would be limited to 5%.

<sup>91</sup> One competitor submitted that "Although the News Corp owned TV channels are attractive to viewers – particularly FX which is popular with audiences and which increasingly shows first runs of major US series such as Dexter, True Blood and Family Guy – and would contribute to a platform's success at the retail level it is unlikely that the availability (or not) of these specific channels would make or break a platform-switching decision as they are potentially substitutable by other similar channels".

upstream rivals; (ii) whether the merged entity would have the incentive to reduce its purchases from its upstream rivals; and (iii) whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market<sup>92</sup>.

151. In the present case, the Commission in particular assessed whether the merged entity would have the ability and incentive to foreclose its actual or potential competitors on (i) the market for the licensing of pay-TV broadcasting rights (namely, the risk that News Corp's competitors in the licensing market would not be able to license their movie, sports, other TV content to BSkyB) and (ii) the market for the wholesale supply of basic pay-TV channels by refusing or restricting its downstream competitors' access to a sufficient customer base in the market for retail pay-TV services.

*Customer foreclosure in relation to the licensing of broadcasting rights*

152. In the UK and Ireland, News Corp is active as a licensor of broadcasting rights to audiovisual content, namely movies (20th Century Fox), sports and other TV content<sup>93</sup>.
153. When looking at total spend in 2009 for the acquisition of broadcasting rights for films (UK and Ireland), BSkyB has a [50-60]% market share. In 2009, BSkyB held a [50-60]% market share in the market for the acquisition of PPV/VOD<sup>94</sup> rights for films (UK and Ireland), whereas it accounted for nearly [90-100]% of the market for the acquisition of first pay-TV window rights for films (UK and Ireland). With regard to sports content, BSkyB accounted in 2009 for [50-60]% of the acquisition market in the UK and Ireland. On the market for the acquisition of other TV content, BSkyB held a [5-10]% share in 2009 for the UK and Ireland.
154. Therefore, BSkyB's position in the acquisition market for films and sports is significant. Nevertheless, as regards audiovisual content (movies and other TV content), it is unlikely that BSkyB would, after the merger, commit to exclusively purchase from News Corp, thereby foreclosing News Corp's competitors. The attractiveness of a pay-TV operator's offer to consumers is based on the richness of the bundle of content and channels broadcast through its platform. Given its current wide offer of content, it is not imaginable that BSkyB, after the merger, would want to narrow its offering by limiting it to only 20th Century Fox's movies or content.
155. As regards sports content, as mentioned above News Corp's licensing activities in relation to sport events in the UK and Ireland are very limited and relate mainly to rugby union and league matches from South Africa, New Zealand and Australia. Therefore it seems unlikely that BSkyB would commit to only purchase such sports rights and would stop acquiring rights for Premier League matches or other major sports events' rights.

---

<sup>92</sup> See Non-Horizontal Merger Guidelines, paragraph 59.

<sup>93</sup> News Corp's licensing activities in relation to other content are limited in the UK and Ireland with shares of approximately [0-5]% and [0-5]% in terms of hours of programming.

<sup>94</sup> The notifying party submitted that normally SVOD rights are licensed/acquired together with the first pay-TV window rights, hence the PPV/VOD denomination refers only to TVOD rights.

156. Furthermore, none of the right holders or basic pay-TV channel producers (except one) expressed any concern that as a result of the transaction they would be prevented from selling their content to BSkyB.

*Customer foreclosure in relation to the licensing of wholesale basic pay-TV channels*

157. News Corp is a supplier of wholesale TV channels, in total 13 of them<sup>95</sup>.
158. BSkyB is already pre-merger a vertically integrated company that is active as a wholesale supplier of TV channel broadcasting rights in the upstream market, and as a purchaser of TV channels broadcasting rights/pay-TV retailer and pay-TV platform operator in the UK and Ireland in the downstream market.
159. Upstream, BSkyB supplies over 30 different channels and is present in all the different segments: FTA channels, basic pay-TV channels and premium pay-TV channels. 15 of the channels are considered premium pay-TV channels<sup>96</sup>; the other channels are divided between FTA and basic pay-TV channels<sup>97</sup>.
160. At the downstream level, BSkyB creates, markets and retails packages of channels to end-users. BSkyB's retail packages include different combinations of its channels (basic and premium), as well as third party channels, totalling 160 channels (including multiplex versions)<sup>98</sup>. A third party channel included in a "Sky" package receives a share of BSkyB's revenues generated from sales of that package.
161. At the downstream level, BSkyB is also active as an operator of a DTH (technical) satellite platform with about 10 million subscribers in the UK. It is the leading pay-TV platform with a market share of [60-70]% in terms of subscribers in 2009, without distinction in relation to delivery technology. BSkyB has about 570 000 subscribers in Ireland, which represents around [50-60]% of all pay-TV households or [30-40]% of all households in 2009. Channels that are not purchased at the wholesale level by BSkyB and not retailed by BSkyB as part of a package can still be viewed by end-users on BSkyB's DTH platform. In this case, the channel retails and markets its service to subscribers independently from BSkyB.
162. The notifying party argues that the merged entity will not have an incentive to foreclose competing TV channel suppliers since offering as many channels as possible renders BSkyB's retail packages more attractive to subscribers. Any channel that

---

<sup>95</sup> Four Fox channels (FX, FX+, FX HD, Fox News), five National Geographic channels (NGC +1, NGC HD, NGC Wild and NGC Wild HD), Star TV channels (Star Plus, Star One and Star Gold) and Baby TV.

<sup>96</sup> Sky Movies Premiere, Sky Movies Comedy, Sky Movies Action and Adventure, Sky Movies Crime and Thriller, Sky Movies Family, Sky Movies Drama and Romance, Sky Movies SciFi and Horror, Sky Movies Classics, Sky Movies Modern Greats, Sky Movies Indie, Sky Movies Showcase, Sky Sports 1, Sky Sports 2, Sky Sports 3 and Sky Sports 4.

<sup>97</sup> Sky News, Sky Sports News, Sky One, Sky Two, Sky Three, Sky Arts 1, Sky Arts 2, Sky Vegas and Sky Poker.com.

<sup>98</sup> For instance, the Discovery channel and MTV channels are included in certain packages retailed by BSkyB, as well as BSkyB's own Sky Arts 1, Sky 1 etc..

makes a positive contribution to attracting or retaining pay-TV subscribers brings a positive contribution to the platform operator.

163. The notifying party argues that the merged entity will not have the ability to totally foreclose competing TV channel suppliers from accessing a viewer base due to BSkyB's obligation to grant third party channels access to its DTH platform on fair, reasonable and non-discriminatory terms (FRAND)<sup>99</sup>. However, this obligation only exists in the UK and not in Ireland.
164. The Commission considers that the merged entity would not have the incentive to engage in customer foreclosure in this respect.
165. The market investigation confirmed that the most important parameter for competition in the retail market is content and that platform operators seek to carry the largest and most interesting bundle of channels. This is also in line with the conclusions reached in the Commission's decision in *News Corp/Premiere*<sup>100</sup>.
166. In addition, and importantly, BSkyB is already pre-merger a vertically integrated firm which retails third party channels as inputs to its channel packages. This shows the ongoing incentive to carry a rich bouquet of channels, rather than limiting the offering to company-owned channels.
167. It is unlikely that the proposed transaction will lead to a material change in incentives for the merged entity leading to restrict access to BSkyB's platform to competing pay-TV channel suppliers. This is because News Corp's presence on the market for wholesale supply of basic pay-TV channels is limited. As regards the market for the wholesale supply of pay-TV channels, News Corp held in 2009 a [0-5]% market share in the UK and of [0-5]% in Ireland, both in terms of revenue. When considering the narrower market for the wholesale supply of basic pay-TV channels, News Corp accounted for [0-5]% of the market in 2009 in the UK in terms of revenue.
168. For the above reasons alone, the Commission can conclude that it is unlikely that there would be input foreclosure in the market for the wholesale supply of basic pay-TV channels.
169. For completeness, with respect to the ability to foreclose, the market investigation confirmed the notifying party's argument that the merged entity would not have the ability to completely foreclose competing basic pay-TV channels from BSkyB's DTH platform due to BSkyB's obligation to carry third party channels on FRAND terms. However, it has been highlighted that access to the technical platform is not a perfect substitute for access to viewers through BSkyB's packages: the competing TV channels have to pay carriage fees to BSkyB and would have to incur all the retailing and marketing costs which they do not have to pay when the channel is marketed (in the various packages) by BSkyB. Furthermore, if a channel is retailed on its own

---

<sup>99</sup> Ofcom, Provision of Technical Platform Services, Guidelines and Explanatory Statement, 21 September 2006, available at <http://stakeholders.ofcom.org.uk/binaries/consultations/tpsguidelines/statement/statement.pdf>.

<sup>100</sup> See Case COMP/M.5121 - *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 64.



rather than as part of a package, it is plausible that it will have fewer viewers and thus lose advertising revenues.

170. As regards Ireland, the lack of "must carry" regulatory obligations is counter balanced by the fact that UPC, the largest cable Pay-TV operator in Ireland, had around 500 000 subscribers in 2009<sup>101</sup>. This accounts for [40-50]% of Pay-TV households in Ireland<sup>102</sup>.
171. It can be concluded in light of all of the above that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to a possible customer foreclosure of News Corp' competitors in the market for the licensing of pay-TV broadcasting rights and the market for the wholesale supply of basic pay-TV channels in relation to BSkyB's platform and position as an acquirer of broadcasting rights to pay-TV channels.

**c. Joint negotiation of rights to audiovisual content for several countries/areas**

172. News Corp controls leading pay-TV operators in Italy (Sky Italia) and in Germany and Austria (Sky Deutschland).
173. The notifying party submitted that Sky Italia holds a market share of approximately [50-60]% in terms of subscribers and [80-90]%<sup>103</sup> in terms of revenues in relation to the retail pay-TV market in Italy, whilst Sky Deutschland holds market shares of approximately [40-50]% in terms of subscribers in relation to the retail pay-TV markets in Germany, and approximately [60-70]% in terms of subscribers in relation to the retail pay-TV markets in Austria. [...].
174. Through the proposed transaction, News Corp will also gain control over a third leading pay-TV operator, BSkyB, in the UK and Ireland. Therefore, the proposed transaction will increase the merged entity's presence within the EEA in relation to the acquisition of rights to premium content.
175. In light of these facts, the market investigation examined whether the proposed transaction could increase News Corp's negotiating power in relation to licensors of premium films and pan-European/international sport events<sup>104</sup>, making it a possibly

---

<sup>101</sup> See Liberty Global Annual report 2009, [http://www.lgi.com/PDF/LGI\\_2009\\_AnnualReport.pdf](http://www.lgi.com/PDF/LGI_2009_AnnualReport.pdf), page 24.

<sup>102</sup> Calculation based on ComReg, Quarterly Key Data Report Q2 2009, p. 69.

<sup>103</sup> Source: Sky Italia and AGCom 2009 Annual Report. See also the Commission's decision C(2010) 4976 final of 20 July 2010 (the "Decision") modifying the application of the Commitments attached to a decision of 2 April 2003 declaring a concentration compatible with the common market and the EEA Agreement (Case No COMP/M.2876), paragraph 31 and 32. Given the fact that Mediaset's DTT pay-TV offer includes both a "pre-paid card" and a "subscription" option, the number of Mediaset subscribers cannot be compared to the number of Sky subscriptions. This is because Mediaset cards are often prepaid, rechargeable cards and once their credit is consumed they can no longer be used and new cards need to be purchased. There is therefore usually more than one PPV card per household. Therefore the most reliable market share data related to the Italian territory are those based on revenues.

<sup>104</sup> The notifying party estimates that BSkyB's market share in the acquisition of 'other TV content' in the UK/Ireland is approximately [5-10]%. It is therefore unlikely that there would be increased post-merger negotiating power on the part of the merged entity in relation to acquisition of such 'other TV content'.

unavoidable counterpart for the distribution of content on the pay-TV platform because of its presence in UK, Ireland, Italy, Germany and Austria. In particular, the market investigation examined whether any such increase in negotiating power would result in other content distributors being *de facto* cut off from the negotiation process for key content, which would in turn strengthen News Corp's position in each national retail pay-TV market. In relation to premium films, the market investigation examined whether the merged entity would, post-merger, have the ability to require exclusivity in relation to PPV/TVOD rights<sup>105</sup>.

**i. Premium films**

176. The notifying party submits that, although post-merger News Corp would be active in the acquisition of film content in three separate geographic markets in the EEA (UK/Ireland, Germany/Austria and Italy), this would not enhance the merged entity's ability to access third party film rights in these territories.
177. Notably, notwithstanding the possibility of broadcasters in different territories acquiring rights in a number of territories at once, the number of cross-border licensing deals for film rights would not be significant today. According to the notifying party, due to language and cultural differences, licensing of broadcasting rights for films has traditionally taken place on a national basis and, where licensing has occurred on a wider basis, it has typically been for specific language areas (such as the UK and Ireland). Also, differences in national broadcasting markets (for example licensed content and number of permitted runs) and the staggered expiry dates of the existing license agreements further explain why licensing generally takes place on a national/language area basis and why cross-territory bids would be unlikely.
178. The notifying party also submits that right holders have strong bargaining power and would prefer to license rights as narrowly as possible in order to maximise licensing revenues.[...]. Moreover, post merger the merged entity would still face strong international competitive pressure from a number of large international groups which operate in several Member States.
179. The Commission's examination, based on the results of the market investigation, showed no concerns as regards the possible increase of News Corp's negotiating power in relation to licensors of premium films following the transaction.

---

As regards sport rights, the market investigation focused mainly on pan-European/international sport events (such as the Olympic Games, the World Cup and the UEFA Champions League). Such events have a pan-European interest from the viewers' perspective (see Case COMP/M.2876 – *News Corp/Telepiù*, Commission decision of 2 April 2003, paragraph 72). National sport events (notably football events) on the other hand appear to have limited appeal outside the State which they relate to (see Case COMP/M. 5121 – *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 24) and therefore an increased post-merger negotiating power on the part of the merged entity in relation to national sport events would be unlikely.

<sup>105</sup> [...]. Sky Italia's exclusive SVOD rights are limited to the DTH platform in Italy pursuant to commitments attached to the Commission's decision in Case COMP/M. 2876 – *News Corp/Telepiù*, Commission decision of 2 April 2003.

180. First, as noted by the Commission in past decisions,<sup>106</sup> as the main source of successful movies, Hollywood majors hold a strong position both quantitatively and qualitatively in relation to pay-TV operators. This factor would affect the merged entity's strength in relation to the negotiation and acquisition of rights to premium films.
181. In that context, the Commission notes that the market investigation did not raise substantiated concerns regarding any possible increase in the merged entity's bargaining power in the negotiation of rights to premium films.
182. Second, the market investigation also revealed that the manner in which licenses are negotiated at present militates against an increased bargaining power of the merged entity across different countries. The Commission found that (i) broadcasting rights are only rarely negotiated simultaneously for different territories and that (ii) broadcasting rights for premium films are generally negotiated and concluded on a country-by-country basis or in relation to a linguistic area or in relation to areas with a particular common socio-cultural background.
183. A number of other factors also appear to exist which would prevent cross border negotiation/licensing: (i) the availability of materials in each language; (ii) differences in the availability dates for content in different territories and (iii) local preferences in programming.
184. Third, it would appear that News Corp is not engaged in joint right negotiations for Germany/Austria and Italy. Some respondents confirmed that News Corp currently engages in multi-territorial negotiations for acquisition of content only in relation to particular linguistic areas<sup>107</sup> [...].
185. Fourth, like the Hollywood Majors (see paragraph 181 above), most of News Corp and BSkyB's competitors at the retail pay-TV level did not express concerns as regards the possible increase of News Corp's negotiating power in relation to licensors of premium films following the transaction<sup>108</sup>.
186. Finally, the market investigation also revealed that the merged entity would face other multinational groups on a hypothetical right purchasing market encompassing several countries, such as the Liberty Global Group and Deutsche Telekom.
187. As regards PPV/TVOD rights, the market investigation confirmed that, unlike linear pay-TV and SVOD services, content in the PPV/TVOD windows generates license fee revenue only for the particular title selected by the viewer. Hollywood majors, therefore, generally license PPV/TVOD rights on a non-exclusive basis as it is important for the content to be widely available through as many delivery points as

---

<sup>106</sup> See in particular Case COMP/M. 2876 – *News Corp/ Telepiù*, Commission decision of 2 April 2003, paragraph 61 and paragraph 57 referring to case COMP/M.2050 *Vivendi/CANAL+/Seagram*, Commission decision of 13 October 2000.

<sup>107</sup> Questionnaire to right holders of 5 November 2010 - Question 20.

<sup>108</sup> Questionnaire to content distributors I of 5 November 2010 – 1 out of 11 respondents expressed concerns; and questionnaire to content distributors II of 5 November 2010 – A minority of competitors in the UK, Germany and Italy (6 out of 16 respondents) did raise concerns in relation to access to premium films.

possible to reach the widest number of customers possible and maximize returns from each title<sup>109</sup>. It is unlikely that, post-merger, the merged entity would be so strong as to undermine the well-established non-exclusive licensing structure for PPV/TVOD in its favour by insisting on exclusive PPV/TVOD rights

## ii. Premium sport content

188. While recognizing that the submission of bids covering rights in more than one territory would be theoretically possible in relation to pan-European/international sport events (such as FIFA organized football, UEFA Champions League and the Olympic Games, which, according to the notifying party are licensed by one single rights holder at the European level to various broadcasters at national or regional level), the notifying party submits that there are several reasons why such multi-territory bids would not be likely in practice.
189. First, tender rules of the major pan-European sport event rights owners require the submission of separate bids for every single country, and on different dates. Furthermore, in terms of the UK Broadcasting Act, 1996, key sport events such as the Olympic Games, FIFA World Cup Finals Tournament and certain matches within the European Football Championship Finals Tournament would need to be offered for live broadcast on the main (FTA) terrestrial channels.
190. [...].
191. The market investigation has confirmed the notifying party's submission that rights to pan-European/international sport events are licensed on a national basis<sup>110</sup>.
192. Furthermore, only one respondent to the market investigation expressed concerns that, by joining its subscriber base in various Member States for the acquisition of international sport rights, News Corp could reduce its average content costs. However, the same respondent also stated that it expects the trend of sports rights acquisitions being made more and more on a purely national basis going forward.
193. Furthermore, certain sports rights would be currently covered by 'listed events' regimes derived from the Audiovisual Media Services Directive in EU Member States. These regimes provide that certain events (such as all or certain matches of the FIFA World Cup finals tournament and all or certain matches of the European Football Championship) must not be broadcast on an exclusive basis. Relative legislation in the UK ensures that key events and matches are available for national broadcast on a FTA basis. Therefore, it is unlikely that the proposed transaction would increase the negotiation power of the merged entity in this regard.

## iii. Conclusion

194. In light of the above, the Commission has come to the conclusion that the combination of BSkyB's presence as a leading pay-TV operator in the UK and Ireland with News Corp's presence as a leading pay-TV operator in Italy, Germany and Austria does not

---

<sup>109</sup> Questionnaire to right holders of 5 November 2010 - Question 15 and 16.

<sup>110</sup> Questionnaire to content distributors II of 5 November 2010 - Question 4.

raise serious doubts as to its compatibility with the internal market in relation to a possible increased bargaining power as regards the negotiation and acquisition of rights to TV content.

**d. Pay-TV technical services**

195. The proposed transaction will result in the vertical integration of News Corp's upstream activities as provider of pay-TV technical services (through a jointly controlled subsidiary, NDS) and BSkyB's downstream activities on the market for the retail supply of audiovisual content to end users. Considering that BSkyB's share of the downstream market exceeds 25%, the market for the provision of pay-TV technical services in the EEA is vertically affected by the merger.
196. The Commission examined the likelihood that News Corp would foreclose BSkyB's rivals in the market for the retail supply of pay-TV by restricting access to the pay-TV technical services offered by NDS.
197. [...]. None of the respondents to the market investigation purchases pay-TV technical services from NDS or plans to do so in the future. However, another pay-TV operator indicated that it is in the process of negotiating an agreement with NDS for the provision of middleware.
198. The Commission considers that the merged entity would not have the ability to foreclose BSkyB's rivals in the market for the retail supply of pay-TV by restricting access to the technical services offered by NDS. In particular, NDS does not have market power in the market for the provision of pay-TV technical services. In 2009, NDS held a market share of [20-30]% for the supply of CA systems in the EEA and accounted for [10-20]% of the supply of middleware.
199. Furthermore, there are strong alternative suppliers of CA systems and middleware in the EEA. Thus, Nagra (Kudelski) accounted in 2009 for [30-40]% of the supply of CA systems, and Conax for [10-20]%. As regards the supply of middleware, Open TV held a [30-40]% share in 2009, whereas the share of Seachange was of [5-10]%, Netgem [0-5]%, Microsoft [0-5]%, proprietary developments [5-10]%, and others [20-30]%
200. In addition, the fact that control over NDS is exercised jointly by News Corp together with an independent investment fund would appear to limit News Corp's ability to foreclose.
201. Although two respondents to the market investigation<sup>111</sup> expressed concerns that the merged entity would foreclose access to the technical services offered by NDS, such concerns were not substantiated, notably with regard to the condition that NDS must hold market power in the market for the provision of pay-TV technical services. In addition, both respondents acknowledge that there are various alternative suppliers of (unbundled) pay-TV technical services components.
202. In light of the above, it can be concluded that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as regards the possible

---

<sup>111</sup> Questionnaire to Content Distributors I of 5 November 2010 - question 20.

input foreclosure of BSkyB's pay-TV competitors in relation to the pay-TV technical services provided by NDS.

## 2. The Newspaper Publishing Sector

### 2.1. Description

203. Newspaper markets are classically two-sided markets. On the publishing side, publishers compete to supply newspapers and other news services to consumers, and/or to attract consumers to online content with many (but not all) publishers generating revenues by charging a cover price for print copies (whether over the counter or by subscription) or an online subscription fee. On the other side of the market, both free and paid-for newspapers, in print and online versions, compete for advertising revenues. In the UK, print newspapers that charge a cover price still derive, on average, around [...] of their overall revenue from advertising. Advertisers purchase advertising space in newspapers and online to promote the sales of goods or services.
204. As concerns means of delivery, while some customers purchase their newspapers under subscription via home delivery, overall, only a small percentage of all newspaper readers in the UK have a subscription to a newspaper, and a number of newspapers (including *The Sun*) do not offer any subscription service. Moreover, newspaper subscription services are not available everywhere in the UK and in Ireland. In addition, in geographic areas where newspaper subscription services are available, newspaper readers are able to obtain the same newspapers at a wide variety of retailers (including newsagents, petrol stations, and general purpose stores such as supermarkets), with a number of retailers providing their own home delivery service.
205. The following two tables show the total newspaper circulation in the UK and in Ireland in 2009, grouping daily and weekly newspapers together<sup>112</sup>.

**Table 2: Newspaper Circulation – UK (2009)**

---

<sup>112</sup> Source: Audit Bureau of Circulations, News Corp. The weekly newspapers only have these sales on Sunday.

Publisher	Title	Average Sales/Day (M)	Share per title (%)	Publisher share (%)
News Corp	Su	[...]	[10-20]	[30-40]
	News Of The World	[...]	[10-20]	
	Times	[...]	[0-5]	
	Sunday Times	[...]	[0-5]	
Daily Mail	Daily Mail	[...]	[0-5]	[20-30]
	Mail On Sunday	[...]	[0-5]	
	Metro (Group)	[...]	[0-5]	
Trinity Mirror	Daily Mirror	[...]	[0-5]	[10-20]
	Sunday Mirror	[...]	[0-5]	
	Daily Record	[...]	[0-5]	
	Sunday Mail	[...]	[0-5]	
	Peopl	[...]	[0-5]	
Telegraph Media Group	Daily Telegraph	[...]	[0-5]	[5-10]
	Sunday Telegraph	[...]	[0-5]	
Northern & Shell	Daily Express	[...]	[0-5]	[10-20]
	Daily Star	[...]	[0-5]	
	Sunday Express	[...]	[0-5]	
	Daily Star Sunday	[...]	[0-5]	
Guardian Media Group	Guardian	[...]	[0-5]	[0-5]
	Observe	[...]	[0-5]	
D.C.	Sunday Post	[...]	[0-5]	[0-5]
Thomson Independent News	Independent	[...]	[0-5]	[0-5]
	Independent on Sunday	[...]	[0-5]	[0-5]
Pearson PLC	Financial Times	[...]	[0-5]	[0-5]
Johnston Press	Scotsma	[...]	[0-5]	[0-5]
	Scotland on Sunday	[...]	[0-5]	[0-5]
Newsquest	Herald (Scotland)	[...]	[0-5]	[0-5]
	Sunday Herald	[...]	[0-5]	[0-5]
FL Partners	Racing Post	[...]	[0-5]	[0-5]
	Tota	[...]	100	100

Table 3: Newspaper Circulation – Ireland (2009)

Publisher	Title	Average Sales/Day ('000)	Share per title (%)	Publisher share (%)
News Corp	News Of The World	[...]	[5-10]	[10-20]
	Sunday Times	[...]	[0-5]	
	Su	[...]	[0-5]	
	Times	[...]	[0-5]	
Tribune Newspaper Plc	Sunday Tribune	[...]	[0-5]	[0-5]
Irish Times Trust	Irish Times	[...]	[5-10]	[0-5]
Independent News and Media	Irish Independent	[...]	[0-5]	[30-40]
	Sunday Independent	[...]	[10-20]	
	Sunday World	[...]	[10-20]	
Thomas Crosbie	Sunday Business Post	[...]	[0-5]	[5-10]
	Irish Examiner	[...]	[0-5]	
Daily Mail	Daily Mail	[...]	[0-5]	[10-20]
	Mail On Sunday	[...]	[0-5]	
Trinity Mirror	Daily Mirror	[...]	[0-5]	[5-10]
	Sunday Mirror	[...]	[0-5]	
	Daily Record	[...]	[0-5]	
	Sunday Mail	[...]	[0-5]	
	Peopl	[...]	[0-5]	
Telegraph Media Group	Daily Telegraph	[...]	[0-5]	[0-5]
	Sunday Telegraph	[...]	[0-5]	
Northern & Shell	Daily Express	[...]	[0-5]	[5-10]
	Daily Star	[...]	[0-5]	
	Sunday Express	[...]	[0-5]	
	Daily Star Sunday	[...]	[0-5]	
Guardian Media Group	Guardian	[...]	[0-5]	[0-5]
	Observe	[...]	[0-5]	
D.C.	Sunday Post	[...]	[0-5]	[0-5]
Thomson Independent News	Independent	[...]	[0-5]	[0-5]
	Independent on Sunday	[...]	[0-5]	[0-5]
Pearson PLC	Financial Times	[...]	[0-5]	[0-5]
FL Partners	Racing Post	[...]	[0-5]	[0-5]
	Tota	[...]	100	100

206. The following two tables show the total share for the provision of online news in the UK and in Ireland in 2009<sup>113</sup>. Data for Google News and Yahoo News are not available and have not been included in the market share tables.

**Table 4: Online News and Information Services - UK (2009)**

Website	Monthly average number of total unique users (000)	Share per title (%)
News Corp	[...]	[5-10]
<i>The Sun Online</i>	[...]	[0-5]
<i>Times Online</i>	[...]	[0-5]
<i>Wal Street Journal Online</i>	[...]	[0-5]
<i>The Scottish Sun Online</i>	[...]	[0-5]
<i>News.Com.au Sites</i>	[...]	[0-5]
<i>Foxnews.com</i>	[...]	[0-5]
<i>NYPost.com</i>	[...]	[0-5]
BSkyB	[...]	[0-5]
BBC	[...]	[10-20]
Mail Online	[...]	[0-5]
NY Times Digital	[...]	[5-10]
Gannett Sites	[...]	[0-5]
The Guardian	[...]	[0-5]
Telegraph Media Group	[...]	[0-5]
MSN News	[...]	[0-5]
Independent.co.uk	[...]	[0-5]
Mirror Online	[...]	[0-5]
AOL News	[...]	[0-5]
Johnston Press Plc	[...]	[0-5]
MSNBC	[...]	[0-5]
Metro.co.uk	[...]	[0-5]
Others	[...]	[30-40]
<b>Total</b>	[...]	<b>100</b>

**Table 5: Online News and Information Services – Ireland (2009)**

Website	Total Unique Visitors (000s)	Share per title (%)
News Corp	[...]	[0-5]
BSkyB	[...]	[0-5]
BBC	[...]	[10-20]
RTE News	[...]	[5-10]
NY Times Digital	[...]	[5-10]
Mail Online	[...]	[5-10]
Independent.ie	[...]	[0-5]
Irishtimes.com	[...]	[0-5]
MSNBC	[...]	[0-5]
AOL News	[...]	[0-5]
Mirror Online	[...]	[0-5]
Independent.co.uk	[...]	[0-5]
Others	[...]	[40-50]
<b>Total</b>	[...]	<b>100</b>

## 2.2. Market definition

### 2.2.1. Product market definition

207. The notifying party considers that that the relevant product market for the purpose of this transaction comprises the supply of print newspapers and online news services.

<sup>113</sup> Source: comSource.



208. The notifying party submits that the markets for the supply of newspapers have changed significantly during the past several years, with an increasing proportion of consumers reading news and other editorial-style content online rather than buying (or reading) a daily print newspaper, and with the re-positioning and entry of newer newspapers.
209. According to the notifying party, all of the main newspaper titles have dedicated branded websites that contain all, or at least a large proportion, of the news and editorial content from their print editions, and, with few exceptions, are available free of charge. In many cases the online versions of daily newspapers offer a volume of information and level of detail that surpasses that found in print daily newspapers. Other freely available online sources, in particular the BBC, also offer a similar range and depth of dedicated news coverage, as well as easy access to various specialist and international news sources. Internet portals – such as Google and Yahoo! – also offer their own dedicated news reports, often supplied by news agencies such as Thomson-Reuters and consumers can also use search engines to search for additional coverage of specific stories. Finally, the type of editorial comment provided by professional journalists in newspapers and (often) in branded websites is increasingly challenged by less formal sources of opinion and comment, such as blogs.
210. The notifying party further submits that there is evidence of a direct competitive relationship between print newspapers and online news sources, and that the expansion of online news sources is one of the main drivers of the decline of print newspaper circulation over the last few years.
211. The Commission has in the past considered that written press should be differentiated from other media products<sup>114</sup>. The market investigation conducted for the purpose of this case was inconclusive as to the substitutability of print newspapers and online news services<sup>115</sup>. The market investigation was also inconclusive as to the substitutability of print newspapers and paid-for online news services<sup>116</sup>.
212. The Commission also investigated whether news delivery through new digital devices such as tablets (e.g. Apple's iPad or Samsung's Galaxy) or e-readers (such as Amazon's Kindle) (will) belong to a separate market or are (will be) part of same

---

<sup>114</sup> See Case IV/M.423 - *Newspaper Publishing*, Commission decision of 14 March 1994, paragraph 11; Case IV/M.1401, *Recoletos/Unedisa*, Commission decision of 1 February 1999, paragraphs 17.

<sup>115</sup> Questionnaire to Newspapers of 5 November 2010 - question 9 - Out of 6 respondents, 2 considered them to still belong to separate markets, 2 considered that increasingly they were becoming part of the same market, 1 indicated that potentially they could be part of the same market, and 1 indicated that for some users, they were part of the same market and for some others, not.

<sup>116</sup> Questionnaire to Newspapers of 5 November 2010 - question 10 - Out of 6 respondents, 2 considered them to still belong to separate markets, 1 considered that increasingly they were becoming part of the same market, 1 indicated that they were part of the same market, 1 replied besides the question, and 1 replied that it was too early to say but that there were indications that in the future, whereas tablets may to some extent substitute print newspapers, free online websites will still complement them.

market as print, or online, newspapers. The market investigation was inconclusive, given the very nascent nature of these new devices<sup>117</sup>.

213. The notifying party and several respondents highlighted that there are very few tablets currently available on the market and that they have only been released for a few months<sup>118</sup>. The notifying party and two respondents replied that in the future, some level of substitutability may exist between newspaper applications ('apps') on tablets (such as Apple's iPad or Samsung's Galaxy) or e-readers (such as Amazon's Kindle), and print newspapers. This is because, according to them, tablets are the digitally-based products that are the closest to the print version of a newspaper and so the most likely to produce substitution. On the other hand, one respondent indicated that according to their research, their online news website audience is significantly different to their print audience (and by implication this may also be true for tablets), that evidence of actual switching away from newspapers is very limited and that it is not clear how this will evolve in the future<sup>119</sup>.
214. In the past, the Commission also concluded that there are three segments within the national print newspaper market: (i) popular tabloids; (ii) mid-market titles; and (iii) the quality segment<sup>120</sup>. This was confirmed by the market investigation<sup>121</sup>.
215. In previous decisions, the Commission has also considered whether there can be distinctions between: (i) daily newspapers and non-daily (i.e., weekly, monthly)<sup>122</sup> and (ii) national daily newspapers and regional or local newspapers<sup>123</sup>. A majority of respondents to the market investigation confirmed that national daily newspapers

---

<sup>117</sup> Questionnaire to Newspapers of 29 November 2010 - question 3 - 5 out of 6 respondents indicated that it was too early to conclude at this stage whether print newspapers, online news and news delivered through new digital devices such as tablets would be more complementary than substitutes to each other.

<sup>118</sup> Apple launched its iPad in April 2010; a recent article by Enders Analysis estimates that some 500,000 iPads have been sold so far in the UK (Newspapers: Good news, bad news, 3 December 2010).

<sup>119</sup> Questionnaire to Newspapers of 29 November 2010 - question 1 and 3 - Out of 6 respondents, 1 indicated some possible substitutability, 1 indicated that based on their research, there is some substitutability, 3 indicated that there was no information to confirm a certain level of substitutability, and 1 replied that based on their research, there was little substitutability because the audiences were different.

<sup>120</sup> See Case IV/M.423 - *Newspaper Publishing*, Commission decision of 14 March 1994, paragraph 14.

<sup>121</sup> Questionnaire to Newspapers of 5 November 2010 - question 14 - 5 out of 6 respondents.

<sup>122</sup> See Case IV/M.1401, *Recoletos/Unedisa*, Commission decision of 1 February 1999, paragraphs 19-20 (the Commission considered such a distinction, but ultimately did not reach a conclusion on product market definition).

<sup>123</sup> See Case COMP/M.3817, *Wegner/PCM/JV*, Commission decision of 7 July 2005, paragraph 19 (the Commission considered such a distinction, but ultimately did not reach a conclusion on product market definition).

constitute a market separate from regional<sup>124</sup> newspapers and magazines, as well as free newspapers<sup>125</sup>.

216. For the purposes of this decision, the Commission considers that the exact product market definition for the supply of newspapers (either in print format, through online news websites or through new digital devices such as tablets) can be left open as the proposed transaction does not raise any competition concerns under any of the alternative product market definitions considered.

### 2.2.2. Geographic market definition

217. In past decisions<sup>126</sup>, the Commission concluded that the relevant geographic market for national newspapers is national. This was not put in question by the market investigation.
218. For the purposes of this decision, the Commission considers that the relevant geographic market for national newspapers is national, in line with Commission precedents.

### 2.3. *Competitive assessment*

219. Respondents to the market investigation<sup>127</sup> raised the concern that in the UK, the merged entity would have, post-transaction, the ability and incentive to (i) use BSKyB's dominant position in the market for the retail supply of pay-TV to foreclose rivals in the newspaper market by offering mixed bundling of subscriptions for print or online News Corp newspapers and BSKyB's pay-TV subscriptions at a price cheaper than the sum of the stand-alone subscription prices; and/or (ii) further decrease prices of its newspapers by subsidising resulting losses from BSKyB's revenue stream.
220. Conglomerate mergers are mergers between firms that are in a relationship that is neither purely horizontal nor vertical. In practice, the focus is on mergers between companies that are active in closely related markets, that is to say mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use<sup>128</sup>.

---

<sup>124</sup> Regional newspapers concentrate on local as opposed to national issues.

<sup>125</sup> Questionnaire to Newspapers of 5 November 2010 - question 18 - Out of 6 respondents, 4 considered them to still belong to separate markets, 1 considered that a new segmentation should be taken into account (national paid-for newspapers, national free newspapers, regional paid-for newspapers, regional free newspapers), and 1 considered that this segmentation had become irrelevant with the advent of free newspapers.

<sup>126</sup> See Case IV/M.423 - *Newspaper Publishing*, Commission decision of 14 March 1994, paragraph 17; Case IV/M.1401, *Recoletos/Unedisa*, Commission decision of 1 February 1999, paragraph 29.

<sup>127</sup> Questionnaire to Newspapers of 5 November 2010 - question 46 - 6 out of 6 respondents have raised either one or two of these concerns.

<sup>128</sup> Non-horizontal Mergers Guidelines, paragraph 91.

221. To establish possible conglomerate leveraging, the Commission must show each of the following elements, in accordance with the Non-Horizontal Merger Guidelines, (i) that the merged firm would have the ability to foreclose its rivals, whether (ii) that it would have the economic incentive to do so and, (iii) that a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers<sup>129</sup>.
222. The notifying party submits that with respect to News Corp's paid-for online news content, any possible offer of packaged deals including BSkyB's pay-TV services and News Corp's paid-for online news content would not have any foreclosure effect. The notifying party also submits that, with respect to News Corp's print newspapers, News Corp has no current plans to offer packaged deals including BSkyB's pay-TV services and News Corp's newspapers. Moreover, the notifying party considers that any such packaged deal would be highly unlikely to have any foreclosure effect *vis-à-vis* competing newspapers in the UK and in Ireland.
223. The Commission will not assess in more detail the submission that post-merger, the merged entity may further decrease the cover price of its newspapers and subsidise any resulting losses from BSkyB's revenue stream as it considers that this possible strategy is not merger-specific. Indeed, before the proposed transaction, News Corp already has the financial means to engage in a strategy of price reduction for its newspapers in the UK if it so wished and does not need the additional anticipated financial gains resulting from the acquisition of the remaining shares of BSkyB to do so.
224. The concern that the merged entity may use BSkyB's dominant position in pay-TV to foreclose rivals in the newspaper market by offering mixed bundling of subscriptions for print, online, or tablet applications of News Corp newspapers and BSkyB's pay-TV subscriptions at a price cheaper than the sum of the stand-alone subscription prices is further analysed below.
225. Following the Non-horizontal Merger Guidelines<sup>130</sup>, the ability to engage in bundling practices requires the merged entity to hold a significant degree of market power in one of the markets concerned. In addition, there must be a large common pool of customers for the individual products concerned. The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying. Such a correspondence in purchasing behaviour is more likely to be significant when the products in question are complementary. Finally, bundling practices are less likely if there are effective and timely counter-strategies that the rival single-product firms may deploy, such as combining their offers in order to make them more attractive or pricing more aggressively to maintain market shares.
226. The notifying party submits that BSkyB does not hold any significant degree of market power in the provision of audiovisual content to end-users in the UK and/or Ireland, and that absent dominance, bundling cannot have any anticompetitive effect. The Commission does not share this view and considers that BSkyB has a strong

---

129 Non-horizontal Mergers Guidelines, paragraph 94.

130 Non-horizontal Mergers Guidelines, paragraph 95 to 104.

position in the market for the retail supply of pay-TV in the UK, with a market share raising a presumption of dominance<sup>131</sup>. The combined market share of all of News Corp's newspapers is also significant in the UK and Ireland<sup>132</sup>.

227. The Commission first investigated whether the merged entity would have the ability to bundle its pay-TV subscriptions with subscriptions to print newspapers.
228. The notifying party submits that pay-TV and newspapers are not viewed by consumers as being complementary in the same way as, for instance, pay-TV and broadband internet and telephony where triple-play offers are marketed to customers.
229. The result of the market investigation was inconclusive as to whether, and to what extent, TV and newspapers are complementary goods or not. A number of newspapers submitted in response to the market investigation that TV programmes and newspapers are complementary goods, especially in terms of the provision of news and of information about programmes<sup>133</sup>. By contrast, most TV content providers replied that they are not complementary<sup>134</sup>. On that basis, the Commission cannot conclude that these goods are complementary and that a bundle of them may be attractive to customers.
230. Furthermore, the market investigation confirmed that the UK has historically had low newspaper subscription rates (around 6% of overall circulation), even lower on the tabloid market, and around 25-33% in the quality market<sup>135</sup>. The Commission therefore considers that creating a bundle of BSkyB's pay-TV with News Corp's newspapers subscriptions may not be sufficiently appealing to customers as

---

<sup>131</sup> According to figures provided by the notifying party, BSkyB held [60-70]% of pay-TV subscriptions in the UK and between [70-80]% to [80-90]% of revenues in 2009.

<sup>132</sup> According to figures provided by the notifying party, News Corp's newspapers combined [30-40]% of all newspapers circulation in the UK in 2009 ([30-40]% of daily and [40-50]% of weekly newspapers circulation; or [50-60]% of national daily tabloids and [20-30]% of national daily quality newspapers circulation, and [50-60]% of national weekly tabloids and [40-50]% of national weekly quality newspapers circulation); they combined [30-40]% of all newspapers revenue in the UK in 2009 ([20-30]% of daily and [30-40]% of weekly newspapers revenue; or [50-60]% of national daily tabloids and [20-30]% of national daily quality newspapers revenues, and [80-90]% of national weekly tabloids and [40-50]% of national weekly quality newspapers revenues).

In Ireland, News Corp's newspapers combined [10-20]% of all newspapers circulation in 2009 ([10-20]% of daily and [20-30]% of weekly newspapers circulation; or [30-40]% of national daily tabloids and [0-5]% of national daily quality newspapers circulation, and [20-30]% of national weekly tabloids and [20-30]% of national weekly quality newspapers circulation); they combined [10-20]% of all newspapers revenue in 2009 ([10-20]% of daily and [10-20]% of weekly newspapers circulation; or [30-40]% of national daily tabloids and [0-5]% of national daily quality newspapers revenues, and [10-20]% of national weekly tabloids and [20-30]% of national weekly quality newspapers revenues).

<sup>133</sup> Questionnaire to Newspapers of 5 November 2010 - question 4 - 6 respondents. In that context, it is important to note that *The Sun* does not offer subscription services.

<sup>134</sup> Questionnaire to Content Distributors of 5 November 2010 - question 43 - 5 respondents in total - 3 responded that TV and newspapers were not complementary goods, 1 responded that with the advent of 24h news channels, they were increasingly complementary, and one had no opinion.

<sup>135</sup> Questionnaire to Newspapers of 5 November 2010 - question 20 - 6 out of 6 respondents.

subscriptions are currently not the distribution channel through which the vast majority of them buy their newspapers, even though customers are generally given a substantial discount (between 25-35%) in case of subscriptions.

231. The market investigation also confirmed that out of the factors motivating readers to purchase a particular newspaper, price is not the first factor, and only one out of several important factors influencing purchasing decisions and determining customer loyalty. The perceived political stance of a newspaper, family heritage, social-economic factors and the type of content are more important factors<sup>136</sup>. The Commission therefore also considers that creating a bundled subscription of BSkyB's pay-TV with News Corp's newspapers at an attractive price may not guarantee either that customers will switch in a significant manner away from their usual newspapers in order to start reading News Corp's newspapers, just because they are cheaper.
232. In conclusion, it appears that post transaction, the merged entity would not have the ability to engage in a bundling strategy between its pay-TV and print newspapers that may foreclose its newspaper competitors.
233. The Commission also investigated whether the merged entity would have the ability to bundle its pay-TV subscriptions with subscriptions to online news website subscriptions.
234. The notifying party submits that internet-users interested in news typically read multiple online news websites for free, and that competition is very intense. It submits that there is no reason to believe that increased readership of News Corp online newspapers resulting from packaged offers would result in a disproportionate reduction in the readership of any particular rival source of online news.
235. The Commission first notes that News Corp is currently one of the two companies in the UK (the other being the Financial Times) that has started to charge for its online news websites, whereas the majority of its competitors have business models based on free digital news financed by advertising.
236. The market investigation also revealed that while some newspapers may have plans to potentially charge for (parts of) their news or for tablet applications, it is unlikely that in the future, News Corp's newspaper competitors will no longer provide online versions of their titles free-of-charge<sup>137</sup>. In addition, news aggregators such as Google News, Yahoo! News or The Huffington Post will continue to represent another free alternative to News Corp's online news websites. Therefore, the Commission considers that even if the merged entity was to bundle its pay-TV subscriptions with subscriptions to News Corp's online news services, there would still remain a large number of free online news websites for readers to access and it is unlikely that they would stop consulting them.

---

<sup>136</sup> Questionnaire to Newspapers of 5 November 2010 - question 14 - 5 out of 6 respondents listed family heritage, perceived political stance, routine, social stance and content as main factors, only one respondent replied that price was the number one factor determining the choice of a newspaper.

<sup>137</sup> Questionnaire to Newspapers of 5 November 2010 - questions 5 and 6 - 6 respondents, 2 had no plans to charge for online news services, 1 replied that they had such plans for the future, and 3 replied that they had plans to charge for specific applications or specific subscriptions.

237. As a conclusion, it appears that post-transaction, the merged entity would not have the ability to engage in a bundling strategy between its pay-TV and online news websites that may foreclose its newspaper competitors.
238. The Commission also investigated whether the merged entity would have the ability to bundle its pay-TV subscriptions with subscriptions to newspaper applications on new electronic devices such as tablets or e-readers.
239. iPad owners can download for free *The Times* app and use it for 30 days. Afterwards, they either can continue to use it for free if they are already subscribers to the online or print edition of *The Times*, or can purchase the app on a stand-alone basis for the price of GBP 9.99 for a 30-day period through the iTunes store<sup>138</sup>. The iPad apps for News Corp's weekly newspapers (*The News of the World* and *The Sunday Times*) will be charged, when launched, on a per-edition basis.
240. The market investigation revealed that in general, newspaper competitors of News Corp already have or consider the possibility to launch free or paid-for apps on iPads and similar e-readers<sup>139</sup>. The market investigation also showed that tablet makers have the incentive to accept as many newspaper apps as possible, including from News Corp's competitors, as they retain a portion of these apps' revenues<sup>140</sup>. It is therefore likely that in the future, most if not all newspapers competing with News Corp will market an app for their newspaper.
241. The Commission assessed whether newspaper apps on digital tablets may have to be consumed through some sort of subscription model. On one hand, when iPad owners purchase an app for *The Times* on a stand alone basis for the price of GBP 9.99 for a 30 day period, this represents a type of subscription model, even though the iTunes store does not currently allow for on-going subscriptions and customers have to renew their subscription on a periodic basis (currently 30 days). [...]. Furthermore, some competing newspapers such as *The Independent* offer the app free of charge. It is therefore not clear, at this early stage of the development of these digital devices, to what extent newspaper apps will be based on some sort of subscription model.
242. The market investigation also highlighted that newspapers are currently somewhat restricted by tablet makers in the way (i) they price their application and (ii) charge for subscriptions<sup>141</sup>. For instance, it appears that the price of the newspaper apps on the Kindle e-reader is decided by Amazon, and not the newspapers. This seems to be confirmed by the fact that News Corp offers *The Times* iPad app for free to subscribers to thetimes.co.uk, but does not offer a similar reduction of fee for its app on Kindle (which can be bought for GBP 0.99 per copy or GBP 9.99 per month). It therefore seems that News Corp could face a number of technical or other commercial

---

<sup>138</sup> News Corp submits that out of a total of [...] customers accessing *The Times* publications via the iPad, approximately [>50]% are subscribers to one or more of News Corp's newspapers (printed or online), and approximately [<50]% are stand-alone subscribers via iTunes. Out of a total of [...] customers accessing *The Sun* publication via the iPad, [>50]% are stand-alone subscribers via iTunes.

<sup>139</sup> Questionnaire to Newspapers of 24 November 2010 - questions 1 and 2 – 6 out of 6 respondents.

<sup>140</sup> Questionnaire to Newspapers of 24 November 2010 - question 2.

<sup>141</sup> Questionnaire to Newspapers of 24 November 2010 - questions 2.

restrictions imposed by tablet makers even if it wanted to engage in a bundling strategy for its pay-TV and newspaper apps subscriptions by offering a packaged subscription at a discount.

243. In addition, as in the case of print newspapers (see paragraph 231 above), price is only one, but not the main factor influencing purchasing decisions and determining customer loyalty, such that any possible bundling strategy may not switch readers away from their usual newspaper.
244. Also, it may take some time before the emerging digital news applications on tablets and other devices represent a significant part of the market (currently digital newspaper subscriptions to *The Times* are estimated as about [0-5]% of total daily print circulation in the UK, and to *The Sun* at about [0-5]%). In addition, although this number may increase quite significantly, the current number of iPads sold so far in the UK is still low compared to more than 11 million daily print newspapers sold per day and their price starts at GBP 429.
245. As a conclusion, new digital devices such as tablets are at a very early stage of development such that it is very difficult to assess any possible competition concerns with respect to subscriptions. On the basis of the business models developed so far, it appears that the merged entity would not have a greater ability to engage in a bundling strategy with BSkyB's pay-TV subscriptions foreclosing its newspaper competitors than is the case for its print edition or online news.
246. Based on the above, it appears unlikely that overall, the merged entity would have the ability to engage in a bundling strategy between pay-TV and (print, online or tablet-based) newspapers subscriptions that may foreclose News Corp's competitors in the newspaper market in the near future.
247. Even though any competition concern that the merged entity would foreclose its competitors in the newspaper market by bundling its pay-TV with newspaper subscriptions could be dispelled on the basis that the merged entity would not have the ability to foreclose its competitors through such strategy, the Commission also investigated whether News Corp would have an incentive to engage in such a strategy post-transaction.
248. As regards incentives, the Commission considers, in accordance with the Non-horizontal Merger Guidelines<sup>142</sup>, that the incentive of the merged entity to foreclose its competitors depends on the degree to which a foreclosure strategy would be profitable. Thus, the possible gains from expanding market share must be compared to the possible losses that result from customers not purchasing the product bundle. It is unlikely that a company would risk losing sales on one large and highly profitable market in order to gain market share in a smaller, less profitable one. The Commission also takes into account the types of strategies adopted in the market in the past and the content of internal strategic documents.
249. The notifying party submits that it has no financial incentive to engage in such bundling strategy [...]. News Corp will not therefore want to run the risk of losing pay-TV customers by engaging in such practices.

---

<sup>142</sup> Non-Horizontal Merger Guidelines, paragraphs 105 to 110.



250. The notifying party further submits that there are a number of commercial considerations which would make such a bundling strategy not attractive to BSKyB.
251. First, offering discounts via package offers to BSKyB subscribers would have a disadvantage relative to offering direct discounts to newspapers readers in that it would, in general terms, be more expensive to achieve similar subscription results through such an "indirect" offer. It considers that a special offer on newspaper subscriptions via a package offer to BSKyB subscribers would likely to entail higher costs than offering these discounts directly to potential newspaper subscribers, as BSKyB subscribers who already subscribe to News Corp newspapers would be almost certain to take up the offer in order to save some money. From News Corp's perspective, this would be like lowering price to customers who are already willing to buy its papers at current prices.
252. Second, such a strategy would not be attractive to customers, and as a result to BSKyB, for the following reasons:
- a. BSKyB already has a large number of products to sell to customers and has to make decisions over which products to advertise to customers using available communications assets and resources. It is likely that BSKyB would prioritise other, more profitable products (both on a profit margin per unit basis and as to the percentage of potential subscribers likely to find the product appealing), over any bundle including newspapers;
  - b. Navigating new subscribers through the complex combinations of packages available to them from BSKyB is already challenging (even with just the core combinations of TV packages, high definition, multi-room, broadband and telephony, there are currently over 80 000 different combinations for a new customer to choose from). BSKyB seeks to simplify those choices, not add further options that may not be as profitable.
253. As regards past examples of similar bundling strategies, the notifying party submits that News Corp has not implemented any bundling or tying strategy between pay-TV and newspapers (and/or online news services) elsewhere in the world, including in the US (for the period during which it controlled pay-TV operator Direct TV) and in Australia, where News Corp controls a number of newspapers (e.g., The Australian and Weekend Australian, The Daily (and Sunday) Telegraph, and the Herald Sun and Sunday Herald Sun) and the pay-TV operator Foxtel. The notifying party further submits that News Corp has no current plans to jointly offer, post-transaction, BSKyB pay-TV subscriptions with News Corp print or online news content.
254. As regards financial incentives, the Commission considers that News Corp's argument is only valid if the merged entity was to engage in a tying strategy where customers wishing to purchase a subscription to BSKyB's pay-TV platform would be obliged to take a subscription to one or several of News Corp's newspapers. The Commission considers that this would be a rather risky commercial strategy which is therefore unlikely to be put in place. In contrast, if the merged entity was to offer customers the possibility, but not the obligation to bundle their pay-TV subscription with a (print or online) newspaper subscription, there seems to be little risk of losing pay-TV customers by engaging in such practice.
255. However, the Commission takes notes that the arguments advanced by News Corp against such a possible bundling strategy appear to be commercially rational. In that

context, the Commission further notes that the market investigation confirmed that to the knowledge of the respondents, such bundling strategy between pay-TV subscription and newspapers (online or paper) had never been attempted before<sup>143</sup>. The market investigation has also confirmed that competing newspapers have not envisaged such strategy either.

256. Based on the above, it seems unlikely that the merged entity would have the incentive to engage in a bundling strategy that may foreclose News Corp's competitors in the newspaper market in the near future.

#### 2.4. Conclusion

257. In light of the above, it can be concluded the proposed transaction does not raise any serious doubts as to its compatibility with the internal market with respect to possible bundling of News Corp's newspaper subscriptions with BSkyB's pay-TV subscriptions.

### 3. The Advertising Sector

258. In the UK and Ireland, News Corp sells advertising space in its print media (*The Sun*, *The Times*, *The Sunday Times*, *News of the World*, and *The Wall Street Journal*) as well as on its TV channels (in particular, on the *Fox*, *National Geographic* and *Star* channels) and various web properties such as its newspapers' websites as well as *MySpace* and *Fox.com*.
259. BSkyB sells advertising space and sponsorship<sup>144</sup> through its advertising sales house Sky Media on its own TV channels and some third party TV channels (from which BSkyB buys the advertising inventory and then resells it), its VOD programming services (*Sky Anytime* and *Sky Player*) as well as on its online media properties and certain third party websites in the UK and Ireland.
260. As of today, Sky Media buys and re-sells advertising space for some, but not all, of News Corp's TV channels including the *Fox* and *National Geographic* channels. However, Sky Media does not sell advertising space in News Corp's print newspapers and websites, including online news services.
261. BSkyB is engaged in a [...] number of integrated advertising deals where their clients can advertise across BSkyB's various media properties (TV channels, VOD, online) with one contract, [...].

---

<sup>143</sup> Questionnaire to Content Distributors of 5 November 2010 - question 44 - 6 out of 6 respondents.

<sup>144</sup> "Sponsorship" means the sale of sponsor credits, generally scheduled directly before and after the advertising break.

### 3.1. Market definition

#### 3.1.1. Relevant product markets

262. The Commission has previously defined a separate product market for the sale of advertisement space in national daily newspapers<sup>145</sup> and in television broadcasting<sup>146</sup>. The Commission has also determined that a distinction can be drawn between online and offline advertising<sup>147</sup>. As regards online advertisement, the Commission further considered whether this market might be further segmented into search and display advertising but ultimately did not reach a conclusion<sup>148</sup>.
263. The notifying party submits that it is not necessary to define the precise scope of the relevant product market for advertising, as the proposed transaction will not give rise to any competition concerns, regardless of the possible alternative market definitions. Alternatively, the notifying party submits that the sale of advertising comprises at the very least newspapers and online news services.
264. With respect to advertisement in print newspapers and online news services, a majority of respondents to the market investigation consider them as complementary and a minority as increasingly substitutable, at least to some degree<sup>149</sup>. The latter view is substantiated by the fact that UK newspapers have lost a significant share of advertising revenues in recent years, with by far the largest increase in revenues being seen in relation to online advertising.
265. Concerning advertising in newspapers, the market investigation indicated important differences between advertising in newspapers with *national* reach versus *regional* or *local* reach<sup>150</sup>. National newspapers currently offer a significantly lower cost per thousand readers to advertisers than regional and local newspapers. Moreover, nationwide campaigns are currently far more difficult to book through regional newspapers although new market developments may lead to more ease of booking (and possibly

---

<sup>145</sup> See Case COMP/M.3817 - *Wegener/PCM/JV*, decision of 07 July 2005, paragraph 27. Case N° IV/M.1401 *Recoletos/Unedisa*, Commission decision of 01 February 1999, paragraphs. 26-28.

<sup>146</sup> See Case No IV/M.566 *CLT/Disney/SuperRTL*, decision of 17 May 1995, paragraph 14; case IV/M.525 *VOX (II)*, Decision of 21 December 1994, paragraph 16.

<sup>147</sup> See Case COMP/M.4731 *Google/Double Click*, decision of 11 March 2008, paragraphs 45, 46.

<sup>148</sup> See Case COMP/M.5727 *Microsoft/ Yahoo! Search Business*, decision of 18 February 2010, paragraph.75; Case COMP/M.4731 *Google/Double Click*, decision of 11 March 2008, paragraph 56.

<sup>149</sup> Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 5 out of 7 content distributors, 3 out of 5 newspapers, and 4 out of 5 media agencies who expressed an opinion did not consider advertising in national newspapers and in online news services to be substitutable. However, out of those saying that both media channels are not substitutable, 3 content distributors and 2 newspapers, media agencies recognize that online advertising is a partial substitute for advertisers and/or does exercise a strong constraint on advertising in print newspapers.

<sup>150</sup> Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 8 out of 10 content distributors, 5 out of 6 newspapers, and 3 out of 5 media agencies did not consider advertising in national newspapers and in regional/ local newspapers to be substitutable.

lower prices) for campaigns in regional/local newspapers going forward<sup>151</sup>. Finally, certain advertisers consider that the perceived editorial quality, as well as the measurement of reach ("audit"), differ between national and (some) regional/local titles.

266. Furthermore, most content distributors and media buying agencies suggested a segmentation of the national newspaper advertising market into daily and weekly sub-segments but the market investigation was inconclusive given that most newspapers did consider them to be substitutable<sup>152</sup>. Some respondents point out that there is a large or an increasing degree of substitutability. Others base a distinction mainly on the fact that *daily* newspapers enable advertisers such as retailers or content distributors to execute specifically timed media campaigns that are important for their direct response advertising campaigns.<sup>153</sup> A high share of advertising in newspapers by large pay-TV providers appears to be spent on direct response marketing<sup>154</sup>. Advertising in *weekly* (Sunday) newspapers is less important for time-critical advertising campaigns. Therefore, the sub-segment of advertising in daily national newspapers is of specific relevance to the competition concern examined here.
267. In line with findings in previous Commission decisions<sup>155</sup>, the majority of respondents see advertisements in print newspapers and TV as separate markets<sup>156</sup>. While being able to reinforce each other, such advertisements expose sufficiently different characteristics (e.g. price, reach, consumption patterns) to not be directly substitutable. The market investigation was inconclusive as to whether advertising on pay-TV and free-to-air TV are part of the same market<sup>157</sup>. However, in light of previous

---

151 Two respondents pointed out that a new advertising product called "OneLocal" provides a one-stop shop for agencies and advertisers to purchase advertising in all 84 regional / local daily titles in the UK at similar cost per thousand impressions..

152 Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 9 out of 10 content distributors, 1 out of 6 newspapers, and 4 out of 5 media agencies did not consider advertising in daily national newspapers and in weekly (Sunday) newspapers to be substitutable. 5 out of 6 newspapers responded that they are substitutable.

153 Direct response advertising is a form of marketing designed to solicit a direct and specific response from potential customers who would contact the advertiser directly (e.g. by calling a call centre number). It is different from brand advertising (aiming to build awareness) and other forms of marketing such as direct marketing (the advertiser contacts the customer directly e.g. by mailings).

154 For instance, in its last five advertising campaigns, BSkyB spent the following percentage of each campaign's press/inserts advertising budget on direct response advertising: [...]

155 See Case No IV/M.566 *CLT/Disney/SuperRTL*, decision of 17.05.1995, para. 14; case IV/M.525 *VOX (II)*, Decision of 21.12.1994, para. 16.

156 Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 9 out of 10 content distributors, 3 out of 6 newspapers, and 4 out of 5 media agencies did not consider advertising on TV and in newspapers to be substitutable.

157 Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 4 out of 7 content distributors, 2 out of 6 newspapers, and 1 out of 5 media agencies considered TV and pay TV advertising to be equivalent, whereas 9 out of all 18 respondents (all categories) considered them not to be in the same market (2 respondents did not express a view).

Commission decisions<sup>158</sup> as well as decisions by the OFT<sup>159</sup> concluding that there was a relevant market for all television advertising, it is likely that advertising on pay-TV is not a distinct advertising market in the UK.

268. For the purposes of the present decision, the Commission considers that the exact product market definition for the supply of advertising space can be left open as the proposed transaction does not raise any competition concerns under any of the alternative product market definitions considered.

### 3.1.2. Relevant geographic markets

269. In line with Commission precedents<sup>160</sup>, the notifying party submits that the relevant product market for advertising (and/or any possible segment thereof) would be at least national in scope in the present case.
270. The market investigation indicated that the relevant geographic market for advertising is national and does *not* comprise both the UK and Ireland. Where a significant part of buyers of advertising space are active in both countries, most sellers of advertising space in various media channels differ. Intermediary media agencies tend to plan and execute campaigns through their local offices. Prices (at least) for certain media channels (TV, national press, outdoor) are significantly lower in the UK.

## 3.2. *Competitive assessment*

### 3.2.1. Horizontal overlaps

271. The notifying party submits that the merged entity's combined share in an overall advertising market encompassing all media channels in the UK and Ireland is well below 15%. It submits that the parties' activities do not overlap in the provision of advertising in the written press in the UK and in Ireland. It further considers that while their activities do overlap in the provision of TV as well as online advertising in the UK and Ireland, their combined market share does not exceed 15% within those markets/ segments (see table 6 below).
272. The Commission notes that the parties only have a relatively small combined market share in the markets for online and TV advertising in the UK and Ireland of [0-5]% and [10-20]% respectively. Therefore, the transaction does not give rise to horizontal competition concerns in these markets.

---

<sup>158</sup> See Case COMP/M. IV/M.566, *CLT/Disney/SuperRTL*, Commission decision of 17 May 1995, paragraph 14; case COMP/M.1574, *Kirch/Mediaset*, Commission decision of 3 August 1999, paragraphs 11-12; case COMP IV/M.525, *VOX (II)*, Commission decision of 21 December 1994, paragraph 16.

<sup>159</sup> See ME/4569/10, *BSkyB/Virgin Media Television*, 14 September 2010, paragraph 26. ME/2811/06, *BSkyB/ITV, Acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc*, Report to the Secretary of State for Trade and Industry, April 27 2007, paragraphs 197-198.

<sup>160</sup> See COMP/ M.1455 - *Gruner + Jahr/Financial Times/JV*, Decision of 20.04.1999, paragraph 21.

**Table 6: Advertising Sales (UK – 2009<sup>161</sup>)**

Media	Total Market (M EUR)	BSkyB		News Corp		Combined Share (%)
		Revenue (M EUR)	Share of total sales (%)	Revenue (M EUR)	Share of total sales (%)	
All advertising	[...]	[...]	[0-5]	[...]	[0-5]	[5-10]
TV	[...]	[...]	[10-20]	[...]	[0-5]	[10-20]
Internet	[...]	[...]	[0-5]	[...]	[0-5]	[0-5]
<i>Search</i>	[...]	[...]	[0-5]	[...]	[0-5]	[0-5]
<i>Non-search</i>	[...]	[...]	[0-5]	[...]	[0-5]	[5-10]
Magazines	[...]	[...]	[0-5]	[...]	[0-5]	[0-5]
Newspapers	[...]	[...]	[0-5]	[...]	[10-20]	[10-20]
Other	[...]	[...]	[0-5]	[...]	[0-5]	[0-5]

Source: Parties and Zenith Optimedia Advertising Expenditure Forecast March 2010

### 3.2.2. Non-horizontal assessment

273. The parties' activities are vertically related to the extent that: (i) BSkyB is a supplier of News Corp, which purchases advertising space to promote its products and services on BSkyB's TV channels and/or websites; and (ii) BSkyB is a customer of News Corp, as it purchases advertising space to promote its products and services on News Corp's newspapers (and to a lesser extent, News Corp's websites and TV channels).
274. The notifying party submits that the market for the provision of advertising space in the UK and in Ireland is not affected since: (i) News Corp's share in the provision of advertising space on print newspapers in the UK and Ireland is below 25%, and (ii) BSkyB's share in the provision of advertising space on TV channels in the UK and Ireland is below 25%.
275. As pointed out above, the market investigation suggested that the relevant advertising product markets may comprise the supply of advertising space in *national* print newspapers (i.e. without regional or local newspapers) or even *daily* national print newspapers. News Corp has a market share of [30-40]% and [30-40]% respectively in these narrower markets/ sub-segments in the UK. Its share in the sub-segment of *weekly* national newspaper advertising amounts to [40-50]%. Therefore, these sub-segments/ markets are technically affected. In Ireland, News Corp's market shares are significantly lower, with [10-20]% of advertising in national print newspapers, [10-20]% in daily national print newspapers and [20-30]% in weekly national print newspapers in 2009. Only the latter sub-segment/market is therefore technically affected.

<sup>161</sup> The parties submit that they do not distinguish internally between sales made for the UK and Ireland, but they understand that their shares within each segment would not be significantly different in Ireland.

**a. Input foreclosure of BSkyB's competitors related to advertising in News Corp's newspapers**

276. The first assessment concerns the possible risk of input foreclosure of BSkyB's competitors in relation to advertising in News Corp's newspapers. In the market investigation, a number of content distributors in the UK expressed the concern that, in the same way that they are currently denied access to advertising on BSkyB's wholly-owned channels, post-transaction, the merged entity would refuse them access to advertising space in News Corp's newspaper titles, or charge a competitive premium for advertising by BSkyB's rivals, thereby impeding their ability to attract subscribers and/or viewers for their channels. No such concerns were raised in Ireland. In addition, News Corp's market shares in national newspapers are significantly lower in Ireland. For these reasons, the analysis focuses on the market in the UK.
277. Following the Non-Horizontal Merger Guidelines, competition concerns could only arise if News Corp had (i) the ability to foreclose BSkyB's competitors from advertising in daily national newspapers, (ii) the incentive to do so and (iii) if this were to have an impact on the (pay) TV market<sup>162</sup>.

**i. Ability to foreclose**

278. The notifying party submits that the merged entity will not have a significant degree of market power in the market(s) for advertising and that advertising on News Corp's titles does not constitute an important input in the provision of pay or FTA TV services.
279. According to the notifying party, News Corp's ability to restrict access to its own advertising space could only have detrimental effects on BSkyB's competitors if the latter could not advertise their services elsewhere. It also claims that News Corp and The Sun lack market power in the relevant advertising markets and that there are a number of strong newspaper publishers (e.g. Daily Mail General Trust, Trinity Mirror) that offer advertising space to a similar number of readers to that of News Corp's newspapers.
280. A small number of respondents to the market investigation submitted that *The Sun* would be indispensable for advertising their products, or their clients' products, in UK newspapers<sup>163</sup>.
281. The Commission considers that market shares in the narrower segments of national newspapers ([30-40]%) or daily national newspapers ([30-40]%) indicate that there are alternative opportunities to advertise. The market investigation confirmed that this is also true for the specific category of content distributors. Content distributors did not spend significantly more on News Corp's newspapers than the average newspaper advertiser. During 2007-2010, content distributors in the UK spent between [20-30]% and [40-50]% of their expenditure on national newspapers on titles owned by News

---

<sup>162</sup> See above, paragraph 222.

<sup>163</sup> 3 out of 21 respondents, Questionnaires to content distributors, newspapers and media agencies of 5 November 2010.

Corp. Moreover, most newspapers with national circulation responding to the market investigation indicated that there were little constraints on the capacity to supply advertising space. BSKyB's competitors would thus not be prevented by capacity constraints from switching their advertising budgets that were previously allocated to News Corp to alternative national newspapers.<sup>164</sup> For these reasons, it can be concluded that there exist sufficient alternatives for advertising in national newspapers and daily national newspapers. This is further confirmed by the data provided by third parties on the reach and effectiveness of direct response campaigns when substituting to alternative newspapers.

282. With respect to the alleged importance of News Corp's newspaper *The Sun*, the Commission notes that with [...] average sales per day, *The Sun* has a share of [20-30]% of UK sales of daily newspapers, [30-40]% of sales of national daily popular press<sup>165</sup> and [50-60]% of sales of daily tabloid titles.<sup>166</sup> However, the Commission considers that there are a number of rival newspaper publishers that also have a large circulation, most notably *The Daily Mail* with [...] sales per day ([10-20]% of UK sales of daily newspapers, [20-30]% of sales of national daily popular press). Moreover, the vast majority of respondents to the market investigation did not quote *The Sun* in particular as a publication necessary for advertising. Given *The Sun's* market shares and the results of the market investigation, the Commission does not consider *The Sun* to constitute an important input for advertising, within the meaning of the Non-Horizontal Merger Guidelines<sup>167</sup>.

---

<sup>164</sup> Questionnaires to newspapers of 19 November 2010 - question 3 - Four newspapers groups out of 6 respondents indicated that capacity constraints were not an issue. Two respondents said that there may be constraints at key times (e.g. Easter and pre-Christmas, as well as on Fridays and Saturdays). One respondent limited this statement to a situation where there was a sudden demand for several large sized advertisements during peak times.

<sup>165</sup> National popular press includes tabloid titles (such as *The Sun*, *Daily Mirror*, *Daily Star*) as well as mid-market titles (such as *The Daily Mail* and *Daily Express*).

<sup>166</sup> 2009 data from Audit Bureau of Circulations. Average sales per day of *The Sun* and *The Times* amount to 30% of all daily newspaper sales and *The News of the World* and *The Sunday Times* represent 40.4% of all weekly newspaper sales.

<sup>167</sup> 18 out of 21 respondents. Questionnaires to content distributors, newspapers and media agencies of 5 November 2010. Amongst others, some respondents also considered certain TV programmes, both FTA and pay TV, to be important for their advertising campaigns. However, to the extent that this involves BSKyB's content, such concern would not be merger-specific given that the transaction does not affect the current situation. Furthermore, one respondent to the market investigation submitted that certain socio-demographic sub-segments may be particularly valuable to advertisers and that News Corp's titles, including *The Sun*, have high reach for instance in the sub-segment of the 15-44 group. However, the relevant product market for the purposes of competition analysis is not defined, in this case, in terms of audience shares with specific socio-demographic target categories. Furthermore, it has not been substantiated that the audience segment of 15-44 year olds would be particularly attractive to advertisers in general or to content distributors in particular. Indeed, other sub-segments such as the "middle class" sub-segment may be considered equally or even more attractive to advertisers due to this audience's higher purchasing power. Moreover, the target audience will differ from one advertising campaign to another depending on who the advertisers identifies as the target group most likely to be responsive to the particular advertising message.



283. For the above reasons, it is not likely that the merged entity will have the ability to foreclose BSkyB's competitors by preventing them from advertising their services effectively.

**ii. Incentive to foreclose**

284. The notifying party submits that News Corp would not have the incentive to foreclose BSkyB's competitors. Firstly, these companies account for a significant fraction of News Corp's revenue stream. Given that some of them also purchase advertising space from News Corp for non-TV related activities they could retaliate and stop advertising for their other products. Secondly, it would be unlikely that such refusal would allow News Corp to achieve greater revenues through an increase in subscriptions to BSkyB's pay TV services. Finally, the notifying party stresses that even though News Corp owns 39% of BSkyB, it has never refused to sell advertising space to BSkyB's competitors and that it is unlikely that the proposed transaction will bring about a change in its business strategy geared toward maximising revenues deriving from advertising.
285. The Commission notes that News Corp's revenues derived from BSkyB's competitors advertising their products amounted to between [...] and [...] <sup>168</sup>, or [0-5]% and [0-5]% of News Corp's overall revenues in newspaper and online advertising that year. Even taking into account the advertising spend of rivals with News Corp on non-TV related products such as broadband subscriptions, all advertising spending by these companies amounts to a total of less than [0-5]% of News Corp's overall revenues in newspaper and online advertising. The Commission therefore does not agree with the argument submitted by the notifying party that News Corp's advertising revenues from BSkyB's competitors represent a significant part of News Corp's overall advertising revenues. As a consequence, it appears that the cost for News Corp, in terms of foregone revenues, in undertaking the foreclosure strategy would not be prohibitive and therefore not constitute in itself a reason to refrain from it.
286. The Commission cannot therefore exclude that, due to its existing shareholding in BSkyB, News Corp already has an incentive to foreclose competitors of BSkyB provided that such strategy is effective and profitable. Such an incentive would only increase with the acquisition of 100% of BSkyB. The fact that News Corp has so far never refused to sell advertising space to BSkyB's competitors can therefore indicate that a strategy of foreclosing BSkyB's competitors from advertising on News Corp newspapers may not be effective (e.g. in view of alternative advertising channels possibly available to the foreclosed advertisers) and/or profitable.
287. Therefore, assuming that News Corp *did* have an ability to foreclose, then it would likely have a greater incentive to implement such a strategy when it moves from 39% to 100% ownership of BSkyB.

**iii. Overall likely impact on effective competition**

---

<sup>168</sup> The exact amount depends upon the extent to which certain companies are considered close competitors and hence are included in, or excluded from, the calculation.

288. Assuming that News Corp not only has the incentive but also the ability to discriminate against BSkyB's competitors, the notifying party submits that this course of action would not result in anti-competitive effects by providing the following economic arguments.
289. The notifying party submits that the fact that News Corp does not currently foreclose BSkyB's competitors willing to advertise on News Corp's titles could be assumed as evidence that such a strategy is not profitable in view of the balance between foregone advertising revenues and additional revenues from new BSkyB subscribers. In 2009, BSkyB's closest competitors spent approximately [...] on advertising in News Corp's print and online properties. Assuming that the foreclosing strategy were effective, this would mean that a "break even" would occur when current News Corp's advertising revenues from BSkyB's competitors correspond to an equivalent (or larger) increase in subscription revenues.
290. Estimations provided by BSkyB on the average net present value of new subscribers<sup>169</sup> with a horizon of [...] years are [...] and [...] per subscriber, respectively. Based on those estimates, [...] and [...] new subscribers would be needed to balance the loss of [...] in advertising after foreclosure. Since with [30-40]% ownership of BSkyB, News Corp did not have the incentive to foreclose, and full ownership would reduce the number of subscribers that would be necessary for the strategy to break even, it can be assumed, for the purposes of the economic analysis, that the worst-case scenario is that News Corp would manage to divert a maximum [...] new subscribers from BSkyB's competitors. This number corresponds to approximately [0-5]% market share<sup>171</sup> that BSkyB would divert from its competitors. Assuming that this diversion would take place proportionally to the current share of each competitor, the strategy would only marginally modify the market shares (e.g. BSkyB up from [60-70]% to [60-70]%; Virgin Media down from [20-30]% to [20-30]%). The conclusion is therefore that assuming ability as well as the "maximum effect" for winning new subscribers, the impact on competition in the provision of pay TV services would be minimal.
291. The Commission observes that this analysis makes a number of working assumptions, which the Commission considers reasonable and relatively conservative. Firstly, the subscription revenues are likely to be underestimated, in view of the fact that the average lifetime of a subscription (and therefore the related revenue streams) is likely to be higher. In fact, on the basis of a churn rate of [...] <sup>172</sup>, the average lifetime can be estimated to be [...]. Secondly, even considering a higher amount of foregone advertising revenues (as noted above, when including less close competitors such revenues could be estimated to be [...]), the point of break even and the overall impact in terms of market shares would be only slightly higher in absolute terms<sup>173</sup>. Thirdly,

<sup>169</sup> [...].

<sup>170</sup> [...].

<sup>171</sup> Calculated on the basis of the number of total subscribers to pay TV services of 14 038 794.

<sup>172</sup> News Corp's response of 23 November to questionnaire of 19 November (question 15).

<sup>173</sup> The break-even under the worst case scenario ([...] years) would be [...] = [...] / ([...]). This would amount to a market share of [ $<1$ ]%, which would not materially change the conclusion.

this analysis is developed under the assumption that News Corp has acted rationally until to date by not refusing BSkyB's competitors the supply of advertising space in its newspapers. The Commission has no reason to question News Corp's rational behaviour with respect to this issue.

292. In addition, the Commission's own market investigation with third parties ascertaining the potential impact of possible foreclosure on BSkyB's competitors suggests that the likely impact would not be sufficiently significant. In particular, the market investigation revealed that foreclosing BSkyB's competitors from advertising on News Corp's titles would not be likely to have a significant impact on the response rates (e.g. calls into call centres) to direct response advertising campaigns. Simulations by content distributors show that the estimated responses by potential customers would fall in between [5-10]% and [20-30]%<sup>174</sup> assuming that the advertising budget formerly dedicated to News Corp titles are re-invested into the next best print titles. Taking into account the average rates for converting responses (e.g. received calls) into sales as provided by one of the respondents and by BSkyB, the lost sales on a yearly basis can be estimated between [0-5]% and [5-10]% of the respective annual growth in subscriber numbers. It should be noted that the real impact would likely be lower given that the simulation assumes that BSkyB's competitors do not substitute their spending with non-national print titles or alternative media channels such as direct mail or online advertising.<sup>175</sup> For these reasons, it would not appear that the potential impact on subscription numbers of rival TV providers would be sufficiently significant.
293. It is more difficult to measure the impact of potential foreclosure on the awareness of an advertiser's brand, products and services and promotions generated by advertising. "Impacts"<sup>176</sup> of an advertisement during a weekly campaign can be taken as a proxy to measure awareness on a comparative basis. Figures from weekly advertising plans submitted by content distributors show that the maximum loss in impacts in *national print* newspapers could amount to [10-20]%-[10-20]% if all of content distributors' spending on News Corp titles are substituted through next best performing print titles. It should be noted that the real impact would likely be lower given that the simulation assumes that BSkyB's competitors do not substitute their spending with non-national print titles or alternative media channels.
294. For the above reasons it appears that, even if the merged entity had the ability to foreclose BSkyB's competitors from advertising in its newspaper titles, the impact on

---

<sup>174</sup> The methods for calculating the impact on campaign response rates differ, which may explain the large variation. One content distributor estimates responses by (broadly) multiplying (i) the average weekly volume of gross circulation of the relevant titles during 2010 by (ii) the average weekly response rate attributable to those titles during 2010. Another content distributor used its media agency's calculations based on a proprietary tool and did not disclose the exact formula used.

<sup>175</sup> Under the extreme hypothetical assumption that BSkyB's competitors could not re-invest their advertising budget formerly dedicated to News Corp titles into other print titles (or other media channels), the lost sales on a yearly basis would still be estimated between 11% and 14% of the respective annual growth in subscriber numbers.

<sup>176</sup> "Impacts" means the reached adults in absolute numbers (i.e. coverage rate multiplied by 49 757 000 UK adults) multiplied by the frequency of an advertisement.

the market for the provision of pay TV services would not be significant enough to raise serious doubts.

**iv. Conclusion**

295. For the above reasons, it can be concluded that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to a possible input foreclosure of BSkyB's competitors as a result of a refusal to advertise in News Corp's newspapers, given that the merged entity will lack the ability to foreclose, and in any case, such a strategy would not have a significant impact on the market of providing pay TV services.

**b. Advertising – Tying/Conditional selling of the Purchase of Advertisements in Newspapers to Purchase of TV Advertisements**

296. A small number of respondents to the market investigation<sup>177</sup> pointed out that the merged entity could be able to conditionally sell advertising space and extend its position in national print newspaper advertising into other media channels including TV advertising. According to them, the merged entity could condition or incentivise purchases of advertising space from one of its media properties, such as print, on the purchase of advertising space in another, one such as TV or online.
297. The notifying party submitted that News Corp already has the ability to offer bundled solutions for advertising, but it is currently not engaging in any type of conditional selling between its newspaper advertising space and its TV channels. This is because TV-advertising and print advertising have different sales structures and different customers, and different media agencies would be used by advertisers to advertise on TV and on newspapers. It further submitted that it offers special prices ('targeted discounts') for incremental slots in its newspapers or TV channels, respectively, rather than conditional discounts as it would find the conditional selling not profitable. Furthermore, offering conditional discounting would result in a loss of infra-marginal revenue that it would not suffer via targeted discounts to sell incremental advertising space.
298. Furthermore, News Corp submitted that it does not already condition the sale of advertising in *The Sun* and *The News of the World* to advertising sales in any other publication. It is also mentioned that no advertiser has ever complained on conditional selling before the relevant representative bodies from advertisers in the UK. It appears that, when a customer purchases advertising space across a number of titles together, News Corp generally grants volume-based price incentives or advantageous rates.
299. For a conglomerate theory to be sustainable, the merged entity should be found to hold significant market power in one of the two tied markets<sup>178</sup>. The respondents who made submissions about this potential competition concern appear to rely on the allegation of significant market power of News Corp in newspaper advertising.

---

<sup>177</sup> Two media agencies and three TV competitors of BSkyB.

<sup>178</sup> See the paragraph 221 for a description of the test.

300. The Commission considers that the significant market power of News Corp in newspaper advertising is not confirmed by the market share data available to the Commission. As mentioned above, News Corp's overall market share in print newspaper advertising in the UK is [10-20]%, with market shares in national print newspaper advertising and daily national print newspaper advertising reaching [30-40]% and [30-40]% respectively. The merged entity's market share in TV advertising would be [10-20]% in the UK (with News Corp's increment being [0-5]%) and its market share in online advertising would be [0-5]% ([0-5]% News Corp and [0-5]% BSkyB). In relation to these market shares, it is unlikely that the merged entity could be considered to have significant market power in national print newspaper advertising or in TV advertising.
301. Furthermore, as mentioned above (paragraph 282), the Commission found that there are alternative opportunities to advertise in national daily newspapers. As regards daily national newspapers, there are alternative players which have market shares around 10-15% each (The Daily Mail, Financial Times and the Daily Telegraph) and a high number of other national daily publications. Moreover, most newspapers with national circulation responding to the market investigation confirmed that they would not face capacity constraints for supplying advertising space.
302. All these elements taken together indicate that it is very unlikely that News Corp would have the ability to leverage its position in the market for advertising in national newspapers to the detriment of BSkyB's competitors in the TV advertising sector. In addition, the Commission takes notes that the arguments advanced by News Corp against such a possible bundling strategy appear to be commercially rational.
303. It can therefore be concluded that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to possible conditioning of the purchase of advertisements in News Corp newspapers to the purchase of TV advertisements from BSkyB

## V. THE UK MEDIA PLURALITY REVIEW

304. Article 21(4) of the Merger Regulation recognizes that Member States may take appropriate measures to protect legitimate interests, such as plurality of the media. In the UK, the Secretary of State for Business, Innovation and Skills (the "Secretary of State") can intervene in mergers involving newspapers and/or broadcasting companies on public interest grounds by issuing a "European intervention notice", making a proposed concentration subject to an additional review of media plurality issues by the UK authorities. Such review is distinct from the competition review carried out by the Commission and is carried out on separate legal grounds<sup>179</sup>.
305. On 4 November, the Secretary of State issued a European intervention notice. This notice requires the relevant UK authorities to investigate and report by 31 December

---

<sup>179</sup> When acting under Article 21(4) of the Merger Regulation, the Member State may take appropriate measures to protect its legitimate interests, provided that such measures are compatible with general principles and other provisions of EU law (recital 19). The European Intervention notice can be found on the following link: <http://www.bis.gov.uk/assets/biscore/business-law/docs/b/bskyb-intervention-notice-nov-2010.pdf>

2010 on whether the proposed transaction is or may be expected to operate against the public interest in sufficiency of plurality of persons with control of media enterprises<sup>180</sup>.

306. The Merger Regulation grants the Commission the exclusive competence to scrutinise mergers of EU dimension on competition grounds. Pursuant to Article 2, paragraph 3, of the Merger Regulation, the Commission must assess whether the concentration would significantly impede effective competition, in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.
307. The purpose and legal frameworks for competition assessments and media plurality assessments are very different. The focus in merger control is whether there is a "significant impediment to effective competition", including the ability of the merged entity to profitably increase prices on defined antitrust markets post-merger. By contrast, a media plurality review reflects the crucial role media plays in a democracy, and looks at wider concerns about whether the number, range and variety of persons with control of media enterprises will be sufficient.
308. The media plurality review has also a different scope and focuses on issues going beyond a competition assessment. The media plurality assessment undertaken with reference to "broadcasting and cross media public interest considerations" includes<sup>181</sup>:
- (a) the need for there to be a sufficient plurality of persons with control of the media enterprises serving that audience in relation to every different audience in the UK or a particular area/locality of the UK;
  - (b) the need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests;
  - (c) the need for persons carrying on media enterprises and for those with control of such enterprises to have a genuine commitment in relation to broadcasting to the attainment of the standard objectives set out in Section 319 of the Communications Act 2003 (for example: due impartiality of news, taste and decency).
309. The present decision is based solely on competition-related grounds under the Merger Regulation and is without prejudice to the media plurality review of the relevant UK authorities. Given that the purpose, legal frameworks, and focus of a competition review by the Commission on one hand, and a media plurality review by the relevant UK authorities on the other hand are different, the findings in the present decision are without prejudice to the UK media plurality review of the proposed transaction.

## VI. CONCLUSION

310. For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the

---

<sup>180</sup> Section 58 of the UK Enterprise Act 2002.

<sup>181</sup> Ofcom guidance for the public interest for media mergers, paragraph 17.

EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation. This Decision is without prejudice to the Media Plurality Review conducted by the relevant UK Authorities.

For the Commission,  
(signed by Neelie Kroes, p.p.)  
Joaquín ALMUNIA  
Vice-President

IP/10/1767

Brussels, 21 December 2010

005

## **Mergers: Commission clears News Corp's proposed acquisition of BSkyB under EU merger rules**

*The European Commission has approved under the EU Merger Regulation the proposed acquisition of British and Irish pay TV operator BSkyB by News Corporation, a global media and communications company headquartered in the US. The Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. The Commission's findings concern solely the competition aspects of the proposed transaction. They are without prejudice to the ongoing investigation by the competent UK authorities of whether the proposed transaction is compatible with the UK interest in media plurality, which is different from the Commission's competition assessment. The UK remains free to decide whether or not to take appropriate measures to protect its legitimate interest in media plurality (as permitted under Article 21 of the EU Merger Regulation).*

Commission Vice-President and Commissioner for Competition Joaquin Almunia said: "I am confident that this merger will not weaken competition in the UK. The effects on media plurality are a matter for the UK authorities."

### **The proposed transaction**

The proposed transaction will bring together BSkyB, the leading pay-TV operator in the UK and Ireland, with News Corp, one of the six major Hollywood film studios (20th Century Fox), a TV channel producer (such as Fox, National Geographic), a leading newspaper publisher in the UK and Ireland (such as The Sun and The Times) and a leading pay-TV operator in Italy (Sky Italia) as well as in Germany and Austria (Sky Deutschland). News Corp announced on 15 June 2010 its offer to acquire the remaining 60.9% of the shares in BSkyB which it does not already own. On 3 November 2010, it notified the proposed transaction to the Commission for regulatory clearance.

News Corp and BSkyB are mainly active in different markets in the UK and Ireland and compete with each other only to a limited extent, in the wholesale supply of basic pay-TV channels and in the supply of online and TV advertising space. The Commission found that the proposed transaction would only lead to a small increment on BSkyB's existing share of the market for the supply of basic pay-TV channels in the UK and Ireland. The parties also have a small combined market share in the market for online and TV advertising. Therefore, the transaction does not give rise to horizontal competition concerns.

Given that the merging companies are mainly active at different levels of the market, the Commission's assessment focused on whether the proposed transaction could lead to possible anticompetitive effects arising from vertically linked or neighbouring activities in the audiovisual sector, in newspaper publishing, or in advertising.



### **Audiovisual sector**

The Commission investigated whether, as a result of the proposed transaction, News Corp would be able to prevent or significantly limit access by BSkyB's competitors to premium movie content. The Commission found that News Corp lacks sufficient market power in the market for the licensing of broadcasting rights for premium movies and that BSkyB's competitors would retain several alternative suppliers with equally attractive content. While the market investigation revealed strong concerns over BSkyB's exclusive deals for premium movies with all six Hollywood majors for the first pay-TV window, the transaction will do little to worsen this market situation that exists already today – and is currently under investigation by the UK Competition Commission following a recent decision by UK regulator OFCOM.<sup>1</sup>

The Commission also investigated whether the proposed transaction would lead to a risk of exclusion from BSkyB's pay-TV offering of competitors of News Corp in the licensing of premium film content and TV programmes and in the wholesale supply of basic pay-TV channels. The Commission found that News Corp's premium movie content and TV programmes and basic pay-TV channels constitute a minimal part of Sky's bouquet and that BSkyB would continue to have the incentive to acquire content from News Corp's competitors to have the most attractive retail packages.

As the proposed transaction brings BSkyB into the same group as Sky Italia and Sky Deutschland, the Commission investigated if the new company would enjoy increased bargaining power vis-à-vis rights holders by purchasing premium content jointly for several territories, to the detriment of its pay-TV competitors. The Commission found that it was unlikely that the merged company would be able to impose upon content rights holders a change from current licensing practices (along national territories or language areas) towards simultaneous negotiations across several countries such as Germany, Austria, Italy, UK and Ireland.

### **Newspaper publishing sector**

The Commission investigated whether the merged company would be able to foreclose competing newspaper publishers by offering mixed bundles of subscriptions to Sky and News Corp's print, online or tablet-based newspapers. With respect to bundling with print subscriptions, the market investigation revealed that price is only one, and not the main factor determining readers' choice of and loyalty to a newspaper. Furthermore, no such bundling has been attempted before. Finally, tabloid papers such as The Sun do not offer any subscriptions to its print editions and a low subscription rate to newspapers of 6% of overall UK circulation and of 25-33% for quality titles indicates that the subscription model currently does not appeal to a majority of readers. With respect to bundling with online news, the vast majority of newspapers' online editions – apart from most News Corp titles – as well as other news sources are currently free of charge and there is no evidence that this will dramatically change in the foreseeable future. For these reasons, the Commission excluded that competition concerns in the newspaper publishing sector would arise from the transaction.

---

<sup>1</sup> OFCOM – Premium pay TV movies. Market investigation reference to the Competition Commission, decision of 4 August 2010.

### **Advertising sector**

The Commission investigated concerns that the merged entity could either refuse advertising by BSkyB's competitors in News Corp's newspaper titles or charge a competitive premium, thereby impeding their ability to attract subscribers or viewers.

The Commission's investigation revealed that there are sufficient alternative opportunities to advertise with other print media. It also found that, in any event, News Corp's refusal would not have a significant impact on subscription rates in the pay-TV market.

The Commission also found that the merged entity was unlikely to be able to tie the purchase of advertisements in News Corp's print newspapers to the purchase of advertisements on BSkyB's TV channels given that News Corp or BSkyB lack the required market power to engage in such tying.

### **UK media plurality review and Article 21 of the EU Merger Regulation**

The Commission has exclusive jurisdiction to assess the impact of the proposed transaction on competition in the various markets. However, Article 21 of the EU Merger Regulation recognises that Member States may take appropriate measures, including prohibiting proposed transactions, to protect legitimate interests, such as the plurality of the media.

The purpose and legal frameworks for competition assessments and media plurality assessments are very different. The competition rules focus broadly on whether consumers would be faced with higher prices or reduced innovation as a result of a transaction. A media plurality assessment reflects the crucial role media plays in a democracy, and looks at wider concerns about whether the number, range and variety of persons with control of media enterprises will be sufficient.

The UK Secretary of State for Business Innovation and Skills issued a European intervention notice on 4 November 2010.<sup>2</sup> This notice requires the relevant UK authorities to investigate and report by 31 December 2010 on whether the proposed transaction is or may be expected to operate against the public interest in sufficiency of plurality of persons with control of media enterprises.<sup>3</sup>

The Commission's findings concern solely the competition aspects of the proposed transaction. Today's clearance decision is therefore without prejudice to the UK's ongoing media plurality review of the proposed transaction.

More information on the case is available at:

[http://ec.europa.eu/competition/eloiade/isef/case\\_details.cfm?proc\\_code=2 M 5932](http://ec.europa.eu/competition/eloiade/isef/case_details.cfm?proc_code=2 M 5932)

---

<sup>2</sup> See

<http://www.bis.gov.uk/assets/biscore/business-law/docs/b/bskyb-intervention-notice-nov-2010.pdf>.

<sup>3</sup> Section 58 of the UK Enterprise Act 2002.

006

[Redacted]

**From:** [Redacted]  
**Sent:** 22 December 2010 17:44  
**To:** ZEFF JON; KILGARRIFF PATRICK; SMITH, Adam; BEEBY, Sue; [Redacted]  
 [Redacted]  
**Cc:** [Redacted]  
**Subject:** Meeting with BIS on NewsCorp/BSkyB Merger

Dear all

BIS officials [Redacted] came in to brief the SoS this morning on his role in the proposed NewsCorp/BSkyB merger. Ed Vaizey, Jonathan Stephens, Jon Zeff, Patrick Kigarriff and Adam Smith were also present. Here are the key points/actions from the meeting:

- BIS officials outlined the SoS's role in the process and the various legal considerations.

In regard to the timeline, the SoS said that he needed an adequate timeframe to make a considered decision, but did not want to deviate too far from BIS's initial timeline. His preferred sequence was as follows: (1) Share drafted version of Ofcom's report with NewsCorp and have meeting with them; (2) have one meeting with parties concerned about the merger; and (3) publish Ofcom's report at the same time as announcing his decision. He would also meet with Counsel. In addition, the SoS would inform the PM of his decision shortly before the public announcement.

- The SoS said that he would be grateful if BIS officials could look into the following matters:
  - Are we permitted to share the Ofcom report with NewsCorp, but not with other interested parties?
  - Is 'bundling' a competition issue and something that we need to think about? **[ACTION: [Redacted] - please could you feed back to us on these issues in w/c 3 Jan?]**
- The SoS said that he would be grateful for some reading material that he could peruse over the Xmas break - we should keep this concise. He would particularly like to see a summary of the representations that were made prior to Vince Cable's intervention notice to Ofcom (e.g. Enders Analysis), as well as the EC Report **[Redacted] you have already provided and I have passed to the SoS - many thanks.** You also explained that the EC report is not in the public domain].

Please shout if I have missed or misconstrued any points.

Many thanks,

[Redacted signature block]

Department for Culture, Media and Sport  
Tel: 0 [Redacted]

**CabinetOffice**



**Sir Gus O'Donnell KCB**

Secretary of the Cabinet and  
Head of the Home Civil Service

70 Whitehall  
London  
SW1A 2AS

Telephone   
Fax   
E-mail   
Web [www.cabinet-office.gov.uk](http://www.cabinet-office.gov.uk)

007

Rt Hon John Denham MP  
The Labour Party  
39 Victoria Street  
LONDON  
WS1H 0HA

22 December 2010

Dear John,

Thank you for your letter received earlier today regarding yesterday's transfer of certain policy responsibilities from the Department for Business, Innovation and Skills (BIS) to the Department for Culture, Media and Sport (DCMS).

As you know, following the remarks made by the Business Secretary the Prime Minister took immediate action and transferred responsibility for competition and policy issues relating to media, broadcasting, digital and telecoms sectors from BIS to DCMS. This was precisely to ensure there was no conflict of interest.

I turn to your question about the fitness of the Secretary of State for Culture, Media and Sport to carry out the quasi-judicial role associated with the current competition case on British television ownership.

In advance of taking the decision to move ministerial responsibility yesterday, the Prime Minister specifically asked me whether there was any legal impediment to moving it to Mr Hunt. I took advice from lawyers and, in providing advice that there was no such impediment I was, of course, aware of the former statements from Mr Hunt which you cite. I am satisfied that those statements do not amount to a pre-judgment of the case in question; indeed the third quotation explicitly states that Mr Hunt would not want to "second guess what regulators might decide".

**Gus O'Donnell**



ALLEN & OVERY

008

STRICTLY CONFIDENTIAL

Rt Hon Jeremy Hunt MP  
Secretary of State for Culture, Olympics, Media and Sport

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 [redacted]  
Direct + [redacted]

Our ref [redacted]

23 December 2010

Dear Mr Hunt,

News Corporation - British Sky Broadcasting Group Plc

I write on behalf of News Corporation (News) in connection with its proposed acquisition of the remaining shares in British Sky Broadcasting Group Plc (Sky) that News does not already own (the Transaction). As News has made clear in its public statements, it has been shocked and dismayed by the views of the Secretary of State for Business, Innovation and Skills, Dr Vince Cable MP which came to light during the course of Tuesday 21 December.

While the removal of the Secretary of State for Business, Innovation and Skills and his department from a decision making role in relation to the Transaction was clearly required, News still finds itself in the entirely unsatisfactory position that the original decision to issue an Intervention Notice under section 67 of the Enterprise Act 2002 was taken by a Secretary of State who was clearly biased against the business interests of News and viewed himself as having "declared war" on Rupert Murdoch. News is particularly concerned by the following comments which were made by the Secretary of State for Business, Innovation and Skills and which suggest that Dr Cable's thinking and intentions may have been known to others, possibly including complainants waging a campaign against News:

*"I have declared war on Mr Murdoch and I think we are going to win"*

*"I have blocked it using the powers that I have got and they are legal powers that I have got. I can't politicise it but from the people that know what is happening this is a big, big thing."*

*"His whole empire is now under attack... So there are things like that we do in government, that we can't do... all we can do in opposition is protest."*

Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. It is regulated by the Solicitors Regulation Authority of England and Wales. The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at its registered office, One Bishops Square, London E1 6AD.

Allen & Overy LLP or an affiliated undertaking has an office in each of: Abu Dhabi, Amsterdam, Antwerp, Bangkok, Beijing, Bratislava, Brussels, Bucharest (associated office), Budapest, Dubai, Düsseldorf, Frankfurt, Hamburg, Hong Kong, London, Luxembourg, Madrid, Mannheim, Milan, Moscow, Munich, New York, Paris, Prague, Riyadh (associated office), Rome, São Paulo, Shanghai, Singapore, Tokyo and Warsaw.

The initial decision to intervene was taken contrary to published DTI Guidance on Media Mergers and without a statement being made to Parliament providing any indication of the reasons for intervention departing from published Statutory Guidance. Previous submissions made to the Department for Business, Innovation and Skills in this regard will be made available to the appropriate officials in your department. The decision was also in stark contrast to the treatment of the recent acquisition of Channel 5 by Northern & Shell, in relation to which no public interest intervention was made, suggesting discriminatory and unfair treatment of News compared with other companies in broadly analogous situations.

News has always believed, and continues to believe, that, focussing on the correct legal test, and approaching the matter from a fair minded and rigorous standpoint, the issues in this case are well defined and straightforward and it is clear that the Transaction would not result in insufficient plurality for any audience in the UK. News is, of course, aware that during the review process which has so far been conducted a large number of complaints have been received, many from vocal and powerful media organisations. But these complaints are clearly self-serving. They reflect particular political and business agendas or personal hostility against the News group. These emotional arguments should play no part in decision making as to the sufficiency of plurality in the UK.

News wishes to reserve its rights and so would request that the Secretary of State for Culture, Olympics, Media and Sport informs News on or before the 31 December 2010 how he intends to proceed.

News will, in parallel, be writing to Ofcom and issuing Freedom of Information Act requests aimed at establishing whether or how, and if so in what terms, the biased approach of the Secretary of State for Business, Innovation and Skills may have been communicated to Ofcom in relation to its review or whether any of the complainants have had undue access or influence over the process.

Yours sincerely

[Redacted signature block]

Partner

009

**From:** [redacted]  
**Sent:** 23 December 2010 15:02  
**To:** [redacted]  
**Cc:** [redacted]; ZEFF JON; [redacted]  
 KILGARRIFF PATRICK; [redacted]  
**Subject:** RE: News Corporation/ Sky: Ofcom

As I believe you are aware, Jon Zeff is the lead policy official in DCMS dealing with this matter. I have spoken to him about your letter, and he has agreed the reply below.

Thank you for the letter from [redacted] dated today to [redacted] at BIS. As you know, DCMS is now leading on News Corporation's proposed acquisition of the remaining British Sky Broadcasting Group plc shares.

I confirm that Ofcom will prepare a redacted copy of the report which can be shared with NewsCorps, which they are planning to send to DCMS shortly after the unredacted version is delivered.

I can also confirm that the intention is for NewsCorp to be given reasonable opportunity to make written and oral representations before the Secretary of State takes his decision. You will be aware that there is an administrative target for the Secretary of State to take his decision within 10 working days from receipt of Ofcom's report.

Regards

Alan

[redacted]  
 [redacted]  
 Public Service Broadcasting & Competition  
 Media Directorate  
 Dept for Culture, Media & Sport  
 2-4 Cockspur Street  
 London SW1Y 5DH  
 [redacted]

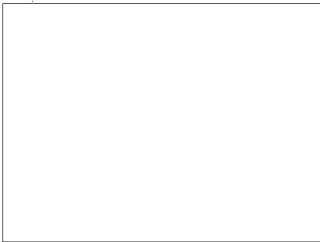
---

**From:** [redacted]  
**Sent:** 23 December 2010 13:43  
**To:** [redacted]  
**Cc:** [redacted]; ZEFF JON; [redacted]  
 KILGARRIFF PATRICK  
**Subject:** RE: News Corporation/ Sky: Ofcom

Many thanks for your reply.

We will relay this information to News.

Regards



Counsel

Hogan Lovells International LLP  
Atlantic House  
Holborn Viaduct  
London EC1A 2FG

Tel: +44 20 7296 2000

Direct: [Redacted]  
Mobile: [Redacted]  
Fax: [Redacted]  
E: [Redacted]

www.hoganlovells.com

---

**From:** [Redacted]  
**Sent:** 23 December 2010 13:41  
**To:** [Redacted]  
**Cc:** [Redacted]; ZEFF JON; [Redacted]  
[Redacted] KILGARRIFF PATRICK  
**Subject:** RE: News Corporation/ Sky: Ofcom

[Redacted] Thank you. On your question about future process, DCMS officials will now be handling this case and the relevant contacts are Jon Zeff, [Redacted] and Patrick Kilgarriff. I have forwarded your letter to them and they will reply shortly. In the meantime I can confirm receipt of your FOI request.



---

**From:** [Redacted]  
**Sent:** 23 December 2010 11:39  
[Redacted]  
**Subject:** News Corporation/ Sky: Ofcom



Please find attached a letter for your attention.

Regards





[Redacted]

**From:** [Redacted]  
**Sent:** 26 December 2010 11:54  
**To:** [Redacted]  
**Subject:** Media alliance submission to Ofcom  
**Attachments:** OFCOM\_SUB.PDF

O10

Dear [Redacted]

Hope you are having a good break. Please find attached our submission to Ofcom for your information. Please feel free to share this internally where it is appropriate but please do not distribute externally.

Best wishes

[Redacted]

---

IRP UK Limited | Registered office: Ground Floor, 84 Eccleston Square, London SW1V 1PX, England | Registered number: 2442501

If this message contains information which may be confidential and privileged. Unless you are the intended recipient (or authorized to receive this message for the intended recipient), you may not use, copy, disseminate or disclose to anyone the message or any information contained in the message. If you have received the message in error, please advise the sender by reply e-mail, and delete the message.

Thank you very much.

This email was received from the INTERNET and scanned by the Government Secure Intranet anti-virus service supplied by Cable&Wireless Worldwide in partnership with MessageLabs. (CCTM Certificate Number 2009/09/0052.) In case of problems, please call your organisation's IT Helpdesk. Communications via the GSi may be automatically logged, monitored and/or recorded for legal purposes.

# SLAUGHTER AND MAY

## News Corporation / British Sky Broadcasting: European Intervention Notice Pursuant to Enterprise Act 2002

### 1. Introduction

1.1 This paper contains submissions to OFCOM on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group in respect of News Corporation's proposed acquisition of British Sky Broadcasting ("BSkyB") (the "Takeover").

1.2 In particular, the paper outlines the clear case for OFCOM recommending to the Secretary of State that the Takeover may be expected to operate against the public interest and therefore requires full assessment by the Competition Commission (the "CC").

### 2. European Intervention Notice – Relevant Law

#### *Public Interest Consideration*

2.1 The public interest consideration in respect of which the Secretary of State issued a European Intervention Notice on 4 November 2010 is set out at Section 58(2C) Enterprise Act 2002:

*"the need, in relation to every audience in the United Kingdom or in a particular area or locality within the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience"*.

2.2 Government guidance on Public Interest Intervention in Media Mergers<sup>1</sup> (the "Guidance") explains that this cross-media plurality is concerned with *"ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda"*.<sup>2</sup>

#### **OFCOM's Role**

2.3 OFCOM's primary role in respect of the European Intervention Notice is to provide the Secretary of State with *"advice and recommendations on any media public interest consideration mentioned in the European intervention notice concerned and which is or*

---

<sup>1</sup> May 2004 DTI Guidance.

<sup>2</sup> Paragraph 7.7.

## SLAUGHTER AND MAY

*may be relevant to the Secretary of State's decision as to whether to make a reference [to the CC].*<sup>3</sup>

- 2.4 Accordingly, if OFCOM considers that media plurality may be relevant to the Takeover, it must provide advice and recommendations on whether to refer the transaction to the CC (the "Referral Decision").
- 2.5 The test to be applied by the Secretary of State when making the Referral Decision (and thus the test which OFCOM is required to advise upon) is whether the Secretary of State:

*"[B]elieves it is or may be the case that –*

*(a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation [The Secretary of State will receive advice on this point from the OFT];*

*(b) one or more than one public interest consideration mentioned in the European intervention notice is relevant to a consideration of the European relevant merger situation concerned; and*

*(c) taking account only of the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.*<sup>4</sup> (Emphasis added).

- 2.6 It is important to note that this test sets a low hurdle for a CC referral. A referral is appropriate if it "is or may be the case" that the Takeover "operates or may be expected to operate" against the public interest.
- 2.7 This low hurdle is in keeping with the nature of the Referral Decision: it is simply a decision to review the merger more thoroughly at the CC with a view to assessing whether substantive concerns arise. Therefore, OFCOM's role is not to advise on whether media plurality concerns are conclusively established but rather to advise on whether there may be concerns, such that a fuller second stage investigation is warranted. This was the approach adopted by OFCOM in *BSkyB/ITV*.<sup>5</sup>
- 2.8 The following sections consider each of the matters listed in OFCOM's Invitation to Comment.

---

<sup>3</sup> Article 4A(3) The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003. OFCOM is also required to provide the Secretary of State with a summary of representations it receives.

<sup>4</sup> Article 5(3) The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.

<sup>5</sup> Acquisition by BSkyB of 17.9% of the shares in ITV (December 2007). In that case, OFCOM advised that there may be insufficient plurality following the merger and, in light of that advice, recommended that a fuller CC investigation was warranted – see paragraphs 5.1 and 5.2 OFCOM report into *BSkyB/ITV* (2007).

## SLAUGHTER AND MAY

### 3. Content Types

- 3.1 The Takeover will result in reduced plurality across a range of content types including news, current affairs and sports coverage. However, this submission focuses on news plurality<sup>6</sup> since:
- The merging parties are particularly important news providers (see further below); and
  - News plurality is especially important to the democratic process.
- 3.2 The importance of news plurality to the democratic process is well-established.
- 3.3 During the consultation prior to the enactment of the current media ownership rules, the Government cited news plurality as one of the three central reasons for ensuring media plurality, identifying the need to secure a plurality of sources of news and opinion, thus preventing the information agenda being slanted in a particular direction.<sup>7</sup>
- 3.4 That consultation went on to state that the Government wanted "*a plurality of voices, giving the citizen access to a variety of views...A healthy democracy depends on a culture of dissent and argument, which would inevitably be diminished if there were only a limited number of providers of news.*"<sup>8</sup>
- 3.5 The CC has previously stated that "*Considering all content genres, including current affairs, documentaries and satire, viewers rank news first in terms of 'societal importance', with a majority of the public saying that news helps them feel part of the democratic process.*"<sup>9</sup>
- 3.6 The importance of media coverage of news in influencing citizens' political knowledge and preferences is the subject of respected academic research.<sup>10</sup>
- 3.7 The key social role of news has important implications for the Referral Decision and OFCOM's advice to the Secretary of State. In particular, given the key role played by news plurality in ensuring the effective functioning of the democratic system, any

---

<sup>6</sup> "News plurality" is used as short-hand for the plurality of persons with control of the media enterprises supplying news content to a relevant audience.

<sup>7</sup> Department for Culture Media & Sport Consultation on Media Ownership Rules (2001).

<sup>8</sup> Department for Culture Media & Sport Consultation on Media Ownership Rules (2001).

<sup>9</sup> Paragraph 5.32 CC Report on *BSkyB/ITV* (2007).

<sup>10</sup> See for example, "The Impact of Political Advertising in the 2001 UK General Election" by Pippa Norris (McGuire Lecturer in Comparative Politics at the John F. Kennedy School of Government, Harvard University) *Political Research Quarterly*, 58(4): 525-536.

## SLAUGHTER AND MAY

transaction that may result in insufficient news plurality may be expected to operate against the public interest within the meaning of Article 5(3)(c) (quoted above).

### 4. Audiences

- 4.1 This submission focuses primarily on the UK cross-media news audience, i.e. those who consume UK news (in whatever media).<sup>11</sup>
- 4.2 The Enterprise Act 2002<sup>12</sup> and the Communications Act 2003<sup>13</sup> make clear that plurality can be assessed on a cross-media basis and that cross-media mergers can give rise to plurality concerns.
- 4.3 This is reflected in the Guidance which states that "*plurality can be considered across a wide range of newspaper and media audiences...and shares held by an enterprise through ownership of broadcasting and newspaper enterprises may be aggregated for the purpose of making the assessment of sufficiency of plurality.*"<sup>14</sup>
- 4.4 The rationale for assessing news plurality on a cross-media basis is that:
- Most people (directly<sup>15</sup> or indirectly<sup>16</sup>) consume news from more than one medium. Therefore, a cross-media merger is at least as likely to reduce the choice of news sources available to the audience as a merger within a single medium; and
  - Each medium is influenced by the news agenda of other media when setting its own agenda – with the result that consumers of one medium indirectly receive news from other media (see Section 5 below). Therefore, a cross-media merger has the potential to reduce the diversity of news by distorting the flow of news between media.
- 4.5 It is important to note that while this submission focuses on assessing plurality from the supply-side, the academic literature on plurality also emphasises the importance of the demand-side. In particular, it is common to consider the extent to which audience members are exposed to different news sources (often known as "exposure

---

<sup>11</sup> The Takeover may well raise concerns in respect of other audiences.

<sup>12</sup> For example, Section 58A(2) Enterprise Act 2002.

<sup>13</sup> For example, Schedule 14 Communications Act 2003.

<sup>14</sup> May 2004 DTI Guidance. See paragraph 7.2.

<sup>15</sup> OFCOM has previously found that more than half of the population actively uses more than one news medium – see paragraph 11 Appendix I to CC report into *BSkyB/ITV*.

<sup>16</sup> OFCOM has previously noted the importance of social interaction between users of different media: "*A person who watches news on TV but does not buy a newspaper may benefit from social interaction with another who reads a newspaper but does not watch TV.*" See paragraph 4.25 OFCOM report into *BSkyB/ITV*.

## SLAUGHTER AND MAY

pluralism").<sup>17</sup> Therefore, a full analysis would also consider, for example, whether there are substantial groups who currently source their news wholly or mainly from News Corporation and BSkyB, such that the Takeover will result in those groups receiving little or no diversity of news. A proper consideration of the key aspects of media plurality would therefore require a CC referral.<sup>18</sup>

### 5. Media Platforms

5.1 The Takeover concerns activities in TV, newspapers, radio and internet and therefore affects each of the four most important sources of news in the UK.<sup>19</sup>

5.2 This section outlines the key features of each of these platforms and discusses the inter-relationship between the platforms.

#### TV

5.3 OFCOM has recently found that TV is by far the most popular platform for news with 74% of people using it as their main source of UK news (an increase from 68% in 2007). Its widespread reach means that TV plays a crucial role in the supply of news.

5.4 In addition to its audience size, TV is also very important because it sets the news agenda in "real time" such that the output of other media is often influenced by TV.

5.5 The real time agenda-setting effect is particularly important as regards "rolling" news channels such as BBC News and Sky News. Rolling news channels have become increasingly important and have gained viewers at the same time as scheduled news bulletins (i.e. news reports at fixed times) have lost viewers. These channels usually provide the first widespread coverage of breaking news and the reaction that the rolling news channels choose to capture often frames the subsequent coverage of any given story.

5.6 In addition, rolling news strongly influences the agenda for other news including scheduled TV news, radio news (which also works on predominantly scheduled news basis), newspapers and internet.

---

<sup>17</sup> On "exposure pluralism" see for example, "Deconstructing the Diversity Principle" by Philip M. Napoli *Journal of Communication* (Autumn 1999).

<sup>18</sup> It is also important that the assessment of this case takes account of recent European approaches to media plurality. See, for example, "Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach" (2009). This report for DG Information Society contains a multi-faceted approach to measuring media plurality.

<sup>19</sup> Figure 4 OFCOM Media Ownership Rules Consultation (2009).

## SLAUGHTER AND MAY

5.7 The agenda-setting function of rolling news channels is also reflected in the nature of their audiences.

5.8 First, their audience tends to include many people who are themselves opinion formers (e.g. it is common for newspaper newsrooms to carry a feed from BBC News or, most commonly, Sky News). For example, Richard Lambert reported that:

*"It is a fair bet that anyone who walks around a newspaper office where televisions are turned on the whole time will find them tuned into Sky News rather than to BBC News 24."*<sup>20</sup>

5.9 Secondly, their audiences tend to be focussed on news consumption (by virtue of the fact that they have selected a news channel) rather than being incidental viewers. Therefore, rolling news channels have a larger viewer impact than their viewing figures alone suggest.

### **Newspapers**

5.10 Newspapers are the second most popular platform for news. UK national newspapers have a total combined circulation of around 10.8m per day<sup>21</sup> and a readership of around 23.8m per day.<sup>22</sup>

5.11 Whilst some way behind TV in terms of direct audience and unable to offer "real time" news in their print editions, it is widely accepted that newspapers play a distinctive role in setting the news agenda.<sup>23</sup>

5.12 First, newspapers have a strong track record of investigative journalism. This means newspapers have tended to play a key role in holding to public account those in positions of authority.

5.13 Secondly, many newspapers are associated with a particular political viewpoint. The result is that, in aggregate, the newspaper sector can generate news stories representing a diverse range of viewpoints.

5.14 Given their relatively small direct audiences (when compared to other platforms), the ability of newspapers to influence the news agenda depends heavily on their content being reported on other platforms. Stories broken by newspapers often receive a higher

---

<sup>20</sup> Richard Lambert "Independent Review of News 24" Department of Culture, Media and Sport. Although this report was written in 2002, the point is equally relevant today.

<sup>21</sup> Paragraph 4.20 OFCOM Media Ownership Rules Consultation (2009).

<sup>22</sup> NRS January-June 2010 (Monday-Saturday sales only).

<sup>23</sup> See, for example, paragraph 4.13 OFCOM Media Ownership Rules Review (2009) which found that "national newspapers play an important role in setting the news agenda".

# SLAUGHTER AND MAY

profile when subsequently reported on TV. A recent example is the MPs expenses affair (a story which was first reported by a newspaper but which assumed a greater national profile as a result of the follow-on coverage on TV and other platforms).

## **Radio**

- 5.15 Radio is only the third most popular platform for news when measured on primary source of news. However, radio audiences are large, e.g. in the second quarter of 2010 46.8m people listened to radio in the UK (representing over 90% of the adult population).<sup>24</sup>
- 5.16 In addition to its broad audience, radio plays an important role as a source of news for people who tend not to consume news pro-actively. This is linked to the nature of radio listening (whereby people tend to listen to one channel for a sustained period rather than "channel-hopping") and the nature of radio news (often short bulletins within other content). As a result, the news agenda of radio is important in serving people who may not otherwise be engaged in the democratic process.
- 5.17 In addition, radio has an important role in agenda-setting, with a day's major news stories often developing from interviews on early morning radio news programmes.
- 5.18 As outlined below, virtually all of the UK's national radio news is supplied by the BBC and BSKyB.

## **Internet**

- 5.19 Internet usage in the UK is growing and people are increasingly sourcing news via the internet. Internet is now the fourth most popular news platform (with 6% of people using it as their main source of UK news). In addition, the internet has allowed for a proliferation of news outlets.
- 5.20 However, online news outlets do not contribute significantly to plurality over and above that provided by the existing broadcast and print media.
- 5.21 First, the existing broadcast and print organisations provide all of the most popular sites, with independents failing to reach large audiences. 80% of online news traffic in the UK is accounted for by five established titles (BBC, The Daily Mail, The Sun, The Guardian and The Telegraph).<sup>25</sup>
- 5.22 Secondly, even to the extent that independent websites are able to attract an audience, very few are able to offer that audience original news content, given the high fixed costs associated with generating that content. Few (if any) independent UK news websites

---

<sup>24</sup> RAJAR. During the period, 34.6m people listened to BBC radio and 32.9m listened to commercial radio.

<sup>25</sup> UKOM (September 2010) – based on page impressions.



## SLAUGHTER AND MAY

have a significant editorial staff. They instead rely on news agency feeds for their news supply. As a result, their content does not contribute additional plurality to the news agenda.

5.23 Thus the House of Lords Select Committee on Communications has found that:

*"Although there are many news sites, there are very few news organisations that invest in journalism and news content production. Websites that provide news online are usually provided either by existing broadcasters and newspaper companies...; news agencies; news aggregator sites that link to the content of two previous categories; or blogs which comment on the news but rarely engage in investigative journalism or news gathering."*<sup>26</sup>

5.24 Finally, OFCOM has previously found that online news still has gaps in its demographic coverage. For example, the elderly and the poor are less able to access online sources.<sup>27</sup>

### **Cross-Platform Dynamics**

5.25 The most important cross-media relationship is that between the two main sources of news: TV and newspapers.

5.26 As outlined above, there is a two-way relationship with:

- TV news (especially rolling news) influencing the stories covered by newspapers; and
- Newspaper original content being more widely dispersed by TV.

5.27 This process results in a cross-fertilisation of news and ideas and gives both sets of viewers/readers exposure to a more diverse news agenda. However, the process relies on objective reporting of each platform's output by the other. As outlined further below, the process is threatened when there is cross-ownership of important outlets in both newspapers and TV, due to the resulting loss of objectivity.

## **6. Control of Media Enterprises – External Ownership and Control**

6.1 "External plurality", i.e. plurality of ownership and control of media outlets, is the primary concern of the legislation. This section considers (i) the current plurality of persons with control of news media organisations in the UK, and (ii) the effect of the merger on that plurality.

---

<sup>26</sup> Paragraph 104 House of Lords Select Committee on Communications "The Ownership of the News" (2008).

<sup>27</sup> Paragraph 4.22 OFCOM Media Ownership Rules Consultation (2009).

# SLAUGHTER AND MAY

## *Supply of News is Already Highly Concentrated*

---

6.2 The supply of news is already highly concentrated, such that any significant further reduction in plurality would clearly give rise to concerns. A recurring feature is that, while the number of news outlets may be increasing, there are only a small number of news suppliers, such that a small number of organisations set the news agenda for all other outlets.

### TV News

6.3 There are only three significant suppliers of TV news: the BBC, ITN (supplying ITV and Channel 4) and BSkyB (supplying Sky News and Five). These three providers supply virtually all TV news in the UK. For example, in 2008, content supplied by BBC, ITN and BSkyB accounted for 99% of total hours of news viewed.<sup>28</sup>

6.4 BSkyB is an important supplier of TV news:

- It is one of only two commercial TV news suppliers in the UK. Given the BBC's reliance on the state for funding, the role of the private sector news suppliers, BSkyB and ITN, is especially important in ensuring a diverse and independent range of views is presented by the news media.
- It is the second biggest TV news supplier in the UK by hours broadcast and the third biggest by total hours viewed.<sup>29</sup>
- It operates one of only two mass market rolling news channels (Sky News and BBC News)<sup>30</sup> and accounts for over one-third of the rolling news hours viewed. As outlined above, rolling TV news plays a key role in setting the agenda for other TV news and other media.
- In addition to Sky News, BSkyB has day-to-day editorial control over the news output of Five News. (The CC has previously found that day-to-day editorial control of output remains with the news provider.<sup>31</sup> Furthermore, whatever the editorial policy of Five News, it is reliant upon the news-gathering infrastructure of BSkyB and the stories it produces.)

---

<sup>28</sup> BARB cited at Figure 26 OFCOM Media Ownership Rules Consultation (2009).

<sup>29</sup> OFCOM Media Ownership Rules Review (2009).

<sup>30</sup> Beyond the BBC News Channel and Sky News, the only other source of 24 hour news to have viewing figures statistically significant enough to be recorded by BARB is EuroNews + Fox News (which has only a 0.01% share of total TV viewing in the year 2010 to date).

<sup>31</sup> Paragraph 5.55 CC report into BSkyB/ITV.

## SLAUGHTER AND MAY

### Newspapers

- 6.5 The UK newspaper sector exhibits a higher degree of plurality than TV, with eight groups accounting for 100% of national newspaper circulation. However, the top three groups (News Corporation, Daily Mail & General Trust and Trinity Mirror) account for almost 75% of circulation.<sup>32</sup>
- 6.6 News Corporation is by far the largest UK newspaper supplier, with a circulation of almost 8 million,<sup>33</sup> amounting to 37% of total circulation.<sup>34</sup>
- 6.7 News Corporation also has unrivalled audience coverage because it is the only group to own both mass market quality newspapers (The Times and The Sunday Times) and tabloids (The Sun and The News of the World). Newspaper readership statistics show that News Corporation is the only group with a title achieving more than 10% coverage in each socio-economic group.<sup>35</sup> As a result, News Corporation is uniquely well-placed to provide news in printed form across the population.

### Radio

- 6.8 There are only two significant suppliers of UK national radio news, with BSkyB being the only private sector supplier.<sup>36</sup> Taken together, these two supply 97.7% of all national radio news.<sup>37</sup>
- 6.9 As outlined above, the total commercial radio audience is around 32.9m. OFCOM recently found that commercial radio reaches 63.7% of the population.<sup>38</sup> Since virtually all commercial radio news is supplied by BSkyB, its role in radio further extends its broad coverage. In particular, radio coverage gives BSkyB exposure amongst those who are likely to consume less news from other sources.
- 6.10 Again, the broad spectrum of radio channels supplied by BSkyB (e.g. Classic FM, Talk Sport, Absolute Radio, music channels aimed at young people, etc.) gives BSkyB unrivalled coverage across different elements of the population.

---

<sup>32</sup> ABC.

<sup>33</sup> ABC.

<sup>34</sup> Enders Analysis. See also paragraph 5.48 CC report into *BSkyB/ITV*.

<sup>35</sup> ABC statistics – available from Newspaper Marketing Association. Based on coverage % within the AB, ABC1, ABC1C2, C1, C2 and DE groups.

<sup>36</sup> The only other supplier is the BBC.

<sup>37</sup> RAJAR as cited in paragraph 4.29 OFCOM report into *BSkyB/ITV* (Sky News and IRN (which now obtains its news supply from BSkyB)).

<sup>38</sup> Paragraph 3.3.1 OFCOM Communications Market Report (2010).

# SLAUGHTER AND MAY

## Online

- 6.11 As outlined above, five titles account for at least 80% of all online news site traffic in the UK. No company other than the existing broadcasters and newspaper publishers has a significant portion of the online news audience.

## *Effect of the Takeover*

Takeover will combine two of the largest, strongest contributors to news plurality

- 6.12 The merging parties are key contributors to news plurality both in terms of audience reach and news resources.

## *Audience Reach*

- 6.13 It is clear from the above description that News Corporation and BSkyB are two of the most important voices in UK news. Between them they account for:

- 1 of only 2 significant TV rolling news channels and 1 of only 2 commercial TV news suppliers;
- 37% of national newspaper circulation; and
- Almost all commercial radio news (representing an audience of up to 32.9m).

- 6.14 The Takeover will combine these two voices into one, resulting in a major reduction in plurality.

- 6.15 The scale of the merged entity (and its corresponding ability to influence the national agenda) is demonstrated by its audience reach. Applying a standard advertising measurement of reach (and even ignoring most of BSkyB's reach through commercial radio), the news outlets supplied by the merged entity would reach at least 52% of the adult population.<sup>39</sup> In contrast, only one other newspaper group has a title that reaches more than 10% of the population.<sup>40</sup>

## *News resources*

- 6.16 In addition to the scale of their coverage, News Corporation and BSkyB are particularly important because they have the greatest commercial resources for gathering and producing news content.

---

<sup>39</sup> Arena BLM Touchpoints Analysis. Based on News Corporation newspapers, BSkyB TV news channels, Five News, News Corporation and BSkyB websites and TalkSport (one of the main radio stations supplied by Sky News). As outlined, it has not been possible to include the reach BSkyB achieves through the supply of news to all commercial radio. Including such outlets would naturally increase this figure further.

<sup>40</sup> ABC. The Mail on Sunday reaches 10.4% of the population.

## SLAUGHTER AND MAY

- 6.17 This is particularly important given current concerns about the effect that financial constraints are having on the news-gathering infrastructure of news providers. In particular, there is concern that cuts to editorial budgets are leading to an increasing reliance on news agency feed and PR material, with the result that there is less diversity of news content than is suggested by the number of outlets. This concern has been identified by the House of Lords Select Committee on Communications:

*"While there has been a proliferation of ways to access the news, there has not been a corresponding expansion in professional journalism. The market pressures faced by news organisations have led many to scale back on investment in journalism and news gathering. Much of the news available on the internet, on the new television channels and elsewhere is repackaged from other sources. The number of specialist correspondents seems to be shrinking rather than growing to keep pace with new trends in news provision. Foreign correspondents have been cut back by most news organisations."<sup>41</sup>*

- 6.18 News Corporation and BSkyB had revenues of over US\$30bn and £5.9bn respectively in their most recent financial years. In contrast, only one other commercial UK news organisation has revenues exceeding £1bn. (Daily Mail & General Trust has revenues of around £2bn). As a result, News Corporation and BSkyB are uniquely well-placed in the commercial sector to invest in news-gathering. Each organisation employs hundreds of reporters and editorial staff in the UK. It is estimated that between them News Corporation and BSkyB have an editorial staff of over 2,100 – which is almost as many as all the other national newspapers combined (estimated at around 2,650).<sup>42</sup> This illustrates the unrivalled ability of the merged entity to generate news content and therefore set the agenda.
- 6.19 As a result, each organisation is able to play a key role in offering an alternative view of events which other organisations may lack the resources to cover independently. For example, News Corporation and BSkyB are especially well-placed to invest in investigative journalism, which is resource-intensive and high-risk (because it may or may not lead to a story). This is particularly important since investigative journalism (especially decisions on who/what to investigate) can have a major influence on the news agenda.
- 6.20 Therefore, the merging parties are able to contribute to news plurality not just because of their audience size but also by virtue of their unrivalled ability to invest in generating original news content. As a result, the Takeover would have the particularly damaging effect of combining the two commercial organisations with the greatest ability to invest in news-gathering.

---

<sup>41</sup> See paragraphs 3 House of Lords Select Committee on Communications "The Ownership of the News" (2008). See also paragraphs 54 to 57.

<sup>42</sup> It is thought that ITN employs only around 110 journalists.

## SLAUGHTER AND MAY

### The Takeover will distort cross-platform dynamics

- 6.21 Section 5 above outlines the importance of cross-platform dynamics in ensuring news plurality. As noted above, these dynamics depend upon each platform impartially reporting on the output of the other. The threat posed to these dynamics by a large cross-media news provider means the Takeover will have far-reaching consequences for plurality, beyond the effect of merging the News Corporation and BSkyB voices.
- 6.22 Following the Takeover, the merged entity will have the ability to distort the exchange of news between platforms and in the process restrict the ability of third party media organisations to contribute to news plurality. For example, Sky News could choose to give disproportionate coverage to stories featured in News Corporation newspapers, with the immediate result that important stories in other newspapers are less likely to be reported to Sky News' large TV and radio audiences.
- 6.23 The importance of BSkyB's rolling TV news in agenda-setting also means that the stories thus excluded from Sky News would also be less likely to be covered by other news outlets.
- 6.24 Evidence from other jurisdictions suggests that the incentives created by cross-ownership can undermine the practice of objective reporting. A US study found that media outlets tend to give disproportionate coverage to the activities of their own corporate group. For example, the CBS network (then owned by Viacom) was more than twice as likely to cover stories from other Viacom outlets than NBC and ABC combined.<sup>43</sup>
- 6.25 As a result, the Takeover not only combines the News Corporation and BSkyB voices but undermines the ability of third party news providers to contribute to the broader news agenda.

### There will be insufficient plurality post-Takeover

- 6.26 Following the Takeover there will be two large UK news groups (News Corporation and the BBC). Given the BBC's reliance on state funding, News Corporation will be the only major private sector news group.
- 6.27 Aside from these two, ITN produces TV news but is a diminishing presence. Audiences for the main ITN bulletins have been in sharp decline. Since 2002 audiences for ITN's News at Ten bulletin have fallen by around 35% and audiences for its main early evening bulletin have fallen by around 25%. ITN's financial circumstances mean it also has an increasingly constrained news-gathering capacity (see further Section 8 below).

---

<sup>43</sup> Study by Project for Excellence in Journalism (2001) cited at paragraph 104 House of Lords Select Committee on Communications "The Ownership of the News" (2008).

## SLAUGHTER AND MAY

- 6.28 Although there will continue to be several newspaper groups, only one of these groups has a title that achieves coverage of more than 10% of the population.<sup>44</sup> Furthermore, the ability of these groups to reach wider audiences will be constrained by Sky News' incentive disproportionately to feature News Corporation content across its TV and radio network. In addition, there is a risk that the enhanced cross-media position of News Corporation post-Takeover will lead to a material weakening, or exit, of one or more newspapers, leading to a further loss of plurality.<sup>45</sup>
- 6.29 Accordingly, it is clear that there will be an insufficient plurality of persons controlling the news media following the Takeover. In these circumstances, it should not be possible for OFCOM to conclude that no further investigation is required. As outlined in Section 8 below, this conclusion is only reinforced when one considers future developments which are likely further to reduce news plurality in the UK.

### 7. Control of Media Enterprises – Internal Control

#### *Limits of Internal Plurality*

- 7.1 OFCOM's Invitation to Comment on the Takeover requested views on "*the level of independence in editorial control or expression within the relevant media organisations*". However, it is important to note the limited relevance of the notion of such "internal plurality", especially in circumstances where each of the relevant enterprises will be 100% owned by News Corporation following the Takeover.

#### Law

- 7.2 As outlined above, the relevant public interest consideration is whether there is "*a sufficient plurality of persons with control of the media enterprises [serving a relevant audience]*".<sup>46</sup>
- 7.3 Importantly, the test relates to control of the enterprise (i.e. the relevant business)<sup>47</sup> – not control of the enterprise's editorial policy. As a result, where the person (here News Corporation) unquestionably has 100% control over the enterprise (here B SkyB), nothing in the statute requires or permits an enquiry into whether that control over the enterprise will be used to control the enterprise's editorial policies.

---

<sup>44</sup> ABC. In contrast, as noted at paragraph 6.15 above, the merged entity would have an audience reach of at least 52%.

<sup>45</sup> Several of the parties to this submission have also expressed concerns to the competition regulators over the merged entity's ability and incentive to bundle Pay TV and news content in a manner which forecloses competing newspapers. It is understood that the OFT has supplied OFCOM with a copy of a paper dated 16 November 2010 from the parties to this submission which outlines some of the competition concerns.

<sup>46</sup> Section 58(2C)(a) Enterprise Act 2002.

<sup>47</sup> Section 129 Enterprise Act 2002.

## SLAUGHTER AND MAY

7.4 To proceed contrary-wise would be to treat Section 58 as containing extra words and asking whether there is a *sufficient plurality of persons with control of the editorial policy of media enterprises*.

7.5 Importantly, the approach is entirely consistent with the Court of Appeal's judgement in *BSkyB/ITV*.<sup>48</sup> In that case the Court of Appeal<sup>49</sup> confirmed that one should look at the actual level of control over the relevant enterprise when applying Section 58 and that moves from a lower to a higher level of control over the enterprise are relevant to the plurality assessment since limited control of the enterprise can limit the risk to plurality (see further below). However, nothing in the case suggested that, where complete control of the enterprise is established, it is permissible to consider how that control might be used. This is apparent from Lloyd LJ's framing of the issue at stake:

*"The question turns on the correct view of the interaction between section 58(2C) and section 58A(5) of the Act, and in particular on the meaning of the phrase... "sufficient plurality of persons with control of...media enterprises..."...The Commission held that what was required was not just an exercise of counting heads, and that it was necessary and proper 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. It referred to this situation as "internal plurality".<sup>50</sup> (Emphasis added.)*

7.6 This passage makes clear that the CC was arguing that it was correct to take account of internal plurality only where that plurality flowed from limited control over the enterprise such that there was limited ability to control editorial content. It was not argued (nor found) in the Court of Appeal that, in circumstances of full control, *de facto* editorial independence was relevant to the statutory test. Accordingly, there is nothing in the Court of Appeal decision to alter the plain meaning of the statute.

---

<sup>48</sup> [2010] EWCA Civ 2.

<sup>49</sup> Paragraphs 53 and 121 *BSkyB v Competition Commission*.

<sup>50</sup> Paragraph 80 *BSkyB v Competition Commission*.



## SLAUGHTER AND MAY

### Policy

7.7 The above analysis is consistent with the underlying policy considerations: if a merger gave A 100% control over B in circumstances where merging the editorial content would threaten plurality, clearance based on internal plurality considerations would essentially delegate to A the task of safeguarding the public interest – since A would have the ability to end internal plurality if and when it so chose. Such a vulnerable situation would not represent meaningful plurality, let alone “sufficient” plurality of persons for the purposes of the statutory test.

7.8 The House of Lords Select Committee on Communications concluded that internal plurality was no substitute for plurality of persons controlling the news media:

*“We do not believe that an internal company structure can be an adequate substitute for competition law and statutory regulation in ensuring that no single voice becomes too powerful.”<sup>51</sup>*

7.9 Accordingly, it is irrelevant to consider possible editorial diversity of separate media outlets under the 100% ownership of the same corporate group. As a result, it is not necessary to consider whether e.g. The Sun enjoys editorial freedom from News Corporation or whether Sky News would enjoy editorial freedom following the Takeover.

### ***News Corporation Internal Plurality***

7.10 Without prejudice to the above analysis, this section demonstrates that, even if it was appropriate to consider internal plurality in this case, such considerations would not alter the conclusions since it is clear that News Corporation outlets do not have sufficient editorial freedom to remedy the external plurality concerns outlined above.

### Existing levels of internal plurality within News Corporation

7.11 News Corporation has previously described its influence over the editorial policy of the The Sun and The News of the World. News Corporation’s Chairman and Chief Executive (Rupert Murdoch) has previously described his interventionist role in The Sun and The News of the World. The House of Lords Select Committee on Communications reports Mr Murdoch’s evidence in the following terms: *“For The Sun and News of the World he [Mr Murdoch] explained that he is a “traditional proprietor”. He exercises editorial control on major issues – like which Party to back in a general election or policy on Europe.”<sup>52</sup>*

7.12 There is also significant evidence that News Corporation plays a key role in setting the agenda for The Times and The Sunday Times. For example, Andrew Neil (former editor

---

<sup>51</sup> Paragraph 220 House of Lords Select Committee on Communications “The Ownership of the News” (2008).

<sup>52</sup> Paragraph 50 Annex 4 House of Lords Select Committee on Communications “The Ownership of the News” (2008).

## SLAUGHTER AND MAY

of The Sunday Times) has alleged that, on occasion, Mr Murdoch sought to intervene in the editorial content of the paper. In particular, Mr Neil alleges that Mr Murdoch urged him not to publish a serialisation of a damaging biography on Robert Maxwell and a story alleging corruption in Malaysia. In each case Mr Neil attributed this interference to conflicts with Mr Murdoch's other business interests.<sup>53</sup>

- 7.13 Mr Murdoch himself has reported that he regularly speaks to editors of The Times and The Sunday Times and requests explanations of their decisions.<sup>54</sup> While this is not necessarily objectionable, it illustrates the fundamental difficulty of seeking to rely on internal diversity to uphold plurality. Even where the proprietor scrupulously tries not to interfere he/she is likely to have an influence on editorial policy, through a process of self-censorship - this is bound to be the case unless one assumes that editors will entirely disregard the preferences of their ultimate boss.
- 7.14 Aside from The Times and The Sunday Times specifically, there is more general evidence of a degree of consensus across News Corporation titles on some news issues, for example on the decision to go to war in Iraq. Indeed, it has been reported that the editors of all 175 significant News Corporation titles were supportive of the decision to go to war,<sup>55</sup> a degree of consistency which shows not just the dominant force of the proprietor but the limits on internal plurality.
- 7.15 News Corporation appears to have influenced the agenda of The Times titles notwithstanding the conditions set out in the DTI's consent to News Corporation's original acquisition of those titles. The consent provided for "independent national directors" ("INDs") whose majority support would be required to:
- Dispose of a newspaper;
  - Appoint or dismiss the Editor-in-Chief and Editor of The Times and the Editor of The Sunday Times; or
  - Resolve disputes between the Editors and the company.<sup>56</sup>
- 7.16 The parties to this submission are not aware of an instance where the INDs have exercised the right of veto and at least two former editors have expressed doubts over the effectiveness of the INDs system. Former editor of The Times, Harold Evans, wrote that the commitments "*are not worth the paper they are written on - unless the owner shares the spirit of them...Internal freedom cannot be guaranteed by external rules*".<sup>57</sup>

---

<sup>53</sup> Pages 167 and 437 Andrew Neil "Full Disclosure" (1996).

<sup>54</sup> Paragraph 49 Annex 4 House of Lords Select Committee on Communications "The Ownership of the News" (2008).

<sup>55</sup> <http://www.guardian.co.uk/media/2003/feb/17/mondaymediasection.iraq>

<sup>56</sup> Paragraph 216 House of Lords Select Committee on Communications "The Ownership of the News" (2008).

<sup>57</sup> Harold Evans "Good Times, Bad Times" (1983).

## SLAUGHTER AND MAY

Andrew Neil stated that the commitments were "a conceit invented to allow Mr Murdoch to take over these papers in the first place...it was not really put in place to protect the independence of the editors."<sup>58</sup>

- 7.17 A biography of Hugh Trevor-Roper (one of the original INDs) describes some of his experiences in the following terms:

*"It soon became clear that [Rupert] Murdoch expected it [the board] to rubber-stamp his decisions. No agenda was sent out in advance of meetings, so there was no opportunity to consider items beforehand. The dates of meetings were often changed at short notice, making it difficult for directors to attend. Hugh deplored Murdoch's casual attitude to the formal commitments he had undertaken."*<sup>59</sup>

- 7.18 The same biography reports on the appointment of Charles Wilson as editor of The Times in 1985 in the following terms:

*"Previously [Rupert] Murdoch had consulted the directors about editorial appointments, but now he simply informed them of his intentions by fax from New York."*<sup>60</sup>

### Relevance to the Takeover

- 7.19 The track record of News Corporation is significant since it demonstrates that, even if internal plurality was relevant to the assessment in this case:

- It is appropriate to treat the various News Corporation titles as one voice for plurality purposes; and
- When assessing the post-Takeover situation, there is no reason to believe that Sky News will enjoy editorial independence such that it could constitute a separate voice to News Corporation.

---

<sup>58</sup> Paragraph 217 House of Lords Select Committee on Communications "The Ownership of the News" (2008).

<sup>59</sup> Page 468 Adam Sisman "Hugh Trevor-Roper: The Biography" (2010).

<sup>60</sup> Page 516 Adam Sisman "Hugh Trevor-Roper: The Biography" (2010).

## SLAUGHTER AND MAY

7.20 On the latter point, it is worth noting that this issue is not addressed by the “due impartiality” requirements on broadcasters like BSkyB. The CC has previously noted that the due impartiality requirements provide that any story which a broadcaster chooses to cover must be handled in an impartial manner but they do not address the prior question of what stories are covered or the prominence given to particular stories.<sup>61</sup> The limits of impartiality regulations and the importance of agenda-setting have been noted by the Chairman of BSkyB:

*“[T]he system is concerned with imposing what it calls impartiality in broadcast news. It should hardly be necessary to point out that mere selection of stories and their place in the running order is itself a process full of unacknowledged partiality.”<sup>62</sup>*

7.21 Accordingly, even if it was legally permissible to consider internal plurality in respect of News Corporation and BSkyB, it is clear that, as matter of fact, there is no sound basis to expect significant internal plurality within the merged entity.

7.22 The evidence on the effectiveness of The Times’ IND systems, as well as the lessons over the coverage of the Iraq war, are also relevant when considering possible remedies – see further Section 10 below.

### 8. Future Developments

#### *Legal Relevance of Future Developments*

8.1 A thorough consideration of future developments is essential to the proper application of the public interest test. For example, when considering whether the level of news plurality is “sufficient” for the purposes of Section 58, it is essential to consider future reductions in plurality that might be expected regardless of the relevant merger. To be sufficient, the level of plurality must be sufficient in light of any reductions in plurality that might be expected to occur in the foreseeable future.

#### *Key Developments*

8.2 Two of the key trends in the news media sector in recent years have been:

- Downward pressure on revenues; and
- Ongoing platform convergence i.e. content that was previously provided separately is increasingly being provided and consumed on a single platform, or in a common format across different platforms.

---

<sup>61</sup> Paragraph 5.54 CC report into BSkyB/ITV.

<sup>62</sup> James Murdoch – MacTaggart Lecture (2009).

## SLAUGHTER AND MAY

- 8.3 These trends are expected to continue for the foreseeable future and are therefore highly relevant to the assessment of the Takeover. Each is examined in more detail below.

### Declining Revenue

- 8.4 The main news media groups have suffered downward pressure on revenues for several years.
- 8.5 TV advertising revenue has fallen by around 15% in recent years - from £3,450m in 2004 to £2,950m in 2009.<sup>63</sup> Enders Analysis forecast that *“TV advertising is expected to recover from the historic low in 2009, but structural change and a continued weak economic environment will result in nominal TV advertising revenue again reaching a similar level in 2013 to that in 2004, a large decline in real terms.”*<sup>64</sup>
- 8.6 Newspaper advertising revenue has fallen by at least 20% in recent years – from £5.1bn in 2004 to £4.1bn in 2008.<sup>65</sup> Cover price revenues are also thought to have fallen by at least 10% from 2004 to 2009.<sup>66</sup>
- 8.7 In contrast, online advertising revenues are increasing. However, as outlined above, there has been little corresponding investment in news-gathering. Indeed the nature of the online experience presents a systemic challenge to the traditional model for financing of news-gathering.
- 8.8 The traditional media have often relied on a degree of cross-subsidy between very popular content which can be produced cheaply (e.g. show business gossip) and more serious, expensive news content. For example, a TV news bulletin or a print newspaper are consumed as a whole and audience attracted by popular items helps to drive advertising revenue for the outlet as a whole (including news).
- 8.9 In contrast, the online experience (which enables the audience to access very specific content directly and enables news aggregators to extract news from its original source), together with targeted advertising technology (whereby advertisers can target the most popular content), means that significant traffic (and therefore advertising revenue) has been diverted away from general news content. This issue is expected to become even more relevant as audience migration to online continues.

---

<sup>63</sup> Enders Analysis.

<sup>64</sup> In contrast, BSkyB's subscription revenues continue to increase.

<sup>65</sup> Paragraph 4.39 OFCOM Media Ownership Rules Consultation (2009). It has also been reported that there was a further 13% year-on-year fall between 2008 and 2009 – Enders Analysis.

<sup>66</sup> Based on a decline in national newspaper circulation over the period. Paragraph 4.20 OFCOM Media Ownership Rules Consultation (2009).

## SLAUGHTER AND MAY

- 8.10 While each of the parties to this submission believes that there is a strong future for entrepreneurial media companies, the financing of news-gathering in particular is coming under significant pressure.
- 8.11 The threat to plurality imposed by declining revenues, combined with fixed or increasing costs, are clear. Various observers have predicted that the continuing financial pressure on news companies will result in fewer companies in future, or at least fewer companies with the resources to invest heavily in news-gathering. For example, Enders Analysis reports that:
- "Given the breadth and intensity of pressures that all newspapers are under, with rising costs and long-term downward pressure on key revenue streams, we consider it inevitable that organisations able to absorb losses will gain market share over those that are forced to make significant cost savings to sustain margins. In other words, the strongest companies will become stronger still."*
- 8.12 It has been reported that Rupert Murdoch considers that the UK market can only support three newspaper titles in the long term.<sup>67</sup>
- 8.13 Others have suggested that consolidation will be necessary for many of the current voices in the media. For example, Sir Martin Sorrell (Chief Executive of WPP) has predicted that *"There will be massive consolidation in media companies. Traditional media cannot survive in its current structure."*<sup>68</sup>
- 8.14 Of particular relevance is the financial health of ITN (BSkyB's only commercial competitor for broadcast news).<sup>69</sup> ITN's most recent set of accounts were heavily qualified, in part due to its pension deficit, and it has had to make substantial editorial redundancies in recent years. Accordingly, there is a material risk that ITN's ability to contribute news plurality will be severely constrained in the coming years. In addition, ITN is heavily reliant on its contracts for the supply of news to ITV. The loss of this contract (due for renewal in late 2012), would threaten ITN's viability.
- 8.15 Finally, while the BBC benefits from substantial public funding, the recent BBC licence fee settlement will result in the BBC having to fund a wider range of operations from the same level of funding. This may adversely affect its ability to fund news-gathering at its current levels.

---

<sup>67</sup> For example, The Sunday Telegraph of 5 September 1993 reported that Mr Murdoch had predicted at an industry conference that The Sun, The Times and The Daily Mail would be the only newspapers to survive. It was also reported in The Spectator of 23 October 1993 that Rupert Murdoch had told friends he would "put [The Telegraph] out of business" through a price war with The Times.

<sup>68</sup> Stream Conference 2009.

<sup>69</sup> See also paragraph 6.27.

## SLAUGHTER AND MAY

### Media Convergence

- 8.16 Media convergence is an ongoing process, with developments in technology and evolving consumer preferences reducing the differences in the output and consumption of media which used to be distinct. For example:
- Many TV broadcasters now offer 'video on demand' on the internet in addition to linear broadcast channels;
  - Newspapers now offer online news that combines video and audio with text news; and
  - Many radio stations stream their output online, often with extra features such as studio webcams, with the result that that output can be similar to a TV programme.
- 8.17 Convergence presents opportunities for entrepreneurial media enterprises. However, it also presents significant challenges for news production and distribution. In particular, to meet evolving consumer expectations it will increasingly be insufficient simply to offer a scheduled TV news broadcast or a daily print edition of a newspaper. Instead, e.g. TV news companies will need to be able to broadcast continually and to maintain an up-to-date website and e.g. a newspaper will need to maintain an up-to-date website and supply that website not only with text but also with video and audio content. As a result, convergence requires greater investment in an increasing range of technology at the same time as news revenues are coming under pressure.
- 8.18 Another important aspect of convergence is that media tend to be converging around web-based platforms. As a result, the internet is an increasingly important route to market for media organisations. BSkyB is one of the four largest internet service providers in the UK. It has over 2.8m broadband subscribers<sup>70</sup> and is growing faster than its rivals (it added 178,000 new subscribers in Q3 2010 – compared to 114,000 for BT and 18,000 for TalkTalk). This position gives BSkyB a substantial marketing advantage over other news organisations. Therefore, convergence is likely to lead to an increase in BSkyB's share of audience even absent the Takeover.

### ***Implications for Plurality Assessment of Takeover***

- 8.19 These trends have two key implications for the assessment of the Takeover:
- First, the pressures on news media organisations mean it would be unjustifiable for OFCOM to assess sufficiency of plurality on the assumption that all of the existing voices in UK news media will continue to exist in their current form for the foreseeable future.

---

<sup>70</sup> [http://corporate.sky.com/about\\_sky/key\\_facts\\_and\\_figures.htm](http://corporate.sky.com/about_sky/key_facts_and_figures.htm)

## SLAUGHTER AND MAY

- Secondly, the financial strength of the merging parties means that they are two of the strongest voices currently contributing to news plurality in the UK. As outlined above, News Corporation and BSkyB have much greater resources to invest in news than their commercial competitors. Accordingly, they are two of the organisations particularly well-placed to survive the current pressures and make the investments needed to thrive in a converged media environment. As a result, the Takeover will combine two of organisations that would otherwise be important contributors to news plurality notwithstanding the current and future financial pressures.
- Thirdly, it is necessary to consider the very real possibility that the Takeover would give the combined entity the ability and incentive to engage in strategic behaviour that has the effect of removing or weakening other news suppliers.

### 9. Effect of the Takeover on BSkyB

- 9.1 For the avoidance of any doubt, this section outlines why the Takeover results in a relevant change for plurality purposes notwithstanding News Corporation's existing 39% stake in BSkyB.<sup>71</sup>

#### *The Legislation Specifically Provides for Intervention in these Circumstances*

- 9.2 The media plurality provisions in the Enterprise Act<sup>72</sup> specifically provide that where two media enterprises (here News Corporation and BSkyB) serving the same audience (which, as above, covers the cross-media provision of news)<sup>73</sup> are part of a "merger situation" and thereby "cease to be distinct" (which includes a move from 39% to 100%),<sup>74</sup> then:

*"the number of such enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards".<sup>75</sup>*

---

<sup>71</sup> While News Corporation holds 39% of the shares in BSkyB, a voting agreement limits its voting rights to 37.19% - see page 43 BSkyB Annual Report 2010.

<sup>72</sup> Specifically, Section 58A(4).

<sup>73</sup> Paragraph 7.12 of the DTI Guidance explains that the "Secretary of State may define an audience in relation to a media enterprise in the manner she considers appropriate... This enables the Secretary of State to treat different audiences as separate or group them together. The audience could therefore include cross media coverage and could include newspaper readership".

<sup>74</sup> By virtue of Section 26(4)(a) Enterprise Act 2002.

<sup>75</sup> The Explanatory Notes to the Act state (at paragraph 804): "This means that all such mergers, including those involving an increase in levels of control of such media enterprises, may be scrutinised for the purposes of subsection (2C(a)), even though the number of enterprises may in fact be unchanged".



## SLAUGHTER AND MAY

9.3 The Guidance states in relation to this provision:

*"All such mergers, including those involving an increase in levels of control of such media enterprises [which is the case for the Takeover], may be examined for the purposes of subsection (2C). This means that the Secretary of State can assess whether, as a result of the merger, there will still be a sufficient plurality of persons with control of the enterprises serving the relevant audience even though the number of enterprises serving that audience may be unchanged."*

9.4 The Court of Appeal<sup>76</sup> put this succinctly as follows:

*"Section 58A(4) precludes an argument that, because B [here B Sky B] is already under the [minority i.e. 39%] control of A at the start [pre-Takeover], the added level of control [in moving to 100%] makes no difference, and the number of enterprises serving the relevant audience is the same before and after the [relevant merger situation]"*.

9.5 The Court of Appeal in the same case<sup>77</sup> went on to clarify:<sup>78</sup>

*"When it comes to assessing the plurality of the aggregate number of relevant controllers [of media enterprises] and 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 [here News Corporation over B Sky B], whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control."*

9.6 Accordingly, even if it is the case that News Corporation already has material influence over B Sky B for the purposes of the Enterprise Act 2002, it is clear as a matter of law that an increase to 100% ownership can result in a relevant reduction in plurality.<sup>79</sup>

### ***Evidence Indicates that B Sky B is Separate from News Corporation***

9.7 The fact that the Takeover will bring about a significant change in the control of B Sky B is shown by the current limits of News Corporation's influence over B Sky B. Whether one considers corporate control over B Sky B, or factual control over Sky News, there is compelling evidence that News Corporation's current influence is limited such that a move to 100% ownership will have a significant impact.

---

<sup>76</sup> Paragraph 53 *B Sky B v Competition Commission*.

<sup>77</sup> Paragraph 121 *B Sky B v Competition Commission*.

<sup>78</sup> Applying Section 58A(5).

<sup>79</sup> The same conclusion would hold in the event of a change from *de facto* to legal control.

## SLAUGHTER AND MAY

### BSkyB

- 9.8 As a matter of law, the directors of BSkyB have a duty to promote the success of the company for the benefit of the shareholders as a whole.<sup>80</sup> As a listed company it also currently has an obligation under the UK Listing Rules to treat all shareholders equally and to ensure that certain transactions with News Corporation are carried out on terms that are fair and reasonable to shareholders as a whole and, in the case of larger transactions, to seek the prior approval of minority shareholders for such transactions.
- 9.9 In essence, the fact that News Corporation is only a minority shareholder in BSkyB means that currently the directors of BSkyB legally cannot seek to favour News Corporation and must instead act independently in the interests of all shareholders. In circumstances where BSkyB is 100% owned by News Corporation however the UK Listing Rules constraints would be removed and directors would be able to take account of the benefit to the News Corporation group as a whole when discharging their duty to promote the success of the company. BSkyB's operations could then be directed for the benefit (financial and/or political) of News Corporation.
- 9.10 The BSkyB Annual Report explains some of the procedures that have put in place to ensure that the company currently does not discriminate in favour of News Corporation:
- "The Group conducts all business transactions with companies which are part of the News Corporation group...a major shareholder, on an arm's length basis."*<sup>81</sup>
- "[Audit] Committee approval is required for the entering into by the Group [BSkyB] of a commitment or arrangement...with News Corporation...which involves...amounts equal to or in excess of £10 million, but not exceeding £25 million in aggregate value ... Any transaction in excess of £25 million in aggregate value must be submitted to the Committee and, if approved by the Committee, must also be submitted to the Board for approval."*<sup>82</sup>
- 9.11 As a matter of fact, News Corporation's minority ownership means that currently it has only limited influence over the appointment of BSkyB management. For example, as at the end of its last financial year, only five of BSkyB's fourteen directors were reported as being employees or former employees of News Corporation.<sup>83</sup> However, in circumstances where BSkyB was 100% owned by News Corporation, News Corporation could unilaterally appoint and dismiss all of the BSkyB management.

<sup>80</sup> Section 172 Companies Act 2006.

<sup>81</sup> Page 33 BSkyB Annual Report 2010.

<sup>82</sup> Page 40 BSkyB Annual Report 2010.

<sup>83</sup> Page 38 BSkyB Annual Review 2010.

## SLAUGHTER AND MAY

- 9.12 News Corporation's own actions suggest that it currently does not have control over BSkyB. For example, has notified the Takeover to the EU Commission for competition clearance. Since jurisdiction only arises under the European Union Merger Regulation in the event of a change of control of the target company,<sup>84</sup> News Corporation must itself recognise (and the EU Commission must accept) that the Takeover will result in a change in the control of BSkyB.

### Sky News

- 9.13 It is clear that News Corporation's current minority shareholding in BSkyB does not translate into any ability to influence the news agenda of Sky News.
- 9.14 BSkyB previously reported to the CC, in the context of *BSkyB/ITV* that "neither News Corporation nor any of its subsidiaries has the ability to influence BSkyB's...news content."<sup>85</sup> Similarly, News International reported that it "did not intervene or influence the presentation of news content, choice of stories or editorial stance taken by Sky News..."<sup>86</sup> In addition, the CC has reported that "we received no evidence from third parties to suggest that senior executives at BSkyB or its parent companies exerted influence on the Sky News agenda".<sup>87</sup>
- 9.15 This is consistent with evidence provided by Mr Murdoch to the House of Lords Select Committee on Communications when he expressed his frustration at his inability to influence BSkyB's news channel. The Committee reported Mr Murdoch's evidence in the following terms:

*"He stated that the only reason Sky News was not more like Fox news was that "nobody at Sky listens to me".<sup>88</sup>*

---

<sup>84</sup> Article 3(1) European Union Merger Regulation.

<sup>85</sup> Paragraph 5.29 CC report on *BSkyB/ITV*.

<sup>86</sup> Paragraph 35 Appendix I CC report into *BSkyB/ITV*.

<sup>87</sup> Paragraph 5.57 CC report into *BSkyB/ITV*.

<sup>88</sup> Paragraph 47 Annex 4 House of Lords Select Committee on Communications "The Ownership of the News" (2008).

## SLAUGHTER AND MAY

- 9.16 The editorial independence of Sky News from News Corporation is also demonstrated by its strong record of reporting on stories even where they are potentially prejudicial to News Corporation. For example, Sky News has recently provided full coverage of the allegations of illegal phone-tapping by The News of the World. In addition, Sky News covered BBC Director-General, Mark Thompson's riposte to criticisms made by News Corporation executive, James Murdoch in 2009.<sup>89</sup>
- 9.17 Therefore, it is clear that B SkyB's news output must currently be treated as distinct from News Corporation for the purposes of assessing the impact on plurality of a move to outright control over B SkyB.

### 10. Remedies

- 10.1 For the reasons outlined above, it is clear that in its current form the Takeover presents a serious threat to news plurality in the UK. Therefore, as requested by OFCOM's Invitation to Comment, the parties to this submission have considered whether there are any potential remedies to the concerns identified.
- 10.2 At this stage, the parties are not aware of any measures (short of divestment) which would provide an effective remedy. In particular, it seems likely that behavioural undertakings to guarantee the editorial independence of B SkyB from News Corporation would be ineffective. For example, experience suggests that it would be wholly inadequate to replicate the commitments imposed when News Corporation purchased The Times.
- 10.3 First, it is clear that, even if News Corporation scrupulously sought to obey the letter and spirit of a behavioural remedy, the output of Sky News is likely to be influenced by the preferences (political or commercial) of News Corporation. As outlined above, editorial self-censorship is likely as Sky News editors cannot be expected to act with complete disregard to the views of their 100% owner.
- 10.4 Secondly, if News Corporation was so minded, it would likely be possible to undermine or circumvent any behavioural remedy without necessarily breaching the letter of the undertaking. For example, if News Corporation was unhappy with the approach of a news editor, there would be a multitude of ways to encourage his departure without dismissing him e.g. reducing his budgets or offering him a lucrative position in another part of the business.
- 10.5 Importantly, it is unlikely a behavioural remedy based on editorial independence could effectively secure the need for any independent editor to have access to an independent news-gathering capacity. For example, if News Corporation sought to cut

---

<sup>89</sup> See for example [http://news.sky.com/skynews/Home/BBC-Director-General-Mark-Thompson-Hits-Back-At-News-Corp-Boss-James-Murdoch-In-Email-To-Staff/Article/200909215379020?lid=ARTICLE\\_15379020\\_BBCDirectorGeneralMarkThompsonHitsBackAtNewsCorpBossJamesMurdochInEmailToStaff&ipos=searchresults](http://news.sky.com/skynews/Home/BBC-Director-General-Mark-Thompson-Hits-Back-At-News-Corp-Boss-James-Murdoch-In-Email-To-Staff/Article/200909215379020?lid=ARTICLE_15379020_BBCDirectorGeneralMarkThompsonHitsBackAtNewsCorpBossJamesMurdochInEmailToStaff&ipos=searchresults).

## SLAUGHTER AND MAY

costs by merging the news-gathering infrastructure of the merging parties, a notionally independent Sky News editor would simply be choosing from the same menu of stories available to News Corporation.

- 10.6 As outlined above, the evidence in respect of The Times acquisition makes clear that such behavioural undertakings cannot be relied upon to safeguard news plurality. Indeed, the conclusion of one of the editors who operated under that system was:

*"If you have to ensure commitments before you allow a merger to go ahead, you probably should not let that merger go ahead."*<sup>90</sup>

- 10.7 The Chairman of BSkyB has also expressed scepticism about the ability of behavioural regulation to ensure independence:

*"[W]e must have genuine independence in the news media. Genuine independence is a rare thing. No amount of governance in the form of committees, regulators, trusts or advisory boards is truly sufficient as a guarantor of independence...On the contrary, independence is characterised by the absence of supervision and dependency."*<sup>91</sup>

- 10.8 It is clear that, whatever behavioural remedies were put in place, BSkyB could not provide an independent contribution to news plurality when under the 100% control of News Corporation.

### 11. Conclusion

- 11.1 There is a compelling case for OFCOM recommending that the Secretary of State refer the Takeover to the CC.

- 11.2 News plurality is of fundamental societal importance such that any significant reduction in news plurality may be expected to operate against the public interest.

- 11.3 News plurality is already limited:

- Three suppliers (BBC, ITN and BSkyB) account for virtually all of the UK's broadcast news supply.
- Two suppliers (BBC and BSkyB) account for virtually all of the UK's national radio news supply.
- Three suppliers (News Corporation, Daily Mail & General Trust and Trinity Mirror) account for 75% of national newspaper circulation.

---

<sup>90</sup> Andrew Neil's evidence to House of Lords Select Committee on Communications – paragraph 219 "The Ownership of the News" (2008).

<sup>91</sup> James Murdoch – MacTaggart Lecture (2009).

## SLAUGHTER AND MAY

- 11.4 News plurality is expected to reduce further even absent the Takeover, with financial pressures and media convergence meaning that some of the existing suppliers either exit the market or reduce their level of investment in news-gathering.
- 11.5 The Takeover would reduce plurality by:
- Combining two of the largest voices in the UK news media – i.e. combining one of the three TV news suppliers and two radio news suppliers with the largest supplier of national newspapers;
  - Combining two of the news suppliers most able to invest in news-gathering and invest in the technology necessary to operate in a converged media environment;
  - Undermining the objective flow of news between different media; and
  - Enabling the merged entity to use its position as a leading internet service provider to further increase its share of the news audience.
- 11.6 The merged entity would have a reach unrivalled amongst the commercial news organisations: the outlets it supplies would reach at least 52% of the population (in contrast, only one other newspaper has a title which reaches more than 10%).
- 11.7 It is clear that the Takeover brings about a relevant change in control over BSkyB: the merging parties themselves have previously described New Corporation's limited influence over BSkyB and its inability to influence the Sky News agenda.
- 11.8 Following the Takeover, News Corporation and the BBC would be by far the two largest voices in the news media. In comparison to News Corporation and the BBC, the other players would make important but constrained contributions to plurality: ITN will be constrained by its financial difficulties and the remaining newspaper groups have limited reach in comparison to News Corporation, BBC and ITN. In addition, the contribution to plurality by those newspaper groups may be reduced or eliminated as a result of the post-merger strategies that News Corporation would have the ability and incentive to adopt post-Takeover.
- 11.9 In these circumstances, it is clear that there would be insufficient plurality of persons controlling news media enterprises following the Takeover. As a result, it is impossible to conclude that the Takeover would not operate against the public interest. Accordingly, OFCOM should recommend that the Takeover be referred to the CC for an in-depth assessment.

**Slaughter and May**  
**19 November 2010**

EC103130028

011

From: [redacted]  
Sent: 27 December 2010 16:50  
To: [redacted]  
Subject: RE: Media alliance submission to Ofcom  
Attachments: ICM poll re BSKyB 27 12 10.pdf

Dear [redacted]

You might also be interested in the attached poll published today. Do let me know if you need anything else on this.

Regards

[redacted]

---

From: [redacted]  
Sent: 26 December 2010 11:57  
To: [redacted]  
Subject: Out of Office: Media alliance submission to Ofcom

I will be out of the office until Tuesday 4 January. If you need to speak to someone before then, please call [redacted] on [redacted] or call me on my mobile: [redacted]

\*\*\*\*\*

This email and its contents are the property of the Department for Culture, Media and Sport. If you are not the intended recipient of this message, please delete it. All DCMS e-mail is recorded and stored for a minimum of 6 months. The original of this email was scanned for viruses by the Government Secure Intranet virus scanning service supplied by Cable&Wireless Worldwide in partnership with MessageLabs. (CCTM Certificate Number 2009/09/0052.) On leaving the GSI this email was certified virus free. Communications via the GSI may be automatically logged, monitored and/or recorded for legal purposes.

---

CMGRP UK Limited | Registered office: Ground Floor, 84 Eccleston Square, London SW1V 1PX, England | Registered number: 2442501

This message contains information which may be confidential and privileged. Unless you are the intended recipient (or authorized to receive message for the intended recipient), you may not use, copy, disseminate or disclose to anyone the message or any information contained in the message. If you have received the message in error, please advise the sender by reply e-mail, and delete the message.  
... you very much.

This email was received from the INTERNET and scanned by the Government Secure Intranet anti-virus service supplied by Cable&Wireless Worldwide in partnership with MessageLabs. (CCTM Certificate Number 2009/09/0052.) In case of problems, please call your organisation's IT Helpdesk. Communications via the GSI may be automatically logged, monitored and/or recorded for legal purposes.

Issued on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group

Embargoed until 0001 Monday 27 December 2010

## **63% back full and independent probe into News Corporation bid to take over BSkyB – ICM poll**

Overwhelming support for a full and independent investigation, into News Corporation's bid to buy the 61% of BSkyB that it does not already own, is revealed in an ICM poll of 2,006 people published today.

Culture, Media and Sport Secretary Jeremy Hunt will receive an initial report from Ofcom on the implications of the planned deal by 31 December. He then has until 15 January to decide whether or not to refer it to the Competition Commission for a full-blown review. Mr Hunt can task the Commission to examine whether the merger would reduce the plurality of the UK media and should therefore be blocked.

The survey – commissioned by BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group – discloses the depth of public concern over the proposed takeover, which was cleared on competition grounds last week by the European Commission:

- 63% said there should be an independent investigation before deciding whether to allow the deal to proceed
- 84% said that a single organisation should not be allowed to control too much of the news media
- 75% said it was important to have competing independent sources of news in the UK
- 44% oppose the deal with a mere 5% being in favour; opposition among Conservative voters was nearly as strong, with 43% opposed and just 5% in favour
- 53% of those who currently identify themselves as Lib Dem oppose the deal with just 4% being in favour.

A spokesman for the alliance of media groups said:

“This deal marks a significant change of control and the public is clearly concerned. If anything, popular awareness of the issues at stake will now be substantially higher.”

“A clear majority of the public wants a full and independent investigation into News Corporation's bid to take over BSkyB. The Competition Commission provides that mechanism. The public's concern that no one organisation should control too much of the news – as News Corporation would under the planned deal – is also very striking.”

“Of those who expressed a view, nine times as many people oppose the deal as support it. With 44% opposing and 5% in favour, that is a significant level of concern. Opposition is stacked against the deal among Conservative voters too.”

-ends-



Issued on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group

1. **Notes to Editors:** ICM interviewed 2,006 adults aged 18+ from its online panel between 10th and 12th December 2010. This was before the power to refer the NewsCorp/BSkyB case to the Competition Commission was transferred from the Business Secretary, Vince Cable, to the Culture, Media and Sport Secretary, Jeremy Hunt. Interviews were conducted across Great Britain and data is weighted to be nationally representative of the 18+ adult population.
2. Data from questions quoted herein:

**Question:** To what extent do you agree or disagree with the following statements?

It is important to have competing independent sources of news in the UK.

	Total (N=2006)
Strongly agree	37%
Tend to agree	38%
Neither agree nor disagree	19%
Tend to disagree	3%
Strongly disagree	1%
Don't know	1%
<i>Net: Agree</i>	<i>75%</i>
<i>Net: Disagree</i>	<i>4%</i>

We should not allow a single organisation to control too much of the news media.

	Total (N=2006)
Strongly agree	51%
Tend to agree	34%
Neither agree nor disagree	11%
Tend to disagree	2%
Strongly disagree	1%
Don't know	1%
<i>Net: Agree</i>	<i>84%</i>
<i>Net: Disagree</i>	<i>3%</i>

Issued on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group

**Question:** Some people have argued that if News Corporation purchases BSkyB, it will result in too few 'media voices' in the UK and so there should be a full and independent investigation before a decision is taken on whether to allow the purchase to proceed. Others have argued that if News Corporation purchases BSkyB there would still be enough 'media voices' in the UK and there is no need for an investigation.

Which of the following statements comes closer to your view?

	Total (N=2006)
There should be an independent investigation before deciding whether to allow the purchase to proceed	63%
An investigation is not necessary and the purchase should be allowed to proceed without holding one	10%
Neither of these	8%
Something else	3%
Don't know	16%

**Question:** News Corporation currently owns 39% of BSkyB and now wishes to buy the remaining 61% and thereby gain full ownership of BSkyB. To what extent do you support or oppose the idea of News Corporation owning all of BSkyB?

	Total (N=2006)	Voted Conservative (N=639)	Identify as Liberal Democrat (N=226)
Strongly support	1%	1%	-
Tend to support	3%	4%	4%
Neither support nor oppose	41%	44%	37%
Tend to oppose	23%	24%	28%
Strongly oppose	21%	19%	25%
Don't know	11%	8%	6%
<i>Net: Support</i>	<i>5%</i>	<i>5%</i>	<i>4%</i>
<i>Net: Oppose</i>	<i>44%</i>	<i>43%</i>	<i>53%</i>

012

OFFICE OF FAIR TRADING

---

A report to the Secretary of State for Culture, Olympics, Media and Sport in response to the European intervention notice issued on 4 November 2010 in relation to the anticipated acquisition by News Corporation of British Sky Broadcasting Group plc

A report pursuant to Article 4(2)-(5) of the Enterprise Act 2002 (Protection of legitimate interests) Order 2003

30 December 2010

---

## BACKGROUND AND ADVICE

1. This report is made following the European intervention notice (the Notice) given to the Office of Fair Trading (OFT) by the Secretary of State on 4 November 2010 pursuant to section 67(2) of the Enterprise Act 2002 (the Act).<sup>1</sup> This report has been prepared pursuant to Article 4 (2)-(5) of the Enterprise Act 2002 (Protection of legitimate interests) Order 2003<sup>2</sup> (the Order).
2. The Notice required the OFT to investigate and report to the Secretary of State in accordance with Article 4 of the Order within the period ending on 31 December 2010. Article 4 of the Order requires the OFT to provide advice to the Secretary of State on the considerations relevant to the making of a reference under section 33 of the Act which are also relevant to the Secretary of State's decision as to whether to make a reference under Article 5 of the Order. Specifically, the OFT is required to provide a decision as to whether it believes that it is, or may be, the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation as defined in section 68 of the Act.
3. The Notice also required the Office of Communications (Ofcom) to investigate and report in accordance with Article 4A of the Order, within the same period on the sufficiency of plurality of persons with control of media enterprises.
4. This report sets out the reasons why the OFT believes that the Secretary of State has jurisdiction and is able to exercise the power to make a reference to the Competition Commission (the CC) under Article 5(3) of the Order to address any media plurality concerns arising from the merger provided that the Secretary of State believes that the conditions set out in Article 5(3) of the Order are satisfied.

## THE PARTIES

5. **News Corporation (News Corp)** is a global media company active in: (1) filmed entertainment; (2) television; (3) cable network programming; (4) direct broadcast satellite television; (5) integrated marketing services; (6) newspapers and information services; (7) book publishing; and (8) other activities such as digital media

---

<sup>1</sup> Although the Notice was originally given on behalf of the Secretary of State for Business, Innovation and Skills, following the transfer of all responsibility for competition issues relating to media, broadcasting, digital and telecoms sectors to the Secretary of State for Culture, Olympics, Media and Sport on 21 December 2010, this report is submitted to him.

<sup>2</sup> S.I. 2003/1592.

properties and outdoor display advertising. In the UK, it owns several daily and weekly newspapers (those are The Sun, The News of the World and The Times) and 39.14 per cent of British Sky Broadcasting Group plc (BSkyB).

6. The target is **BSkyB**. The acquisition will be effected through an offer to acquire the entire issued and to be issued share capital of BSKyB not already owned by News Corp. BSKyB's activities in the UK include: (1) the creation and retail and wholesale distribution of 'linear' TV channels; (2) the retail distribution of BSKyB's and third parties' 'audiovisual' content; (3) the provision of retail telephony and broadband services; (4) the provision of conditional access, access control and electronic program guide services to broadcasters and interactive service providers; (5) the sale of advertising and sponsorship on BSKyB and third parties' channels and websites; (6) interactive services on BSKyB's platform; and (7) the provision of fixed-odds betting services.

## THE TRANSACTION

7. News Corp intends to acquire BSKyB through an offer for the entire issued and to be issued share capital of BSKyB not already owned by News Corp.

## JURISDICTION

### Introduction

8. This transaction falls for consideration under the EC Merger Regulation.<sup>3</sup> As a result, the European Commission has sole jurisdiction to investigate the competition aspects of this transaction.<sup>4</sup> However, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation and compatible with the general principles and other provisions of Community law.<sup>5</sup> The second paragraph of Article 21(4) Merger Regulation states that plurality of the media shall be regarded as a legitimate interest.
9. Under section 58 of the Act, 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 is specified as a public interest consideration. The Secretary of State is therefore entitled to intervene in relation to a European relevant merger situation where he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.
10. Under section 68 of the Act, a European relevant merger situation means a relevant merger situation: (a) which will be created if arrangements which are in progress or in contemplation are carried into effect; (b) by virtue of which a concentration with a Community dimension (within the meaning of the Merger Regulation), or a part of such a concentration, will arise; and (c) in relation to which a reference was prevented from being made under section 33 (whether or not there would otherwise have been a duty to make such a reference) by virtue of Community law or anything done under or in accordance with it.
11. The OFT sets out below why it believes that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation.

---

<sup>3</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the Merger Regulation).

<sup>4</sup> Article 21(3) Merger Regulation.

<sup>5</sup> Article 21(4) Merger Regulation.

**The transaction would create a relevant merger situation under the Act**

12. A merger must meet all three of the following criteria to constitute a relevant merger situation for the purposes of the Act:<sup>6</sup>

- two or more enterprises must cease to be distinct, or there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct; and
- either the value of UK turnover of the enterprise which is being acquired exceeds £70 million or the enterprises which cease to be distinct supply or acquire goods or services of any description and after the merger together supply or acquire at least 25 per cent of all those particular goods or services supplied in the UK or in a substantial part of it; and
- either the merger must not yet have taken place; or (subject to certain exceptions) the merger must have taken place not more than four months before the reference is made.

13. Taking each of these criterion in turn.

Enterprises ceasing to be distinct

14. Based on the information submitted by News Corp, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation. These arrangements are the steps News Corp is taking to acquire BSKyB and which, if successful, will bring two or more enterprises (being each of News Corp and BSKyB) under common control.
15. At present, News Corp already owns 39.14 per cent of BSKyB and may therefore already exercise some degree of control<sup>7</sup> over BSKyB for the purposes of the Act. However, section 26(4) of the Act provides that a person or group of persons may be treated as bringing an enterprise under his or their control if being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate.

---

<sup>6</sup> See *Merger Assessment Guidelines* (OFT1254), paragraph 3.1.3.

<sup>7</sup> That is, the ability to control or materially to influence the policy of BSKyB, but without having a controlling interest in BSKyB. See paragraph 3.2.5 of the *Merger Assessment Guidelines* (OFT1254).

16. The transaction would result in News Corp acquiring a controlling interest in BSkyB.<sup>8</sup> Regardless of whether News Corp was able previously to control or materially to influence the policy of BSkyB, section 26(4) means that the transaction would result in a change in the level of control so as to enable BSkyB to be treated as being brought under News Corp's control for the purposes of the Act.

Turnover threshold

17. The turnover test under the Act is met because the UK turnover of BSkyB is greater than £70 million.

Four-month time limit

18. The third criterion is, at present, met because News Corp has not completed the acquisition of the remaining shares of BSkyB. However, following the approval of the proposed acquisition by the European Commission (see paragraph 20 below), News Corp is permitted to acquire a controlling interest in BSkyB. As such, if at any stage, News Corp were to acquire shares in BSkyB above 50 per cent of its issued share capital, then the power to make a reference under the Act would last for four months from the date of such an acquisition.
19. As a result of the above, arrangements are in progress or in contemplation which if carried into effect would result in the creation of a relevant merger situation.

**Transaction with Community dimension**

20. The European Commission concluded on 21 December 2010 that the transaction constitutes a concentration with Community dimension, but that it would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.<sup>9</sup>
21. As a result of this transaction, arrangements are in progress by virtue of which a concentration with a Community dimension (within the meaning of the Merger Regulation) will arise.
22. In relation to those arrangements, a reference would be prevented from being made since the European Commission has asserted its

---

<sup>8</sup> A 'controlling interest' generally means a shareholding of more than 50 per cent of the voting rights in a company. See paragraph 3.2.14 of the *Merger Assessment Guidelines* (OFT1254).

<sup>9</sup> Case No. COMP/M.5932. Decision not yet published. See IP/10/1767.



exclusive jurisdiction based on Article 21(3) of the Merger Regulation.<sup>10</sup>

### Conclusion on jurisdiction

23. As a result of the reasons above, the OFT believes that there are arrangements in progress or in contemplation which, if carried into effect, will create a European relevant merger situation within the meaning of section 68(2) of the Act.

### SUMMARY OF THIRD PARTY REPRESENTATIONS

24. Under Article 4 of the Order, the OFT's report may contain a summary of any representations about the case which have been received by the OFT and which relate to media plurality and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under Article 5. The OFT may also include advice and recommendations which relate to media plurality and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under Article 5.
25. Following receipt of the Notice, the OFT has consulted and invited comments on jurisdictional matters only, since the Secretary of State has requested Ofcom to report on the issues relating to media plurality.<sup>11</sup> In response to the OFT's consultation, two third parties made representations.
26. These representations were not directly relevant for this report since they addressed competition issues. These representations were provided to the European Commission for consideration in its assessment.<sup>12</sup>
27. No representations were received that the Secretary of State does not have jurisdiction to intervene in this case.

### CONCLUSION

28. The OFT advises the Secretary of State that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation for the purposes of section 68(2) of the Act. Therefore, the OFT believes

<sup>10</sup> As stated above. See paragraph 20 above.

<sup>11</sup> See further section 44A of the Act and 4A of the Order.

<sup>12</sup> The representations received also urged the OFT to request that the European Commission refer the case to the UK for a competition assessment pursuant to Article 9 Merger Regulation. In the context of these submissions, representations on why this transaction gives rise to a relevant merger situation were made. These are substantially aligned with the OFT's views as stated above (see paragraphs 12-19).

that the Secretary of State has jurisdiction to make a reference to the CC under Article 5(3) of the Order to address any media plurality concerns if the Secretary of State believes that the conditions set out in Article 5(3) of the Order are satisfied.



**Director, Mergers**  
**Office of Fair Trading**  
**30 December 2010**



Report on public  
interest test on the proposed  
acquisition of British Sky  
Broadcasting Group plc by  
News  
Corporation

This is the non-confidential version.  
Confidential information has been redacted.  
Redactions are indicated by [X]

31 December 2010

Report on public interest test

# Contents

Section		Page
1	Summary	4
2	Introduction	16
3	Audience definition	22
4	The current situation	26
5	Effects of the proposed acquisition - static analysis	53
6	Effects of the proposed acquisition - dynamic analysis	78
7	Recommendations	90
Annex		Page
1	Data sources used	93
2	Summary of representations	98

## Section 1

## Summary

## Introduction

- 1.1 On 3 November 2010 News Corporation ("News Corp") notified the European Commission of its intention to acquire the shares in British Sky Broadcasting Group plc ("Sky") it does not already own (throughout the report we refer to this as the "proposed acquisition" or "the transaction"). This would increase its holding from approximately 39.1% to 100%.
- 1.2 On 4 November the Secretary of State for Business, Innovation and Skills issued a European intervention notice in relation to the proposed acquisition. The notice specified the public interest consideration in section 58 of the Enterprise Act 2002 ("the Act") concerned with the sufficiency of plurality of persons with control of media enterprises. This 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".<sup>1</sup>*
- 1.3 He asked Ofcom to investigate and to report to him by 31 December 2010 providing advice and recommendations on the specified public interest consideration, which may be relevant to the Secretary of State's decision on whether to refer the case to the Competition Commission.
- 1.4 It is not Ofcom's role to advise on whether concerns are conclusively established but rather to advise on whether there may be concerns such that a fuller second stage investigation is warranted. In our advisory role undertaking a first stage assessment within 40 working days, the threshold to be reached for Ofcom to advise the Secretary of State that the proposed acquisition may warrant fuller consideration by the Competition Commission is fairly low. *Ofcom needs to hold a reasonable belief, on the basis of the evidence available, that the proposed acquisition may operate or be expected to operate against the public interest<sup>2</sup>.*
- 1.5 In fulfilling this role, we have had particular regard to the significance attached by Parliament to media plurality to the functioning of a healthy and informed democracy. The relevant Government minister said in 2003 that *"[media] plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda".<sup>3</sup>*
- 1.6 We have undertaken our own analysis and new primary research and taken into account submissions received from a range of stakeholders including:
- 20 commercial and professional organisations (including News Corp and Sky);
  - 8 academics and industry observers;

<sup>1</sup> There has only been one previous instance of an intervention notice being issued in relation to this public interest consideration involving Sky's proposed acquisition of 17.5% of ITV ("Sky/ITV")

<sup>2</sup> Office of Fair Trading & Ors v IBA Health Ltd [2004] EWCA Civ 142 (19 February 2004)

<sup>3</sup> Lord McIntosh of Haringey (Parliamentary Under Secretary, DCMS) 2 July 2003, Hansard

- 96 direct submissions from individuals; and
  - 58,600 individuals via two online campaign groups.
- 1.7 We have taken account of the relevant DTI Guidance<sup>4</sup>, the Competition Commission's report on the Sky/ITV case<sup>5</sup>, and the Court of Appeal's judgment in the Sky/ITV case<sup>6</sup>. We have also considered other relevant regulatory provisions, in particular, the impartiality requirements under Ofcom's Broadcasting Code.
- 1.8 It is important to note that whilst a number of parties have suggested to us that the proposed transaction may also raise competition concerns, we are concerned only with the specific public interest consideration referred to us by the Secretary of State in his intervention notice. The effect of the transaction on competition was the subject of a separate investigation by the European Commission that resulted in the proposed acquisition being approved under the EU Merger Regulation<sup>7</sup>.
- 1.9 In light of the potential issues raised by representations made to us, we have looked at the public interest consideration in two ways:
- the 'static' effects of the proposed acquisition – on plurality immediately after the transaction in terms of range and number of persons controlling media enterprises including their ability to influence opinions; and
  - the 'dynamic' effects of the proposed acquisition – issues that may arise over time, within a forward view of how plurality may develop.
- 1.10 In considering plurality and the need for there to be sufficient plurality, we have considered the range and number of persons having control of media enterprises in the context of their ability to influence opinions and control the agenda<sup>8</sup>,
- 1.11 In doing so we have had regard to the Government statement during the debate of the plurality provisions (see paragraph 1.5 above) and the Secretary of State's guidance on the media public interest merger provisions, which states that the public interest consideration *is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This 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*<sup>9</sup>.
- 1.12 Ofcom has a wide discretion in relation to the assessment of sufficient plurality. Following the Court of Appeal decision in Sky/ITV, what is required is "a qualitative assessment of the position resulting, or likely to result", from the proposed

<sup>4</sup> DTI Guidance: the Enterprise Act 2002: Public Interest Intervention in Media Relevant merger situations, May 2004

<sup>5</sup> Competition Commission Report on the Acquisition by BSkyB plc of 17.9% of the shares in ITV Plc sent to Secretary of State (BERR) 14 December 2007, ("Competition Commission")

<sup>6</sup> British Sky Broadcasting Group plc v The Competition Commission and The Secretary of State for Business Enterprise and Regulatory Reform [2010] EWCA Civ 2 ("Court of Appeal")

<sup>7</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1767&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>8</sup> Competition Commission report, paragraph 5.7 and Court of Appeal paragraph 90 on range and number.

<sup>9</sup> DTI Guidance, paragraph 7.7

Report on public interest test

acquisition<sup>10</sup>. This is inevitably a matter of judgment, which we have exercised with regard to the considerable importance Parliament has attached to media plurality for the functioning of a healthy and informed democracy.

1.13 News Corp argued to us that plurality has increased since Parliament last legislated in relation to it, the inference being that it must now be more than sufficient such that the proposed transaction (even if it reduces plurality) cannot be said to operate against the public interest. On the other hand, many other respondents have argued that plurality is already insufficient and that the proposed transaction would exacerbate the problem<sup>11</sup>.

1.14 When examining the effects of the proposed transaction on the sufficiency of plurality of persons in control of the media, we adopt the same approach taken by the Competition<sup>X</sup> Commission in the Sky/ITV case:

*"Whilst recognising that it would not be sufficient for plurality purposes to rely on a single provider (for example, the BBC), we do not consider it necessary to take a view on precisely how many owners would constitute a 'sufficient' level of plurality of persons. Rather, we have looked qualitatively at sufficiency. We have considered sufficiency by reference to the current levels of plurality, having regard to any change in plurality that arises as a result of the acquisition."<sup>12</sup>*

### Relevant audiences

1.15 We have defined the relevant audiences as United Kingdom audiences for cross-media news and current affairs including TV, radio, newspapers and the internet. This is because:

- *News and current affairs* – news was the main focus of the majority of representations. In addition, consumers rank news highest in terms of both personal and social importance<sup>13</sup>. Current affairs also plays an important role in providing consumers with information and analysis and therefore in the development of public opinion. The various media platforms like newspapers are not solely devoted to news and include comment on current affairs.
- *Cross-media* - prior to the transaction News Corp provides news and current affairs in newspapers and online, whilst Sky provides news and current affairs directly on TV and online, and indirectly over radio as a result of wholesale news provision to commercial radio through a contract with IRN. Therefore, other than online, the proposed transaction would not change the number and range or ability to influence *within* each individual platform. The main effect of the transaction is in relation to cross-media audiences.
- *UK-wide audiences* - the two parties mainly provide news and current affairs to a UK-wide audience, with limited provision of news to specific regions or localities.

<sup>10</sup> Court of Appeal, paragraph 87

<sup>11</sup> See for example responses from 38 Degrees, Campaign for Press & Broadcasting Freedom paragraphs 4.1 to 4.3 and 5.1, NUJ pages 3 and 4, Robert Beveridge page 2 and Prof Steven Barnett page 6.

<sup>X</sup> A typographical error contained in the version of this report sent to the Secretary of State on 31 December 2010 has been subsequently corrected here. The original text was: "When examining the effects of the proposed transaction on the sufficiency of plurality of persons in control of the media, we adopt the same approach taken by the Competition and Commission in the Sky/ITV case"

<sup>12</sup> Competition Commission, 2007, paragraph 5.15.

<sup>13</sup> See Figure 4



- *No sub-group audiences* - there are some variations in news consumption among age and socio-economic groups, but we have no substantive evidence suggesting there are specific concerns for sub-group audiences. We do not believe that any particular sub-groups would be more significantly affected than the population as a whole as a result of this proposed acquisition.

### Plurality of persons with control of media enterprises

- 1.16 Ofcom's consideration of plurality takes into account the fact that News Corp already owns approximately 39.1% of Sky. However, the proposed acquisition would give it a 100% ownership of shares in Sky so that Sky would become a wholly owned subsidiary of News Corp. Currently, News Corp's stake in Sky, while representing material influence over Sky, does not enable News Corp to pass general and special resolutions alone given the presence of other shareholders and independent directors.<sup>14</sup>
- 1.17 Full control would allow News Corp to take decisions involving Sky which are in the exclusive commercial interests of News Corp. In light of the fact that the proposed transaction would give News Corp total control of Sky, we consider it would result in a reduction in the number of persons with control of media enterprises and that Sky would cease to be a distinct media enterprise.
- 1.18 In addition, we also consider the number and range of views across different media enterprises in the context of their ability to influence, and the range of views *within* media enterprises.
- 1.19 This is the approach adopted by the Competition Commission in Sky/ITV where it termed the former external plurality and the latter internal plurality, although in that case the Competition Commission was considering a situation involving Sky's acquisition of 17.9% shareholding in ITV as compared to 100% in this case.<sup>15</sup>

### External plurality

- 1.20 Representations have been made to us that after the proposed transaction there would be sufficient plurality by reference to the total number and range of media enterprises available. However, as set out in paragraphs 1.10 and 1.11, we consider that in assessing sufficient plurality we should look not simply at the number and range of media enterprises, but also at their relative ability to influence and inform public opinion.
- 1.21 We have looked at ability to influence and inform opinion by reference to a number of factors since there is no single standard industry measure which can be used consistently across-media platforms. These are:
- *Audience share and reach within individual platforms*<sup>16</sup>. Where possible, we have used recognised industry measures for each media platform to assess the current situation and the potential effect of the proposed transaction.

<sup>14</sup> In Sky/ITV, we assumed that News Corp's 39% shareholding gave it a level of control over Sky for the purposes of including newspapers in our assessment, but we did not have to consider in that context the question of News Corp having full control of Sky.

<sup>15</sup> Competition Commission report, paragraph 5.11

<sup>16</sup> Audience share is the percentage of total consumption accounted for by a specific news provider. Audience reach is the percentage of the total audience which is exposed to a specific news provider

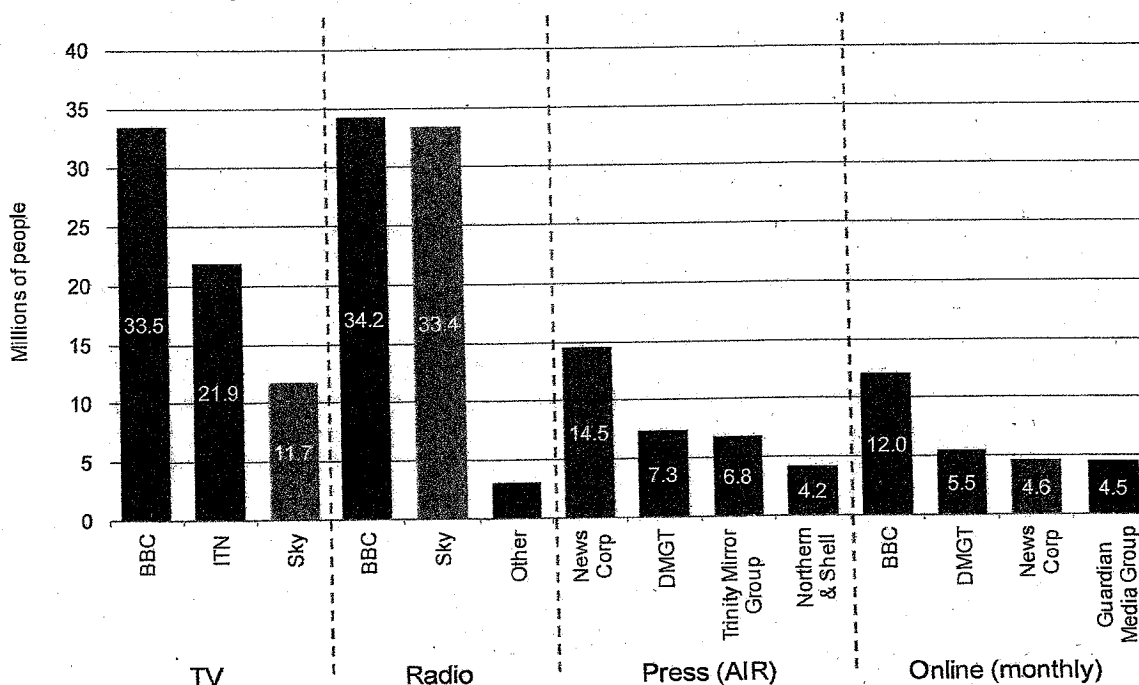
Report on public interest test

- *Analysis of consumers' consumption of news* - based on minutes of use by a typical consumer in a day.
- *Primary research on consumers' claimed use of different media*. This new market research provides us with the only available measure to compare the use and reach of different news sources across different media, something which is of particular importance in light of our identification of relevant audiences as cross-media audiences<sup>17</sup>.

1.22 In considering the effect of the proposed acquisition on the relative positions of News Corp and Sky within individual platforms, we have looked both at their audience share and reach.

1.23 Comparison of either audience share or reach across platforms is not simple given the different ways this information is collected. However, a comparison of reach is helpful in understanding how many consumers may obtain news from News Corp or Sky news content today. We have looked at this measure both on a wholesale and retail basis<sup>18</sup>. The reach of News Corp and Sky cannot be added together following the proposed transaction as there will be an overlap among consumers who already use both News Corp and Sky content<sup>19</sup>.

Figure 1: Reach across platform (millions of people) at wholesale level



Source: TV: October 2010, BARB, All Adults (16+), Radio: Q3 2010, RAJAR, All Adults (16+), Press: Kantar Media/NRS, all adults (16+), Online: October 2010, Nielsen / UKOM, all 2+. See footnote 84 for source details. Methodologies for data collection differ by industry. Note, radio reach is for all radio listening, not radio news listening as RAJAR does not provide genre breakdowns.

<sup>17</sup> This cross-platform metric is a 'share of references', derived by determining which media outlets, titles or channels consumers refer to when asked about their news and current affairs providers across media platforms. See footnotes 54 and 55 and Annex 1 for more details

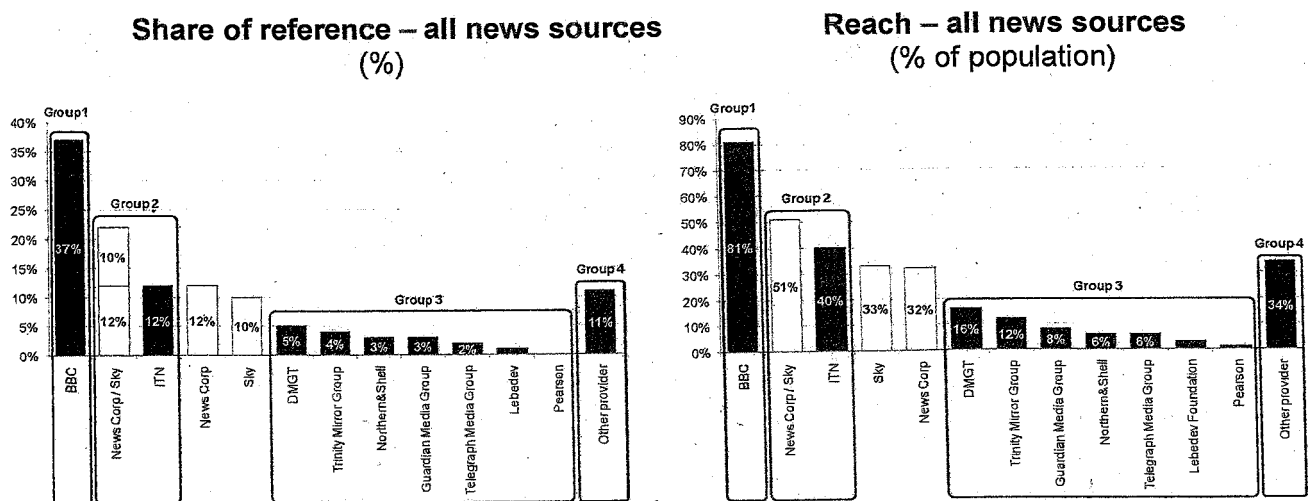
<sup>18</sup> For retail, see Figure 16

<sup>19</sup> For more details, see paragraphs 4.11 to 4.38

- 1.24 Following representations made to us, we have also reviewed the effect of the proposed acquisition in terms of minutes of use of news media across platforms.
- 1.25 This suggests that the proposed acquisition would see News Corp consolidate its second place in terms of news consumption (rising from 14% to 24% including wholesale news provision). This compares to the BBC, which has news consumption of 44% of minutes and DMGT which is third with 9%. This approach provides a useful overview of cross-media news usage from a consumers' perspective. Whilst this assessment is an improvement on a straightforward analysis of availability, it is still limited: it does not take into account the varying ability of different media to influence opinion. This is set out in 5.24 to 5.32.
- 1.26 The results of Ofcom's new market research are summarised below. This research is based on a measure which takes into account the differential ability of alternative media and media organisations to influence opinion as it shows consumers' views of their main sources and all regular sources of news on a cross-media basis.
- 1.27 The data reproduced at Figure 2 relates to the wholesale provision of news, so it takes account for example of the provision of TV news by ITN to C4 and by Sky to Five.

**Figure 2 - Effect of the proposed acquisition on news provision to audiences and ability to influence based on wholesale news provision**

Percentage of regular news and current affairs consumers - 96% of GB population



Source: Ofcom, cross-media audience research, 2010<sup>20</sup>. Represents 96% of the GB (excludes Northern Ireland) adult population aged 16+. See Annex 1 for details

1.28 This data suggests that providers of news and current affairs across-media platforms can be divided into four broad groups based on their relative share of references by consumers<sup>21</sup>:

- The BBC has the largest share, representing 37% of the total references.

<sup>20</sup> Share of all sources of news and current affairs used regularly (i.e. at least once a week) by adults in GB, by wholesale news provider.

<sup>21</sup> See paragraph 4.43 onwards for full details

Report on public interest test

- ITN (providing news via ITV and Channel 4), News Corp and Sky news currently constitute a second group of providers. Prior to the transaction each of these has a share of references of around 10%. It is noteworthy that, since its launch, Sky has built its presence in retail and wholesale news provision.
- A third group, made up mainly of the other physical and online newspaper providers have shares ranging from 5% to 1% of references. These include DMGT, Trinity Mirror Group and the Guardian Media Group.
- Finally, a large number and range of other providers represent a further 11% share in total, but individually, they have a small share of references

1.29 A similar story is apparent for the *reach* of different news providers – the number of individuals who use each news provider at least once a week.

1.30 In terms of reach, the BBC (in the form of TV, online or radio) is used by 81% of UK adults at least once a week. This compares to 40% for ITN, 33% for Sky News and 32% for News Corp. The next largest provider in terms of reach is DMGT with 16% of adults using it as a news provider at least once per week<sup>22</sup>.

1.31 The reason why the BBC, ITN and Sky feature so prominently in this data is because of the continuing importance of TV news as a means of influencing opinion. This also accounts for the relatively high share of reference attributed to Sky News despite its relatively small share of the total television news audience. The reason for the prominence of News Corp is its strong position in newspapers, which makes it the only non-TV media enterprise with a similar level of influence to the major providers of TV news.

1.32 The effect of the proposed acquisition is to bring together one of the three main providers of TV news with the largest provider of newspapers. The effect on the relevant share of references and reach is indicated by our market research. In relation to the provision of wholesale news:

- The proposed transaction would result in Sky ceasing to be a distinct media enterprise, reducing the number of Group 2 providers from three to two in both share and reach terms. This is particularly marked in wholesale news provision.
- The proposed transaction would be a combination of the second and fourth largest providers based on our research into share of all references for news providers. For example, News Corp's potential ability to influence would increase with the addition of Sky News, increasing its share of references from 12% to 22%. News Corp's reach as a percentage of regular news consumers would increase from 32% to 51%.
- This does not suggest News Corp moves from Group 2 to Group 1<sup>x</sup> in our charts: it would not be of the same scale as the BBC in share or reach terms after the proposed transaction. However, it would be larger in relative ability to influence opinion than both ITN and the Group 3 providers at the wholesale level.

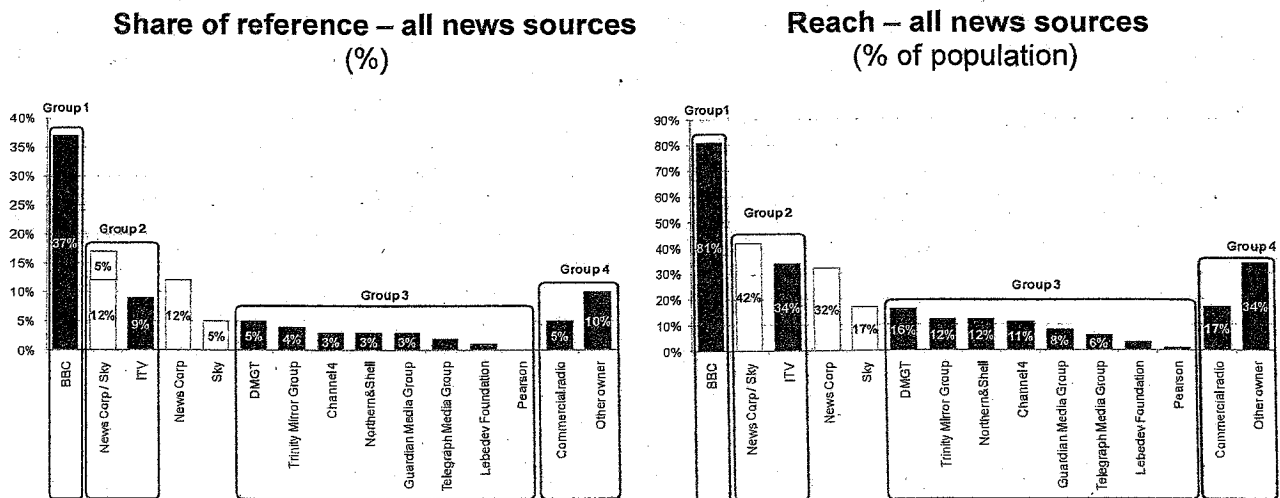
<sup>22</sup> See Figure 22 and Figure 23 in section 4

<sup>x</sup> A typographical error contained in the version of this report sent to the Secretary of State on 31 December 2010 has been subsequently corrected here. The original text was: "This does not suggest News Corp moves from Group 1 to Group 2 in our charts".

- 1.33 This analysis is based on all news sources measured in the survey (across TV, newspapers, online and radio) and is based on wholesale news provision not retail.
- 1.34 However, a similar picture is displayed when considering all sources of retail news provision, outlined below, and when considering the main source<sup>23</sup> of news at the retail level (see Figure 28 and Figure 30 in Section 4). In both cases, the BBC continues to be the largest provider, while the transaction increases News Corp's potential ability to influence.

**Figure 3 - effect of the proposed acquisition on news provision to audiences and ability to influence based on retail news provision**

Percentage of regular news and current affairs consumers - 96% of GB population



Source: Ofcom, cross-media audience research, 2010<sup>24</sup>.

- 1.35 The BBC is the only Group 1 provider in our analysis, a consequence of its scale in television, radio and online news. As with all media enterprises, the BBC may have an institutional view which can shape its editorial decisions. However, the governance of the BBC is different from other broadcasters in that it has a Royal Charter that requires it to be "independent in all matters concerning the content of its output...and in the management of its affairs." Its strategic direction is set by the BBC Trust, which is held publicly accountable for the performance of its role in meeting the "public interest, particularly the interest of licence fee payers". The Trust must also maintain the independence of the executive, which oversees output. This is fundamentally different from other media enterprises, including News Corp, which typically have a controlling proprietor.

**Internal plurality**

- 1.36 For the reasons set out above, we consider that the proposed acquisition by News Corp, giving it 100% ownership of Sky's shareholding, would reduce the number of persons with control of media enterprises with Sky ceasing to be a distinct media enterprise. Although News Corp would have full control of Sky we have nonetheless

<sup>24</sup> Share of all sources of news and current affairs used regularly (i.e. at least once a week for all sources, except for weekly newspapers/magazines which are defined as at least once a month) by adults in GB, by retail news provider.

Report on public interest test

considered the actual extent of control that would be exercised and exercisable by News Corp. This is in line with the approach taken by the Court of Appeal<sup>25</sup>.

- 1.37 We have received a number of submissions on how far internal plurality within the merged group would help in ensuring a range of opinion, and in particular whether Sky News could be seen to remain an independent voice to News Corp's other news outlets.
- 1.38 A number of the submissions received argue that there is a history of intervention in relation to the News Corp owned newspapers, and that there is no reason why this should not also occur in other media. News Corp submit that TV broadcasting has a different culture from newspapers, and that for a combination of a number of reasons such as editorial policy not being a matter for the board, audience expectations and the nature of TV news (see further Section 5), the transaction would not jeopardise the editorial independence of Sky News.
- 1.39 In light of the conflicting views that have been put to us on this issue and taking account of the fact that in this case News Corp would acquire full control of Sky, we do not consider that we can reach the view that internal plurality will ensure sufficient plurality in the provision of news and current affairs as part of a first stage review.
- 1.40 News Corp's submissions on internal plurality are made in the context of a regulatory framework which it argues will safeguard against the over-representation of one point of view. In particular News Corp have submitted that, in practice, the impartiality rules help to ensure that the owner of a television station could not intervene to require news items on their own television news service to receive lesser or greater prominence for political reasons.
- 1.41 Ofcom's Broadcasting Code requires that "news in whatever form, must be reported with due accuracy and presented with due impartiality". The requirement for "due impartiality" is not absolute and broadcasters' have a degree of editorial discretion in the selection of the news agenda. We recognise that the impartiality rules may contribute as a safeguard against potential influence on the news agenda by media owners, but they cannot themselves necessarily ensure against it.
- 1.42 In any event, there is a difference between the Broadcasting Code which provides the regulator with the ability to intervene on a case by case basis to ensure impartiality in terms of news presentation and the statutory need for there to be a sufficient plurality of persons with control of media enterprises. The regulatory framework, while relevant to the plurality of news and, hence, the statutory public interest assessment, does not on its own ensure a sufficiency of plurality of news. This was the position adopted by the Competition Commission in Sky/ITV.

Multi-sourcing and online news provision

- 1.43 In arguing that there would be sufficient plurality following the proposed transaction, News Corp and Sky have made representations and provided evidence that multi-sourcing (or the use by consumers of multiple sources of news) and the use of online sources of news have both increased since the Communications Act was introduced in 2003, which they consider to be significant.
- 1.44 Although a minority of consumers (18%<sup>26</sup>) rely on a single media owner, the majority of consumers draw on a range of sources for news and current affairs. Our research

---

<sup>25</sup> Court of Appeal, paragraph 121

estimates that the average news consumer uses 2.9 news providers in a typical week. Data from submissions from News Corp puts this higher at 4 sources per week, but includes local and regional sources as well. The loss of Sky as a distinct media enterprise would not materially change this average number of news providers used by individual consumers.

- 1.45 However, although we believe multi-sourcing to be important, we do not believe we can rely on it to ensure sufficient plurality. This is because the process of forming public opinion does not just depend on individuals consuming news, and then each forming their own opinion without reference to other consumers. Rather, individuals consume news, debate and discuss it with others, and it is this process of both news consumption and debate which helps form public opinion. In our view, what matters more therefore are the number and range of news providers used by *all* consumers and their relative significance, rather than the number and range used by each individual.
- 1.46 We also recognise the increasing importance of online news provision today. Wider availability and use of the internet, and the extension of media enterprises' news offerings online, allow consumers to access news more easily from a range of different providers. Our audience research indicates that online usage appears to be complementing the use of traditional media for consumers. This can increase the availability of news sources, and result in consumers using a greater range of sources than may have historically been the case.
- 1.47 However, traditional media providers account for 10 of the top 15 online providers of news (eight newspaper groups plus the BBC and Sky), with the remainder predominantly being news aggregators rather than alternative sources of news. This suggests that today online news tends to extend the reach of established news providers as opposed to favouring the use of new outlets that are not present on traditional media. We recognise that this could change in the future, but the nature of any such change is uncertain.
- 1.48 We have considered plurality and the need for there to be sufficient plurality by looking at the number and range of persons with control of media enterprises in light of their ability to influence opinion. We have done so in accordance with the purpose of the public interest consideration. We have considered carefully all the representations made and evidence available to us, including submissions made in relation to the increase in multi-sourcing and online news provision. However, for the reasons summarised above and set out in full in Section 5, our view within this first stage review, is that we consider it reasonable to believe that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences.

### Forward looking dynamic assessment

- 1.49 The longer term effects of the proposed transaction are inherently uncertain. Many of them will depend on how the wider media market develops, which is inherently difficult to predict given the extent of dynamic change within the sector. As a result, the longer-term implications of the transaction are harder to quantify in comparison to the static effects, and therefore more difficult to take into account.

---

<sup>26</sup> Ofcom cross media audience research, 2010

Report on public interest test

- 1.50 These generally relate to the economic position of the merged entity by comparison to the majority of other news providers in the market (outside of the BBC). Specific concerns included:
- Development and launch of integrated news products for convergent devices and media
  - Cross promotion between News Corp news titles and channels.
  - Bundling of news products with other media services.
  - Winning new wholesale news contracts.
- 1.51 Few of these potential developments can be linked exclusively to the proposed transaction. In considering the counter-factual, many of these developments may come to pass regardless of the common ownership of News Corp and Sky. How far such forward looking developments would affect plurality would depend on a range of factors including the competitive responses of other players, how far new products are replicable, or the adoption of new services by consumers.
- 1.52 Potential consumer benefits could arise as a result of the proposed transaction. For example, News Corp and Sky have a track record of investing in news. News Corp is an innovative, well resourced company that can and does explore risky business models which may benefit both consumers and the wider industry if proven to work. We believe this is of particular significance in the context of current uncertainties as content providers seek to identify profitable business models online. However, it is unclear whether these consumer benefits may or may not result in positive effects for plurality.
- 1.53 We have received representations that suggest there could be public interest concerns in a forward view. We also note that media markets and news provision is changing dramatically, with the continued development, launch and adoption of new products and services. The proposed acquisition may affect these market developments given the strategic and financial assets of the combined entity. Representations made to us suggest such effects may be either positive for consumers or negative for plurality over time. If it was the case that, over time, plurality suffered as result of this proposed acquisition, this would reinforce our conclusions on the static analysis.
- 1.54 However, there is a high degree of uncertainty about these developments. We do not rely upon this forward looking analysis for our advice to the Secretary of State, but note that there are possible situations where both positive and negative effects from the proposed acquisition could emerge.
- 1.55 In this context, it is important to note there is no mechanism to address potential plurality concerns arising in the future on an ex post basis.

**Our advice and recommendations**

- 1.56 This report provides advice and recommendations to the Secretary of State on the specified public interest consideration in section 58 of the Enterprise Act 2002 concerned with the sufficiency of plurality of persons with control of media enterprises.



- 1.57 Ofcom's advice, based on the evidence and reasons set out in this report, is that it reasonably believes that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences. In reaching this view we do not rely on the dynamic effects discussed in full in Section 6.
- 1.58 We believe there is, therefore, a need for a fuller second stage review of these issues by the Competition Commission to assess the extent to which the concentration in media ownership may act against the public interest, and we advise the Secretary of State accordingly.

### Concerns about wider market developments and sufficient plurality

- 1.59 The future market developments explored in this report suggest that the current statutory framework may no longer be equipped to achieve Parliament's policy objective of ensuring sufficient plurality of media ownership. These market developments include the risk of market exit by current news providers, or a steady, organic growth in audience shares and increase in the ability to influence by any one provider.
- 1.60 These changes are, by their nature, evolutionary. However, a public interest consideration can only be triggered by a specific corporate transaction. The current statutory framework may therefore fail to deliver its public interest objectives if plurality in the UK is significantly reduced by developments that do not arise from a specific corporate transaction involving media enterprises.
- 1.61 While there is a clear statutory framework for remedying competition concerns which may develop following a merger or from general market developments,<sup>27</sup> the same is not true of concerns related to plurality. This means that if a transaction is found not to operate against the public interest in relation to plurality, there is no subsequent opportunity or mechanism to address or consider any plurality concerns that may emerge in the future.
- 1.62 This suggests that a more fundamental review and possible reform of the current statutory framework may be required. Any such review would be a matter for Parliament.
- 1.63 Any new mechanism would need to provide a means for intervention if market developments resulted in significant concerns about the sufficiency of plurality over time. At the same time, it must be transparent and proportionate, ensure freedom to innovate in response to market developments, to make risky investments and earn suitable rewards and must avoid creating negative or perverse incentives.
- 1.64 We therefore also recommend that the Government consider undertaking a wider review of the statutory framework to ensure sufficient plurality in the public interest. Specifically, we believe there may be value in providing for intervention where plurality concerns arise in the absence of any transaction involving media enterprises and which are not safeguarded by the current media ownership rules.

---

<sup>27</sup> These include the use of ex post powers under the Competition Act, as well as the possibility of a market investigation reference under the Enterprise Act.

## Section 2

## Introduction

## The proposed acquisition and Ofcom's role

- 2.1 On 3 November 2010 News Corporation notified the European Commission of its intention to acquire the shares in British Sky Broadcasting Group plc it does not already own (throughout the report we refer to this as the "proposed acquisition" or "the transaction"). This would increase its holding from approximately 39.1% to 100%.
- 2.2 On 4 November the Secretary of State issued a European intervention notice in relation to the proposed acquisition. The notice specified the public interest consideration in section 58 of the Enterprise Act 2002 ("the Act") concerned with the sufficiency of plurality of persons with control of media enterprises. This 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".*
- 2.3 Consequently, Ofcom must report to the Secretary of State by 31 December 2010 on this public interest consideration. Our report must provide advice and recommendations on the specified public interest consideration, which may be relevant to the Secretary of State's decision on whether to refer the case to the Competition Commission.
- 2.4 It is not Ofcom's role to advise on whether concerns are conclusively established but rather to advise on whether they may be concerns such that a fuller second stage investigation is warranted. In our advisory role undertaking a first stage assessment within 40 working days, the threshold to be reached for Ofcom to advise the Secretary of State that the proposed acquisition may warrant fuller consideration by the Competition Commission is fairly low. Ofcom needs to hold a reasonable belief, on the basis of the evidence available, that it may be the case that the proposed acquisition may operate or be expected to operate against the public interest<sup>28</sup>.

## Our approach

- 2.5 After receiving the European Intervention notice, we published a guidance note on our approach to the public interest test<sup>29</sup> and invited the parties and other stakeholders to comment on the proposed acquisition in a number of areas, including: content types; audiences; media platforms; control of media enterprises; and future developments in the media landscape<sup>30</sup>. We received submissions from a range of stakeholders, and have taken these into account in our advice. Representations were received from :

- 20 commercial and professional organisations (including News Corp and Sky);
- 8 academics and noted industry observers;

<sup>28</sup> Office of Fair Trading & Ors v IBA Health Ltd [2004] EWCA Civ 142 (19 February 2004)

<sup>29</sup> <http://media.ofcom.org.uk/2010/11/04/guidance-note-for-public-interest-test/>

<sup>30</sup> <http://media.ofcom.org.uk/2010/11/05/invitation-to-comment-public-interest-test-proposed-acquisition-of-bskyb-by-news-corporation/>

- 96 direct submissions from individuals; and
- 58,600 individuals via two online campaign groups.

2.6 In order to assess the public interest consideration defined by the Secretary of State, we have adopted a similar approach to that of the Competition Commission in the Sky/ITV case. We have therefore considered:

- The nature of the public interest test, including sufficient plurality, described below
- the relevant audience(s), defined in Section 3;
- the current market situation, including News Corp and Sky's contribution to news and current affairs and consumers' behaviours, outlined in Section 4
- the static effects of the proposed transaction, considered in Section 5;
- a forward view (dynamic) of the effect of the proposed transaction, in Section 6; and

2.7 We provide conclusions and recommendations in Section 7.

### **Sufficient plurality of persons with control of media enterprises**

2.8 As explained in the Secretary of State's guidance on the media public interest merger provisions, the public interest consideration outlined in 2.2 above *is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This 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*<sup>31</sup>.

2.9 Ofcom has a wide discretion in relation to our assessment of sufficient plurality. What is required is "a qualitative assessment of the position resulting, or likely to result", from the proposed acquisition<sup>32</sup>. This is inevitably a matter of judgment, which we exercise with regard to the considerable importance Parliament has attached to the preservation of plurality of controllers of media enterprises<sup>33</sup>. The relevant Government minister said in 2003 *"[media] plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda"*<sup>34</sup>.

2.10 News Corp argued that plurality has increased since Parliament last legislated in relation to it, the inference being that it must now be more than sufficient such that the proposed transaction (even if it reduces plurality) cannot be said to operate

<sup>31</sup> DTI Guidance: the Enterprise Act 2002: Public Interest Intervention in Media Relevant merger situations, May 2004, paragraph 7.7

<sup>32</sup> Court of Appeal *British Sky Broadcasting Group plc v The Competition Commission and The Secretary of State for Business Enterprise and Regulatory Reform* [2010] EWCA Civ 2 ("Court of Appeal"), at paragraph 87.

<sup>33</sup> *Ibid* at paragraph 104.

<sup>34</sup> Lord McIntosh of Haringey (Parliamentary Under Secretary, DCMS) 2 July 2003, Hansard

Report on public interest test

against the public interest. On the other hand, many respondents argued that plurality is already insufficient and that the proposed transaction would exacerbate the problem<sup>35</sup>.

- 2.11 When examining the effects of the proposed acquisition on the sufficiency of plurality of persons in control of the media, we adopt the same approach taken by the CC in the Sky/ITV case:

*"Whilst recognising that it would not be sufficient for plurality purposes to rely on a single provider (for example, the BBC), we do not consider it necessary to take a view on precisely how many owners would constitute a 'sufficient' level of plurality of persons. Rather, we have looked qualitatively at sufficiency. We have considered sufficiency by reference to the current levels of plurality, having regard to any change in plurality that arises as a result of the acquisition."<sup>36</sup>*

- 2.12 We therefore commence our analysis by reference to the current levels of plurality. We consider how the proposed transaction may affect the level of plurality in the market today, and whether this may raise risks for the public interest in terms of a potential reduction in media plurality such that a fuller second stage investigation is warranted.

- 2.13 In undertaking our assessment, we consider a number of broad points that underpin our advice and recommendations. These include:

- defining the relevant audiences for the proposed acquisition;
- media enterprises;
- control of media enterprises and assessing the effects of any change on plurality;
- assessing external and internal plurality;
- the timeframe for forward-looking analysis; and
- plurality and other regulatory measures.

#### Defining the relevant audiences for the proposed acquisition

- 2.14 In relation to the audiences served by the merging parties, (which includes readers<sup>37</sup>), the Act gives us a wide discretion to consider them all together, separately, parts of them or in groups, as we consider appropriate<sup>38</sup>.

- 2.15 In this case we consider that relevant audiences should be defined according to:

- Content types: Parliament did not define specific content genres as being important to plurality. We need to consider which content types are most relevant to the proposed acquisition and plurality.

<sup>35</sup> See e.g. responses from 38 Degrees, Campaign for Press & Broadcasting Freedom paragraphs 4.1 to 4.3 and 5.1, NUJ pages 3 and 4, Robert Beveridge page 2 and Prof Steven Barnett page 6.

<sup>36</sup> Competition Commission Report on the Acquisition by BSkyB plc of 17.9% of the shares in ITV Plc sent to Secretary of State (BERR) 14 December 2007, ("Competition Commission"), paragraph 5.15.

<sup>37</sup> Section 58A(8) of the Act.

<sup>38</sup> Section 58A(6) and (7) of the Act.

- **Geographical location:** the audience affected by the proposed acquisition may be UK-wide or confined to particular geographical areas. This depends primarily on the geographical scope of the activities of the media enterprises involved in the transaction.
- **Media platforms:** audiences should also be defined according to the media used to access relevant content types provided by the merging parties.
- **Sub-groups:** in defining audiences we have also had regard as to whether particular sub-groups (for example according to age, socio-economic groups, ethnicity or other criteria) may be more affected than others by the proposed transaction.

2.16 Section 3 of this report discusses our audience definition.

### Media enterprises

2.17 For the purposes of this assessment a "media enterprise" consists in or involves broadcasting or the supply of newspapers<sup>39</sup>. Broadcasting means, very broadly, the provision of radio and television services<sup>40</sup>. A "newspaper" is a daily, Sunday or local newspaper circulating wholly or mainly in the UK or part of the UK<sup>41</sup>. However, media enterprises typically publish content online, reflecting the public's growing access to and popularity of the internet. When we are considering the "sufficiency" of plurality of media enterprises, we have had regard to the content they, and others, publish online.

2.18 In many of the representations we received, stakeholders have commented on the role of the internet, including online news providers who are not also UK TV news broadcasters or newspaper groups. In terms of the Enterprise Act, these are not defined as media enterprises. However, we consider the internet and wider online news provision to be relevant in any consideration of the sufficiency of plurality in the provision of news and current affairs and we have taken it into account.

2.19 Some representations submitted that wholesale news provision also falls outside the scope of the public interest consideration. As noted by the Competition Commission, in providing wholesale news to channels and publishers, both wholesaler and channel operator share some degree of editorial influence.

*"Within the strategic framework provided by the channel operator, the news provider (e.g. ITN, Sky News) is responsible for day-to-day editorial control, such as selecting the stories to be presented on a given bulletin and the way in which they are to be presented. The channel operator remains ultimately accountable (including to the regulator) for the news that is presented on its channels".<sup>42</sup>*

2.20 Sky's provision of news ('Sky News') to other media enterprises may not, of itself, bring Sky within the definition of "media enterprise" for the purpose of the statutory test. However, it is relevant to the question of the contribution made by those other media enterprises to plurality and therefore to the degree of any concerns arising from the proposed transaction. In any event, Sky is a "media enterprise" and it

<sup>39</sup> Sections 58A(1) and 58A(2) of the Act.

<sup>40</sup> Services for which a Broadcasting Act licence is required, see section 44(9) of the Act.

<sup>41</sup> Section 44(10) of the Act.

<sup>42</sup> Competition Commission, 2007, par 5.55 (c) and (d).

Report on public interest test

indirectly serves a variety of audiences besides its retail audiences, through wholesale news provision.

- 2.21 Typically, while national news outlets may source news from upstream providers like news wires, the national news outlet generally retains editorial control and plays a significant role in shaping the position and tone of their output. This is qualitatively different from wholesale news provision by ITN and Sky News to TV and radio retailers, the scope of the latter to make day-to-day editorial decisions on the content is far smaller.
- 2.22 In the analysis which follows, we present data on the proposed transaction both with wholesale content provision included, and with it excluded. In considering wholesale content provision, we have only included those wholesalers who typically provide a refined product in relation to which there is little scope for editorial adjustment by the retailer. This means we have included ITN and Sky News, but excluded, for example, the news wires.

Control of media enterprises and assessing the effects of any change on plurality

- 2.23 Ofcom's consideration of plurality takes into account the fact that News Corp already holds approximately 39.1% of Sky, noting the proposed acquisition would move it to having full control. In Sky/ITV, the Court of Appeal determined how we should approach a situation like this within the framework of the Enterprise Act 2002 (the "Act").
- 2.24 Our starting point is that the proposed acquisition reduces the number of persons having control of media enterprises<sup>43</sup>. Full control will allow News Corp to do a number of things it cannot do at present, for example, to take decisions which are in the exclusive commercial interests of News Corp.
- 2.25 However, the Court of Appeal has made it clear that in order to assess plurality and sufficiency of plurality, it is right to look not just at the number of persons having control, but also at the range<sup>44</sup> of persons having control, before and after the transaction. We must also "*take into account the actual level of control exercised and exercisable over a relevant enterprise by another*" and make an assessment which is qualitative not quantitative<sup>45</sup>.
- 2.26 In this report we have categorised these considerations under number and range, and included an assessment of the sources of news and current affairs available to consumers.
- 2.27 In addition, we believe a consideration of the relative 'ability to influence' of media enterprises, particularly evidenced by audience share, reach and trust, is important to any assessment of the effect of the proposed acquisition on plurality. This is because, as the DTI guidance outlines, what constitutes a sufficient number of owners controlling media enterprises in a given case may be affected by the relative audience shares that these enterprises hold<sup>46</sup>. Should a transaction increase significantly the ability of one media enterprise to influence relative to others, this would suggest a greater concentration affecting sufficiency of plurality.

<sup>43</sup> Section 58A(4) of the Act, see also Court of Appeal at paragraph 121.

<sup>44</sup> In our report, we use range to cover the concepts of 'range and variety' – see Court of Appeal paragraph 90

<sup>45</sup> Sky/ITV, at paragraph 121.

<sup>46</sup> DTI Guidance: the Enterprise Act 2002: Public Interest Intervention in Media Relevant merger situations, May 2004, paragraph 7.10

### Assessing external and internal plurality

- 2.28 In carrying out this assessment, we adopt the same approach as the Competition Commission did in Sky/ITV. We look at the range of opinions and views across the various groups of media enterprises (*external plurality*), and at the range of opinions and views within a group of media enterprises (*internal plurality*).

### The timeframe for forward-looking analysis

- 2.29 We noted that representations made by interested parties were concerned with both effects arising directly by virtue of the transaction taking place, but also with effects of the acquisition considered in a wider context of market evolution. In our analysis we have sought to make a distinction between these.
- 2.30 Section 4 of this report discusses what we refer to as a *static analysis* of the effects of the proposed acquisition. This focuses on short-term effects on plurality that would arise directly from the transaction.
- 2.31 Section 5 illustrates our *dynamic analysis*. This considers the possible effects on plurality in a forward-look view of the market, considering possible changes to plurality affected by the transaction over a period of time.

### Plurality and other regulatory measures

- 2.32 The public interest consideration is one of a number of regulatory mechanisms which can have a bearing on plurality.
- 2.33 Parliament has previously put in place media ownership rules for television, radio and newspapers. Ofcom has a statutory duty<sup>47</sup> to undertake a review of these rules every three years. Although the purposes of the media ownership rules are similar to those of the public interest consideration, the scope of the media ownership rules is narrower, focusing in particular on ownership of Channel 3 licences alongside other media outlets.
- 2.34 Ofcom's Broadcasting Code contains impartiality provisions, requiring that news is reported with due accuracy and presented with due impartiality<sup>48</sup>. For example, views and facts must not be misrepresented. Views must also be presented with due weight over appropriate timeframes. We consider linkages between these regulations and the effect of the proposed acquisition on plurality in Section 5 of this report.
- 2.35 Plurality is distinct from competition considerations and therefore competition policy. Parliament has acknowledged the role that competition law plays in protecting consumer interests where concentrations of market power are concerned but such a framework alone would not guarantee plurality<sup>49</sup>.
- 2.36 A parallel but distinct review of any competition issues resulting from the proposed acquisition is being conducted by the European Commission<sup>50</sup>.

<sup>47</sup> The Public Bodies Bill proposes to amend the Communications Act 2003 to remove this duty.

<sup>48</sup> Section 5 of Ofcom's Broadcasting Code, which broadcasters are required to comply with under the terms of their licences (<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/impartiality/>)

<sup>49</sup> See for instance Hansard HL Debate, 2 July 2003, c 913, and Hansard HL Debate, 5 June 2003, c 1435

<sup>50</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1767&type=HTML>

### Section 3

## Audience definition

3.1 In considering what audiences are relevant for this test we have focused on UK-wide audiences for cross-media news and current affairs including TV, radio, newspapers and the internet. The paragraphs below set out our thinking in relation to the constituent elements of this audience definition, as set out in section 2:

- Content types
- Geographical location
- Media platforms
- Subgroups

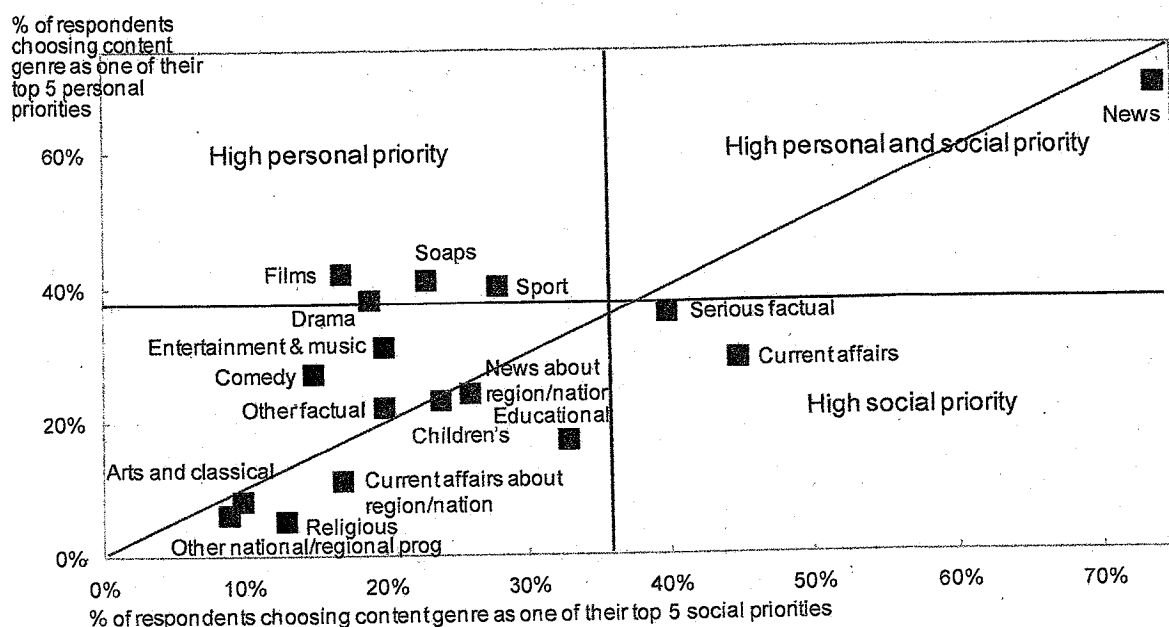
### **Content types: news and current affairs**

3.2 Representations from merging parties and third parties focused on the provision of news content. This is consistent with the approach we took in the Sky/ITV case in 2007, where we concluded that Parliament's focus on how media enterprises influence opinion and set the political agenda suggested that news was the most important content type. Within news we include international, national and regional news stories.

3.3 Other categories of content can also be relevant to the public interest consideration. In broadcasting, the term 'current affairs' relates to programmes providing in-depth discussions of current events of particular political, economic or social importance. These programmes play an important role in providing consumers with information and analysis about society, and therefore in the formation of public opinion. Previous Ofcom research highlights that 45% of consumers chose current affairs as one of their top 5 priorities for the main 5 TV channels in terms of social importance. This placed it in second place behind news (74% of respondents chose news as one of their top 5 social priorities).



**Figure 4 - Mapping social and personal importance for content genres on main TV channels**



Source: PSB Review survey Q29 and Q30 2,260 interviews with UK adults aged 16+, October - December 2007

- 3.4 In the Sky / ITV case, the Competition Commission focused its analysis on national news, but it also acknowledged that genres such as current affairs were connected with the formation of public opinion.
- 3.5 Newspapers are not solely devoted to the reporting of news, but also provide content based on in-depth discussions and opinionated commentary. Representations made to us have highlighted the importance of these features in informing and influencing opinions and therefore contributing to democracy<sup>51</sup>.
- 3.6 In TV and radio broadcasting current affairs programming provides content that is to some extent comparable to the features of newspapers discussed above. In the context of our cross-media analysis for this case, we believe that current affairs broadcasts are relevant to our assessment.
- 3.7 Our content type definition therefore uses the terms 'news and current affairs' to refer to programmes and articles provided across all the relevant media platforms that inform the public and contribute to democracy through the reporting, discussion and commentary of current events. As a result, we have only considered the Sky News channel in this analysis, as opposed to other factual channels carried on the Sky platform that could have some current affairs related content (for example National Geographic or the History channel). We have also excluded sports news programming.

### Geography: UK wide audiences

- 3.8 The two parties' main focus for news and current affairs within the UK is the provision of news and current affairs to a UK wide audience, with little provision of news at the

<sup>51</sup> Sky submission, Slaughter & May, NUJ, Enders

Report on public interest test

regional or local level. We therefore believe that the relevant geographic audience for the public interest consideration is UK-wide.

- 3.9 On TV, we have considered all national TV news and current affairs providers. On radio, we have considered station groups that have national or near-national coverage. This includes all national analogue licensees, but also groups like Bauer Media that, through a network of local stations, achieve near-national coverage and a substantial audience share. In addition, we note that many of the local stations provide news at a local level that is sourced from a single, UK-wide provider (IRN).
- 3.10 We note that, within newspaper and online platforms, there is a mix of UK-wide and regional titles and news provision. Amongst online services, international titles also feature as a prominent source of news for consumers. Both regional and international titles and channels can make a contribution to public opinion and therefore the democratic process. However, UK-wide news and current affairs providers can be expected to have a wider reach and greater relevance to UK democracy given a UK specific agenda.
- 3.11 We have excluded from our analysis regional newspaper groups because they do not provide news to a UK-wide audience, and will have lower circulations and readerships for individual titles compared to national newspaper groups. Some regional titles, notably within newspapers, may have a reach large enough to influence nation-wide opinion. These include publications like the Evening Standard in London and regional variations of Metro. Both are free papers, and one an evening paper. Our investigation has not afforded us the time to examine in detail how far such publications may contribute to plurality nation-wide. We have therefore excluded them from our audience definition. If there is a subsequent reference to the Competition Commission, this may be an area for further analysis.<sup>52</sup>
- 3.12 We also note that press titles that are only available in the devolved nations (Scotland, Wales and Northern Ireland) will influence public opinion in those nations, and hence contribute to the democratic process. However, we have received no submissions and found no evidence that suggests audiences in the nations would be more significantly affected by the proposed acquisition than the UK-wide audience.
- 3.13 These factors combined suggest that there is no need to define a sub-national audience for the purposes of our assessment of the public interest consideration.

**Media platforms: cross-media**

- 3.14 Prior to the transaction News Corp provides news and current affairs in newspapers and online, whilst Sky provides news and current affairs directly on TV and online, and indirectly over radio as a result of wholesale news provision to commercial radio through a contract with IRN. The only areas of overlap are therefore in relation to online audiences.
- 3.15 Post-acquisition, the two parties combined would provide news and current affairs directly on TV, in newspapers and online; and indirectly over radio. With the exception of online, neither News Corp nor Sky is both present on a single platform.

---

<sup>52</sup> Our market research included regional and local news providers within the questions asked as it was scoped before a final decision was taken on the audience definition. Local and regional providers referred to by consumers are therefore included in results under 'other'. This has the effect of diluting the share of references for the nation-wide news providers. For the reach of news providers, it has no effect.

- 3.16 We have not considered the effect of the transaction on the plurality available to audiences for online news only as these are not defined as media enterprises in the Enterprise Act. We have included online within cross-media audiences for the reasons outlined in paragraph 2.18.
- 3.17 We therefore consider that relevant audiences should be considered cross-media, including TV, newspapers, radio and online.

### **No audience subgroups**

- 3.18 We have analysed consumer markets at the UK-wide level by age, socio-economic group and by the news title that consumers claim to be their 'main' source of news. As we illustrate below in 4.56 to 4.58, we note that there are some variations in news consumption among age and socio-economic groups, especially in relation to the use of news sources on the internet, but we do not think these variances suggest a need to define sub-group audiences.
- 3.19 No representations suggested there were specific concerns for ethnically defined sub-groups. Some concerns were raised about consumers who solely source news and current affairs from a combination of News Corp and Sky, but we note that this group is likely to be very small (see paragraph 5.109 and 5.112).
- 3.20 Our view is therefore that no particular sub-groups would be more significantly affected than the population as a whole as a result of this proposed acquisition. We do not consider there is a need to define separate audiences on the basis of geography, age, socio-economic group or ethnicity.

## Section 4

# The current situation

- 4.1 In this section we examine how audiences access and consume relevant content types within and across platforms as context for our advice and recommendations.
- 4.2 In considering the situation pre-transaction, we have had regard to the following issues:
- how news is gathered;
  - the importance that consumers attach to different media platforms when sourcing news;
  - how consumers access and consume news and current affairs within media;
  - how consumers access and consume news and current affairs across TV, newspapers, radio and online;
  - how consumers rely on different and multiple sources, within and across-media; and
  - consumers' trust and critical evaluation of the news they consume.
- 4.3 Annex 1 discusses the data sources used in this report

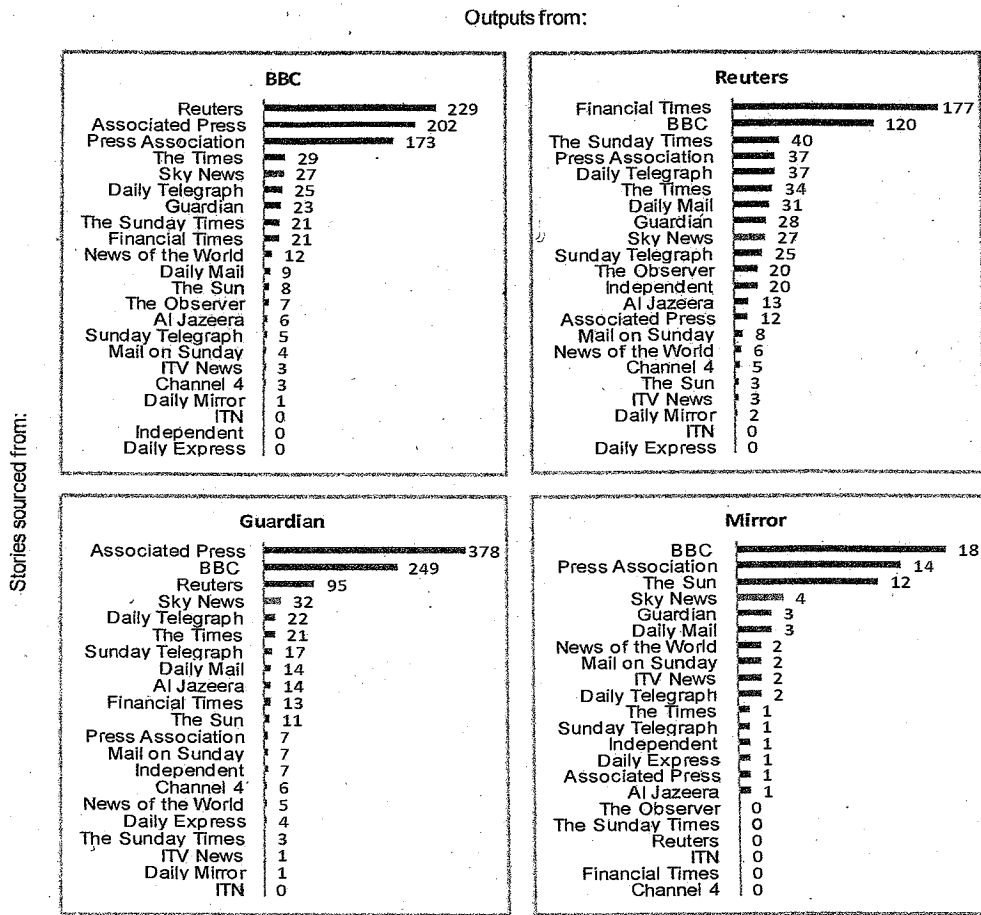
## How news is gathered

- 4.4 Today, consumers are provided news content by channels and publishers from two sources: content produced in-house (retail content); and content sourced from third parties (wholesale content). For example, ITV and Channel 4 source news content and programming from ITN and Five from Sky. ITN and Sky are acting as 'wholesale' news providers, while ITV, Channel 4 and Five can be considered as the 'retailer'. The BBC and national newspaper groups on the other hand produce a significant amount of news content in-house, fulfilling both wholesale and retail roles.
- 4.5 However, this is a simplification of the actual process for news gathering and aggregation. In practice, news providers source stories and content from a range of areas, including for example news wires. For example, News Corp's submission set out the range of sources for news stories used by different media providers, as illustrated in Figure 5 below<sup>53</sup>.

<sup>53</sup> The citations analysis was submitted to Ofcom by News Corp and undertaken by Perspective. It is based on stories tracked by Google News for 6 month period 1 June 2010 to 30 November 2010 that were available at 8-17 December 2010. The following stories / cross references were excluded:

- those about a media outlet rather than citing it (eg coverage of the BBC Licence Fee settlement was not counted as a citation of the BBC);
- historically referenced stories (e.g. quotes in a biography); and
- stories from newspaper reviews / gossip columns.

**Figure 5 - Original sources of news stories appearing in outputs of a selection of media enterprises (BBC, Reuters, Guardian, Mirror), June to November 2010**



Source: News Corp submission - Perspective report, *Setting the news agenda*, 15 December 2010

- 4.6 [X]. We consider that news agencies play an important role in news gathering, but that whilst this gives them some ability to influence the news agenda, there are a number of other sources of influence.
- 4.7 A source may be influential in that it “breaks” stories, for example, by carrying out its own investigation. Alternatively, a source may be important because it is capable of bringing a story wide publicity. A story broken by a regional news outlet may be picked up by a national one. A story given enough coverage by an outlet with enough influence may become so important that all news outlets must cover it or lose credibility. All these roles matter in any consideration of plurality.
- 4.8 In the time available to us we have not been able to assess the relative importance of these different roles. Overall, our view is that the ability to influence opinion is held mainly by those media enterprises that can exert meaningful editorial control over the news and current affairs output of media enterprises. Therefore, and as noted above, we have included wholesale news providers in our analysis, but not the content provided by upstream suppliers of individual stories.

**Main sources of news and current affairs by medium**

- 4.9 When asked to identify their main source of UK news, consumers do not appear to attach equal weight to all platforms. Ofcom’s media tracking study has consistently

## Report on public interest test

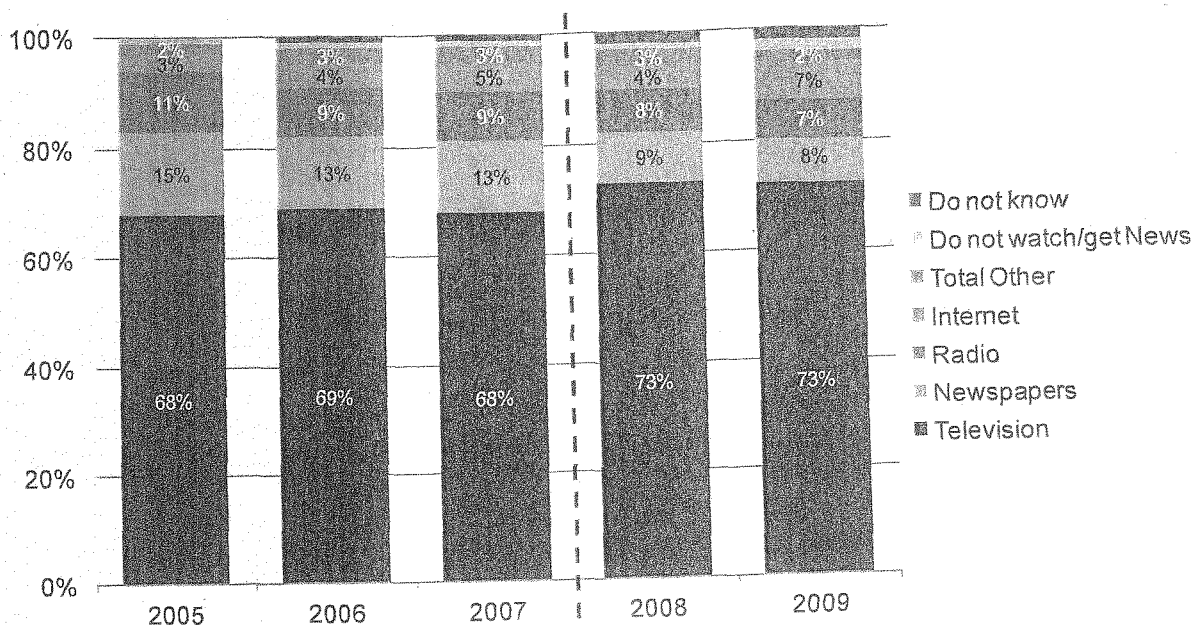
identified the television as the most popular 'main' source of UK news for a large proportion of the UK adult population aged 15+ (73% of all respondents, according to our media tracking study, 2009). Older people are more likely to cite the television as their main news source, as are people in the C2DE socio-economic group. Newspapers are cited by a further 8% of the UK adult population as their main source, with radio at 7% and online 7%<sup>54</sup>.

- 4.10 Our media tracker research suggests that the proportion of the population nominating online as their main UK news source looks to have risen over time (up by four percentage points from 3% in 2005), probably reflecting the growing take-up and access to broadband services across the UK. The results suggest that during that same period TV has maintained or even enhanced its importance and that the growth in online to date appears to be mainly at the cost of newspapers, and radio.

---

<sup>54</sup> Our recent cross media audience research (CMAR) showed a similar pattern in the proportion of people naming each media platform as their main source of news, although actual figures differ. The results were 63% for television, 14% for newspapers, 10% for radio and 10% for total internet. Differences in results between the two surveys are likely to be due to a range of methodological differences including: (1) Question asked: main source of UK and international news and current affairs (CMAR), main source of UK news (media tracker). CMAR splits out internet on computer and internet on mobile phone whereas Media tracker did not. (2) Time period: November 2010 (CMAR) April and October 2009 rolled data (media tracker). (3) Sampling: CMAR quotas for age ranges including 65+, and starts at age 16, and covers Great Britain, media tracker quotas for age ranges including 55+, and starts at age 15, and covers UK. (4) Question order: CMAR questions focused solely on UK and international news and current affairs and were the first questions asked of respondents, the media tracker question is asked towards the end of a 40 minute survey on a range of media related subjects, including questions on main source of local news.

Figure 6 - Main source of news by platform - 2005-2009



Source: Ofcom Media Tracker. Base: All UK Adults aged 15+. 'Total Other' = Teletext, Magazines, Talking to other people, Other. Note: data is not fully comparable over time except for 2009 vs 2008 due to method changes

## News and current affairs consumption on individual media

### Television

- 4.11 Our recent cross-media audience research (2010) found that 79% of adults stated that they regularly use TV as a source of news<sup>55</sup>, with 29% of regular news consumers saying that they source their news only from TV on a weekly basis. TV therefore represents a particularly important source of news to a large proportion of the population.
- 4.12 TV viewing of national news, as classified on BARB, has remained fairly constant at around 20 minutes per day per UK adult aged 16+ over the last few years. There has been a slight decline since 2002, when the average daily viewing was 20.9 minutes per day, compared to 20.0 minutes per day in 2009.<sup>56</sup>
- 4.13 The vast majority of news in the UK (at the retail level) is provided by five media owners, BBC, ITV, Channel 4, Five and Sky. In addition, there are a number of specialist news channels such as France 24, Euro News and Al Jazeera, Fox News and CNN. However, these specialist news channels do not have a UK news agenda and are only watched by a small minority of audiences<sup>57</sup>

<sup>55</sup> Respondents were provided a list of different media types and then asked the question "From the list below, please tell me which of these you use regularly for UK/International news and current affairs, by regularly I mean at least once a week."

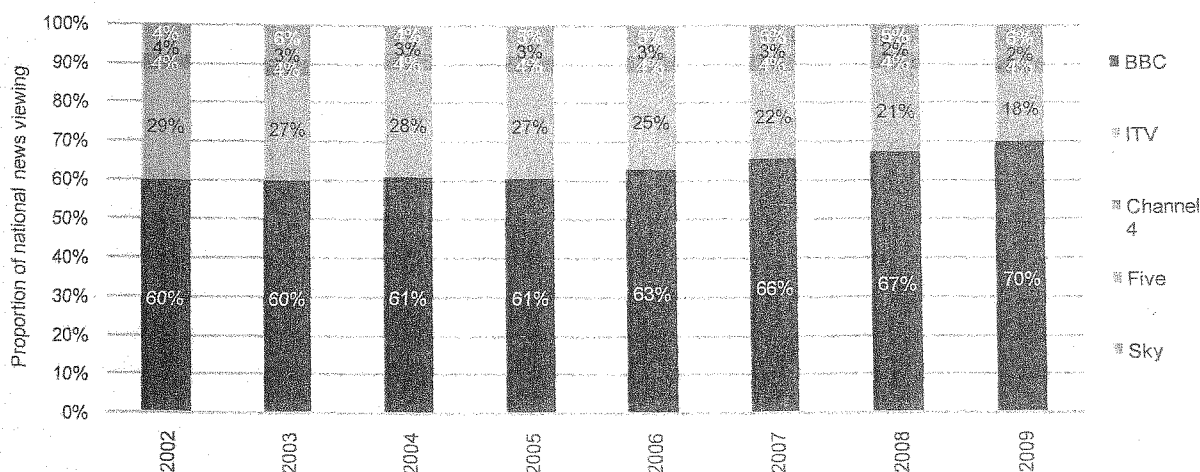
<sup>56</sup> Source: BARB, Network plus.

<sup>57</sup> With the exception of Euro News and Fox News, the remaining specialist news channels are not measured or reported by BARB. We estimate these non-BARB reported channels represent a very small proportion of total national/international news viewing. BARB Network plus figures for 2009 show that Euro News achieved a total share among all UK adults 16+ of 0.01% and Fox News

Report on public interest test

- 4.14 At the wholesale level, both Sky and ITN have contracts to supply news content to Five and ITV / Channel 4 respectively. As discussed above, we have therefore considered the impact of the transaction at both the wholesale (news content provider)<sup>58</sup> and retail (news broadcaster)<sup>59</sup> level.
- 4.15 Figure 7 below provides a breakdown of the audience share for national TV news viewing (based on the BARB subgenre of national and international news) for each of the five main providers, according to BARB<sup>60</sup>. At the retail level, there are five providers: the BBC is the most watched provider (70%), ITV second (18%), followed by Sky with 6% share (based on Sky news channel), Channel 4 at 4% and Five at 2%.
- 4.16 This analysis also shows that, over time, the BBC share of news viewing has increased, while ITV's share has declined and Sky's share of news viewing has remained relatively stable. At the wholesale level, there are only three principal providers of TV news content. The BBC is the leading provider of TV news, accounting for a 70% share of national news viewing, ITN is second with 22% and Sky is third with 8% (Sky news channel and Five combined) in 2009.

Figure 7 - Share of viewing to 'national and international news' on TV by media retailer, 2002 - 2009



Source: BARB, All adults (16+), Network Plus, 2002-2009. National News genre. BBC = BBC One, BBC Two, BBC News; ITV; C4; Five; Sky = Sky News channel.

- 4.17 According to BARB, on a weekly basis, 38.6 million adults (79.4% of the adult population, 16+) watched at least 3 consecutive minutes of television news in October 2010.

achieved a total share of 0.02%. Total minutes viewed per day for Euro News channel overall averaged at 0.02 per adult and 0.04 for Fox News.

<sup>58</sup> That is, Five's audiences will be attributed to Sky, and Channel 4/ITV audiences to ITN.

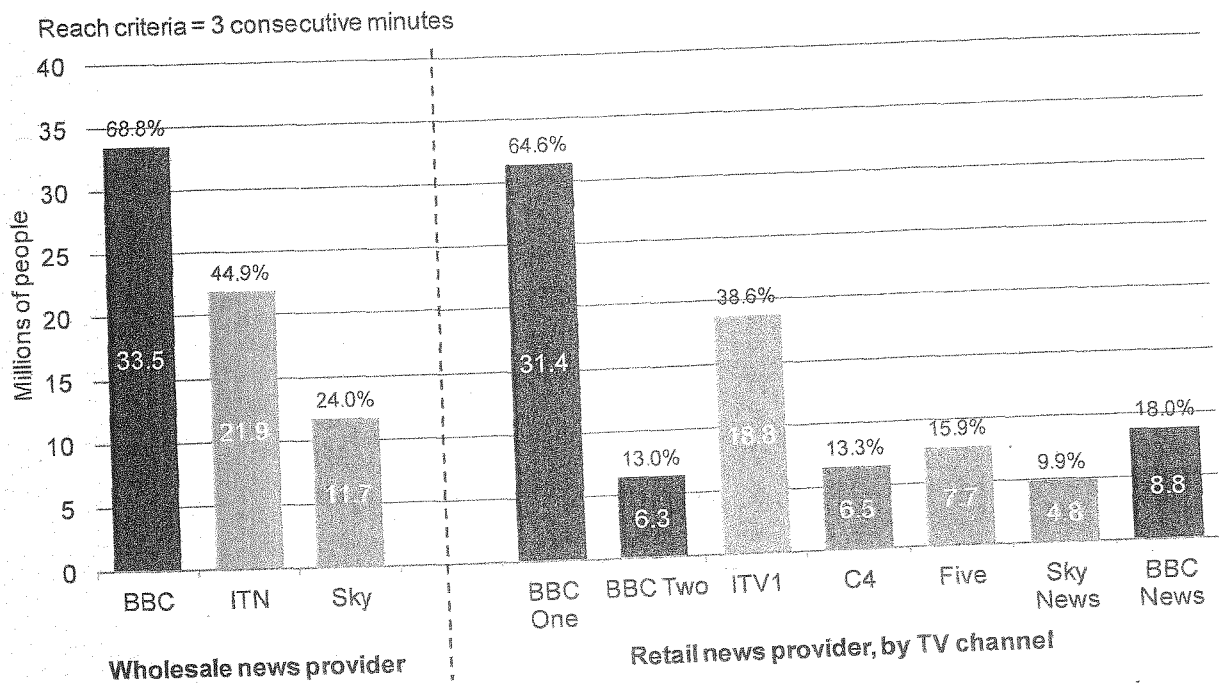
<sup>59</sup> That is, audiences will be attributed to Five, Channel 4 and ITV as separate media enterprises.

<sup>60</sup> This analysis excludes 'other' viewing to the national and international BARB subgenre, which represents less than 1% of the total genre from 2002 to 2009. In 2009 'other' news viewing represented 0.3% share of the total category. Fox News does not appear in this figure, as its schedule is not classified as news in BARB. Programme genre classification is optional.



4.18 In terms of audience reach<sup>61</sup>, the BBC continues to maintain a significant presence with 33.5 million adults (or 69% of the adult population) watching at least 3 consecutive minutes of news on a weekly basis in October 2010. At the wholesale level, ITN reached 21.9 million UK adults (45%) in a typical week in October 2010. At the wholesale level, Sky's news content reached 11.7 million (24%) adults (i.e. Sky news channel and Five news combined). Sky's reach was 4.8 million (10%) adults when considered at the retail level (excluding wholesale provision through Five).

Figure 8 - Average weekly reach for TV 'National News' (October 2010)



Source BARB, All adults (16+), All homes, October 2010. National News genre. Reach criteria = 3 consecutive minutes at least once in the week. Full weeks used. BBC = BBC One, BBC Two, BBC News; ITN = ITV1, C4; Sky = Sky News, Five.

### Newspapers

4.19 Our cross-media audience research (2010) found that 44% of adults say that they regularly use newspapers as a source of news, with 6% of regular news consumers only sourcing their news from newspapers on a weekly basis.

4.20 Newspaper providers have, over the last decade, experienced a decline in circulation for both daily and Sunday newspapers, with total national newspaper circulation falling from around 13 million for daily newspapers and 14 million for Sunday newspapers in 2000 to 10 million copies in 2009 for both daily and Sunday newspapers<sup>62</sup>. Newspaper readership is also in decline, with the number of people reading a Sunday title falling by almost 5% per annum over the nine years to 2009, while daily readership has fallen at an average annualised rate of almost 3% over the same period<sup>63</sup>.

<sup>61</sup> Reach is defined as any viewing to the national news genre for 3+ consecutive minutes, in this case on a weekly basis in the month of October 2010.

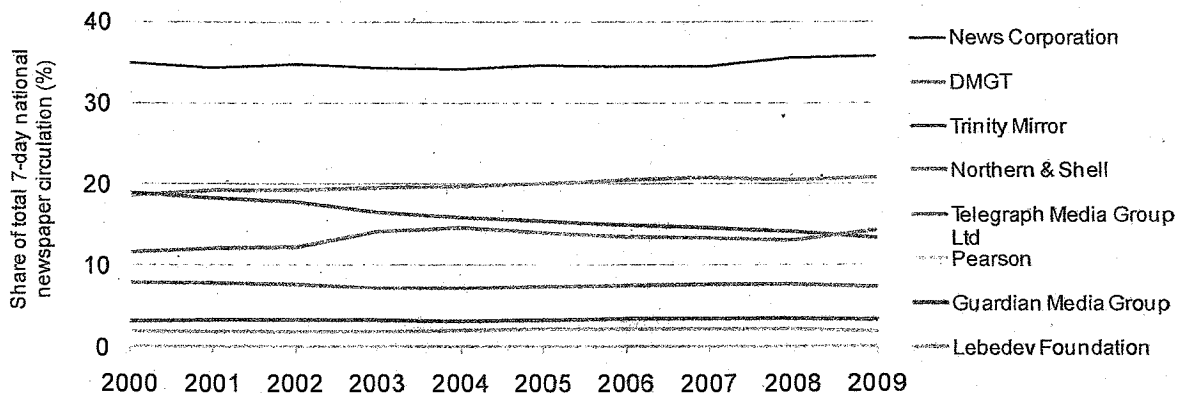
<sup>62</sup> Source: Audit Bureau of Circulations / MediaTel / Ofcom calculations

<sup>63</sup> Source: National Readership Survey / MediaTel / Ofcom calculations.

Report on public interest test

4.21 There are eight main providers of national newspapers, publishing 20 national daily and Sunday titles between them, accounting for 100% of total paid-for circulation<sup>64</sup>. As Figure 9 below demonstrates, News Corp has the largest national newspaper group; its titles, which include the Sun, The Times, The Sunday Times and the News of the World, account for over a third (35.7%<sup>65</sup>) of combined daily and Sunday national newspaper circulation. DMGT (Daily Mail) has the next largest share of the market by circulation (20.8%<sup>66</sup>), followed by Northern & Shell (Daily Express, Daily Star), with 14.2%<sup>67</sup>.

Figure 9 - National newspaper market share by publisher, 2000-2009



Source: Audit Bureau of Circulations / MediaTel / Ofcom calculations

Note: Publisher data is based on current ownership and is not retrospective. Excludes regional newspapers

4.22 The National Readership survey provides industry data on the readership of newspaper titles, in terms of Average Issue Readership (AIR). This is defined as anyone who has read or looked at a newspaper title for two minutes or more within the issue period of the newspaper. For example, for daily newspapers the respondent is asked if they have read a title yesterday. These results provide an equivalent metric to the television reach figures provided above in estimating the number of people who have read a particular title.

4.23 Figure 10 below shows that News Corp has the highest readership of all newspaper groups, with 14.5 million adults aged 16+ (or 29% of the adult population) reading at least one of their titles. News Corp's readership is approximately double that of DMGT (7.3 million, 14.8%) and Trinity Mirror Group (6.8 million, 13.9%), the second and third largest newspaper providers<sup>68</sup>.

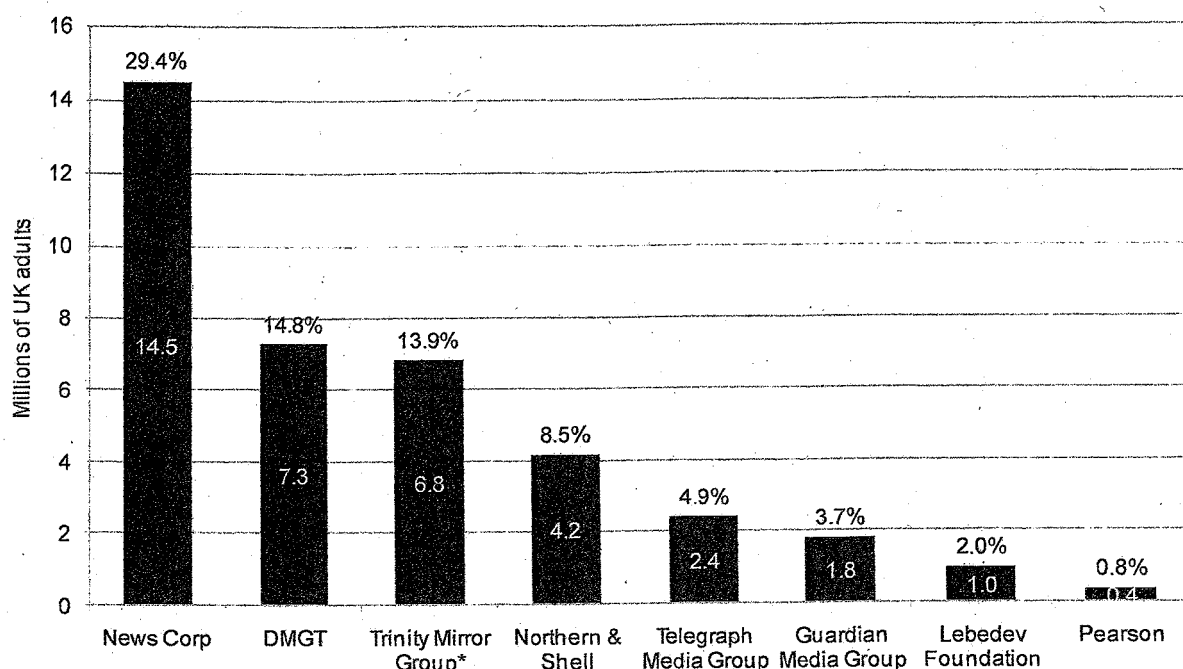
<sup>64</sup> There are a number of other newspaper titles in the UK, however, these have been excluded from our analysis as they have a regional or non-UK wide (e.g. Scottish) news focus. Four remaining national newspapers have also been excluded – Daily Sport, Saturday Sport, Sunday Sport and Racing Post – as they do not carry a material amount of national news.

<sup>65</sup> News International accounts for 34.8% of circulation for daily newspapers, and 41.3% of circulation for Sunday newspapers.

<sup>66</sup> DMGT account for 20.9% of circulation for daily newspapers, and 20.1% of circulation for Sunday newspapers. ABC/MediaTel/Ofcom calculations

<sup>67</sup> Northern & Shell account for 15% of circulation for daily newspapers, and 17.5% of circulation for Sunday newspapers. ABC/MediaTel/Ofcom calculations

<sup>68</sup> National Readership Survey 2010 - (October 2009 - September 2010). Based on net average issue readership, 6 day period for daily titles.

**Figure 10 - Readership for national newspaper groups**

Source: Ofcom / Kantar Media analysis based on NRS data 2010 (October 2009 - September 2010). All adults 16+.

Note: Daily and Sunday national newspapers only, excluding regional newspapers. Net reach is based on average issue readership (AIR). For daily papers this is 6-day AIR. Trinity Mirror includes Daily Record in Scotland.

### Online services

4.24 Our cross-media audience research (2010) found that 26% of adults regularly use the internet as a source of news<sup>69</sup>. Internet take-up, currently at 76% of UK homes, continues to grow<sup>70</sup>, with an increasing number of people using the internet as a source of news (as displayed in Figure 6 above).

4.25 The internet is the only platform on which both Sky and News Corp directly overlap. As Figure 11<sup>71</sup> below shows, News Corp is currently the fourth largest online news

<sup>69</sup> This is comprised of 24% for internet on computer and also 5% for internet on mobile phone, which when combined and de-duplicated is 26%.

<sup>70</sup> Ofcom Consumer Experience Report 2010, p. 23-24.

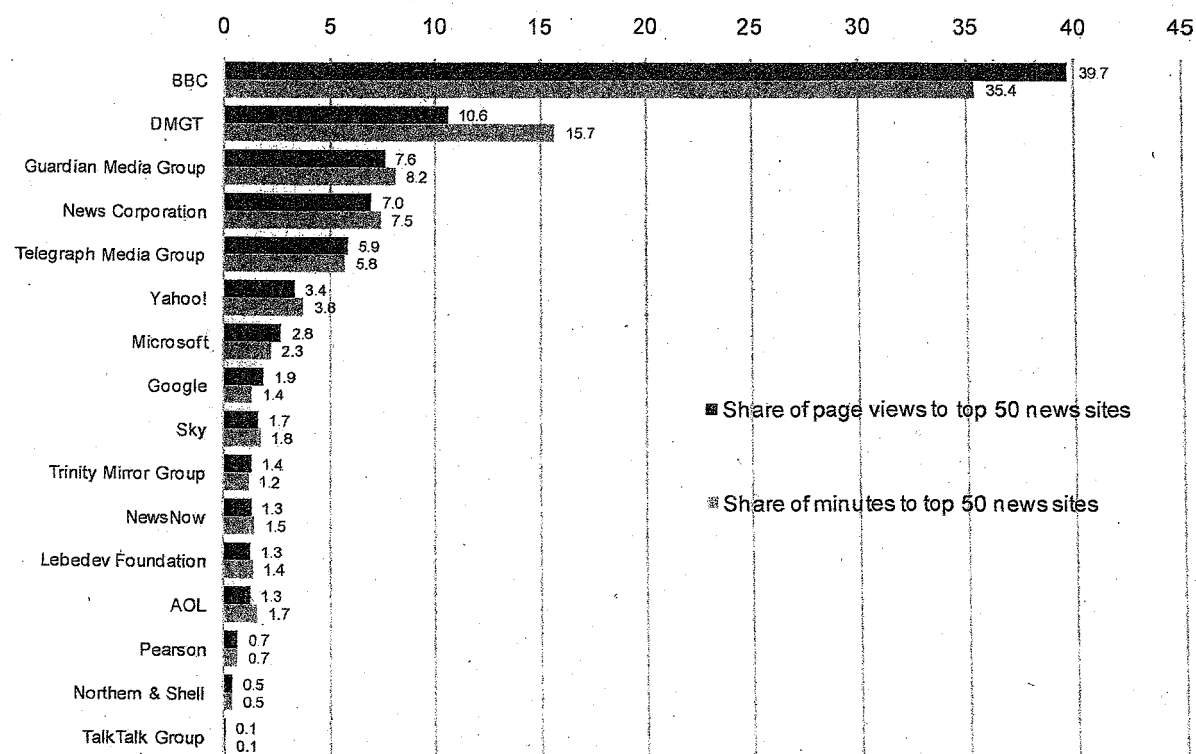
<sup>71</sup> Our figures for the share and reach of each owner exclude regional and international titles for each owner. However such titles are included in the total number of page views and minutes from which the percentages are calculated (i.e. the denominator includes page views and minutes to regional/international sites). This has the effect of understating the share and reach figures for media owners who have regional and international titles. Including international and regional titles in our reach and share figures would have the following effects:

- DMGT's share of minutes increases from 15.7% to 18.7%, and its reach from 9.1% to 11.8%.
- GMG's share of minutes increases from 8.2% to 8.5% while its reach increases from 7.4% to 7.8%.
- News Corp's, share of minutes increases from 7.5% to 7.8% when international titles and the Scottish Sun are included, while its reach increases from 7.7% to 8.2%.
- Other media providers including Trinity Mirror and The Lebedev Foundation also show slight increases in population share and reach when regional/international titles are included.

Report on public interest test

provider in terms of both page views (7.0%) and minutes (7.5%), while Sky currently is tenth (with 1.7% and 1.8% for page views and minutes respectively). The BBC leads the usage of online news sites with a 39.7% share of page views and 35.4% share of minutes of use.

Figure 11 - Share of Page Views and Minutes for Top 50 News Sites by wholesale news provider (%)



Source: Nielsen, home and work panel, applications included, all people aged 2+, October 2010.<sup>72</sup>

4.26 Nielsen provides a standard metric of population reach, which is defined as the proportion of the total UK population aged 2+ who have visited a site. In terms of population reach, News Corp was the third largest internet news provider, reaching 4.6 million individuals (or 7.7% of the UK population, aged 2+<sup>73</sup>) with its online news content in October 2010, while Sky reached 1.6 million individuals (2.6% of the population). The largest provider was the BBC, reaching 12 million individuals (19.8%), followed by DMGT reaching 5.5 million individuals (9.1%). This data shows

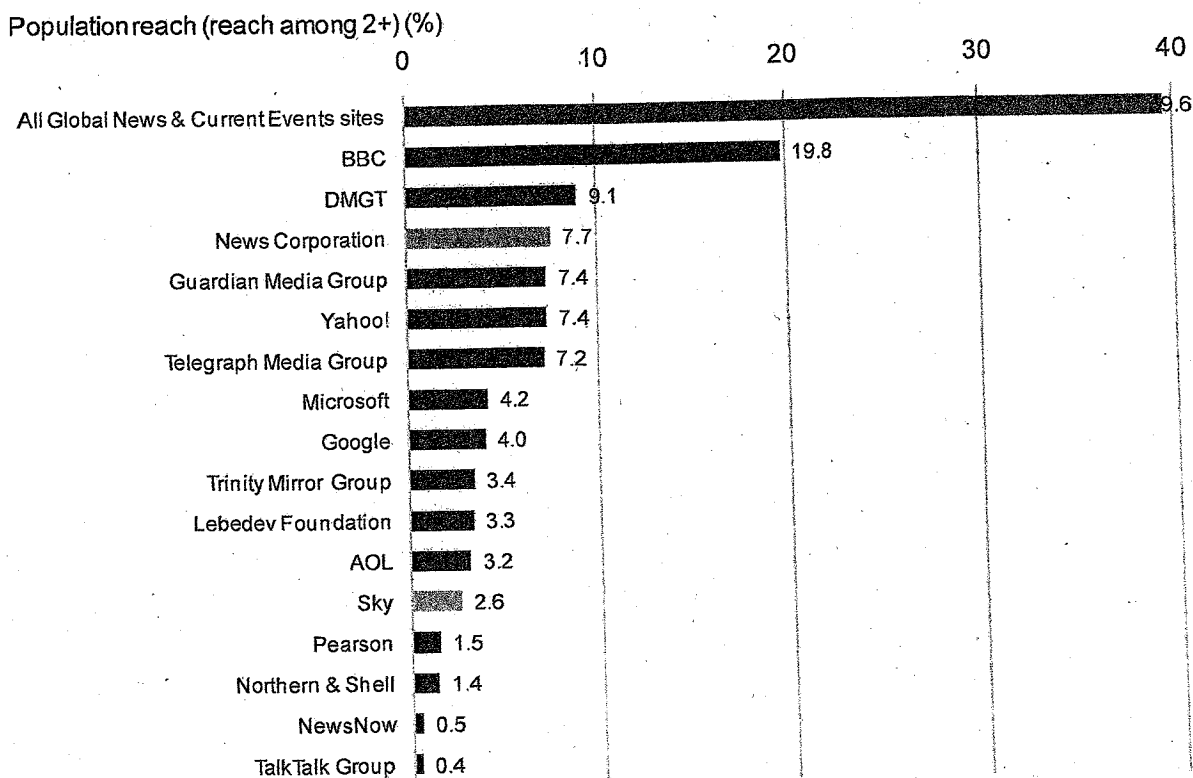
- The chart would also include some standalone regional or international providers such as the New York Times and Gannett.

<sup>72</sup> Market share calculated as a percentage of the top 44 sites in Nielsen's 'Current Events & Global News' subcategory combined with six other relevant sites (FT.com, Wall Street Journal, Reuters, Metro.co.uk, Northcliffe Newspaper Group, Archant Regional Network). Nielsen is investigating a decline in its internet use data around duration metrics and the potential impact of this on unique audience metrics. Consequently, until these investigations are concluded, Nielsen internet data for 2010 is likely to represent a lower bound and should be treated as indicative only.

<sup>73</sup> Data collected by UKOM/Nielsen is based on a total UK population aged 2+. This differs from the data used to assess other platforms in this report which are based on the adult population 16+. As a result, the percentage of population figures quoted for online reach will be proportionally lower than those quoted as percentage of the adult population for other platforms.

a greater balance in the relative reach of the nation-wide newspaper providers compared to print news.

**Figure 12 - Online Population Reach for Top 50 sites by Owner (%)**



Source: Nielsen, home and work panel, applications included, all people aged 2+, October 2010.<sup>74 75</sup>

- 4.27 In its submission, News Corp argued that the high degree of fragmentation in the online news sector ensures plurality in online news provision. The FTI Report, attached to the News Corp submission, states that "Online has hundreds (and potentially millions) of news voices (and media, formats, and services). Moreover, there are several other players in this space, primarily the BBC, that enjoy a much stronger market position than Sky and News Corporation".
- 4.28 We have found that there is a multitude of internet sites providing users with access to news content online. However, the extent to which these internet news providers add to plurality over and above the plurality which is delivered via other platforms is less clear. For the most part, internet news providers tend either to have a presence on another platform already (e.g. TV, newspapers); are news aggregators (e.g. Google News. Yahoo); or do not have a UK focussed news agenda (e.g. New York Times).

<sup>74</sup> Nielsen is investigating a decline in its internet use data around duration metrics and the potential impact of this on Unique Audience metrics. Consequently, until these investigations are concluded, Nielsen internet data for 2010 is likely to represent a lower bound and should be treated as indicative only.

<sup>75</sup> This information is after The Times introduced a paywall. However, the way the information is collected, measurement is taken on access to the home page of news providers' sites, which does not sit behind a paywall for The Times. Since introduction of the paywall on The Times site, News Corp has reported numbers of consumers using its services.

## Report on public interest test

- 4.29 There is anecdotal evidence that the level of syndication of news on the internet is high<sup>76</sup>, suggesting that the majority of news stories reported by each individual site are essentially replicated from a small number of original news stories. Despite this, news aggregators may, to some extent, add to plurality by exerting a degree of editorial influence in deciding which stories are given prominence, and, in the case of aggregators, may increase users' exposure to multiple sources of news. This is explored in more detail in Section 5.
- 4.30 There is also evidence that multi-sourcing (where consumers source news from a range of providers within or across platforms) may be higher among consumers of online news than other platforms. The Perspective report submitted by News Corp included an analysis of Comscore data which found that the average online multi-sourcing among online news consumers was 3.46 sources within the platform<sup>77</sup>. The issue of multi-sourcing and its effect on the consumption of news is explored in more detail in paragraphs 4.59 to 4.80.
- 4.31 We note that higher levels of multi-sourcing online may be focused on specific demographics and socio-economic groups given the variations in online take-up and usage. Just under a quarter (24%) of UK households do not have access to the internet<sup>78</sup>. As noted earlier, 26% of adults say that they regularly consume news online<sup>79</sup>. However, only 6% of those aged 65 and over said that they consumed news online on a regular basis<sup>80</sup>. Within socio-economic groups, online news consumption is higher for those in ABC1 socio economic group (34%) than those in C2DE group (15%).

## Radio

- 4.32 Our cross-media audience research (2010) found that 32% of adults say that they regularly use radio as a source of news. Among regular news consumers only 3% say that they source their news only from radio. This compares to 29% who only source news from TV, 6% for newspapers and 5% for online. Furthermore, Ofcom's Media Tracker (2009) found that 7% of UK adults consider radio to be their main source of UK news. As a main source of news, radio appears to be relatively less important than some of the other media.
- 4.33 Sky does not have a retail presence in the radio sector; rather, it wholesales its news content to commercial radio providers. Following the awarding of the IRN contract to Sky in March 2009 (previously held by ITN), it now supplies news content to virtually all commercial radio stations in the UK.
- 4.34 According to RAJAR, nearly 46.8 million adults (aged 16+) listened to the radio on a weekly basis (5 minutes consecutive listening) in the third quarter of 2010. This

<sup>76</sup> Desk research from the Nieman Foundation at Harvard University found that of the 121 unique articles listed on Google News for one news item on February 20<sup>th</sup> 2010, only 13 (11%) had some amount of original reporting and only 7 (6%) consisted primarily of original reporting. (<http://www.niemanlab.org/2010/02/the-googlechina-hacking-case-how-many-news-outlets-do-the-original-reporting-on-a-big-story/>)

<sup>77</sup> National Readership Survey, BARB, Comscore, Perspective Analysis, in Perspective Report p33

<sup>78</sup> UK Internet Take-up is 76% of households, as published in our Consumer Experience Report (December 2010)

<sup>79</sup> Ofcom Cross-media audience research. Note: Regular defined as at least once a week. 24% for internet on computer, but also 5% for internet on mobile phone, which when combined and de-duplicated comes out as 26%.

<sup>80</sup> In addition, this figure was 36% among 16-24, 39% among 25-34, 32% among those aged 35-44, 29% among those aged 45-54, and 17% in the 55-64 age group.

equates to 90% of the UK adult population. RAJAR does not provide a breakdown of listening by programme type. However, we estimate that a large proportion of this listening is not to news content because news content is scheduled only periodically on radio networks.

- 4.35 As outlined above, the radio listening figures from RAJAR are based on listening to all radio, and are not specific to listening to news content. At the wholesale level, Sky is one of only two main providers of news content to radio listeners. The radio stations that it provides news to account for 43.6% of all radio listening<sup>81</sup>, with the BBC accounting for 54.2%, according to RAJAR. At the retail level, the BBC share of listening remains the same (54.2%) and is then followed by a range of smaller radio providers, most notably Global (16.6%) and Bauer (11.1%).

**Figure 13: Radio listening shares and wholesale provision**

<b>Group</b>	<b>Share of radio listening</b>	<b>News supplier</b>
BBC Network Stations	45.2%	BBC
BBC Local/Regional	9.0%	BBC
<b>Total BBC</b>	<b>54.2%</b>	
Global Radio (UK)	16.6%	Sky
Bauer Radio	11.1%	Sky
GMG Radio	4.1%	Sky
UTV Radio (inc. TalkSPORT)	3.3%	Sky
Absolute Radio Network	1.7%	Sky
Other commercial	6.8%	Sky
<b>Total Commercial</b>	<b>43.6%</b>	
Other listening	2.2%	
<b>Total other listening</b>	<b>2.2%</b>	

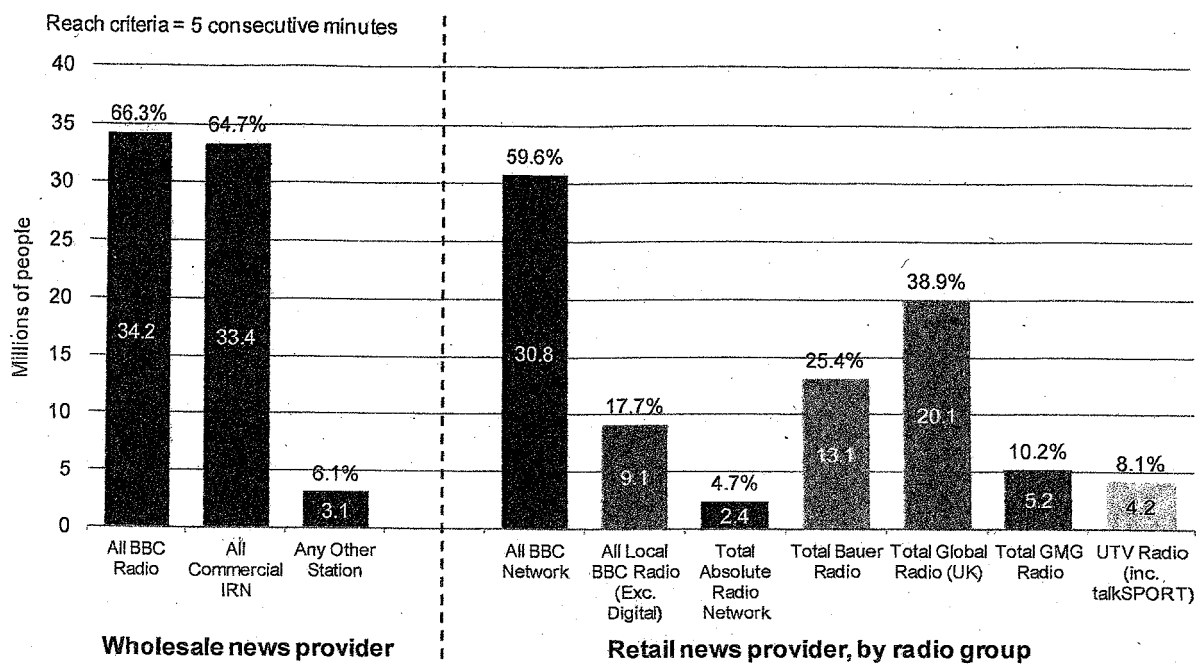
Source: Ofcom, RAJAR Q3 2010, all adults 16+

Note: Figures are for total listening, not radio news listening, as RAJAR does not provide genre breakdowns.

- 4.36 Figure 14 below sets out the proportion of adults aged 16+ who listened to at least 5 consecutive minutes of radio (audience reach) for each provider of radio news at both the wholesale and retail level. This demonstrates that, through its supply of news content at the wholesale level Sky has the potential to reach 33.4 million adults or 64.7% of the adult population. This compares to the BBC's reach of 34.2 million (66.3%) adults. It has not been possible to calculate reach on the basis of radio news listening alone, and the amount of national news broadcast will vary by outlet, it is likely that estimating reach on the basis of all radio listening overstates the level of reach achieved in respect of national news listening. No industry data is available to estimate the share or reach of radio news.

<sup>81</sup> As noted earlier, in the absence of data on radio news listening (as RAJAR does not provide genre breakdowns) we have used total radio listening when considering the relative positions of each media provider on the radio platform.

Figure 14 - Radio Average Weekly Reach – Q3 2010



Source: RAJAR, All Adults (16+), Q3 2010<sup>82</sup>. Note, this is not radio news listening, but all radio listening as RAJAR does not provide genre breakdowns.

Summary of platform by platform analysis

4.37 With a strong presence on three of the four media platforms (TV, Radio and online), the BBC is the largest and most far reaching provider of news and current affairs to consumers in the UK. While ITN and ITV are only present on two platforms (TV, online), they currently hold a strong overall position given their presence on TV (as the second largest provider) which is the most commonly used platform for news and current affairs consumption. Sky is present on three platforms at the wholesale level (two at the retail level) which includes the TV platform. As a result it achieves a relatively high reach in terms of proportion of the adult population. At the wholesale level, Sky also has a strong presence in the provision of news content to radio broadcasters. News Corp is currently present on two platforms (newspapers, online), and holds a strong position in respect of newspapers, achieving a reach double that of its nearest rival, DMGT. A number of other media providers are also present on one or two platforms.<sup>83</sup>

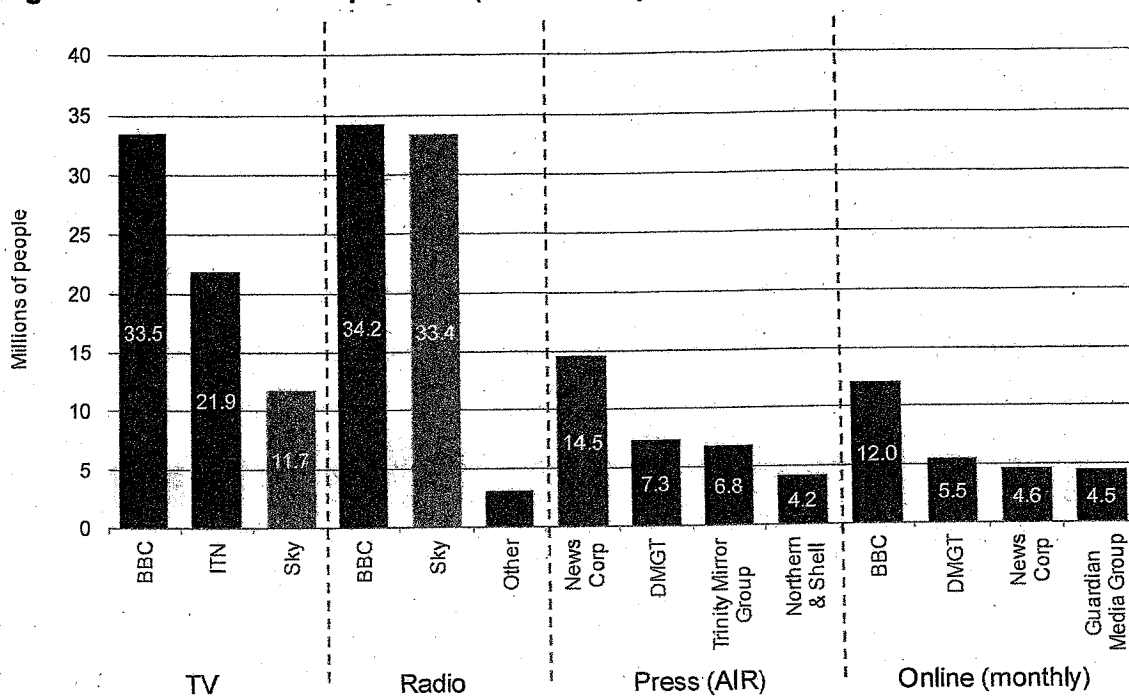
4.38 Figure 15 and Figure 16 provide a graphical comparison of the parties' reach within each platform. While the standard industry measure of reach is different for each platform and cannot be combined, viewing each measure as a proportion of the adult population does provide a picture of the main news media providers' relative importance (in terms of reach) across all four media platforms.

<sup>82</sup> 'Any other station' will include listening to (but not limited to) stations not measured by RAJAR (e.g. small community radio stations), hospital radio stations, army base radio stations.

<sup>83</sup> In most cases, the second platform is online as a result of the creation of a news website to complement their offering on another platform.



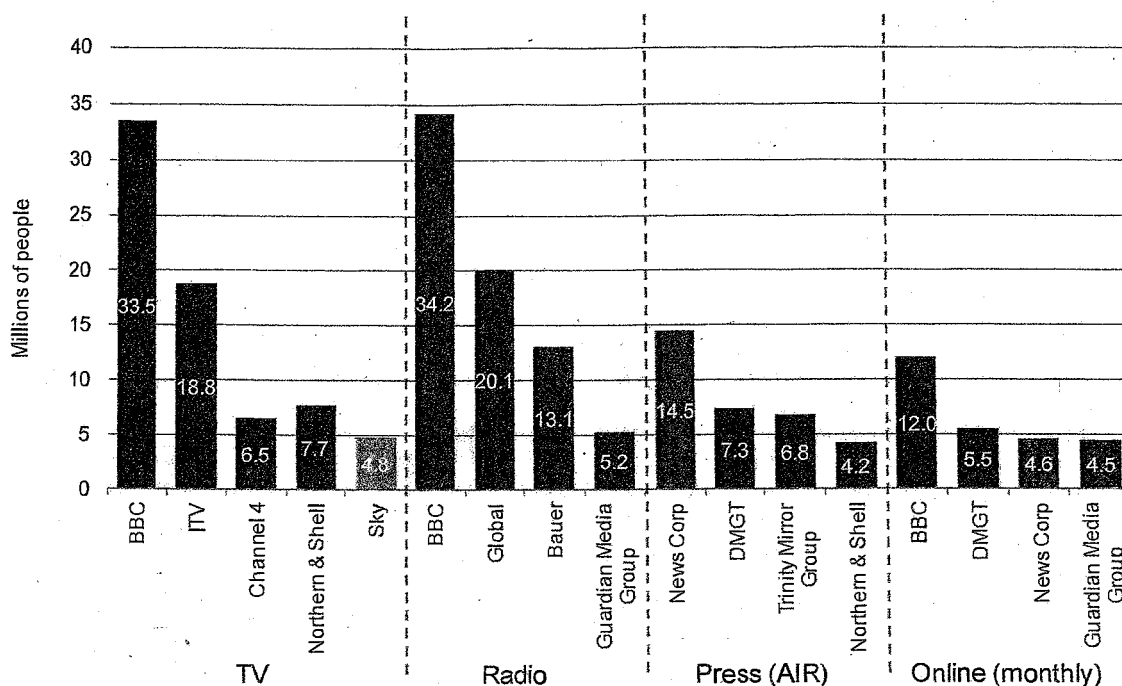
Figure 15 - Reach across platform (millions of people) at wholesale level



Source: TV: October 2010, BARB, All Adults (16+), Radio: Q3 2010, RAJAR, All Adults (16+), Press: Kantar Media/NRS, all adults (16+), Online: October 2010, Nielsen / UKOM<sup>84</sup>, all 2+. Methodologies for data collection differ by industry.

<sup>84</sup> **TV:** National and international news subgenre only. BBC = BBC One, BBC Two, BBC News. ITN = ITV1, C4. Sky = Sky News, Five. Reach criteria = 3 consecutive minutes of viewing in an average week, October 2010. **Radio:** Listening to all radio – as RAJAR does not provide programme genre analysis. ‘Any other’ includes listening to stations not individually measured by RAJAR and non BBC or Commercial stations. Reach criteria = 5 consecutive minutes of listening once in the week. **Press:** 6 day average issue readership (AIR) for dailies, Oct 2009 – Sept 2010, excludes regional titles. Reach criteria = read or looked into a publication within its publication period for at least 2 minutes. News Corp = The Sun, News of the World, Times, Sunday Times; DMGT = Daily Mail, Mail on Sunday; Trinity Mirror = Daily Mirror, Sunday Mirror, The People, Daily Record (in Scotland); Northern & Shell = Daily Star, Daily Express, Daily Star Sunday, Sunday Express. **Online:** Home and work panel, applications included, all aged 2+. Analysis based on top 50 news sites only. Figures are monthly unduplicated audiences. Unduplicated audience figures exclude regional and international titles, and sites outside the top 50. BBC = BBC News + BBC Homepage, DMGT = MailOnline, News Corp = The Sun + News of the World + The Times/Sunday Times, Guardian Media Group = Guardian.co.uk.

Figure 16 - Reach across platform (millions of people) at retail level



Source: TV: BARB, All Adults (16+), Oct 2010, Radio: RAJAR, All Adults (16+), Q3 2010, Press: Kantar Media/NRS, all adults (15+), Online: Nielsen / UKOM, Oct 2010, all 2+.<sup>85</sup>

### News and current affairs consumption cross-media

4.39 In the absence of a single metric to measure the consumption of news consistently across platforms, Ofcom commissioned audience research into the claimed consumption patterns of user across TV, radio, press and online. Details of this research can be found in Annex 1. The research asked respondents to name their sources of UK and international news and current affairs from a prompted list that included regional and local sources, such as regional newspapers or regional radio stations (see footnote 52). From this data we were able to establish a common metric (share of references<sup>86</sup>) to measure cross-media news and current affairs consumption in terms of:

- 'main source of news' – respondents were also asked to name their single main source of news that they used regularly (e.g. a specific TV channel, website,

<sup>85</sup>TV 'National News' genre only. Reach criteria = 3 consecutive minutes of viewing once in the week  
 Radio: Top 4 groups charted. Reach criteria = 5 consecutive minutes of listening once in the week  
 Press: Press: 12 month average issue readership (AIR) Oct 2009 – Sept 2010, excludes regional titles. Reach criteria = read a publication within its publication period for at least 2 minutes. Online: Home and work panel, applications included, all aged 2+. Analysis based on top 50 news sites only. Figures are monthly unduplicated audiences. Unduplicated audience figures exclude regional and international titles, and sites outside the top 50.

<sup>86</sup> In Ofcom's cross-media audience research (2010) a 'reference' is a news brand/title that is cited by a consumer as a source of regular (i.e. at least once a week for all sources, except for weekly newspapers and magazines where it is defined as at least once a month) UK or international news or current affairs for them. A media provider's total references are calculated as responses for each individual news source across the platforms of TV, radio, newspapers and internet. These are for example, BBC One, Sky News, The Daily Mail, etc. If a respondent uses more than one source from a particular media provider it counts each time. The share of each media provider is then calculated as the aggregated number of references for that media provider, expressed as a proportion of all references.

newspaper or radio station). This enabled us to aggregate this data by media owner (retailer) and media provider (wholesaler) to establish the share by media owner or provider based on consumers' single main source of news<sup>87</sup>; and

- 'all regular sources of news' – by provider (retailer e.g. title, channel) and wholesaler (media provider). This includes all sources of news and current affairs named by consumers that they used regularly. It therefore includes both the main source of news named and 'secondary' sources named, thereby including the effects of multi-sourcing on the share of media providers.

4.40 Respondents were able to name any source of news, including both nation-wide and local or regional news providers as part of this research. In the results, local or regional providers have been aggregated into 'other' but individually accounted for a small share of responses.

4.41 Furthermore we were able to calculate the proportion of people who said that they had used at least one media source by media owner (retailer) and by media provider (wholesaler), in order to produce a cross-media reach metric based on regular news consumers. For example, if a respondent said they had used both a BBC website and BBC One, they counted once in the cross-media reach for the BBC. See Annex 1 for more details.

4.42 This research has enabled us to examine the relative shares and reach of different news and current affairs providers, in respect of their importance to consumers both as a main source of news, and as a regular source of news more generally.

**Share of references**

4.43 The analysis provides us with four different measures of audience share for each provider: the "main source of news", and "all regular sources of news", at both the retail and wholesale level. The results of our research are summarised in Figure 17 and displayed in Figure 18 to Figure 21 below for regular use (at least once a week).

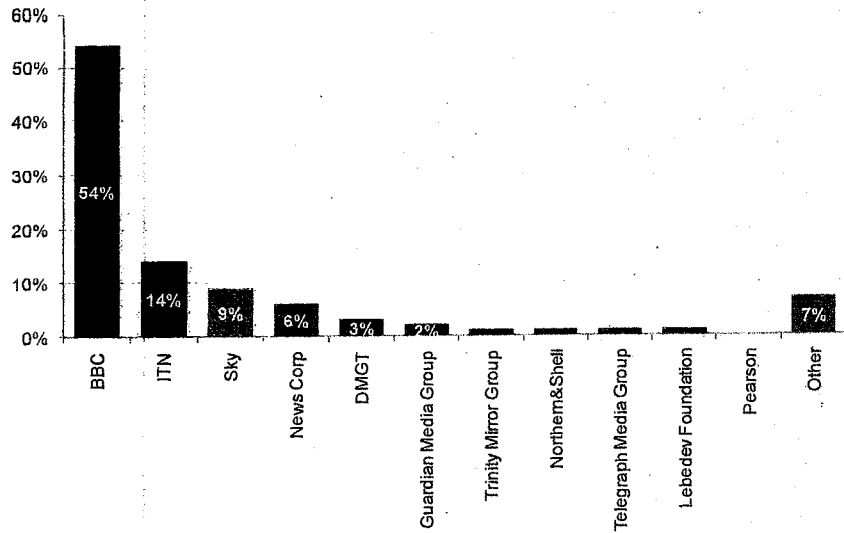
**Figure 17: Summary results from market research on share of references**

	'Share of references'			
	'Main source of news'		'All regular sources of news'	
	Wholesale	Retail	Wholesale	Retail
BBC	54%	54%	37%	37%
ITN / ITV	14%	12%	12%	9%
News Corp	6%	6%	12%	12%
Sky	9%	7%	10%	5%
Others	See Figure 18	See Figure 19	See Figure 20	See Figure 21

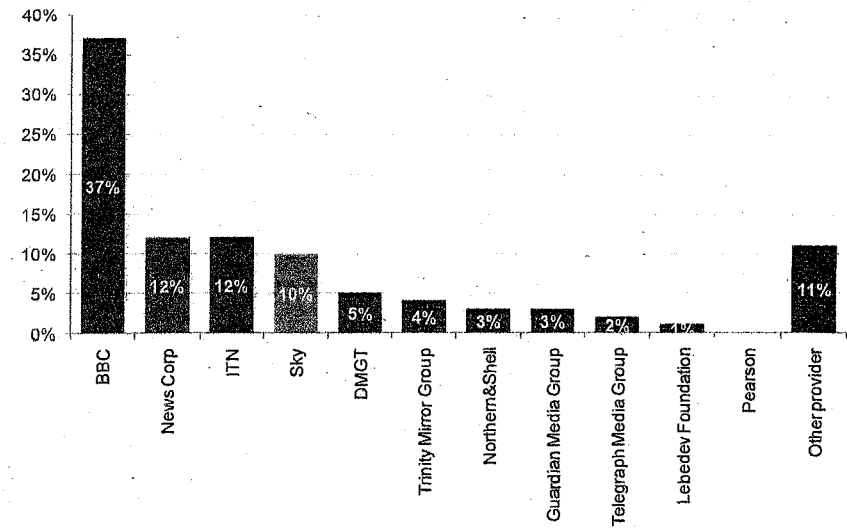
<sup>87</sup> For the purposes of assessing share of references at the wholesale level, where news is provided through a wholesale contract, the reference is attributed to the wholesale provider of news content. At the retail level, the reference is attributed to the owner of the news source named.

Report on public interest test

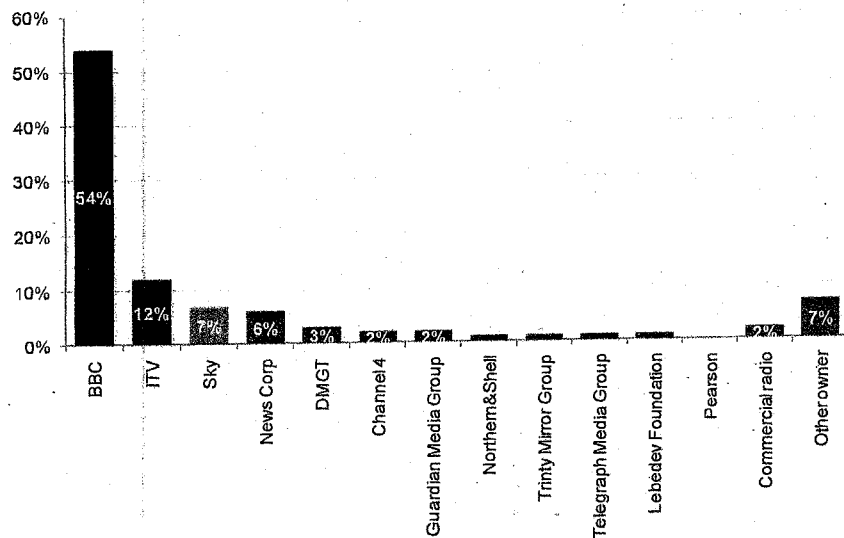
**Figure 18 - Share of references for single main source of news, at wholesale level** (Base: regular users of news, 96% of GB population)



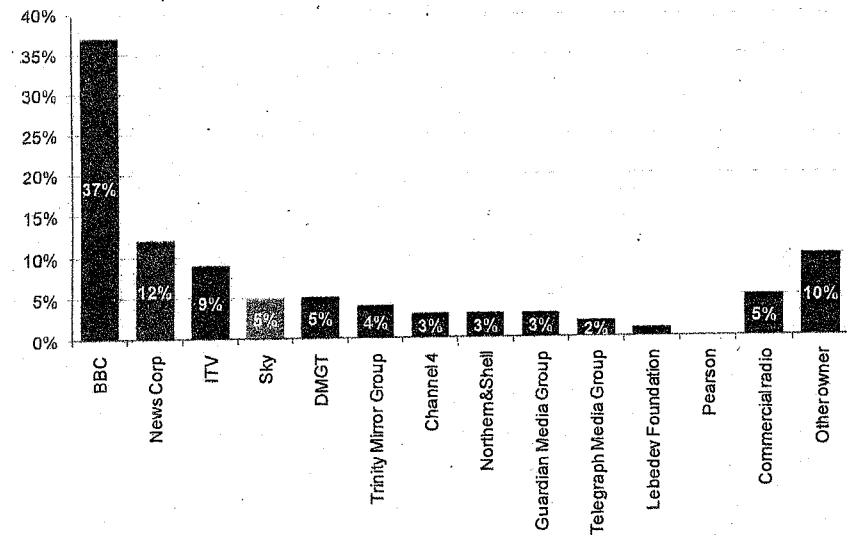
**Figure 20 - Share of references for all sources of news, at wholesale level** (Base: regular users of news, 96% of GB population)



**Figure 19 - Share of references for single main source of news, at retail level** (Base: regular users of news, 96% of GB population)



**Figure 21 - Share of references for all sources of news, at retail level** (Base: regular users of news, 96% of GB population)



- 4.44 Our analysis indicates that the BBC is the single most named source of news and current affairs for respondents, both in terms of share of references for main source of news (54%) and share of references for all sources of news (37%). While the BBC is not present on all four platforms, it continues to account for a large proportion of cross-media consumption, primarily due to its position in TV news viewing, the platform most cited by consumers as being their main source of news. As noted earlier, the BBC's position in the provision of TV news has increased over the last eight years. It also possesses a strong online news service and is the leading source of radio news for listeners.
- 4.45 Together ITN and ITV hold a relatively strong position in the provision of news to cross-media audiences at the wholesale and retail levels respectively. In respect of the wholesale provision of news, ITN is the second largest wholesale provider in terms of main source of news with 14% of respondents naming ITV or Channel 4 as their main source of news. ITN is second (joint with News Corp) most cited of all sources of news with 12%. Similarly, ITV is a strong provider of news at the retail (media owner) level as the third largest provider, with 12% of respondents indicating it was their main source of news and 9% of responses indicating it was a regular source of news. The prominence of ITV and ITN is primarily due to their presence on the TV platform, particularly given they are currently only present on one other platform (online). As noted earlier, ITV's share of TV news viewing has been falling over the last eight years.
- 4.46 While only present on two of four platforms today (newspapers, online) News Corp has a strong position relative to other remaining media providers, with 6% of respondents naming it as a main source of news (fourth overall) and 12% of responses citing it as a regular source of news (second overall)<sup>88</sup>. News Corp's position in respect of cross-media consumption is primarily due to its leading presence in the newspaper platform.
- 4.47 Due to its presence on the TV platform, Sky also has a relatively strong position relative to other providers. Sky's position is enhanced at the wholesale level, due to its wholesale contracts to supply TV and radio news content, where it is the third largest provider of news in cross-media terms. In this respect, 9% of respondents cited Sky as a main source of news, whereas it had a 10% share of references as a regular source of news. If considered at the retail level, Sky's is third with a 7% share of references for main source of news, and is equal fourth in share of references for all regular sources of news with 5%.
- 4.48 As would be expected, a number of other media providers also contribute to cross-media consumption, although for the most part they account for substantially smaller shares of references for main source of news and for all regular sources of news. The one exception to this is DMGT<sup>89</sup> which had the same share of all sources of

<sup>88</sup> There is no difference between wholesale and retail for News Corp as it self-provides news for its newspaper and online.

<sup>89</sup> The questions on news sources in the quantitative research were based on asking respondents to select from a list which news sources they used on a regular basis. Respondents were also asked if there were any other titles they used that were not on the list and these were also recorded. For the weekly newspapers, the list read: The Observer, The Sunday Telegraph, The Sunday Times, The Independent on Sunday, Sunday Mirror, News of the World, The Sunday Herald (shown in Scotland only), Wales on Sunday (shown in Wales only), Weekly magazines (e.g. The Economist, The Spectator, New Statesman, etc), Other weekend/weekly newspaper or weekly magazine (write in). Due to an error, the list omitted the following weekly newspapers: Mail on Sunday, Daily Star on Sunday, Sunday Express, The People. Data for these titles are therefore based on spontaneous responses from participants. In order to investigate the potential impact of this research effect, we

## Report on public interest test

news (5%) as Sky at the retail level. However, only 3% of respondents named it as a main source of news (compared to 7% for Sky).

## Reach

- 4.49 Our cross-media audience research also provided us with the data to calculate an estimate of the proportion of regular news consumers who say that they use at least one source of news on a regular basis for each media provider and owner across all platforms (offering a cross-media audience reach metric). For example, if a respondent said they had used both the BBC website and BBC One as regular sources of news, they were counted once in the cross-media reach for the BBC.
- 4.50 Submissions made to Ofcom offered alternative measures for audience reach. A number of submissions used reach figures sourced from Touchpoints, which provides a database for multimedia channel planning which gathers together figures from the industry standard measures for each of BARB for TV, RAJAR for radio, UKOM for online and NRS for print to generate a single source through data fusion. This suggested the combined reach of News Corp / Sky would be 52% of the UK population<sup>90</sup>.
- 4.51 We have not had sufficient time to fully validate the Touchpoints findings in addition to our own research and use of individual industry data. This is within the context of there being no one industry recognised single source of media measurement across platform. In addition, each of the individual industry measures for TV, radio, newspapers and online have differing definitions for the genre of news, as well as different methods for measuring consumption, as well as variation in age ranges, and definitions of consumers.
- 4.52 The quantitative research we commissioned offers instead a consistent definition of news and current affairs, and of consumption for each platform. Although it has from limitations (for example, our market research is based on a weighted sample of respondents that is smaller than those generally used to compile standard industry metrics) we believe that it provides useful data in analysing reach on a cross-media

---

undertook a modelling exercise for all the weekly newspapers and normalised estimates based on the national readership distribution from the national readership survey. The results showed a minimal effect on total share of references:

- Retail level results: BBC 36%, ITV1 9%, News Corp 13%, Sky 5%, Channel 4 3%, Northern Shell, 4%, Associated Newspapers 6%, Trinity Mirror Group 5%, Telegraph Media Group 2%, Guardian Media Group 3%, Independent Print 1%, Pearson (less than 1%), Commercial radio 5%, other owner 9%.
- Wholesale level results: BBC 36%, ITN 12%, News Corp 13%, Sky 10%, Northern Shell 3%, Associated Newspapers 6%, Trinity Mirror Group 5%, Telegraph Media Group 2%, Guardian Media Group 3%, Independent Print 1%, Pearson less than 1%, Other owner 10%

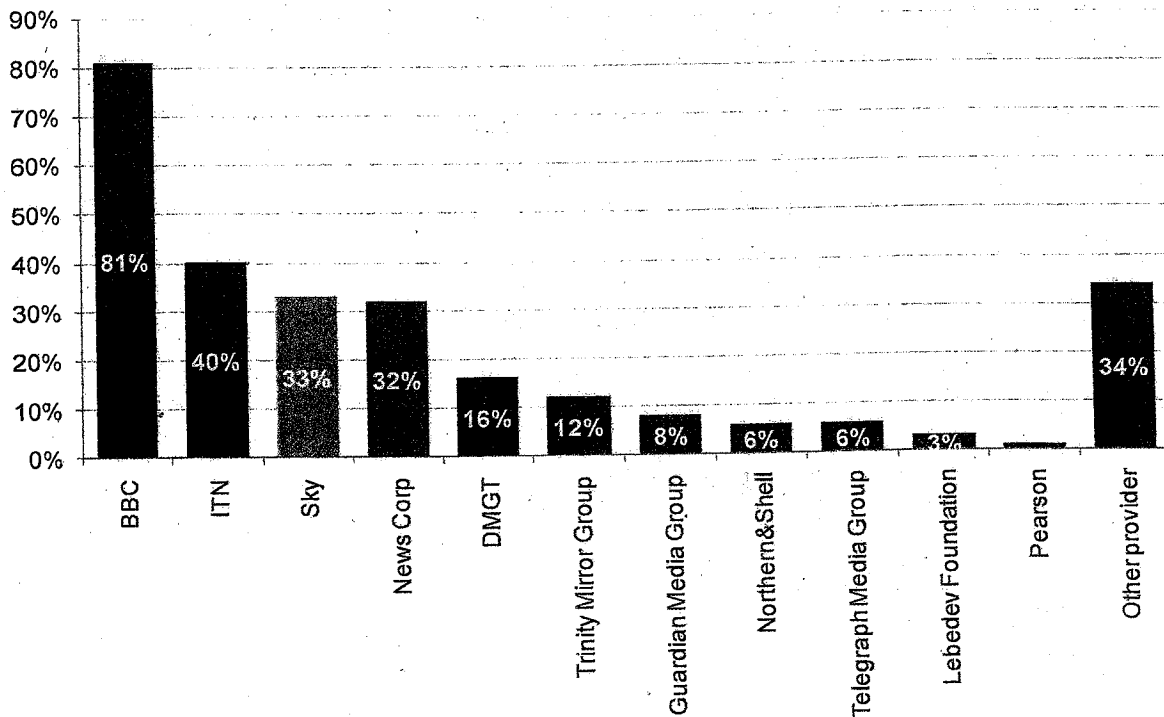
<sup>90</sup> Source: Slaughter and May submission, based on Arena BLM Touchpoints Analysis. Covering News Corporation newspapers, BSkyB TV news channels, Five News, News Corporation and BSkyB websites and TalkSport (one of the main radio stations supplied by Sky News). It does not include reach BSkyB achieves through the supply of news to all commercial radio. Touchpoints provide a database for multimedia channel planning which gathers together figures from the industry standard measures for each of BARB for TV, RAJAR for radio, UKOM for online and NRS for print to generate a single source through data fusion. Due to the time constraints on the test, we did not have sufficient time to fully validate the Touchpoints findings, this also applies to other third party research quoted in this document. This is within the context of there being no one industry recognised single source of media measurement across platform. In addition, each of the individual industry measures for TV, Radio, Newspapers and online have differing definitions for the genre of news, as well as different methods for measuring consumption, as well as variation in age ranges, and definitions of consumers.

basis. Our platform-by-platform analysis outlined between paragraphs 4.11 and 4.38 considers the standard industry reach metrics specific to each platform.

- 4.53 The results of our cross-media audience research are given in Figure 22 and Figure 23 below. This shows that 81% of consumers who use news regularly use the BBC as a news source at least once a week. This position does not vary between wholesale and retail as the BBC self-provides news.
- 4.54 At the wholesale level, ITN is second in cross-media audience reach, with 40% of consumers who use news regularly saying they use it as a regular source of news. Sky is third achieving a cross-media audience reach of 33%, followed by News Corp in fourth with 32%. There is then a longer tail of smaller providers comprising the other newspaper groups. 'Other providers' is a fragmented group of smaller providers named by respondents to the research.
- 4.55 At the retail level ITV is the second placed news provider with a reach of 34%. News Corp is third with 32% and Sky fourth with 17%. However, although the identity of the top four news providers remains the same, the gap between them and the other providers is much reduced, with DGMT and Trinity Mirror at fifth and sixth place with 16% and 12% respectively. In this chart, Channel Five is included within Northern and Shell. The retail assessment also includes commercial radio (covering the reach of all commercial radio stations) and other providers. The difference between the wholesale and retail data on reach is mainly due to the significant reach of TV news on Channel 4 and Channel Five.

**Figure 22 - Cross-media audience reach of consumers who use news regularly, wholesale level**

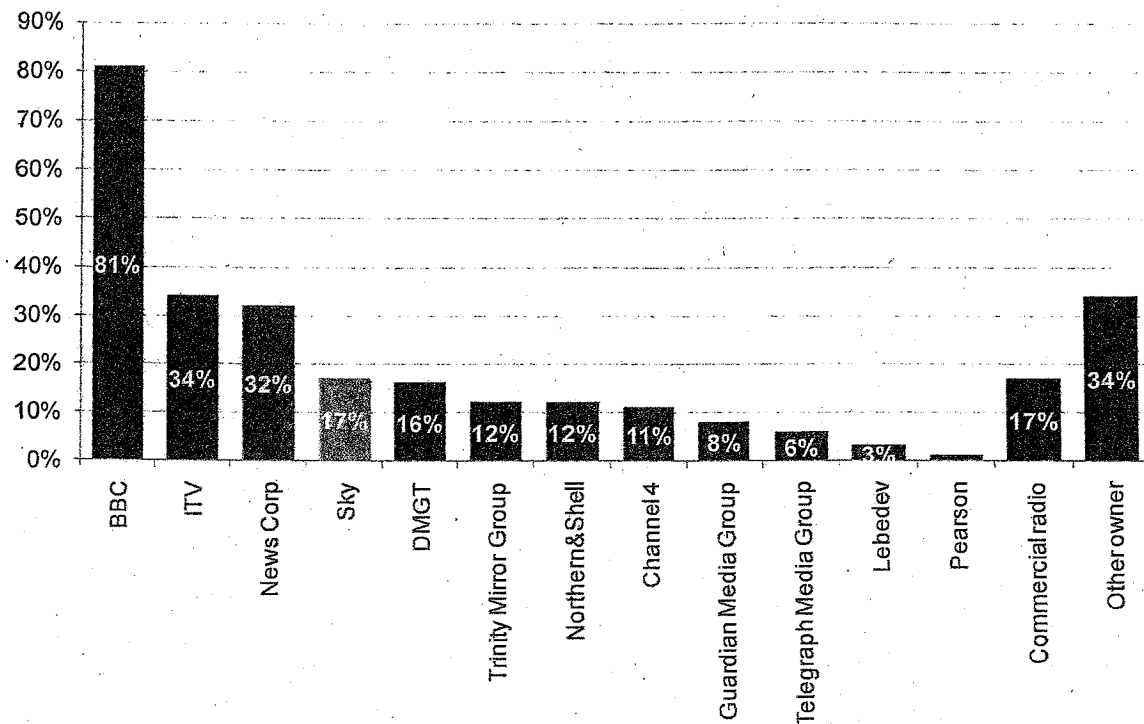
Percentage of consumers using news regularly



Source: Ofcom cross-media audience research, 2010

**Figure 23 - Cross-media audience reach of consumers who use news regularly, retail level**

Percentage of consumers using news regularly



Source: Ofcom cross-media audience research, 2010

**Demographic and socio-economic variations in cross-media use of news and current affairs**

4.56 Our cross-media audience research highlighted some variation in the news and current affairs sources that people from different age or socio-economic groups use to access news and current affairs.

4.57 The most notable variations are as follows:

- Older consumers are less likely to use the internet as a source of news. While on average across the population 26% of people said that they regularly used the internet to access news, for the 65+ age group this was 6%<sup>91</sup>. Regular use of the internet as a source of news and current affairs also varies according to socio-economic group, with 34% of those in the ABC1 group comparing to 15% of those in the C2DE group<sup>92</sup>. Both of these are consistent with general internet take-up and usage trends within these groups.
- Younger consumers are less likely to say that they use radio as a source of news and current affairs. While the proportion of the population as a whole who used the radio to access news on a regular basis was 32% on average, for 16-24 year olds, this was 21%. Younger consumers were also less likely to cite television

<sup>91</sup> Cross media audience research 2010, Base: All adults in GB (2018), Q1A: platforms used regularly (at least once a week) for news. Note: Regular defined as at least once a week.

<sup>92</sup> *ibid.*



(66%) versus 79% for all adults, and more likely to cite the internet (36%) versus 26% for all adults.

- Older consumers aged 55+ are more likely to cite newspapers as a source of news (50% of those aged 55-64 and 54% of those aged 65+) versus 44% for all adults.
- Platform-level multi-sourcing also varies to some extent. According to our cross-media audience research, people aged 55-64 were less likely to use just one platform for news (36% compared to 42% for all adults) whereas those aged 16-24 were more likely (46%), as were those in the C2DE socio-economic group (50%). Research cited by the merging parties showed broadly consistent socio-economic variations regarding multi-sourcing.

4.58 In the time available, we did not consider these variations to be significant enough to warrant the definition of separate audiences according to age or socio-economic groupings.

### Consumers' use of multiple sources of news and current affairs

4.59 Of relevance to plurality for news and current affairs is an understanding of how consumers may draw on multiple sources for news and current affairs. We refer to this by using the term 'multi-sourcing'.

4.60 It is important to note that the audience shares which we present above for the 'main source of news' are unlikely to capture the effects of multi-sourcing. However, the analysis which we present of audience shares for 'all sources of news' does capture the effects of multi-sourcing, albeit implicitly.

4.61 We have received detailed representations on how many sources consumer use for news and current affairs<sup>93</sup>. Consumers may use multiple sources of news in three ways:

- sourcing news from one provider on more than one platform;
- sourcing news from more than one provider on the same platform;
- sourcing news from more than one provider on more than one platform.

4.62 We look here at multi-sourcing across all providers and platforms. We have also looked in particular at consumers who source news today from both News Corp and Sky.

4.63 The possible implications of consumers using multiple sources for news and current affairs in the context of the proposed transaction are explored in section 5.

### Use of multiple media platforms

4.64 We estimate that a large proportion of the UK adult population uses more than one media platform to access news and current affairs.

4.65 Our cross-media audience research showed that 42% of regular news consumers rely on a single media platform for news and current affairs while 58% use two or

<sup>93</sup> See for example News Corp's response to the Invitation to Comment paragraphs 6.7-6.8 and [3].

## Report on public interest test

more platforms on a weekly basis (32% use two platforms, 19% three platforms and 7% four platforms). This suggests that the average number of platforms used to access news in a typical week is 1.9.

- 4.66 Evidence submitted by News Corp suggests instead that the average number of 'types of media' used 'regularly' is closer to 4<sup>94</sup>. We note that FTI / Mintel consider local/regional newspapers as a type of media distinct from national newspapers, and similarly local/regional radio as a distinct type of media from national radio. This means that the total number of different types of media in the FTI / Mintel analysis is six: TV, internet, national newspapers, local/regional newspapers, national radio, and local/regional radio. Our analysis, instead, focuses on four media platforms: TV, radio, newspapers and internet. In addition, the definition of news for the multi-sourcing data may be broader than our definition for the public interest consideration, including: national and international news; sports; entertainment news; current affairs; and politics.
- 4.67 We are not persuaded in any event that these different approaches and the inclusion of different media are likely to make a significant difference to the overall understanding of consumers' use of multiple sources of news.
- 4.68 Among the alternative platform combinations available, our research found that 29% of regular news consumers claimed to rely on television alone for news content. Television coupled with newspapers was the next most popular combination (16% of respondents). Television, radio and newspapers came third (12%), followed by TV/radio together (7%) and TV/radio/newspapers/internet combined (7%). These five consumption modes accounted for over 70% of regular news consumers as measured in our quantitative research.

### Multi-sourcing within each platform

- 4.69 News Corp submitted evidence on how consumers use a range of different sources within and across platforms:
- FTI's report provides information on the proportion of consumers who use a mix of different platforms for news, drawing from TV, radio, newspapers, online and magazines. This suggests that around 8% of consumers use no sources of news, with around 17% using one source, 24% two sources, just under 25% using three sources, around 18% using four sources and around 8% using 5 sources. FTI noted more than 50% of consumers use 3 or more media platforms.
  - Within platforms FTI provided data suggesting that on average each week consumers use 1.1 channels for TV news, 2.2 channels for radio, 1.4 titles for newspapers and 3.5 websites for online<sup>95</sup>.
  - Perspective also provided data on multi-sourcing for news within platforms, slightly differing from FTI's, stating that consumers use 1.26 newspaper titles, 2.2 TV channels and 3.5 websites<sup>96</sup>.

<sup>94</sup> This estimate is based upon an analysis by FTI for News Corp of data published by Mintel in *Consumer Perception of News Media*, Sept 2010. In the time available, we have not been able to validate this evidence. Differences between our and FTI's estimate may be due to numerous methodological factors.

<sup>95</sup> News Corp submission, Annex 1 by FTI (Table 5.1)

<sup>96</sup> News Corp submission, Annex 1 by FTI (Table 5.1), Annex 2 by Perspective (Figure 23)

- 4.70 Our cross-media audience research<sup>97</sup> also provides evidence on the level of multi-sourcing within each platform. Its estimates are broadly similar to News Corp's for multi-sourcing within TV and newspapers. It indicates that for UK news and current affairs consumption: regular<sup>98</sup> TV news viewers use on average 1.7 channels per week; regular daily newspaper readers use on average 1.3 titles per week; and regular weekly newspaper readers use on average 1.1 titles per month.
- 4.71 However, our research suggests lower levels of multi-sourcing within the radio and internet platforms compared with the News Corp submission. We recognise that the difference in results may be due in part to limitations of our survey methodology causing an underestimate on our part of the level of multi-sourcing on the radio and internet<sup>99</sup>. On the other hand, we have not been able to validate the evidence submitted by News Corp in the time available.
- 4.72 If a reference to the Competition Commission were made, we would recommend further investigation of the level of media-brand multi-sourcing within the radio and internet platforms as a relevant factor in understanding how consumers use of news and current affairs media and how this affects plurality.

### Multi-sourcing across platforms

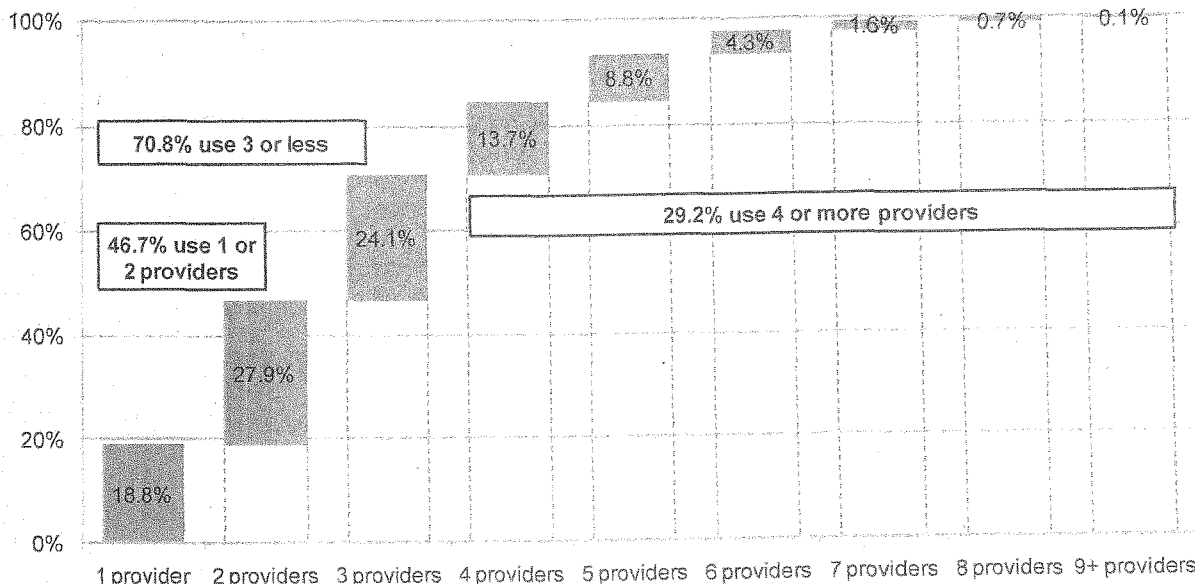
- 4.73 Our cross-media audience research provides evidence on the number of providers from which consumers source their news across all platforms. Figure 24 suggests that many regular news and current affairs consumers tend to source their news and current affairs from a relatively limited number of providers. Looking at wholesale provision, 71% of regular news and current affairs consumers use three or fewer providers in a typical week, and 47% only use one or two. However, a significant proportion (29%) uses four or more providers at least weekly. On average, consumers who use news and current affairs regularly use 2.9 providers in a typical week.

<sup>97</sup> Source: Ofcom cross-media audience research (2010). Base : regular users of news platforms (TV=1784, Newspapers=1281, Radio=942, Internet=705) Q3a/b, Q4a/b, Q5a/b, Q6a/b, Q7a/b

<sup>98</sup> We use 'regular' to refer to consumption of UK news and current affairs on a weekly basis on a specific platform.

<sup>99</sup> The questionnaire we used in our research lists groupings of some radio stations as a single brand. For example, all BBC national radio stations are grouped as one brand. And while we list a number of different news websites, we grouped 'other' websites together in our questionnaire. This means, for example, we classify all the different blogs as one source and all other websites not listed in our questionnaire as one source.

**Figure 24 - Distribution of multi-sourcing by wholesale provider among all regular news consumers**



Source: Ofcom cross-media audience research (2010)

Note: Figures refer to at least weekly use for TV channels, radio stations, websites and daily newspapers, and at least monthly for weekly/Sunday newspapers of wholesale providers of news and current affairs across all platforms. Figures count News Corp and Sky as separate providers. Figures may underestimate the amount of multi-sourcing because "other" sources are grouped as one.

- 4.74 By considering retail provision, multi-sourcing levels do not appear materially different. According to our research results, consumers who use news and current affairs regularly access on average 2.8<sup>100</sup> retail news providers, with 19.2% consumers relying on one source, 48.9% on two or less, 72.9% on three or less, and 27.1% on four or more.
- 4.75 The high levels of single-sourcing are partly driven by a large proportion (11%) of regular news consumers solely relying on the BBC to access news and current affairs.

**Multi-sourcing by Sky and News Corp consumers**

- 4.76 Our cross-media audience research also indicates that regular users of Sky and News Corp sources are more likely to use multiple sources than the average regular news consumer. We found that both Sky and News Corp users access on average content from 4 different wholesale news providers in a typical week. This compares to an average of 2.9 for the general regular news consumer.
- 4.77 When looking at the distribution of multi-sourcing by wholesale news, we found that 62% of regular Sky news consumers use four or more providers on at least a weekly basis. Around 38% use three or fewer, 17% use one or two, and only 7% of Sky consumers solely rely on Sky.

<sup>100</sup> Results from our market research show only a very small different in multi-sourcing between the wholesale and retail levels – 2.89 and 2.81 respectively

- 4.78 News Corp consumers have a similar distribution when it comes to multi-sourcing, with 54% accessing news and current affairs from 4 or more providers. We also found that only 2% of News Corp consumers rely solely on News Corp sources.
- 4.79 Across the population as a whole, we found that few regular news consumers rely solely on Sky titles or solely on News Corp titles: at the retail level, 2% rely solely on news from Sky; and 1% rely solely on news from News Corp<sup>101</sup>; these shares do not change materially if considering wholesale news provision.
- 4.80 Our market research data is broadly consistent with the available industry data for television. On television, BARB data highlights that out of all the viewers of national news provided by Sky in October 2010, 4% only watched Sky's news services whereas 76% watched news from two other providers in that month. A further 20% watched news from one other provider<sup>102</sup>.

### Critical evaluation and trust of the media

- 4.81 How consumers engage with the media may affect the ability of a media owner to influence public opinion. In particular, some consumers may critically assess the quality of the news that they consume and try to understand the agenda and key issues behind it.
- 4.82 For example, research from Mintel indicates that around a third of internet users aged 16+ tend not to trust the news that they see, hear or read in the media<sup>103</sup>, and that just over half<sup>104</sup> of consumers say that they often check more than one source to confirm news stories that they have read.
- 4.83 Where consumers do seek to question the news they may themselves limit the ability of a media owner to influence public opinion. How far this can successfully guard against the risk that one controller of media enterprises may have too much influence remains unclear. Consumers may find it difficult to stay abreast of all the key events and underlying key issues in the news; this could take a significant amount of time and effort to research.
- 4.84 In any case, Ofcom research indicates that a large proportion of consumers do place a significant trust in TV news. Both news programmes on BBC One and Sky News demonstrate high levels of trust. Around 84% of regular Sky News viewers rate Sky News highly on the provision of trustworthy news. Similarly, 80% of regular BBC One viewers rate BBC One highly on the provision of trustworthy news<sup>105</sup>. On the same trust metric, TV news from other public service broadcasters had lower rates among their regular viewers, ITV and Channel 4 at 70%, and 61% respectively.
- 4.85 Many consumers do however understand that newspapers are more prone to expressing a particular position than TV news. Ofcom research indicates that 36% of consumers believe newspapers are either impartial or neutral<sup>106</sup>. This compares with 56% of consumers who believe newspapers are biased. By comparison, 72% of consumers believe TV is either impartial or neutral and 22% believe it is biased.

<sup>101</sup> Source: Ofcom cross-media audience research (2010). Base: All regular news consumers (1923), All GB adults (2018) Q3a/4a/5a/6a/7a combined.

<sup>102</sup> Source: BARB, Network, based on 3 consecutive minutes, October 2010

<sup>103</sup> Consumer Perceptions of News Media - UK - September 2010, Mintel, Figure 55 (internet survey)

<sup>104</sup> Consumer Perceptions of News Media - UK - September 2010, Mintel, Figure 55 (internet survey)

<sup>105</sup> Source: Ofcom PSB Tracker, 2009. Consumers provided ratings of 7, 8, 9 or 10 out of a score of 1 to 10 where 1 is not at all trustworthy and 10 is completely trustworthy.

<sup>106</sup> Ofcom Media Tracker, 2009 [Q105. All adults 15+]

Report on public interest test

- 4.86 Consumers may also consider some platforms and specific media brands more influential than others. For example, the News Corp submission<sup>107</sup> reported that in the press, *The Times* has the most positive perceptions among consumers; it is seen as authoritative, traditional, reliable, and responsible. In comparison, it reported that the Sun is viewed as sensationalist, biased and lightweight.
- 4.87 More generally, consumers may seek out different types of content depending on the media they use. For example, the Mintel research indicates that 58% of popular tabloid readers are interested in politics/current affairs compared to 81% of broadsheet readers<sup>108</sup>. These different perceptions and interests could suggest different degrees of influence of different media brands. While quantitative metrics on media usage provides some indication of relative influence between different media players, they are not perfect measures. Some media players may be more influential than these metrics would suggest, whereas the opposite may hold true for others.

---

<sup>107</sup> News Corp submission, Annex 1 by FTI (p62) using Consumer Perceptions of News Media - UK - September 2010, Mintel (internet survey)

<sup>108</sup> Consumer Perceptions of News Media - UK - September 2010, Mintel, Figure 62 (internet survey)

## Section 5

## Effects of the proposed acquisition - static analysis

5.1 In this section we have looked at the effects of the proposed acquisition on plurality immediately after the transaction in terms of range and number of persons controlling media enterprises including their ability to influence opinions. We refer to these as "static" effects.

5.2 In performing our static analysis we have had regard to:

- whether the proposed transaction constitutes a change of control;
- external plurality: we have considered the range and number of persons having control of media enterprises in the context of their ability to influence opinions and control the agenda.<sup>109</sup>
- internal plurality: we examined how far the range of views expressed within media enterprises may ensure sufficient plurality following the proposed transaction, including the effects of the impartiality rules for broadcast news, the culture of newsrooms and audience expectations; and
- multi-sourcing and online news provision: we considered the effect of consumers' use of multiple media and the increase in online news provision.

### Change of control

5.3 The proposed transaction involves News Corp, which currently holds 39.14% of Sky, acquiring the remaining shares it does not own, to give it 100% control of Sky. This would represent a move from part ownership to full ownership. Currently, News Corp's stake in Sky, while representing material influence over Sky, does not enable News Corp to pass general and special resolutions alone given the presence of other shareholders and independent directors.<sup>110</sup>

5.4 The degree to which News Corp can influence the corporate policy and strategic direction of Sky, given its current shareholding, will depend on a number of factors:

- Voter turnout and share of votes cast – at present News Corp's voting rights are limited to [X]%<sup>111</sup> which, based on past voter turnout over the last five years, equates to between [X]%-[X]% of votes cast. On this basis News Corp is currently not able, on its own, to achieve a simple majority of votes cast which, for example, would be necessary to appoint or remove the Board. News Corp's voting rights would, however, allow it to block special resolutions which, amongst other things, would be required to alter Sky's Articles of Association, reduce Sky's share capital, and decide on the voluntary winding up of Sky.

<sup>109</sup> Competition Commission report, paragraph 5.7, Court of Appeal paragraph 90 on range and number and DTI Guidance paragraph 7.7 on ability to influence.

<sup>110</sup> In Sky/ITV, we assumed that News Corp's 39% shareholding gave it a level of control over Sky for the purposes of including newspapers in our assessment, but we did not have to consider in that context the question of News Corp having full control of Sky.

<sup>111</sup> [X]

Report on public interest test

- Board representation – the Sky board currently includes a majority of independent directors (8 of 14). Four of the six non-independent directors, are affiliated with, but not appointed by, News Corp. The remaining two directors are executive directors and are therefore classed as non-independent directors.<sup>112</sup>
  - UKLA listing rules and corporate governance arrangements – a number of rules govern and safeguard transactions between Sky and News Corp. In particular, Board approval is required for Sky to enter into certain arrangements with News Corp or any of its affiliates.
  - Special rights – News Corp does not currently enjoy any special voting rights in respect of its shareholding in Sky, nor does it have the right to appoint a director to the Sky board.<sup>113</sup>
- 5.5 Taking these factors together the presence of the remaining shareholders and independent directors is such that News Corp does not have full control over Sky.
- 5.6 Following the proposed acquisition, News Corp would have 100% ownership giving it full control of Sky, which would enable News Corp to take decisions that are in the exclusive commercial interests of News Corp.
- 5.7 News Corp may also gain a greater ability to exert influence over editorial decisions, for example through the appointment or dismissal of the editor of Sky News ( see later paragraphs 5.54 to 5.103 on our assessment of internal plurality).

### Plurality of persons with control of media enterprises

- 5.8 In considering plurality and sufficiency of plurality, we consider the number and range of views *across* different media enterprises in the context of their ability to influence, and the range of views *within* media enterprises. This is the approach adopted by the Competition Commission in Sky/ITV where it termed the former external plurality, and the latter internal plurality, although in that case the Competition Commission was considering a situation involving Sky's acquisition of 17.9% shareholding in ITV as compared to 100% in this case.<sup>114</sup>
- 5.9 In looking at the number and range, we did not look simply at the number and range of media enterprises, but also at their relative ability to influence and inform public opinion. In doing so we have had regard to the purpose of plurality provisions<sup>115</sup> and as explained in the Secretary of State's guidance on the media public interest merger provisions, which states that the public interest consideration *'is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This broadcasting and cross media public interest consideration,*

<sup>112</sup> For the purposes of Sky's Corporate Governance Code, all executive directors are treated as not being independent of the company.

<sup>113</sup> The presence of directors on the Sky Board who are affiliated with News Corp would indicate that News Corp does have some influence over the appointment of directors; however, this influence arises from their position as a major shareholder in Sky and not through any special rights.

<sup>114</sup> Competition Commission report, paragraph 5.11

<sup>115</sup> Lord McIntosh of Haringey (Parliamentary Under Secretary, DCMS) 2 July 2003, Hansard



*therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality<sup>116</sup>.*

### External plurality

- 5.10 Representations have been made to us that after the proposed transaction there would be sufficient plurality by reference to the total number and range of media enterprises available.
- 5.11 An analysis of this type would not take account of the ability to influence opinion. It would simply indicate the number and range of persons with control of media enterprises providing news and current affairs without considering use by consumers.
- 5.12 [X]
- 5.13 [X]<sup>117</sup>
- 5.14 At the most extreme, adopting a count of the number and range of owners of media enterprises without taking account of their ability to influence opinion would mean that all news and current affairs providers would be included as contributing to plurality simply by being available regardless of whether they were used by several million or zero consumers.
- 5.15 We do not consider these submissions or this approach to be credible. Assuming a reasonable minimum scale, the number and range of persons controlling media enterprises at the retail level with a minimum scale falls from 16 to 15. At the wholesale level, the number and range of persons controlling media enterprises would decrease from 11 to 10<sup>118</sup>.
- 5.16 In any event, as explained above, we consider that in assessing plurality and sufficient plurality we should look not simply at the number and range of media enterprises, but also at their relative ability to influence and inform public opinion.

<sup>116</sup> DTI Guidance, paragraph 7.7

<sup>117</sup> [X]

<sup>118</sup> For wholesale, this figure has been calculated under the following assumptions:

- Specialist TV news broadcasters (e.g. France 24, Al Jazeera, CNN, Euronews, Fox News, RT, CNBC, Bloomberg, CCTV, Star News, Press TV and NDTV) are excluded as they do not have a UK news agenda, are targeted at a small minority of the UK news audience. We estimate that they account for less than 1% of total national news viewing. This would limit their ability to influence
- The TV and Radio news content provided by Sky at a wholesale level to third party broadcasters is treated as 'controlled' by Sky for the purposes of the 'count'; and
- Online only news providers are excluded, as these are not defined as media enterprises under the Enterprise Act 2002. It should be noted that in almost all cases online news providers either (i) already have a presence on another platform (e.g. newspapers, TV) and are therefore included in the 'count' of media enterprises, or (ii) are online news aggregators or (iii) do not have a UK news agenda.

At the retail level, The figure has been calculated using the same assumptions as those at the wholesale level, with the following exception - the TV and Radio news content provided by Sky at a wholesale level to third party broadcasters is instead treated as 'controlled' by the third party broadcaster. Furthermore, we have exclude radio providers that account for less than 1% of total radio listening given their limited ability to influence opinion

- 5.17 We have looked at ability to influence and inform opinion by reference to a number of factors since there is no single standard industry measure which can be used consistently across media platforms. These are:
- *Audience share and reach within individual platforms*<sup>119</sup>. Where possible, we have used recognised industry measures for each media platform to assess the current situation and the potential effect of the proposed transaction.
  - *Analysis of consumers' consumption of news* - based on minutes of use by a typical consumer in a day.
  - *Primary research on consumers' claimed use of different media*. This new market research provides us with the only available measure to compare the use and reach of different news sources across different media, something which is of particular importance in light of our identification of relevant audiences as cross-media audiences<sup>120</sup>
- 5.18 While each of these measures may not individually capture all the different features of cross media consumption and the effects of the proposed transaction, they provide useful insight.

In combination the parties would have a significant presence across platforms

- 5.19 This transaction does not result in a change in the number, range or relative ability to influence within three of the individual platforms - TV, radio and newspapers. There would be a change within online news provision, with a reduction in the number of voices and a concentration in audiences as both News Corp and Sky provide news on this platform.
- 5.20 However, the relevant audience for this public interest test is cross media. Taking into consideration the parties' positions across all media platforms, the transaction may be expected to have an impact on the number and range of persons owning media enterprises across media platforms.
- 5.21 As discussed in Section 4, News Corp is currently present on two media platforms (newspapers and online), while Sky is present on three platforms at the wholesale level (TV, radio and online) and two platforms at the retail level (TV and online).
- 5.22 Following the transaction, News Corp would be the only news and media provider present on all four media platforms at the wholesale level (TV, newspapers, online and radio). At the retail level, it would be one of three providers of UK-wide news and current affairs on three of four platforms (alongside the BBC on TV, radio and online and Northern & Shell on TV, newspapers and online). Considering the respective positions of the parties in terms of reach on each platform (see Figure 22 and Figure 23), post-transaction, News Corp would have a significant presence<sup>121</sup> across all media platforms.

---

<sup>119</sup> Audience share is the percentage of total consumption accounted for by a specific news provider. Audience reach is the percentage of the total audience which is exposed to a specific news provider

<sup>120</sup> This cross-platform metric is a 'share of references', derived by determining which media outlets, titles or channels consumers mention when asked about their news and current affairs providers across media platforms. See Annex 1 for more details

<sup>121</sup> Post-transaction, at the wholesale level, News Corp would be the largest (of eight) newspaper provider, the third largest (of three) TV news provider, the second (of two) largest provider of radio news content, and one of the top five online news providers.

- 5.23 Most importantly, the transaction will provide News Corp with full control of a presence on the TV platform. Access to TV for news delivery is of particular importance – this is the platform to which consumers rely on most, with 73% stating it is their main source of UK news compared to 8% for radio, 7% for newspapers and 7% for online news<sup>122</sup>.

#### Share of cross media news consumption – shares of minutes of news consumed

- 5.24 In order to understand the potential ability to influence public opinion, we have considered the parties position in respect of their share of 'news minutes' consumed. Ofcom estimates that the average person spends approximately one hour per person per day consuming news content across media platforms. Using data from industry standard data sources (BARB / RAJAR / NRS / Nielsen) we can display the distribution of this time by platform and media owner<sup>123</sup>.
- 5.25 This provides a common measure upon which to compare consumption by media provider across all platforms. Such analysis does have some drawbacks. In particular, it assumes that one minute of news consumption is equal in terms of ability to influence across all media<sup>124</sup>, and that the underlying standard industry measures being converted into minutes are directly comparable<sup>125</sup>. Both of these assumptions are likely to be flawed to some degree.
- 5.26 Nonetheless, we considered that this measure provides a useful overview of the parties' relative positions and ability to influence public opinion through cross-media news and current affairs consumption, particularly when viewed in conjunction with other cross media data.
- 5.27 The results of our analysis of cross media share of consumption based on share of minutes consumed per head, per day by news provider are set out in Figure 25 and Figure 26.
- 5.28 Following the transaction, at the wholesale level, our analysis suggests News Corp will account for 23.7% of all minutes of news consumption – a 9.8 percentage point increment. At the retail level, News Corp's share of minutes would be 16.3% (a 2.4 percentage point increment) given the exclusion of Sky News's current wholesale provision of news to Five and commercial radio. By comparison, the BBC continues to account for the largest proportion of news minutes consumed (43.5%). The third placed provider would be DMGT at 9.4% of minutes, with others substantially lower.

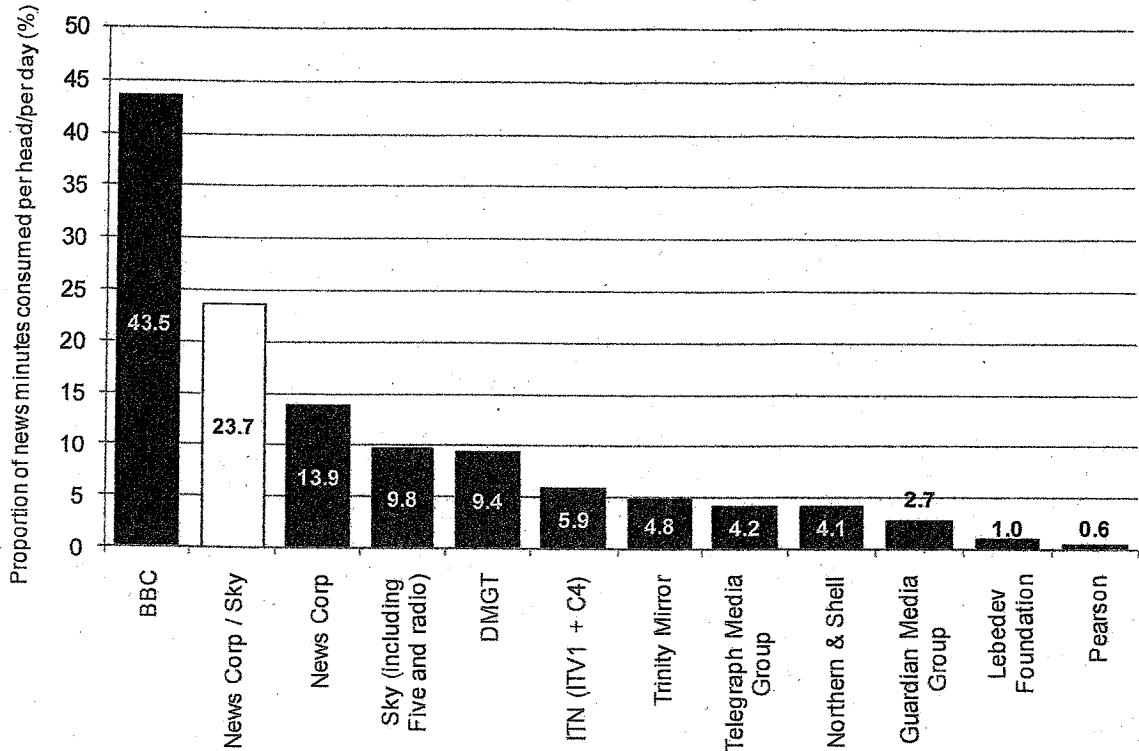
<sup>122</sup> Respondents were provided a list of different media types and then asked the question "From the list below, please tell me which of these you use regularly for UK/International news and current affairs, by regularly I mean at least once a week."

<sup>123</sup> For this analysis we have estimated radio news listening based on RAJAR figures and Ofcom assumptions. This differs to the treatment of reach earlier that displayed all radio listening, unadjusted.

<sup>124</sup> For example, one minute of TV national news consumption in this analysis is equivalent to one minute of reading a newspaper.

<sup>125</sup> It is important to bear in mind that each industry measure has its own methodology for measuring consumption. For example, television and online measurement are both based on a continuous panel of people and a metered form of measurement. Radio and print, on the other hand, are based on respondents' claimed consumption reported in a diary or survey. Furthermore, there is no consistent measure of news consumption across platforms.

**Figure 25: Share of news consumption by media enterprise at the wholesale level**



Source: see footnote 126

- 5.29 It should be noted that the share of minutes attributed to Sky could, to some degree, understate its impact on consumers as a TV viewing minute is attributed the same value as a minute spent on other media platforms. However, the same will be true of the relative importance of ITV and Channel 4 in this analysis.
- 5.30 In practice, we would expect that a TV news minute would hold greater weight in terms of ability to influence than other media given television's impact as a medium. Specifically, TV news broadcasts are designed to deliver information and messages effectively in a relatively short time period compared to that available to newspapers. This suggests TV news broadcasts may be somewhat underweighted in this analysis. At the same time, newspapers may be overweighted given the time spent on reading. The analysis also highlights how a relatively limited amount of time may be spent by consumers using online news media.
- 5.31 [X].

**Figure 26 - Proportion (%) of news minutes consumed per head/per day by platform and provider<sup>126</sup>**

	Papers <sup>1</sup>	TV <sup>2</sup>	Radio <sup>3</sup>	Online <sup>4</sup>	Total
Sky (including radio)	0.0	2.4	6.7	0.0	9.1
Five	0.0	0.7	0.0	0.0	0.7
News Corp	13.8	0.0	0.0	0.1	13.9
<b>News Corp / Sky</b>	<b>13.8</b>	<b>3.1</b>	<b>6.7</b>	<b>0.1</b>	<b>23.7</b>
<b>BBC</b>	<b>0.0</b>	<b>24.9</b>	<b>18.3</b>	<b>0.3</b>	<b>43.5</b>
ITV 1	0.0	4.8	0.0	0.0	4.8
Channel 4	0.0	1.1	0.0	0.0	1.1
<b>ITN (ITV1 + C4)</b>	<b>0.0</b>	<b>5.9</b>	<b>0.0</b>	<b>0.0</b>	<b>5.9</b>
DMGT	9.2	0.0	0.0	0.2	9.4
Trinity Mirror	4.8	0.0	0.0	0.0	4.8
Telegraph Media Group	4.2	0.0	0.0	0.1	4.2
Northern & Shell	4.1	0.0	0.0	0.0	4.1
Guardian Media Group	2.6	0.0	0.0	0.1	2.7
Lebedev Foundation	1.0	0.0	0.0	0.0	1.0
Pearson	0.6	0.0	0.0	0.0	0.6
<b>Total</b>	<b>40.3</b>	<b>33.9</b>	<b>25.1</b>	<b>0.7</b>	<b>100.0</b>

Source: see footnote 126

5.32 Overall, we consider that this measure provides a useful insight into the level of news consumed from each media provider. The analysis indicates that News Corp currently holds a strong position with respect to the consumption of news content across all media. This will be further strengthened by their acquisition of Sky, creating a significant gap between the top two providers (the other being the BBC) and the remaining news providers. On this measure, the effect of the proposed transaction varies when the impact on wholesale or retail news provision is considered.

<sup>126</sup> Note of data sources:

- Papers: Ofcom analysis based on NRS data supplied by Kantar Media. Audience base is 16+, and the data covers the period October 2009 – September 2010.
- TV: Ofcom analysis. Total minutes of television viewing sourced from BARB, all Adults (16+), all homes. National and international news subgenre category only in BARB. The base for minutes/head is the adult UK population. Note that news output on Sky represents Sky News channel's output that is categorised as national/international news in BARB. For the BBC, it includes news on BBC One, BBC Two and BBC News. October 2010.
- Radio: Ofcom analysis. Total minutes of radio listening sourced from RAJAR, based on all adults (16+), Q3 2010. Minutes spread across the total adult population 16+. As RAJAR does not provide programme genres, we have had to estimate the amount of listening to the news genre on radio. We have weighted minutes of listening to commercial radio and BBC radio services according to an assessment of the proportion of the schedule dedicated to news output. The weighting is 5% for all stations except BBC Radio 4, which has been weighted at 27% and BBC Radio Five Live (19%). Note that this doesn't include minutes of unallocated radio listening which, by its nature, cannot be apportioned to news and non-news content.
- Online: Ofcom analysis. Sourced from Nielsen, all internet users aged 2+ in October 2010. The base for minutes/head is Ofcom's estimate of the population aged 2+.

Relative share and reach of the combined entity across media

- 5.33 Our market research has enabled us to examine the parties' position, relative to other nation-wide news providers, in respect of their importance to consumers both as a main source of news, and as a regular source of news more generally. This measure provides the most direct comparison across media for sources of news, with consumers identifying both their main and regular sources of news.
- 5.34 Figure 27 to Figure 30 show News Corp's position relative to other providers following the transaction in relation to both wholesale and retail provision of news.
- 5.35 Most notably, post transaction News Corp would be of roughly equal size to ITN and ITV as the second largest main source of news at both the wholesale and retail level. Similarly, News Corp's position as the second largest provider in respect of all sources of news is also further strengthened, increasing the gap between it and ITV/ITN.
- 5.36 Examining this analysis in more detail at the wholesale level, News Corp would be the equal second largest single main source of news with a share of 15% of respondents, marginally ahead of ITN (14%) and behind the BBC (54%). Sky News, which was the third player pre-acquisition, would no longer exist as a distinct media enterprise from an external plurality perspective. There would then be a notable drop in share to the next largest providers.
- 5.37 All of these other players have a substantially smaller share given their focus on one or two of the four platforms and most notably their lack of presence on the TV platform. In addition, the proposed transaction would result in News Corp achieving a share of references for all regular sources of news of 22%, second to the BBC (37%), and ahead of ITN (12%), DMGT (5%)<sup>127</sup>, and the Trinity Mirror Group (4%).

---

<sup>127</sup> See footnote 85 for a discussion of the possible effects of the omission of the following titles from the prompted list of newspaper titles in our questionnaire: Mail on Sunday, Daily Star on Sunday, Sunday Express, The People.

Figure 27 - Share of references for single main source of news, at wholesale level (post-transaction) (Base - all regular news users)

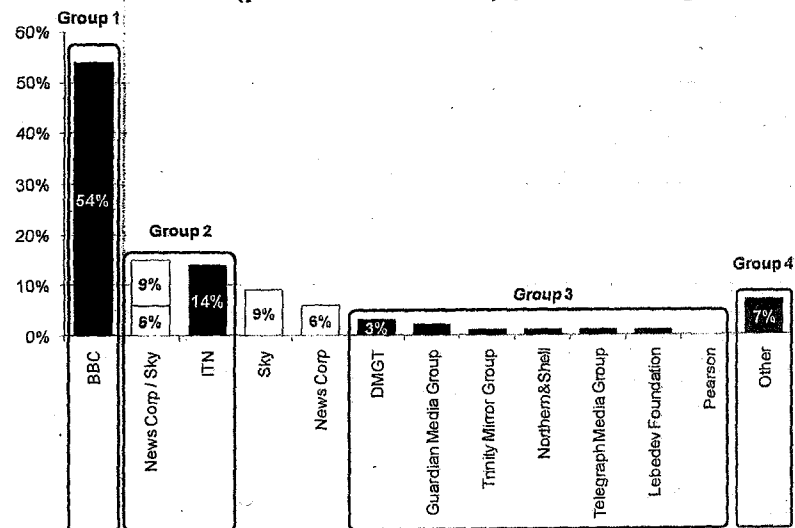


Figure 29 - Share of references for all news sources, at wholesale level (post-transaction) (Base - all regular news users)

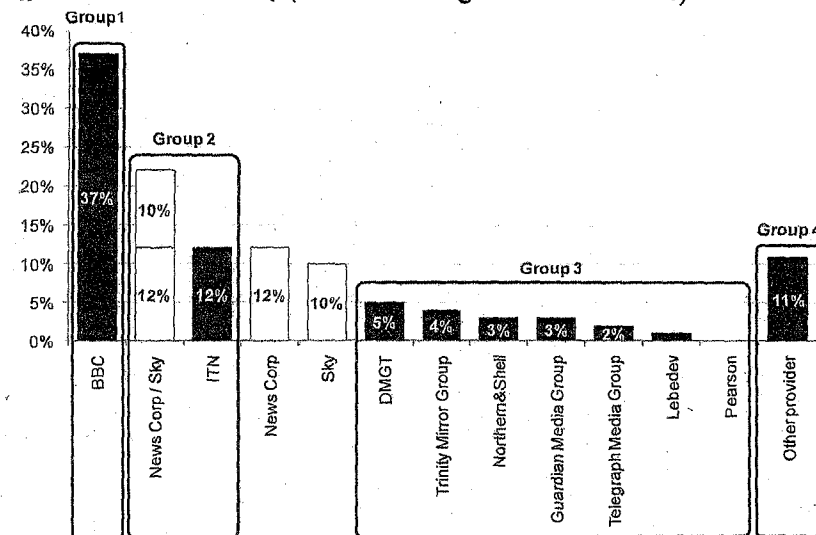


Figure 28 - Share of references for single main source of news, at retail level (post-transaction) (Base - all regular news users)

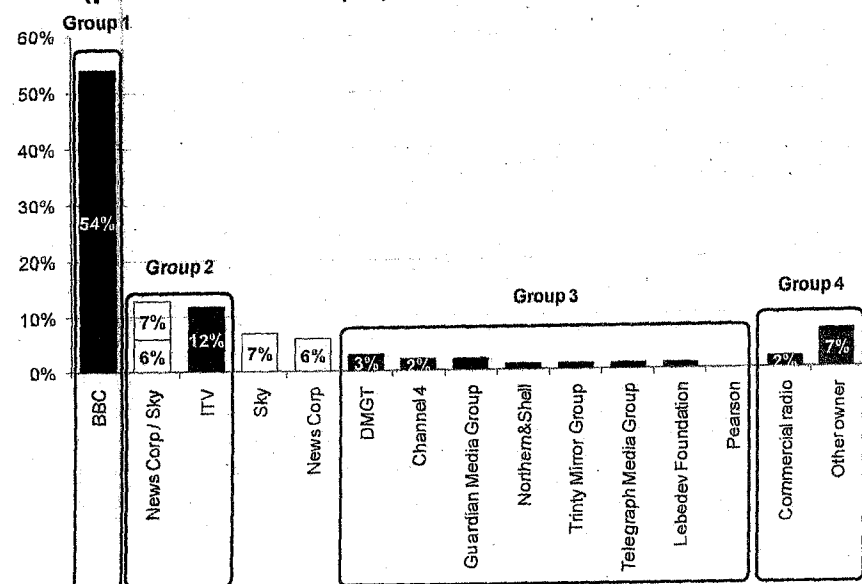
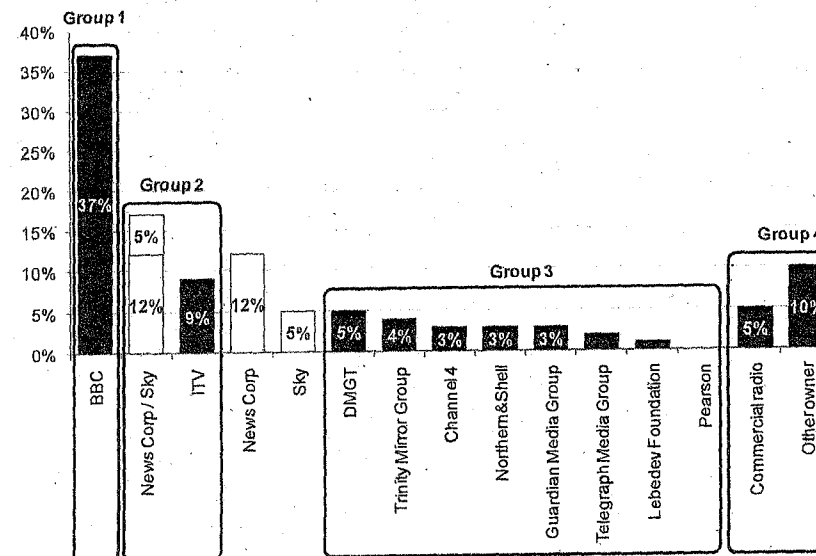


Figure 30 - Share of references for all news sources, at retail level (post-transaction) (Base - all regular news users)



Report on public interest test

- 5.38 At the retail level, a combined News Corp/Sky would become the equal second largest single main source of news with a share of 13% of respondents, behind the BBC (54%) and marginally ahead of ITV (12%), DMGT (3%), and Channel 4 (2%) and the Guardian Media Group (2%). News Corp would also strengthen its position as the second largest provider by share of reference for all regular use of news sources (17%).
- 5.39 This compares to the BBC (first with 37%) and ITV (third with 9%), DMGT (fourth with 5%) and a range of other smaller providers. In both cases, Sky News which was third and fourth in terms of main source and all sources would cease to exist as a distinct media enterprise provider of news in terms of external plurality.
- 5.40 Overall, the proposed transaction would result in the loss of the fourth largest provider of news content and would serve to strengthen News Corp's position as the second largest provider of news content, second to the BBC. Furthermore, it would further widen the gap between News Corp and ITV / ITN and the remaining news providers across all media platforms. Such a change to the relative ability to influence public opinion may suggest public interest concerns.
- 5.41 As noted earlier, our cross media audience research also provided us with the means to estimate cross media audience reach for each media provider. The results of this analysis are given in Figure 31 and Figure 32. The BBC continues to lead with a cross media audience reach of 81% of regular news consumers. However, after the transaction, News Corp will overtake ITV/ITN as the second largest provider in terms of cross media audience reach with 51% at the wholesale level and 42% at the retail level.
- 5.42 Both News Corp and ITV/ITN achieve substantially higher levels of cross media audience reach (more than double) relative to the remaining media providers. At the wholesale level, the transaction also results in the loss of one of four media providers today who achieve a cross media audience reach of greater than 30%<sup>128</sup>.
- 5.43 By looking at these measures, we consider that post-transaction, providers of news and current affairs can be divided into four groups based on their relative share and reach, indicating relative ability to influence.
- In the first group, the BBC has the largest share both in terms of share of main source of news (54%) and share of references to all sources of news by regular news users (37%), as well as the largest reach of all news providers (81%).
  - News Corp/ Sky and ITN (at wholesale level) or ITV (at retail level) tend to constitute a second group of providers with a share of main source of above 10%, and share of references to all sources of news above 9%. Post-transaction, these players have a reach in excess of 30%.
  - A third group, made up mainly of the other physical and online newspaper providers who have shares of 5% or less in terms of share of references to all sources of news used regularly and share of main source of news and a reach of

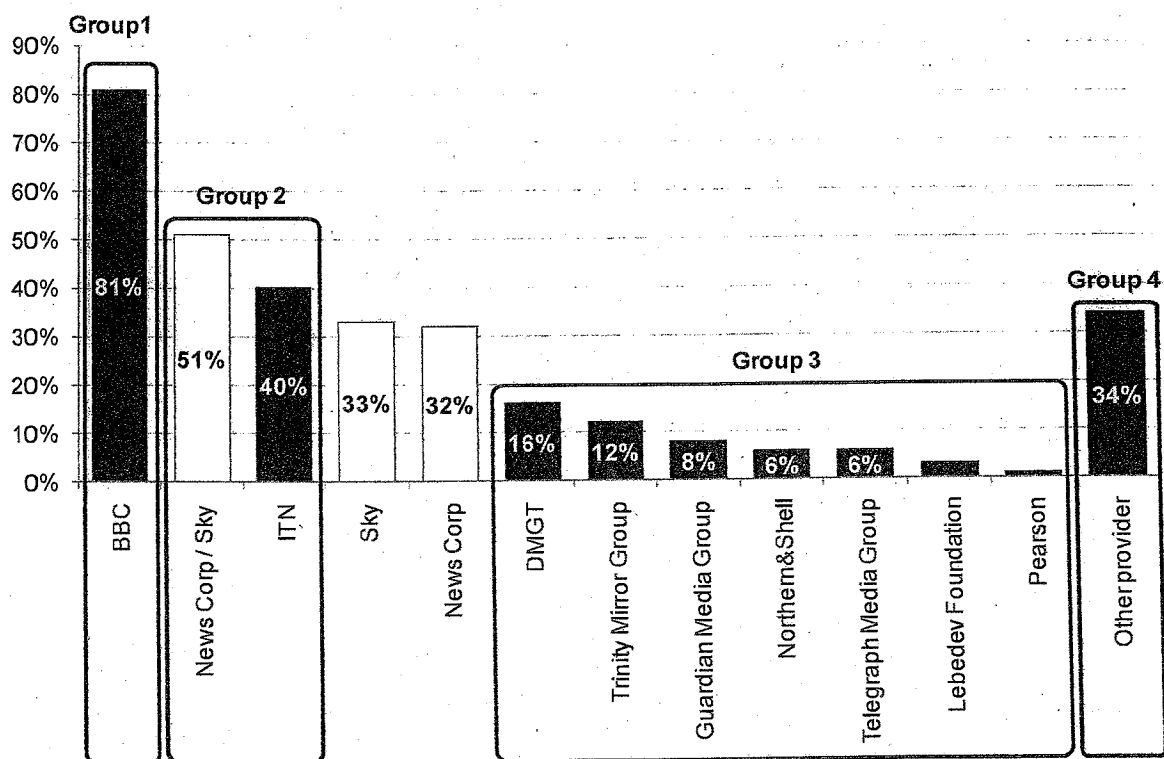
<sup>128</sup> At the retail level, the number of providers with a cross media audience reach of greater than 20% remains the same.



16% or less. These include DMGT<sup>129</sup>, Trinity Mirror and the Guardian Media Group.

5.44 Finally, there are a large number of other providers who were referenced by respondents but which, individually, have small share of references.

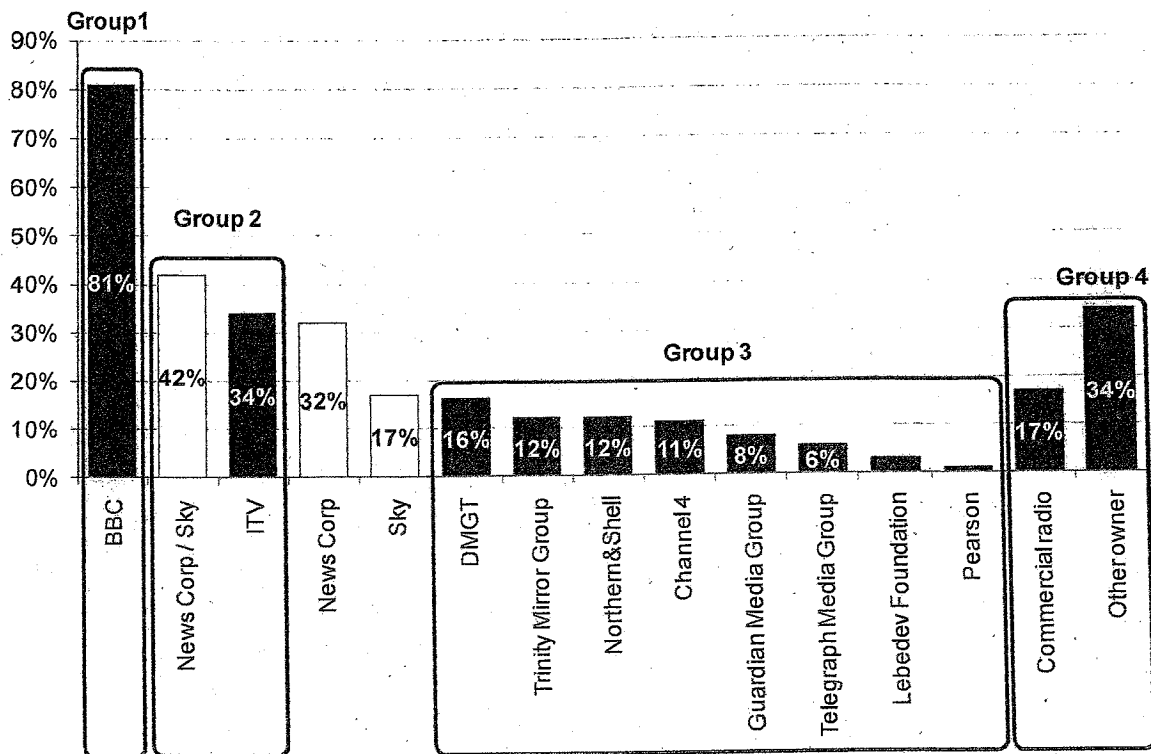
Figure 31 - Cross-media audience reach for news, wholesale level (post-transaction)



Source: Ofcom cross-media audience research, 2010. Base – all regular news users, 96% of GB population

<sup>129</sup> Associated Newspapers does achieve a share of 5% on the basis of all sources of news at the retail level.

Figure 32 - Cross-media audience reach for news, retail level (post-transaction)



Source: Ofcom cross-media audience research, 2010. Base – all regular news users, 96% of GB population

**Summary of analysis of external plurality**

5.45 We have looked at the number and range of persons with control of media enterprises taking account of their ability to influence and inform opinion by reference to a number of different measures in order to assess the impact of the transaction on the parties' position with respect to cross media consumption.

5.46 While Sky News' audience share as highlighted by TV industry data is relatively low, it has a significant ability to influence public opinion and the news agenda in audience terms given its presence and reach on TV and having built a strong presence in retail and wholesale news provision. As a result, today it makes a strong and positive contribution to plurality. Similarly, News Corp contributes to plurality as a result of its presence in newspapers and online. The proposed transaction would result in Sky ceasing to be a distinct media enterprise from News Corp.

5.47 Share of minutes is a less directly comparable measure. However, it provides a useful complementary measure. Our view based on our new market research and set out above is supported by the analysis of share of minutes, which demonstrates that, following the transaction, News Corp would consolidate its position as the second largest provider of news and current affairs behind the BBC, creating a significant gap between these top two providers and the remaining news providers. This analysis also shows that online may account for a relatively limited amount of time for news consumption, especially in relation to newspapers which are seen to represent a significant share of total news minutes.

5.48 Based on our market research, the effect of the proposed acquisition is to bring together one of the three main providers of TV news with the largest provider of newspapers. The effect on the relevant share of references and reach is indicated by our market research. In relation to the provision of wholesale news:

- The proposed transaction would result in Sky ceasing to be a distinct media enterprise, reducing the number of Group 2 providers from three to two in both share and reach terms. This is particularly marked in wholesale news provision.
- The proposed transaction would be a combination of the second and fourth largest providers based on our research into share of all references for news providers. For example, News Corp's potential ability to influence would increase with the addition of Sky News, increasing its share of references from 12% to 22%. News Corp's reach as a percentage of regular news consumers would increase from 32% to 51%.
- This does not suggest News Corp moves from Group 2 to Group 1<sup>x</sup> in our charts: it would not be of the same scale as the BBC in share or reach terms after the proposed transaction. However, it would be larger in relative ability to influence opinion than both ITN and the Group 3 providers at the wholesale level.

5.49 This analysis is based on all news sources measured in the survey (across TV, newspapers, online and radio) and is based on wholesale news provision not retail.

5.50 However, a similar picture is displayed when considering all sources of retail news provision, outlined below, and when considering the main source<sup>130</sup> of news at the retail level (see Figure 28 and Figure 30). In both cases, the BBC continues to be the largest provider, while the transaction increases News Corp's potential ability to influence.

5.51 We note that the acquisition would not affect the BBC's status as the strongest provider of news and current affairs in the UK. As with all media enterprises, the BBC may have an institutional view which can shape its editorial decisions. However, the governance of the BBC is different from other broadcasters in that it has a Royal Charter that requires it to be "independent in all matters concerning the content of its output...and in the management of its affairs." Its strategic direction is set by the BBC Trust, which is held publicly accountable for the performance of its role in meeting the "public interest, particularly the interest of licence fee payers". The Trust must also maintain the independence of the executive, which oversees output. This is fundamentally different from other media enterprises, including News Corp, which typically have a controlling proprietor.

5.52 We therefore consider that the proposed transaction will result in an increase in News Corp's ability to influence public opinion, as measured by share of news and current affairs consumption in the context of a cross media market. Taken in combination, this indicates a change in the concentration of media ownership which is likely to affect sufficient plurality.

<sup>x</sup> A typographical error contained in the version of this report sent to the Secretary of State on 31 December 2010 has been subsequently corrected here. The original text was: "This does not suggest News Corp moves from Group 1 to Group 2 in our charts".

Report on public interest test

### Internal plurality

- 5.53 For the reasons set out above, we consider that the proposed acquisition by News Corp giving it 100% ownership of Sky's shareholding would reduce the number of persons with control of media enterprises, with Sky ceasing to be a distinct media enterprise. Although News Corp would have full control of Sky we have nonetheless considered the actual extent of control that would be exercised and exercisable by News Corp.
- 5.54 We have received a number of submissions on how far internal plurality within the merged group would help in ensuring a range of opinions; in particular whether Sky News could be seen to remain an independent voice to News Corp's other news outlets. Some respondents to our invitation to comment submitted that it was inappropriate to consider internal plurality at all in circumstances where the proposed acquisition led to 100% control. However, the Court of Appeal has stated that the right approach is to "*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...or rather one of actual common ownership or control*"<sup>131</sup>.
- 5.55 The Competition Commission noted in Sky/ITV that "[BSkyB's board] had no role in the day-to-day editorial control of Sky News content on television or online. We received no evidence from third parties to suggest that senior executives at BSkyB or its parent companies exerted influence on the Sky News agenda".<sup>132</sup>
- 5.56 We note comments made by Rupert Murdoch to the Ownership of the News report by the House of Lords Select Committee on Communications where he noted: *'the only reason that Sky News was not more like Fox News was because 'nobody at Sky listens to me'*<sup>133</sup>). We also note News Corps' submission that despite the degree of control it currently has over Sky, it does not currently exert such control to influence editorial decisions of Sky News.
- 5.57 Therefore, in terms of editorial decisions, in looking at the position today, we have considered Sky News as a media enterprise which is distinct from News Corp regardless of the 39.14% ownership.
- 5.58 We received a mixed set of responses on how far internal plurality may remain once News Corp owns 100% of Sky. This section considers:
- Concerns that internal plurality for Sky News will not be maintained.
  - Arguments that a range of existing mechanisms will ensure internal plurality will be maintained

### Concerns in relation to internal plurality

- 5.59 The main concern raised has been that, given the proposed acquisition will result in full ownership of Sky by News Corp, internal plurality for Sky News cannot be

<sup>131</sup> British Sky Broadcasting Group PLC, Virgin Media Inc v The Competition Commission and Secretary of State for BERR and others, [2010] EWCA Civ 2, at paragraph 121.

<sup>132</sup> Paragraph 5.57, Competition Commission Report on the Acquisition by BSkyB plc of 17.9% of the shares in ITV Plc sent to Secretary of State (BERR) 14 December 2007

<sup>133</sup> House of Lords Select Committee on Communications, Ownership of the News, 2008, Appendix 4, paragraph 47

guaranteed. Representations argue that this is because the proposed acquisition will result in the loss of independent shareholders and the removal of the existing independent directors who currently help protect the independence and diversity of Sky News. Following the proposed transaction, News Corp would have greater direct control and influence over the editorial staff of Sky News.

- 5.60 One important issue here is the fact that, post transaction, News Corp would be able to appoint and dismiss the editor of Sky News. It has also been argued that:
- the economics of news provision means some level of operational integration is likely, providing new coordination mechanisms for Sky and News Corp; and
  - media proprietors have a tendency to intervene in editorial decisions, most notably in the newspaper industry.

### Operational integration

- 5.61 The economics of news provision is dominated by the substantial fixed costs of newsgathering and distribution. We received representations arguing that the acquisition would provide News Corp with the opportunity to reduce some of these fixed costs by integrating aspects of the news operations of Sky News and News Corp's news titles, including News International's UK newspapers<sup>134</sup>. Integration could range from consolidation of certain back-office functions, e.g. HR or IT support, to full newsroom integration with shared journalists, foreign bureaux and/or editorial control.
- 5.62 We recognise that some synergies can be realised without any need for a merger. There are examples today of commercial deals between rival titles designed to deliver such synergies. For example, The Daily Telegraph currently uses News International's printing press facilities. We also note that David Elstein submitted that Sky and News Corp could integrate their newsrooms regardless of the proposed acquisition, if they were so inclined.
- 5.63 We also recognise that operational integration of editorial functions associated with different titles could be counter-productive, in circumstances where those different titles have different target audiences, and where it is therefore commercially advantageous for the different titles to maintain distinct voices. We note in this context that News Corp has not integrated news functions of its existing titles and channels either in the UK or internationally. We note News Corp's submission [X] noted the views from Perspective's report on the difficulties posed from different cultures of TV and press newsroom. We also note that David Elstein submitted that Sky and News Corp could integrate their newsrooms regardless of any proposed acquisition, if they were so inclined.
- 5.64 Nevertheless, we believe that the transaction would make it possible to exploit a range of operational synergies between News Corp and Sky. [X].
- 5.65 Overall, we consider that some level of operational integration is likely to follow as a result of the transaction. Even if this does not result in newsroom integration, it may still result in an enhanced ability to co-ordinate the news gathering and distribution activities of different distribution channels, and therefore an enhanced ability for the News Corp to exercise influence.

<sup>134</sup> See e.g. responses from BT (page 5); Campaign for Press & Broadcasting Freedom (page 5); Northern & Shell Network Limited (throughout).

Report on public interest test

### Media proprietors' influence

- 5.66 Numerous submissions to Ofcom alleged that Rupert Murdoch has a history of intervening in the editorial decisions and political slant of the News Corps newspapers, and that after the proposed acquisition this editorial influence would be extended to Sky News thus reducing the level of plurality within the media enterprise<sup>135</sup>.
- 5.67 A range of anecdotal evidence was provided to this point in relation to News Corp, however, it should be noted that claims of such influence are not limited to News Corp – it is a common theme for many media enterprises, most notably in the press.
- 5.68 As set out in the Competition Commissions report<sup>136</sup> 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. The risk is that a 'traditional newspaper proprietor' may seek to adopt a similar approach to TV news.
- 5.69 Among News Corporation titles, it has been argued that Rupert Murdoch adopts different roles and exerts different levels of influence. This issue was considered by the Competition Commission in Sky/ITV where it noted that:
- News International also told us that Mr Rupert Murdoch and the News International Executive Chairman had regular discussions with the Editor of The Sun on a range of editorial matters, from page design to editorial policy, whereas, in relation to The Times and The Sunday Times, the position on news coverage, editorial stance and appointment of editors is governed by the terms of the DTI consent of 27 January 1981 relating to the transfer of these titles to their current ownership<sup>137</sup>.*
- 5.70 The Competition Commission in Sky/ITV concluded that there was a considerably greater degree of involvement by Mr Rupert Murdoch in relation to *The Sun* than some other News International newspapers, such as *The Times*.
- 5.71 This was further supported by evidence submitted by Rupert Murdoch to the House of Lords Select Committee on Communications report on The Ownership of the News<sup>138</sup> In this evidence Rupert Murdoch described himself as a 'traditional proprietor' for *The Sun* and *News of the World* exercising editorial control on major issues, like which political party to back in a general election or which policy to support on Europe. However he argued that 'the law' prevents him from instructing the editors of *The Times* and *The Sunday Times* and that the independent board is there to ensure he cannot interfere.
- 5.72 However we also received submissions which argued, for example, that during Andrew Neil's tenure as editor of *The Sunday Times* Rupert Murdoch sought to intervene in the editorial content of the paper in areas that related to Rupert Murdoch's business interests.

<sup>135</sup> See e.g. responses from Slaughter and May paragraphs 7.11-7.18; Campaign for Press and Broadcasting Freedom note 7; International Consumer Policy Bureau, entire document; Professor Steven Barnett, sections 2(i)-(ii).

<sup>136</sup> Paragraph 5.58 Competition Commission Report on the Acquisition by BSkyB plc of 17.9% of the shares in ITV Plc sent to Secretary of State (BERR) 14 December 2007

<sup>137</sup> Paragraph 5.6 Competition Commission Report on the Acquisition by BSkyB plc of 17.9% of the shares in ITV Plc sent to Secretary of State (BERR) 14 December 2007

<sup>138</sup> House of Lords Select Committee on Communications report on The Ownership of the News paragraph 128

5.73 This influence does not always have to be overt. The House of Lords report "The Ownership of the News" quotes Andrew Neil:

*"There are many ways in which you can influence a newspaper without giving a downright instruction. Throughout the 11 years that I was Editor of The Sunday Times, I never got an instruction to take a particular line, I never got an instruction to put something on the front page and I do not think I even got an instruction not to do something, but I was never left in any doubt what he wanted"*

5.74 Some of the submissions we received noted that intervention also took place when the news agenda coincided with News Corps wider business interests. A submission referred to Andrew Neil, who said that the division between *The Sun* and the *Times'* editorial independence as declared by Rupert Murdoch was blurred over issues which specifically related to the business interests of News Corporation, rather than day-to-day coverage or major political issues.<sup>139</sup>

5.75 Andrew Neil also reports that while editor he was subject to interference on news items which affected Rupert Murdoch's business.<sup>140</sup>

5.76 We also note submissions from Sky and the conclusions of the Competition Commission, that there is no evidence of editorial influence being exerted on Sky News by the Sky Board or by shareholders. David Elstein noted in his submission that in his own experience there was never any pressure applied to Sky News. However, we also note that the evidence of past behaviour may not necessarily be a reliable indicator of future behaviour:

### **Submissions that there are a number of existing mechanisms that would ensure internal plurality**

5.77 We received submissions making four main arguments suggesting internal plurality would remain following the proposed acquisition:

- Increasing the level of control to full control will not translate in to the loss of Sky News's editorial independence as Sky News' editorial policy is not a matter for the Board.
- Existing regulatory safeguards, notably impartiality requirements on TV broadcast news would protect internal plurality and ensure no undue influence on the news agenda and public opinion from media owners.
- The existing impartiality requirements and history of TV news has resulted in audience expectations of impartial TV news broadcasts, a high level of trust in TV news and a distinct culture among TV news journalists and newsrooms. Combined, these all help protect plurality.
- The nature of TV news, especially rolling news services like Sky's, is such that the news agenda is defined by breaking news, not by what stories a broadcaster chooses or chooses not to cover. This is different from the role played by newspapers, which adopt a more investigative approach to finding and exploring stories, as well as containing opinion and comment.

<sup>139</sup> Slaughter and May submission 7.12, p16-17

<sup>140</sup> House of Lords Select Committee on Communications, Ownership of the News 2008, paragraph 188

### Sky's editorial policy is not a matter for the Board

- 5.78 News Corp submitted that Sky's editorial policy was not a matter for Board determination. Editorial policy has not been debated at Board level and News Corp has not sought to influence the editorial policy of Sky News. Further they argued that there is no evidence that the independent directors have had to "defend" the editorial policy of Sky News against influence by News Corp executives. News Corp stated that the regulatory requirements of impartiality in Ofcom's Broadcasting Code and the strong culture of independence in TV newsrooms (see below) are significant safeguards.
- 5.79 However, notwithstanding the regulatory framework and culture, we note that the current behaviour of News Corp as a minority shareholder in Sky is not necessarily a clear indicator of its future behaviour should it have full control of Sky. The degree of control exercisable by News Corp as a full owner is clearly potentially different from its current minority shareholding, for example, News Corp would be able to appoint or dismiss the senior editorial team, including editor, at Sky News.

### Impartiality requirements

- 5.80 Section 5 of the Broadcasting Code is intended *'to ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality'* and *'to ensure that the special impartiality requirements of the [Communications] Act are complied with'*<sup>141</sup>.
- 5.81 We received submissions that argued that the impartiality rules in Ofcom's Broadcasting Code:
- reduce the scope for influence by owners of television channels over editorial decisions concerning broadcast news; and
  - are not limited to preventing the biased presentation of news stories, but also prevent partiality for political reasons in editorial decisions on the selection of and prominence given to stories which are broadcast.
- 5.82 We have considered whether existing provisions on impartiality and due prominence would allay any internal plurality concerns arising from this transaction.
- 5.83 The requirement for broadcasters to present the news with "due impartiality" is of course not absolute and broadcasters have a degree of editorial discretion in the selection of the news agenda. These rules would not necessarily prevent an individual with control of a media organisation from influencing the news agenda through the selection or omission of stories. There could be cases where the deliberate exclusion of stories could potentially be a breach of the Broadcasting Code. However, in practice, the effect of partial selection or omission of news stories would be a subtle one which it could be difficult, through regulation, to identify and/or prove.
- 5.84 The potential limitations of impartiality regulation and the role that selection of stories can have in setting the agenda have been highlighted to us by a number of submissions and were indeed noted within the Sky Chairman's own MacTaggart lecture in 2009:

---

<sup>141</sup> Ofcom, Broadcasting Code Section 5 <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/impartiality/>



*'the system is concerned with imposing what it calls impartiality in broadcast news. It should hardly be necessary to point out that mere selection of stories and their place in the running order is itself a process full of unacknowledged partiality.'*<sup>142</sup>

5.85 This is consistent with the position of the Competition Commission in Sky ITV:

*Impartiality relates to the fair and balanced treatment of differing viewpoints in relation to particular news stories. However, it does not address the relative prominence given to each story. In our view, it is a matter of public interest that decisions about the relative importance of different news stories should be made by a range of independent people and reflect diverse perspectives'*<sup>143</sup>

*We found that the regulatory framework, while relevant to the plurality of news and, hence the statutory public interest assessment, does not on its own ensure a sufficiency of plurality of news'*<sup>144</sup>

5.86 We agree with the Competition Commission's conclusion and in particular with its view that *"decisions about the relative importance of different news stories should be made by a range of independent people and reflect diverse perspectives"*<sup>145</sup>.

5.87 We recognise that the impartiality rules are relevant and may contribute as a safeguard against potential influence on the news agenda by media owners, but they cannot by themselves necessarily ensure against it. Our view is that these provisions do not by themselves adequately address all potential concerns.

5.88 In any event, there is a difference between the Broadcasting Code which provides the regulator with the ability to intervene on a case by case basis to ensure impartiality in terms of news presentation and the statutory need for there to be a sufficient plurality of persons with control of media enterprises. The regulatory framework, while relevant to the plurality of news and hence the public interest assessment, does not on its own ensure a sufficiency of plurality of news.

### Audience expectations

5.89 We received submissions that argued audiences have particular expectations for television news to be impartial and balanced, citing Ofcom research which found that 87% of audiences thought impartiality was important in television news<sup>146</sup>. These submissions also suggested that the relatively low audience share of Fox News in the UK was evidence of a lack of demand for partial journalism in TV news in the UK.

5.90 While audience expectations may deter a media owner from attempting to influence editorial decisions, it is our view that the audience desire and expectation for impartial TV news would not be sufficient to ensure the continued delivery of impartial news and a plurality of views. They may act as a constraint – to an extent – on stories that are broadcast. However, these expectations are less likely to be relevant when considering which items are included in– or excluded from – the news agenda.

<sup>142</sup> James Murdoch, MacTaggart Lecture, 2009

<sup>143</sup> Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc, 14 Dec 2007, paragraph 5.12

<sup>144</sup> Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc, 14 Dec 2007, paragraph 5.38

<sup>145</sup> Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc, 14 Dec 2007, paragraph 31

<sup>146</sup> Ofcom, New News Future News, Figure 5.4 p65

Report on public interest test

We believe that, while there could be commercial incentive to cater to audience demand for impartial news, the extent to which this would prevent any potential desire to interfere with the editorial independence of Sky News is unclear and hard to quantify.

- 5.91 In addition, while in some cases audiences (and the regulator) would be able to identify more obvious partial news as a result of story selection (for example on very high profile political issues), other cases would be harder to identify (for example, non-selection of stories detrimental to the commercial or personal interests of a media owner).
- 5.92 Therefore, we do not consider that audience expectations of TV news could be relied on to protect plurality.

Culture of TV newsrooms

- 5.93 We have received submissions that safeguards already exist within the internal culture of all TV newsrooms, including Sky News. At the core of these is the argument that TV news has a different culture from newspapers, and that this culture would be resistant to editorial interference. Evidence submitted included:
- Comments on the nature of TV news compared to newspapers for example television news, with its different technical and logistical skills, tends to recruit from within itself rather than from newspaper journalists which suggests that this cements the separate culture.
  - There is already a strong culture of independence among TV news editors, in part due to the expectation of impartiality and also as a result of the approach of the BBC in this area. The culture of independence was noted by the Competition Commission in Sky/ITV: *"the evidence that we received suggested to us that there was a strong commitment to editorial independence across television news broadcasting which would lead to editors resisting any direct board intervention or intervention from shareholders to set the news agenda"*<sup>147</sup>
- 5.94 Alternatively, other representations questioned how far such cultural differences and safeguards could be depended on in a situation of full ownership. Specifically, concerns were raised that editors may 'self-censor' as editors cannot be expected to act with complete disregard to the views of a full owner<sup>148</sup>. This links to points made by the Competition Commission which noted: *"boards usually play some role in the appointment of editors"*.
- 5.95 In addition, in future there may be potential journalistic and operational benefits arising from combining print and TV journalists when creating news for converged platforms. The increasing use of video content on text based news websites, or development of news for convergent devices, may result in a change in the distinction between print and video journalism and hence a change in the role and culture of newsrooms.

---

<sup>147</sup> Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc, 14 Dec 2007, Paragraph 5.68

<sup>148</sup> See e.g. responses from Slaughter and May, paragraph 7.13; Professor Steven Barnett, section 2(ii)

- 5.96 It is our view that cultural safeguards may be expected to go some way to maintaining the editorial impartiality of Sky News but we do not consider that they can be relied upon to secure plurality.

### Summary of analysis of internal plurality

- 5.97 We recognise that audience expectations, the culture of TV journalism and the nature of rolling news may together contribute towards the independence of editorial voices against proprietary influence on the Sky News agenda. However, for the reasons set out above we do not consider that these factors will ensure plurality.
- 5.98 We recognise that the impartiality rules are relevant and may contribute as a safeguard against potential influence on the news agenda by media owners, but they cannot by themselves necessarily ensure against it. Our view is that these provisions do not adequately address all potential concerns.
- 5.99 In any event, there is a difference between the Broadcasting Code which provides the regulator with the ability to intervene on a case by case basis to ensure impartiality in terms of news presentation and the statutory need for there to be a sufficient plurality of persons with control of media enterprises. The broadcasting regulatory framework, while relevant to the plurality of news and hence the public interest assessment, does not on its own ensure a sufficiency of plurality of news.
- 5.100 We recognise that it is possible that Sky News may remain a strong independent voice from an internal plurality perspective even while no longer part of a distinct media enterprise.
- 5.101 However, in a situation where Sky is wholly owned by News Corp and where we have received a significant number of representations that a proprietor may want to interfere with editorial decisions, we need to understand what would in practice prevent such intervention. From the evidence submitted to us, while there are factors that are likely to contribute to internal plurality, we consider that these are not such that they would preclude such interference in circumstances of full control.
- 5.102 In light of the importance attached by Parliament to media plurality in informing opinion and setting the agenda, we do not consider that in this case we can rely on internal plurality to ensure sufficient plurality in the provision of news and current affairs.
- 5.103 This is consistent with views expressed by the House of Lords Select Committee on Communications in 2008:

*We do not believe that an internal company structure can be an adequate substitute for competition law and statutory regulation in ensuring that no single voice becomes too powerful.*<sup>149</sup>

### Multi-sourcing and online news provision

- 5.104 As explained in section 4, consumers tend to use more than one source of news and current affairs and this is a relevant consideration in any plurality assessment. This is because the extent to which consumers access and use news and current affairs

<sup>149</sup>House of Lords Select Committee on Communications, The Ownership of the News, 2008, paragraph 220

## Report on public interest test

from different providers may limit the ability of any single provider to influence audiences.

- 5.105 The use of multiple sources of news is considered in most of the measures we have used to assess changes in external plurality. The effects of multi-sourcing are particularly evident when comparing the share of references of different providers for all news sources (which takes account of consumers' use of multiple sources) with the shares related to single main sources (which instead considers only the sources to which each consumer attaches the most importance).
- 5.106 The BBC accounts for 37% of references when considering all sources of news by wholesale provider, but its share rises to 54% when looking at single main sources. ITN's share of references remains similar (12% and 14%) when moving from all sources to single main source, and Sky also broadly maintains its share (10% for all sources, 9% for single main source). News Corp has a materially lower share of single main source share of references (6%) relative to its all-sources share (12%). A similar trend is visible for other newspaper providers. This suggests that consumers, when prompted to choose a single source of news, attach more weight to the news and current affairs content they access on television as opposed to newspapers.
- 5.107 News Corp's ability to influence is strengthened by the proposed acquisition (both in terms of share and of reach) even when taking into consideration all the sources that consumers access regularly. It is important to note that, regardless of the level of multi-sourcing, acquisition of one player by another will always result in an increase in the relative share of the acquiring enterprises. Similarly, a merger will always increase the reach of the acquirer unless the two entities merging have a perfectly overlapping audience.
- 5.108 In addition to considering multi-sourcing in our analysis of static effects to external plurality, we have also looked specifically at whether the proposed acquisition would change overall levels of multi-sourcing by consumers through the loss of one distinct news and current affairs provider (Sky News).
- 5.109 In its submission, News Corp estimated that 6% of all UK consumers relied on both News Corp and Sky for news. Of these, approximately 96% also sourced news from other sources as well. News Corp therefore estimated that the proportion of consumers who would, post transaction, rely on only News Corp and Sky News and no other news provider would be 0.3% of the population<sup>150</sup>.
- 5.110 As described in section 4, our research found that in a typical week consumers used on average 2.9 wholesale news providers, with 46.8% of respondents claiming they use 1 or 2 providers and 29.2% 4 or more. We have also highlighted that levels of multi-sourcing for consumers that access Sky News regularly are higher than for the general population – with 4 news providers used in a typical week.
- 5.111 When considering News Corp and Sky as a single provider post-transaction, the level of multi-sourcing for the population as a whole decreases only slightly. The average number of wholesale news providers accessed by all consumers who regularly access news would fall to 2.8<sup>151</sup>. For the sole consumer base of Sky and News Corp combined, the average number of sources used following the proposed acquisition

<sup>150</sup> Source: News Corp submission (FTI report), paragraph 6.37

<sup>151</sup> Source: Ofcom cross-media audience research 2010. This analysis assumes no other change to cross-media consumption of news and current affairs, other than the loss of Sky as an independent provider.

would instead fall to 3.5. Although the relative change is higher, we note that the average number of sources would still remain considerably above the average for the population as a whole.

- 5.112 In section 4 we also noted that the size of the audience that relies solely on Sky or News Corp for accessing news and current affairs is very small (respectively 1% and 2% according to our market research) and this remains the case post-transaction, with only 6% of the combined consumer base (or 3% of the total population) relying solely on news and current affairs from News Corp or Sky.
- 5.113 This data suggests that although Sky would cease to be a distinct media enterprise, many individual consumers would continue to access a number of different sources following the proposed transaction. This would therefore provide some constraint on the extent to which News Corp, post transaction, would be able to take advantage of an increase in its audience share and reach to influence public opinion and the news agenda.
- 5.114 However, the implications of multi-sourcing in relation to this proposed transaction are complex and as a first stage authority we do not have sufficient time to consider it fully.
- 5.115 In any case, although we believe the level of multi-sourcing by individual consumers to be important, we do not believe that we can rely on it to ensure sufficient plurality.
- 5.116 This is because the process of forming public opinion does not just depend on individuals consuming news, and then each forming their own opinion without reference to other consumers. Rather, individuals consume news, debate and discuss it with others, and it is this process of both news consumption and discussion which contributes to public opinion. What matters more therefore is the number and range of news providers used by *all* consumers and their relative significance, rather than the number of news providers used by each individual consumer.
- 5.117 We also recognise the increasing importance of online news provision today. Wider availability and use of the internet, and the extension of media enterprises' news offerings online, allow consumers to access news more easily from a range of different providers. Our audience research indicates that online usage appears to be complementing the use of traditional media for consumers. This can increase the availability of news sources, and result in consumers using a greater range and variety of sources than may have historically been the case.
- 5.118 However, traditional media providers account for 10 of the top 15 online providers of news (eight newspaper groups plus the BBC and Sky), with the remainder predominantly being news aggregators rather than alternative sources of news. This suggests that today online news tends to extend the reach of established news providers as opposed to favouring the use of new outlets that are not present on traditional media. We recognise that this could change in the future, but the nature of any such change is uncertain.

### **Influence on other media and the agenda**

- 5.119 We have received some representations that the merged entity, given its presence across all platforms and in particular in TV rolling news (through Sky News), could

Report on public interest test

exert a greater influence over the news agenda of third parties, therefore diminishing overall plurality<sup>152</sup>.

- 5.120 One submission illustrated this by referring to the risk that Sky News could choose to give disproportionate coverage to stories featured in News Corp titles, at the expense of stories featured by other news providers. We received representations that a story picked up by Sky News is more likely to become so important that all news outlets have to cover it<sup>153</sup>. Conversely, the perceived importance of Sky's rolling TV news in agenda-setting<sup>154</sup> would mean that stories excluded by Sky News would be less likely to be covered by other outlets.
- 5.121 The merging parties have instead argued that it is very unlikely for any single media enterprise (and for Sky News in particular) to be able to influence the wider news agenda because of a variety of factors, including:
- Sky News's relatively small viewing share in TV;
  - the prominence of the BBC in news provision and the fact it is unlikely to follow any agenda set by other players;
  - the growing importance of online outlets in both news distribution and news gathering; and
  - trends towards greater use by consumers of international and specialist outlets, which are unlikely to be influenced by mainstream UK news sources.
- 5.122 We note that a variety of factors affect the way in which media enterprises source the stories they cover, and their editorial policy. For example, a title or programme focused on investigative reporting will (by definition) tend to source its stories directly. Other outlets may instead rely more on news stories supplied by news agencies<sup>155</sup>.
- 5.123 As displayed in Figure 5 in Section 4, the news providers contained in the Perspective analysis drew on a range of cited sources for news stories in the period June to November 2010. In this analysis, neither News Corp nor Sky were the main source of news stories for these news providers. For the outlets Perspective examined, of stories that cited a source, Sky News was referenced 3.7% of the time. Sky in combination with all the News International papers was referenced 12.1% of the time. By comparison, the BBC was cited as a source for 24.6% of stories. The three news agencies were also cited as key sources for the titles contained in the Perspective analysis: Associated Press 25%, Reuters 13%; and the Press Association 10%. However relevant, rolling TV news is just one of many possible sources of news for media enterprises. Overall, 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.

<sup>152</sup> Slaughter & May, BT, Dr Des Freedman

<sup>153</sup> See file note of telephone conference with [X] [a national newspaper editor].

<sup>154</sup> Slaughter & May

<sup>155</sup> We received a representation that, for example, the BBC's rolling news coverage largely reflects the Press Association's newlists. See file note of telephone conference with [X] [a national newspaper editor].

## Conclusions on static analysis

- 5.124 We have considered plurality and the need for there to be sufficient plurality by looking at the number and range of persons with control of media enterprises in light of their ability to influence opinion. We have done so in accordance with the purpose of the public interest consideration. We have considered carefully all the representations made and evidence available to us. We believe that there is a public interest concern in relation to external plurality as the effect of the proposed transaction would bring together one of the three main providers of TV news and the largest provider of newspapers significantly increasing News Corp's ability to influence opinion and control the agenda.
- 5.125 Further in circumstances of 100% ownership and control, we do not believe that cultural safeguards and internal plurality can be relied upon to ensure plurality.
- 5.126 We recognise that the impartiality requirements of the Broadcasting Code may contribute as a safeguard against potential influence on the news agenda by media owners, but they cannot themselves necessarily ensure against it. In any event, there is a difference between the Broadcasting Code which provides the regulator with the ability to intervene on a case by case basis to ensure impartiality in terms of news presentation and the statutory need for there to be a sufficient plurality of persons with control of media enterprises.
- 5.127 We have carefully considered the submissions made in relation to the multi-sourcing and the increase in online news provision. Whilst we believe the level of multi-sourcing by individual consumers to be important, we do not believe that we can rely on it to ensure sufficient plurality. We also recognise the increasing importance of online news provision today. However, we believe that online news tends to extend the reach of established news providers as opposed to favouring the use of new outlets that are not already present on traditional media.
- 5.128 For the reasons summarised above and considering all the relevant factors together, our view within this first stage review, is that we consider it reasonable to believe that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross media audiences.

## Section 6

# Effects of the proposed acquisition - dynamic analysis

- 6.1 In addition to the static analysis, the proposed transaction could result in changes to the level of media plurality over a longer period of time. We received a number of submissions raising concerns about possible longer term effects from the proposed acquisition. We have therefore considered a forward view of the possible effects on plurality.
- 6.2 In order to do this, we have divided this section into two:
- An overview of key media market trends to provide a relevant context for plurality.
  - In this context, we have provided a summary of the potential longer term effects on plurality arising from the proposed transaction that were raised with us through submissions.

## Market trends and future market developments

### UK consumers and content producers have adopted a wide range of new digital media technologies, platforms and services over the last ten years.

- 6.3 Ofcom's research has highlighted the growth in availability, take-up and usage of different media services over recent years. This has been supported by the development of a number of new technologies; convergence between different media services; and the growing availability of access to digital services via fixed and mobile broadband networks.
- 6.4 Ofcom's 2010 Communications Market Report presented research demonstrating that, on average, nearly half of UK adults' waking hours are spent using media content and communications services. Use of different services at the same time is also increasingly common, with people squeezing 8 hours and 48 minutes of media consumption into an average of 7 hours and 5 minutes of time each day. Of all services, television remains the most heavily used<sup>156</sup>.
- 6.5 Many of the new technologies being adopted provide consumers with greater choice, convenience and control over how they consume content. These developments have also reduced the traditional distinctions between different services for consumers. The recent development and take-up of smart phones and tablet devices now enable consumers to access a range of content from broadcast, audio, print and other media on one device wherever they are. These devices have the potential to increase the levels of interactivity, participation and personalisation of media. Consumers are also increasingly choosing to take a bundle of different services from a single provider.
- 6.6 Such new services are usually adopted initially by younger and more affluent audience demographics. Daily use of a range of digital technologies is consistently higher among adults aged 16-24. By way of example, this audience spends a larger

---

<sup>156</sup> Ofcom Communications Market Report 2010, Figures 1.16 and 1.17



proportion of its media consumption time using mobile devices than any other age demographic<sup>157</sup>.

- 6.7 These trends are making more information available to consumers and giving them more ways to access it. At the same time, the traditional media platforms continue to play a significant role for many consumers, including older consumers. Today, Ofcom research estimates that 38% of all media and communications usage for those aged 16 and over is watching scheduled television on a TV set – the most popular media activity among consumers. This rises to 51% for those who are aged 55 plus<sup>158</sup>.
- 6.8 The development of new digital media technologies, platforms and services has consequences for the economics of the sector, above and beyond the impact of the recent economic downturn. These can include both opportunities to open up new revenues streams through selling new content and services to customers and challenges to existing business models when new technologies reduce the barriers to new entrants able to offer competitive services to consumers.
- 6.9 In the last five years there has been substantial growth in the revenue generated through subscription television and online advertising, whereas advertising from traditional print, television and radio has seen much more limited growth, and in some cases substantial declines. These trends are partially a consequence of the close link between GDP and advertising expenditure, but there is evidence of structural change occurring to the business models across the sector.
- 6.10 For content producers, these developments offer the prospect of new revenue models through the possibility of consumers paying for added choice or convenience, or access to a wider choice of content. They can open up new revenue streams such as online display advertising to media owners who extend their presence online. In addition, advertisers may be willing to pay a premium for targeting a particular audience target or demographic.

Despite widening access and use of new media technologies, the audience for television has remained relatively stable.

- 6.11 Television remains the most heavily used of all media services, and despite the growth in other media platforms such as broadband and mobile, overall levels of viewing have increased slightly over the last five years<sup>159</sup>.
- 6.12 It is possible that this resilience of television viewing is a consequence of a number of technological enhancements to the platform, which have included the growth of digital television, the launch of high-definition television and time-shifted viewing through PVRs. Digital television is now available in 93% of homes; digital video recorders are installed in 37% households and 5.1m households take HD (as of Q2 2010).<sup>160</sup>
- 6.13 Over the last five years, television advertising revenue has declined by 1.8% p.a., whereas licence fee income allocated to television has grown by 1.7% p.a. and subscription revenue to television services has grown by 6.2% p.a.<sup>161</sup> This has led to

<sup>157</sup> Ofcom Communications Market Report 2010, Figure 1.19

<sup>158</sup> Ofcom Communications Market Report 2010, Figure 1.24

<sup>159</sup> Ofcom Communications Market Report 2010, Figure 2.67

<sup>160</sup> Ofcom Communications Market Report 2010, , Figure 1.2, Figure 2.15

<sup>161</sup> Ofcom Communications Market Report CMR 2010, Figure 2.28

## Report on public interest test

a reduction in the overall levels of investment in programming by the main public service broadcasters over the period, with a 4.6% p.a. decline in investment in original programming over the last five years among public service broadcasters<sup>162</sup>.

- 6.14 The availability and take-up of services that enable time-shifted and VOD television programming has grown significantly. All of the major broadcasters have launched video-on-demand services (or 'players') which they make available to a wide variety of platforms including the PC, games consoles, mobile devices and hybrid IPTV platforms. Of adults with the internet, 31% have watched catch-up TV<sup>163</sup>, while time-shifted viewing through a DVR still only represents 5.9% of all television viewing<sup>164</sup>.
- 6.15 Broadcast news has been affected less than other content genres by the emergence of new technologies that can draw audiences away from the live TV platform. Ofcom's consumer research shows that viewers prefer to watch news content live rather than on-demand or timeshifted<sup>165</sup>. However, broadcasters do appear to have pulled back on their news commissioning funding. Total spending on news-based content fell from £363m in 2005 to £293m in 2009<sup>166</sup>.

#### Radio also remains a significant service for a large proportion of the UK audience

- 6.16 Like broadcast television, radio remains a very highly used medium by audiences despite growing use of other services. Overall weekly reach of radio has stayed consistent at 90% over the last five years. However, average weekly hours of listening has declined over the same period (by 5.3% p.a. to 19.8 hours per head per week)<sup>167</sup>.
- 6.17 Digital Audio Broadcasting (DAB) has grown in usage with almost 16%<sup>168</sup> of homes owning a DAB set as of Q2 2010 and DAB listening representing almost a quarter of all radio listening.
- 6.18 The BBC remains the most significant player in the sector and its expenditure on radio has grown over the last five years, whereas both listening and revenues to commercial radio have declined over the same period<sup>169</sup>. This is primarily a consequence of a decline in advertising revenue in radio, which like television appears to be a consequence of both cyclical changes and the growing competition from other media for advertising expenditure.
- 6.19 The growth in the number of devices (both in the home and mobile) that can connect to the internet has led to the availability of non-broadcast audio services (e.g. audio streaming or downloading to a PC or mobile phone). Take-up and use of such services is most significant amongst the 16-24 age group.

#### Print media is facing declines in circulation as online use grows

- 6.20 The newspaper industry is in a transitional phase as new, disruptive means of distribution emerge and traditional revenue sources decline.

<sup>162</sup> Ofcom Communications Market Report, Figure 2.36

<sup>163</sup> Ofcom Communications Market Report Figure 2.8

<sup>164</sup> Ofcom Communications Market Report Figure 2.4

<sup>165</sup> Communications Market Report 2009, Figure 1.41

<sup>166</sup> PSB annual report 2010

<sup>167</sup> Ofcom Communications Market Report 2010, Figure 3.1

<sup>168</sup> Ofcom Communications Market Report 2010, Figure 3.2

<sup>169</sup> Ofcom Communications Market Report 2010, Figure 3.6

- 6.21 Print media has experienced progressive decline over the past ten years. There have been substantial declines in circulation and readership of national newspapers. For example, readership has fallen substantially among both daily and Sunday newspapers – by 3% p.a. among the Sundays and by nearly 2% p.a. for daily newspapers<sup>170</sup>.
- 6.22 Newspaper providers have been especially affected by a drop in classified advertising revenues, matched to a steady decline in circulation, which threaten the future profitability of many titles<sup>171</sup>.

#### Consumption of online services continues to grow in popularity

- 6.23 The growth in the availability and take-up of the internet has provided a platform over which a variety of content types can be delivered to consumers, both traditional (existing television, radio and newspaper content) and new (such as social networking sites and other sources of user generated content).
- 6.24 Access to the internet by consumers is now at 76% of UK households, the vast majority of whom use a broadband connection (up from 31% in 2005)<sup>172</sup>. As home internet take-up has risen, so has the average minutes spent per person surfing the web – at 27 minutes per person per day (up by an average of 17% p.a. since 2004)<sup>173</sup>.
- 6.25 The growth in the availability and take-up of the internet has provided a platform over which a variety of content types can be delivered to consumers, both traditional (existing television, radio and newspaper content) and new (such as social networking sites and other sources of user generated content).
- 6.26 As a consequence of this rapid growth in broadband access to the internet, the total level of revenues generated by online services has grown substantially in the UK. The online advertising market alone was worth £3.54bn in 2009, 27% growth per annum over the last four years<sup>174</sup>.
- 6.27 The majority of online advertising (£6 in every £10 generated) is made up of paid for search services such as Google. The remainder of the market is split evenly between classified and display advertising. It is particularly the growth in these two categories that has structural implications for the television, radio and press sectors, given each currently relies significantly on classified and display advertising currently. Each of these sectors is seeking to tap into the growth of online advertising as a consequence of declines in advertising in their own markets.
- 6.28 One of the most significant trends in the last few years has been the growth in mobile access to the internet, which is now at 16% of consumers and growing rapidly<sup>175</sup>. This has the potential to enable a range of new services to consumers above and beyond those already available to them at home or work, particularly linked to the take-up of smart-phones and tablets.
- 6.29 The breadth of functionality that mobile and fixed broadband access to the internet offers is reflected in the range of services consumers use. Social networking

<sup>170</sup> Source: NRS / MediaTel / Ofcom calculations

<sup>171</sup> Enders Analysis submission

<sup>172</sup> See Ofcom technology tracking study, Q3 2010, question QE6, Table 44

<sup>173</sup> Ofcom Communications Market Report 2010, Figure 1.4

<sup>174</sup> Ofcom Communications Market Report 2010, Figure 4.7

<sup>175</sup> See Ofcom technology tracking study, Q3 2010, question QE6, Table 44

## Report on public interest test

accounts for a quarter of the time consumers spend online, by far the largest share of any online service (including email, search, news, games and other service). Online news is attracting a growing unique monthly audience, although it still accounts for a very small proportion of overall time spent online (less than 3%<sup>176</sup>). Most providers of news on television or radio have launched offerings on the internet accessible via a range of devices including PCs, smartphones and tablets. Each is seeking to extend the reach and use of their output while also accessing the growth in online revenue.

- 6.30 A range of different online content and business models are emerging which may provide new revenue opportunities for the newspaper publishers. News aggregators such as Google News and Yahoo! News bring together news stories from a wide range of providers and outlets. Many newspapers online are making increasing use of video and audio to enhance the richness of their content propositions. Some, such as FT.com and Times.co.uk, have opted for 'freemium' or subscription-based revenue models, whereas other players have pursued a free model reliant on advertising. So far newspapers' online revenues have failed to match those of their print counterparts. DMGT, for example, recently announced that the ad-supported Mail Online website, currently the second-most popular newspaper website in the world according to ComScore<sup>177</sup>, generated approximately £12m in the financial year 2009/10<sup>178</sup>. GMG website The Guardian Online reportedly generated around £40m last year<sup>179</sup>.

**These trends suggest that convergent cross-media services will become increasingly important**

- 6.31 Taken together, these trends suggest that there may be a continuous shift in the relative mix and balance of different media platforms and services for consumers, with an increasing push into convergent cross-media services.
- 6.32 Of the traditional media platforms, television appears to have an enduring strength as a key platform for the delivery of content to consumers – its reach, impact and significance to consumers is likely to continue in the future. However, all platforms including online today will need to respond to the development and adoption of increasingly convergent media.
- 6.33 Online services, and the convergence of the internet with traditional media platforms are therefore one of the key areas for future development. This will continue to result in the development of new, cross-media products and services for consumers. This is one of the areas of focus for many players in media, including news and current affairs: the development of convergent, integrated media products that draw on the strengths of video, print, and audio to deliver content to consumers across a range of platforms and devices.
- 6.34 It is unclear at present to what extent these cross-media services will be complementary to existing services, in which case we might expect bundling of such services to increase in importance, or substitutional to existing services, in which case they might be expected to displace them. [X]<sup>180</sup> [The redacted text refers to

<sup>176</sup> Ofcom Communications Market Report 2010, Figure 4.4

<sup>177</sup> As reported by Paid Content. See <http://paidcontent.org/article/419-mail-online-vs-nytimes.com-running-the-numbers/>

<sup>178</sup> <http://www.dmgt.co.uk/uploads/files/DMGT-Preliminary-Results-2010.pdf>

<sup>179</sup> <http://www.abc.net.au/pm/content/2010/s3058684.htm>

<sup>180</sup> [X]

<sup>181</sup> [X]

paragraphs 210 and 213 of the European Commission's decision, in relation to which Ofcom is not in a position to identify what may be disclosed].

- 6.35 However this develops from a commercial perspective, for those consumers adopting new products and services that exploit the potential of convergence between online and traditional media, this undoubtedly increases their ability to consume content from a wider variety of sources, with greater flexibility and sophistication than ever before.

### Potential longer term effects on plurality arising from the proposed transaction

- 6.36 We received many submissions that raised concerns about the potential for the proposed acquisition to affect plurality in the future. Much of this concern was around the potential effect of the economic power of the combined entity in the context of future media market developments. The concerns raised were that, following the acquisition, News Corp would be better placed than its competitors to respond to market developments and develop its service and presence across-media.
- 6.37 The economic power of the combined group covers a number of possible factors. The merged entity would be financially bigger than any of the other voices in the market (for example in terms of group revenues and cash flows). Representations argued that thanks to its financial security and size News Corp would be able to make commercial decisions that its rivals would be unable to make, and thus would be better placed to respond to market developments and challenges. This would allow News Corp to increase its market presence and share compared to other news providers, while not behaving anti-competitively.
- 6.38 [X]. Our view is that future concerns in relation to plurality are not necessarily captured by any competition assessment of the proposed transaction. As outlined in paragraph 2.35, media public interest considerations invoked by the Secretary of State are distinct from the competition-based test applied by the competition authorities. The aim of any competition analysis is to prevent a level of concentration of ownership which could give rise to a substantial lessening of competition, to the detriment of consumers. The public interest considerations defined by Parliament have a different goal: to ensure sufficient plurality of media enterprises to support effective debate and the democratic process. While it is possible that there may be overlap between issues and / or facts relevant to a competition consideration and a need for sufficient plurality under the public interest consideration, the two statutory regimes are distinct with different purposes.
- 6.39 As noted in paragraph 2.36 of this report, on 21 December 2010 The European Commission ("the EC") concluded its Phase One investigation into the competition effects of the proposed acquisition. The EC decided not to oppose the notified acquisition and declared it compatible with the internal market and with the EEA Agreement. Its decision was based solely on competition-related grounds, pursuant to Article 4 of European Council Regulation No 139/2004. [X]<sup>182</sup> [The redacted text refers to paragraphs 1, 307, 309 and 310 of the European Commission's decision, in relation to which Ofcom is not in a position to identify what may be disclosed. The EC's press release of its decision is available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1767>].

<sup>182</sup> [X]

### Concerns were raised in representations that the proposed transaction could influence future levels of plurality

- 6.40 In representations, we received two main groups of possible concerns for plurality as a result of the proposed transaction:
- The economic power of the combined entity and its ability to react to future market developments like convergence
  - A range of specific concerns relating to potential activities by the merged entity

#### Economic power and convergence

- 6.41 There are historic examples of how 'economic power' can be employed to engage in long term strategies that could affect plurality if other players in the market are not able to respond. For example, News Corp has in the past supported Fox News through a period of substantial loss until it became established<sup>183</sup>. Such activities are not unique to News Corp though – there are numerous examples of media enterprises making significant investments in new titles and routes to market, notably online, before they make an economic return.
- 6.42 Economic power can allow a company to take strategic decisions that might ultimately have an impact on plurality. Economic power may allow a media enterprise to invest in new ventures, business developments or adopt pricing strategies that others do not have the resources to compete with. There may be a consequential reduction in other players' share of voice and hence plurality.
- 6.43 As noted above, one of the key expected developments for the future is developing the presence of news content across convergent media. For all media players, a future presence online and development of new applications, taking advantage of the functionality of new devices and the ways that consumers access content is likely to be key.
- 6.44 Representations to us suggested that the combination of News Corp's print news content and Sky's audio-visual content makes it best-placed to take advantage of the move to convergent news media. If for example it was able to develop a compelling content proposition for e-readers or tablet devices, which could not be replicated by other providers, this might over a period of time enable it to extend its share of voice beyond that which it achieves as an immediate consequence of the proposed transaction.
- 6.45 We acknowledge that the ability of News Corp to develop and distribute convergent media products does not depend on the proposed transaction. For example, The Times newspaper's website and the Times iPad edition already feature some Sky News content. The transaction is however likely to strengthen the ability of News Corp to produce such products, given the complementary capabilities of News Corp and of Sky in the production of textual and audiovisual content respectively.
- 6.46 We note that it is a difficult and uncertain process for other news providers (e.g. newspapers) to build up the capability to produce their own AV and multimedia content, although there are some emerging examples of newspapers doing so<sup>184</sup>. It is

<sup>183</sup> House of Lords Select Committee, Ownership of the News 2008, Appendix 4, paragraph 29

<sup>184</sup> E.g. Telegraph Media Group's Telegraph TV <http://www.telegraph.co.uk/telegraphtv/>

potentially costly, and would require them to diversify into a very different skill-set in order to produce high-quality AV journalism.

- 6.47 However, we note also that investment in new, innovative convergent media products is not limited to a combined News Corp or Sky, and other news suppliers do offer similar multimedia content<sup>185</sup>. Other news providers and platform operators may develop and distribute converged services through commercial deals<sup>186</sup>. No other single company has the same combination of a portfolio of content assets (including news) and scale of distribution across TV, newspapers and broadband. However, the evidence which has been presented to us in the time available does not support a conclusion that such strategies could not be replicated by rival news providers, entering where necessary into commercial agreements with appropriate partners.
- 6.48 We acknowledge that the effects on plurality of new convergent products are uncertain. They may fail, in which case they will have no impact on plurality. If they succeed, this could have a negative impact on plurality if other providers are not able to provide similar products, but could also have a positive impact if they help pioneer the development of new online business models which are then replicable by a wider range of alternative providers.
- 6.49 There is a high degree of uncertainty surrounding future convergent products, and the potential for a range of players across the communications value chain including news providers and platform operators to invest in such products. As a result, we do not consider that there is sufficient evidence for the view that it may be the case that these issues may be expected to result in additional plurality concerns to those identified in our static analysis.
- 6.50 However, that is not to say that these concerns can be dismissed either. This is particularly true given the fact that under the current statutory framework it is only possible to examine these concerns at the time of a particular transaction. So whilst we do not rely on these issues as the basis for our recommendation that a reference be made to the Competition Commission, in event of a reference then this is an area that may warrant further consideration

#### Specific concerns relating to potential activities by the merged entity

- 6.51 In addition to the development and launch of convergent news media products, a number of other possible future issues were raised by respondents as potentially having an effect on the level of plurality. Specifically, representations raised concerns about:
- a greater ability to cross-subsidise news operations;
  - more cross-promotion between News Corp outlets including Sky;
  - 'bundling' together of goods and services; and
  - a greater ability to bid for and win wholesale news deals.
- 6.52 **Better ability to cross-subsidise news operations.** Concerns were raised with us that the combined entity would have significant funds for cross subsidy between its different media operations. However, cross subsidies are a common feature of the

<sup>185</sup> E.g. BBC News has made certain AV content available to all newspaper websites [http://www.bbc.co.uk/pressoffice/pressreleases/stories/2009/07\\_july/28/content.shtml](http://www.bbc.co.uk/pressoffice/pressreleases/stories/2009/07_july/28/content.shtml)

<sup>186</sup> It is common for newspaper websites to use a mix of their own and third party content, e.g. The Financial Times using CBS AV news content <http://www.pressgazette.co.uk/story.asp?storycode=46046>

## Report on public interest test

market today for a range of media providers, and News Corp in particular already has a strong enough financial position to enable it to fund any cross-subsidies which it might wish to provide. Therefore, although the proposed transaction would increase the strength of News Corp's finances in terms of cash flow, we do not believe that the proposed acquisition would create a situation which is not possible already given News Corp's existing ability to cross subsidise its different media operations.

- 6.53 [X]<sup>187</sup> [The redacted text refers to paragraph 223 and 213 of the European Commission's decision, in relation to which Ofcom is not in a position to identify what may be disclosed].
- 6.54 **Cross-promotion between News Corp outlets.** Concerns were raised that News Corp's influence on consumers could be increased through greater use of cross promotion. This could include direct cross-promotion, such as more references to Sky in News Corp's newspaper titles, or indirect cross-promotion, such as sister titles sharing correspondents or columnists. Incentives already exist for cross-promotion between News International's print titles and Sky, but these would be increased by the transaction.
- 6.55 There are limitations to how far Sky could directly promote News Corp titles on its television channels, as set out in Ofcom's Broadcasting Code<sup>188</sup> ("the Code"). However, the Code does not necessarily restrict some forms of indirect promotion<sup>189</sup> such as leading the news agenda with a sister outlet's news scoop or inviting a sister outlet's star columnist to comment on news stories.
- 6.56 We note that the European Commission considered the risk of input foreclosure of BSkyB's competitors as a result of a refusal to advertise in News Corp titles. The Commission concluded that this was not a concern, largely on the basis that there are alternative means of advertising to these titles.<sup>190</sup> This conclusion is relevant to our consideration of cross-promotion, since it suggests that News Corp titles are not uniquely well placed to engage in cross-promotion. However, we believe it may still be possible for cross-promotion to provide increased influence in circumstances which fall short of input foreclosure.
- 6.57 Overall we believe that the transaction may increase the effectiveness of cross-promotion between Sky and News Corp titles, and therefore the influence of these titles, but have not in the time available been able to quantify this effect. We acknowledge that there is already an incentive to engage in some cross-promotion, and note the conclusion of the European Commission on input foreclosure
- 6.58 **"Bundling" together of goods and content.** Bundles can come in several forms:
- a) physical bundles of products (e.g. giving subscribers to Sky TV a "free" subscription to The Times newspaper);
  - b) content aggregation services (e.g. a News Corp service in which News Corp collects content from a variety of third party sources (e.g. The Daily Mail, The Independent newspapers) and brings it together at a single point of use for consumers. It would act as gatekeeper to this service.); and

<sup>187</sup> [X]

<sup>188</sup> See Section 10, 'Commercial References and Other Matters'

<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/commercial-references/>

<sup>189</sup> Subject to the limits implied by rules on preventing undue prominence of a product or service

<sup>190</sup> [X]



- c) more complex bundling and integration (e.g. placing and using news content on the Sky broadband internet home page; giving priority to News Corp's own news content via broadband traffic management).

6.59 We note that some of the potential concerns which have been put to us under the banner of 'bundling' relate to the creation of new integrated products, typically in the context of convergent media. We have already discussed these above. In what follows we focus on the somewhat narrower question of the retail bundling of existing products, [X] [The redacted text in this and the five following paragraphs refers to paragraphs 224-257 of the European Commission's decision, in relation to which Ofcom is not in a position to identify what may be disclosed].

6.60 [X]<sup>191</sup>

6.61 [X]<sup>192</sup>

6.62 [X]<sup>193</sup>

6.63 [X]<sup>194</sup>

6.64 Our view, [X] is that bundling of existing TV and newspaper subscription services is unlikely to be a significant concern. However, as discussed above, [X] there is a great deal of uncertainty as to the types of integrated tablet or e-reader type products that might be developed as a result of convergence through new devices and the manner in which these might be retailed. However, this may create concerns in the future, and we note the absence of a statutory framework for addressing such potential issues on an ex post basis.

6.65 **Bidding for wholesale TV news deals** - Today TV news provision is already highly concentrated, with only three providers of news at the wholesale level: the BBC, ITN and Sky News. We received representations arguing that, in the longer term, the proposed acquisition might have an impact on the level of plurality in the wholesale provision of television news<sup>195</sup>. Specifically, post transaction, Sky might be in a stronger position when bidding for broadcast news contracts. Concern was expressed that, in the long term, this might lead to ITN exiting the wholesale broadcast news market<sup>196</sup>, which could ultimately result in a duopoly of wholesale news provision in broadcast news<sup>197</sup>.

6.66 We note that Sky News already bids competitively for wholesale tenders, both successfully and unsuccessfully, and that there is already the possibility of current wholesale providers of TV news being displaced by Sky News. Sky News is already part of a large and well resourced media enterprise, capable of bidding effectively for wholesale tenders regardless of this transaction. We have not seen any evidence that suggests changes in wholesale provision would flow specifically as a result of the transaction.

<sup>191</sup> [X]

<sup>192</sup> [X]

<sup>193</sup> [X]

<sup>194</sup> [X]

<sup>195</sup> For example, see BBC, Goldsmiths Leverhulme, Media Research Centre, Slaughter & May

<sup>196</sup> For example, see BBC, Enders, Slaughter & May, Professor Barnett

<sup>197</sup> It is important to note that Sky News would only be able to provide news to ITV as part of a consortium where it held less than 20% due to the designated provider rules for Channel 3 news

Report on public interest test

- 6.67 While it is possible that there will be changes which affect plurality in the future in relation to wholesale news provision, these are uncertain and could work to reduce plurality or to increase it. In this context we note once again the absence of a statutory framework for addressing potential issues on an ex post basis.

**The proposed acquisition may result in potentially positive outcomes for consumers**

- 6.68 We note that there are several potentially positive outcomes from this transaction.
- 6.69 The merged entity could be able to afford to take more risks and to innovate, with possible positive spill-over benefits for the wider industry. We note that News Corp and Sky each have strong records of innovation. News Corp led the way in revitalising the newspaper industry in the late 1980's, by driving the adoption of new printing technologies despite union opposition, and is currently trialling the use of paywalls for online news content. Sky has consistently pioneered new means of producing and distributing TV content including, *inter alia*, its launch in 1989 of Sky News, and its subsequent development as one of the UK's main sources of rolling TV news.
- 6.70 The increased scale and economic power of a merged News Corp / Sky may help it to establish or support new business models. The wider news industry could then benefit from these, as long as they are replicable. For example, News Corp has opted for a subscription-based (pay-wall) revenue model for some of its UK newspaper website titles. Subscription revenues per user are typically higher than advertising-based revenues, so it is plausible that if the transaction were to help establish a subscription model, allowing it time to mature and increase take-up, that it would improve the ability of a range of organisations to develop sustainable business models for news content online. This in turn, could help initiate a virtuous cycle, leading to a resurgence of the wider news industry.

**Conclusions on dynamic analysis**

- 6.71 A number of forward-looking concerns have been put to us. The most credible are those that relate to the ability of the merged party to use its economic power and its complementary strengths in text and audiovisual news content to produce new integrated products within the context of an increasingly converged market. Examples might include new types of news applications for e-readers and tablets. If these could not be replicated by other providers, this might over a period of time enable the merged party to extend its share of voice beyond that which it achieves as a direct consequence of the proposed acquisition.
- 6.72 As a result of the degree of uncertainty affecting any view on possible future developments, the limited evidence available on the effect of the proposed transaction, and uncertainty on how far these developments could occur absent the transaction, we do not consider that there is sufficient evidence for the view that these issues may be expected to result in additional plurality concerns to those identified by our static analysis.
- 6.73 However, that is not to say they can be dismissed either. So whilst we do not rely on these issues as the basis for our recommendation that a reference be made to the Competition Commission, if a reference is made then these issues merit further evaluation. We are particularly conscious that whilst some of the longer-term effects

of the transaction are inevitably somewhat speculative, there is no ex post mechanism to address potential plurality concerns arising in the future.

- 6.74 Our analysis and consideration of a forward view of the market in terms of plurality does suggest that, regardless of the transaction, plurality may face challenges in the future. Market developments such as those identified in paragraphs 6.3 to 6.35 above may be expected to have an effect on the relative influence of different voices over time. In this context, a relatively more influential voice for a combined News Corp/Sky may be more of a concern than relatively stronger voices for each of the two separate companies as distinct media enterprises.

## Section 7

# Recommendations

## Advice and recommendations

- 7.1 Ofcom's advice, based on the evidence and reasons set out in this report and summarised in the executive summary, is that it may be the case that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences. In reaching this view we do not rely on the dynamic effects discussed in full in Section 6.
- 7.2 Therefore we believe there is a need for a fuller second stage review of these issues by the Competition Commission to assess the extent to which the concentration in media ownership may act against the public interest, and we advise the Secretary of State accordingly.

## Stakeholder views on possible remedies

- 7.3 We received various submissions in response to our invitation to comment on possible remedies to ensure sufficient plurality. Overall, three broad categories of potential remedy were identified:
- Requiring undertakings (behavioural remedies) from the parties to secure editorial independence for Sky News
  - Requiring divestment of some news media assets
  - Blocking the proposed acquisition on public interest grounds
- 7.4 We received few representations on remedies [X]. One common theme within the comments we received was significant scepticism as to the effectiveness of behavioural remedies as a means of guaranteeing the editorial independence of Sky News from News Corp.
- 7.5 This scepticism was based partially on general concerns about the effectiveness of behavioural remedies, but also on the perceived outcome of specific commitments given during previous transactions, in particular following the acquisition by News Corp of the Times and Sunday Times. We note however that the evidence provided on this point was largely anecdotal.
- 7.6 While divestment remedies might potentially address public interest concerns, they would require a credible purchaser. Otherwise such a remedy risks a potentially perverse outcome for plurality, given the contribution currently made by Sky News, News International newspapers and their respective online services.

## Recommendation on review of statutory framework for plurality

- 7.7 We received many submissions that raised concerns about the potential for the proposed acquisition to affect plurality in the future. We consider these in Section 6.

- 7.8 Furthermore, many of the submissions we received raised additional concerns which are relevant to plurality, but which are not specific to this transaction. These concerns arise from the rapid and far reaching changes that are taking place within the media as a result of technological advances and new business models. They include:
- **Adoption and use of new media technologies** combined with a contraction in some of the more traditional media forms. For example, according to Ofcom research online news was the main source of news for 7% of consumers in 2009, up from 3% in 2005<sup>198</sup>. The majority of online news is accounted for by online versions of current newspapers, but also includes aggregators such as Google and Yahoo. At the same time, newspaper circulation has been falling, down from 25 million for daily newspapers and 27 million for weeklies in 2000, to 22 million for each in 2009<sup>199</sup>.
  - **Organic change in market shares** of key players – since 2003, we have seen material changes in the relative standings and importance of different players. For example, ITN (which provides news for ITV and Channel 4) has seen its share of all national news viewing fall from 34% in 2003 to 22% in 2009<sup>200</sup> as a result of ITV's falling share and the loss of the Five news contract to Sky.
  - **Changes to wholesale news provision** – wholesale news provision can change fairly quickly through changing contractual relationships. As a result, the structure and ownership of news provision on platforms like TV or radio can alter with the change of a significant contract.
  - **Evolution in upstream content provision** – we may witness the emergence of a few stronger players in the upstream gathering and provision of news as a result of the economics of news provision. This possible development was discussed in more detail in our review of the Media Ownership Rules in 2009.
- 7.9 Under the current statutory framework, a media public interest consideration of plurality can only be triggered when there is a proposed merger involving media enterprises. The future market developments considered in this report suggest that the current statutory framework may no longer be fully equipped to achieve Parliament's objective of ensuring sufficient plurality of media ownership.
- 7.10 The market developments identified include the risk of market exit by current news providers, or a steady organic growth in audience shares and increase in ability to influence by any one provider. For example, in a situation where a company grows organically through entirely legitimate business strategy which does not involve any anti-competitive behaviour but finds itself in the relevant media market with 90% share of audiences. While this may not have raised competition concerns, it very clearly may raise plurality concerns.
- 7.11 While there is a clear statutory framework for remedying competition concerns which may arise in the context of a merger<sup>201</sup>, the same is not true of concerns related to plurality more generally. This means that if a transaction is found not to operate against the public interest in relation to plurality at the time, there is no subsequent

<sup>198</sup> Ofcom Media Tracker, 2009, all adults 15+.

<sup>199</sup> NRS / MediaTel / Ofcom calculations

<sup>200</sup> Barb, Network Plus, Ofcom

<sup>201</sup> These include the use of ex post powers under the Competition Act, as well as the possibility of a market investigation reference under the Enterprise Act.

Report on public interest test

opportunity or mechanism to address or even to consider any plurality concerns which develop over time.

- 7.12 This suggests that a more fundamental review and possible reform of the current statutory framework may be required. Any such review would be a matter for Parliament.
- 7.13 Any new legislative and regulatory framework for plurality would need to provide a mechanism for intervention if market developments resulted in changes which raised serious doubts in relation to the sufficiency of plurality.
- 7.14 However, any intervention would need to be transparent, proportionate and balance the need for a plural media environment with possible risks from intervention. Any modified policy would need to ensure there remained a freedom to innovate in response to market developments, to make risky investments and earn suitable rewards and must avoid creating negative or perverse incentives.
- 7.15 This is properly a debate for Parliament. In undertaking any such review, we think it would be useful to consider a number of questions, including:
- What could trigger any safeguard – for example certain thresholds for cross-media audience shares or reach; regular situation reporting similar to the infrastructure report from Ofcom to Government?
  - Who would be responsible for conducting any review following the trigger and to whom would it report?
  - What sort of outcomes or solutions to public interest concerns might be required – which would be useful in defining the powers necessary to safeguard plurality effectively in the future
  - What sort of legal instrument and mechanisms could be used to deliver a safeguard for plurality? How could it be ensured that any intervention was proportionate?
- 7.16 We therefore also recommend that the Government consider undertaking a wider review of the statutory framework to ensure plurality in the public interest. Specifically, we believe there may be value in providing for intervention where plurality concerns arise in the absence of a corporate transaction involving media enterprises and which are not safeguarded by the current media ownership rules.

**Linkages to the current public interest consideration**

- 7.17 Our thinking on potential new safeguards for plurality does not change our advice and recommendations on the proposed transaction. The time required to conduct a review of the legislative framework to secure sufficient plurality may be substantial and we see this as a separate consideration

## Annex 1

## Data sources used

- A1.1 There is no existing system that measures cross-platform news consumption on a consistent basis. Instead, there are a series of separate industry standard metrics available on a platform-by-platform basis. It is important to note that each uses a different research methodology (as outlined below) and that the ability to analyse news-specific consumption also varies substantially across the methodologies; reach is also defined differently by each system. To supplement the analysis that these industry metrics support, Ofcom commissioned primary quantitative research to understand consumers' use of news across-media platforms.
- A1.2 This section sets out the main features both of the standard industry measurement systems and of the quantitative research that Ofcom commissioned.

Currency	Methodology	Time period	Age range and sample size	News definition	Reach definition
Television - BARB	Continuous panel. Uses a meter attached to the television, measuring viewing on a second by second basis	October 2010, trend data 2002-2010 year to date	Age range: UK adults aged 16+, Sample size: 5,100 UK households on a continuous basis	News: national and international sub-genre provided by BARB	3+ consecutive minutes of viewing
Radio - RAJAR	One week self-completion diary – self reported measure	Quarter 3 2010	110,000 UK adults aged 15+	Radio listening overall, with exception of average minutes analysis where we have estimated the amount of news listening.	5+ minutes of consecutive listening
Print - NRS	Face to face quantitative survey – self reported measure	October 2009-September 2010	36,000 UK respondents annually Aged 16+	Self reported measure – read the newspaper	Average issue readership – using NRS 6-day estimate for dailies
Online - UKOM/Nielsen	Continuous panel of participants	October 2010	43,330 people aged 2+; data reported monthly	UKOM current events & global news sub category and selected other news sites.	The percentage of a country's 2+ population that visited the Web site or used the application.

## Television news viewing - BARB

- A1.3 For television viewing, we have used the BARB industry currency (Broadcaster Audience Research Board). BARB uses a continuous panel of 5,100 UK homes and tracks television viewing among all people aged 4+ in these homes on a second by second basis using a metering system.
- A1.4 BARB viewing data can be analysed by programme genre. Programmes are categorised by the broadcasters and can be a useful way of analysing viewing. However, the genre classifications are provided on a voluntary basis by broadcasters, and there is no independent verification of them.
- A1.5 The 'News and weather' genre contains four subgenres – 'national/international news', 'weather', 'regional news' and 'miscellaneous'. Analysis in this report is based on viewing to the subgenre of 'national/international news'. The other subgenres were excluded as we deemed them less relevant to an understanding of

## Report on public interest test

consumption of TV national and international news. We also excluded the BARB genre of Current Affairs, as it contains a wide range of programme titles, including ones we thought were not relevant to an understanding of the consumption of news and current affairs (such as The One Show, or Helicopter Heroes). This was also the case even when we looked at the 'political/economic and social' sub-genre of Current Affairs.

- A1.6 In this report, analysis has been conducted on viewers aged 16+. Reach (that is the proportion of the population who have consumed a defined number of minutes of national/international news in a given period) is based on anyone who has watched at least 3 consecutive minutes of the sub-genre in an average week; industry practice is generally 3+ or 5+ minutes. Ofcom decided to run the TV news analysis on 3+ minutes due to the varying duration of news programmes (e.g. short news bulletins, hour long programmes or 24 hour channels).
- A1.7 Share of news viewing is based on the following three providers - BBC (BBC One, BBC Two, BBC News); ITN (ITV1, C4), Sky (Sky News, Five), and relates to October 2010; in 2009, these providers accounted for 99.69% of all television news viewing (rising from 99.05% in 2001). Other channels measured by BARB that provide short news bulletins and/or generate a small proportion of total viewing of news are not included in this analysis. These include Euronews, Fox News, BBC Parliament, ITV2, ITV3, BBC Three, BBC Four; they accounted for the remaining 0.31% of television news viewing in 2009.
- A1.8 There are other dedicated news channels that broadcast in the UK. However, as these are not individually measured nor reported by BARB (which is indicative of their relatively small channel shares) the viewing minutes they attract cannot be allocated to the 'news' category. These channels include CNN, Al Jazeera English, Russia Today and France 24. We estimate these non-BARB reported channels represent a very small proportion of total national/international news viewing.

### Radio news listening – RAJAR

- A1.9 For radio listening we have used the RAJAR industry currency (Radio Joint Industry Research). RAJAR interviews approximately 110,000 adults aged 16+ over 50 weeks per year. The survey operates as a sweep, not a panel, which means that respondents only participate for one week. Respondents are asked to complete a one week diary showing all the stations they listened to, for at least 5 minutes, recorded in quarter hour time blocks. Data is compiled and released on a quarterly basis.
- A1.10 RAJAR does not provide programme level detail or programme genres. Therefore we have been unable to measure listening to news or current affairs programmes on radio. Instead, we have used listening to radio *overall* and analysed radio consumption by commercial stations versus BBC services. Where it has become necessary to conduct more detailed analysis, we have used a range of weights on station minutage to reflect the differing presence of news content on different categories of radio network; in so doing we have been able to provide an estimate of the amount of time spent listening to news on the radio (based on a review of the schedules of different radio networks, we consider it reasonable to apply weights of 27% to Radio 4; 19% to Radio 5 Live and 5% for all other radio networks). All reach and radio share figures are based on total radio listening and are not specific to news.



- A1.11 In this statement, reach is based on those listeners who say that they listen to 5 or more consecutive minutes of radio in the average week.

### **Newspaper readership - National readership survey (NRS)**

- A1.12 Newspaper-specific analysis uses the industry currency – the National Readership Survey (NRS). This is a rolling face-to-face quantitative survey, drawing on a monthly sample of 3,000 respondents, interviewing 36,000 respondents each year.
- A1.13 A respondent is deemed to have read a paper if they spent more than two minutes reading or looking at it. Average issue readership (AIR) is based on whether respondents say if they have read each title within the issue period of the title. For example, for daily newspapers respondents are asked whether they have read each daily paper in the last day.
- A1.14 The titles analysed are the twenty newspapers that are available on a national basis: The Sun, The Mirror, The Daily Star, The Express, The Daily Mail, The Times, The Daily Telegraph, The Guardian, The Independent, The FT, The News of the World, The Daily Star Sunday, The Sunday Express, The Sunday Mirror, The People, The Mail on Sunday, The Sunday Times, The Sunday Telegraph, The Observer, The Independent on Sunday.

### **Online – UKOM / Nielsen**

- A1.15 Online-specific consumption is measured using data supplied by UKOM (UK Online Measurement) / Nielsen, which monitors consumers' active use of online sites on PCs and laptops at home and at work. The UKOM / Nielsen panel consists of 43,330 individuals aged 2+. Standard survey metrics provided by this panel include monthly active and population reach of different online sites/groups of sites; page views and time spent on a site per session.
- A1.16 Nielsen is currently investigating a decline in its Internet use data around duration metrics and the potential impact of this on Unique Audience metrics. Until these investigations are concluded, Nielsen Internet data for October 2010 is likely to represent a lower bound and should be treated as indicative only.
- A1.17 Nielsen groups websites into categories and sub-categories. In this statement we have performed our online analysis on its 'Current Events and Global News' subcategory. This includes the overwhelming majority, although not all, of the sites pertinent to this statement. To correct for this, we have combined this sub-category with a small number of sites found elsewhere – FT.com, Reuters, Wall Street Journal Digital, Metro.co.uk, Archant Regional Network and Northcliffe Newspapers. Our share of page views and time spent analysis is based on the top 50 sites by unique audience from this combined list of sites.

### **Cross-media research**

- A1.18 Ofcom commissioned eight questions on Kantar Media's omnibus survey between 19<sup>th</sup> and 23<sup>rd</sup> November 2010. This was a face-to-face survey among a representative sample of 2,018 adults in Great Britain, excluding Northern Ireland as this was not covered by the omnibus survey. The data is weighted to the National readership survey (by region, gender, age and socio economic group). Respondents were asked which platforms they used regularly/occasionally for UK/international news and current affairs. For those platforms cited, they were asked to select from a list which news sources they used. Regularly was defined as

Report on public interest test

'at least once a week', and occasionally was defined as 'at least once a month', with the exception of weekly newspapers and magazines, whereby regularly was defined as 'at least once a month', and occasionally was defined as 'less than once a month'. We also asked consumers which platform (i.e. television, newspapers, radio or internet) and which title they regarded as their main source of news.

- A1.19 The analysis in this report groups responses by wholesale news provider (Sky, ITN, BBC etc) and retail news providers (BBC, ITV1, Sky News etc). The quantitative consumer research includes analysis of the share of each news provider cross-platform, based on the number of times each individual news source is cited by respondents. An individual news source is, for example, a specific television station, radio station, newspaper title or website.
- A1.20 Each provider's share is based on the total number of responses for each individual source across television, radio, daily and weekly newspapers and the internet. If a respondent uses more than one source from a particular provider, it is counted each time. The share of each provider is then calculated as the aggregated number of responses in thousands for that provider, expressed as a proportion of all responses for all news sources measured in the survey. Note that a reference of a daily newspaper carries the same weight as a reference of a Sunday newspaper.
- A1.21 Reach describes the proportion of respondents who say that they use each news source, platform, or provider on a regular basis. The reach figures for media providers are calculated based on the proportion of respondents who say they use at least one news source regularly provided by each media group. For example, if a respondent says that they use both the BBC One and BBC website for their news on a regular basis, they will be represented once in the reach figure for the BBC. The reach figures for media owners are calculated in a similar way.
- A1.22 The statement uses analysis by both wholesale news providers and retail providers. Please see the tables below for full details on how each source is grouped.

Retail news provider	Makeup
BBC	BBC channels (Q3), BBC national radio, BBC local radio (Q6), BBC website (Q7)
ITV	ITV (Q3), ITV website (Q7)
News Corp	Fox News, Star News (Q3), Sun, Times (Q4), News of the World, Sunday Times (Q5), Times\Sunday Times website, Sun website, News of the World website (Q7)
Sky	Sky news (Q3), Sky news website (Q7)
Channel 4	Channel 4 (Q3), Channel 4 website (Q7)
Northern Shell	Five (Q3), Daily Star, Daily Express (Q4), Sunday Star, Sunday Express (Q5), Star website, Daily Express website (Q7)
Associated Newspapers	Daily Mail (Q4), Mail on Sunday (Q5), Daily Mail website (Q7)
Trinity Mirror	Daily Mirror (Q4), Daily Mirror website (Q5), Sunday Mirror, People (Q5), Daily Post (Q4), Western Mail (Q4), Wales on Sunday (Q5)
Telegraph Media Group	Telegraph (Q4), Sunday Telegraph (Q5), Telegraph\Sunday Telegraph website (Q7)
Guardian Media Group	Guardian (Q4), Observer (Q5), Guardian website (Q7)
Independent Print Ltd	Independent (Q4), Sunday Independent (Q5), Independent website (Q7)
Pearson	Financial Times (Q4), Financial Times website (Q7)
Commercial radio	Classic FM, Absolute Radio, TalkSport, Any other commercial radio station (Q6)
Other	CNN, Euro News, Other TV Channel (Q3), Morning Star, Herald/Scotsman/Daily Record, Any regional local paper (Q4), Sunday Herald, Weekly Magazines, Other weekend/weekly newspaper Magazine (Q5), Other radio station (Q6), Google News/Yahoo news/MSN news, blogs, other websites (Q7)

Wholesale news provider	Makeup
BBC	BBC channels (Q3), BBC national radio, BBC local radio (Q6), BBC website (Q7)
ITN	ITV, Channel 4 (Q3), ITV website, Channel 4 website (Q7)
NewsCorp	Fox News, Star News (Q3), Sun, Times (Q4), News of the World, Sunday Times (Q5), Times\Sunday Times website, Sun website, News of the World website (Q7)
Sky	Sky news, Five (Q3), Sky news website (Q7), Classic FM, Absolute Radio, Any other commercial radio station (note: exc. TalkSport) (Q6)
Northern Shell	Daily Star, Daily Express (Q4), Sunday Star, Sunday Express (Q5), Star website, Daily Express website (Q7)
Associated Newspapers	Daily Mail (Q4), Mail on Sunday (Q5), Daily Mail website (Q7)
Trinity Mirror	Daily Mirror (Q4), Daily Mirror website (Q5), Sunday Mirror, People (Q5), Daily Post (Q4), Western Mail (Q4), Wales on Sunday (Q5)
Telegraph Media Group	Telegraph (Q4), Sunday Telegraph (Q5), Telegraph\Sunday Telegraph website (Q7)
Guardian Media Group	Guardian (Q4), Observer (Q5), Guardian website (Q7)
Independent Print Ltd	Independent (Q4), Sunday Independent (Q5), Independent website (Q7)
Pearson	Financial Times (Q4), Financial Times website (Q7)
Other	CNN, Euro News, Other TV Channel (Q3) Morning Star, Herald/Scotsman/Daily Record, Any regional local paper (Q4), the Sunday Herald, Weekly Magazines, Other weekend/weekly newspaper Magazine (Q5), TalkSport, Other radio station (Q6), Google News/Yahoo news/MSN news, blogs, other websites (Q7)

## Annex 2

# Summary of representations

- A2.1 In total, we received 126 responses to our invitation to comment, comprised of 22<sup>x</sup> from organisations and 104 from members of the public. Two submissions from organisations consisted of collations of messages from individuals (around 58,500 in total).
- A2.2 We summarise below the representations we have received. Some of these responses were in part or entirely confidential.

## Organisations

### Sky

- A2.3 Sky provided a submission to Ofcom's Invitation to Comment, along with an appendix containing a copy of Sky's statement of 15 June 2010 regarding News Corp's proposal. [X]
- A2.4 Sky stated that, because an offer from News Corp could be in the interests of Sky shareholders in the future and that obtaining any necessary merger clearances would facilitate such an offer, it had agreed to co-operate with News Corp in seeking those clearances.
- A2.5 Sky stated that:
- it considered that an offer from News Corp could be in the interests of Sky shareholders in the future, noting that the prevention of such an acceptable offer would be adverse to those interests.
  - it wished to ensure that no precedent was set which would unduly restrict any merger or acquisition opportunities which may be available to Sky.
- A2.6 Sky stressed that the investigation should be properly focused on the question before Ofcom (with submissions from commercial competitors being treated with 'due scepticism') and conducted in a manner which was mindful of the need for transparency and predictability in merger control, so as not unduly to undermine the ability or incentive for companies to expand, invest and innovate.

### The scope of Ofcom's investigation

- A2.7 Sky noted two boundaries to the scope of Ofcom's investigation, namely:
- that Ofcom is required to investigate the impact of the proposed acquisition on media plurality rather than competition (which is a matter which falls to the European Commission).
  - that the investigation is limited to the impact of the proposed acquisition on existing levels of plurality

---

<sup>x</sup> In the version of this annex provided to the Secretary of State on 31 December 2010, we indicated erroneously here that we received a total of 127 responses and that 23 organisations had submitted representations on this case. This version gives the correct information, already provided in paragraphs 1.6 and 2.5 of the main report.

Without these boundaries, Sky believed that there was a risk of the media plurality provisions operating without clear and objective criteria, and undermining the incentives of operators to expand, invest and innovate.

- A2.8 In relation to the first of these boundaries, Sky stated that 'any intervention by the UK authorities in the present case on grounds of media plurality must be justified by reference to the need to protect the sufficiency of media plurality, must be reasoned, transparent and proportionate and must be consistent with the competition assessment of the transaction to be undertaken by the European Commission'.
- A2.9 Any submissions alleging that the proposed acquisition may adversely impact competition in the provision of news or other content would concern "extraneous factors" which, in Sky's view, should not properly fall within the scope of Ofcom's investigation.
- A2.10 Sky stated that the second boundary reflected the framework of analysis adopted by the Competition Commission in 2007, which considered whether the proposed acquisition could have an adverse effect on the plurality of news relative to the position absent the acquisition. The proper scope of Ofcom's investigation was therefore to investigate the extent of any impact on current levels of plurality that results from News Corp moving from owning a 39.1% shareholding in Sky to owning a 100% shareholding in Sky.
- A2.11 Sky also urged Ofcom to take due account of the DTI Guidance, which suggested that the media plurality public interest provisions are intended to operate only "in exceptional circumstances" where such mergers give rise to "serious public interest concerns".

### **The scope of Ofcom's invitation to comment**

#### *Content types*

- A2.12 Sky submitted that no content types other than news were relevant for the public interest consideration, given the statutory framework and Parliament's intentions. The submission highlighted that in the Sky/ITV case, neither the Competition Commission nor Ofcom investigated the impact that transaction might have had on any content type other than national news.

#### *Control of media enterprises*

- A2.13 Sky noted that it was appropriate for Ofcom to consider the potential impact on the proposed acquisition by reference to 'internal plurality'. The Competition Commission adopted this approach in 2007 and did not consider that the degree of "internal plurality" at ITV would be adversely affected by Sky's acquisition - therefore concluding that the sufficiency of plurality of persons with control of media enterprises servicing audiences for news would not be materially affected.
- A2.14 In light of the Competition Commission's reasoning, Sky stated that if no material change to the degree of "internal plurality" at Sky would be expected as a result of the proposed acquisition, then there could be no expected reduction in the overall current level of plurality. Ofcom would therefore need to determine whether the degree of "internal plurality" at Sky would be adversely affected by the proposed transaction and, in particular, whether Sky News would cease to be an independent

Report on public interest test

“voice” from News Corp in circumstances in which it operates within a strong culture of editorial independence across television news broadcasting.

- A2.15 Sky drew attention to findings by the Competition Commission in the Sky/ITV case which indicated that Sky News (and television news broadcasting as a whole) retained a strong commitment to editorial independence. The submission further highlighted that the setting of Sky News’ news agenda was carried out by the Head of Sky News and his editorial team, and that impartiality requirements would continue to apply (which the Competition Commission considered relevant in 2007).
- A2.16 Sky also stated that it had invested in the operation of Sky News despite the unattractive returns available from such investments. This enhanced the overall attractiveness of the services Sky offers, meaning that the availability of Sky News to audiences was the result of a strong commercial incentive. This incentive would remain irrespective of a change in ownership of Sky, but it had the potential to be undermined if the operation of Sky News inappropriately or unduly restricted any merger or acquisition opportunities which may be available to Sky. Thus, a conclusion that the transaction would result in a loss in plurality could, in Sky’s view, increase the risk of that very situation.

*Audiences and media platforms*

- A2.17 If Ofcom determined that internal plurality could be adversely affected, then the investigation would then need to consider whether the proposed acquisition would adversely affect the sufficiency of plurality of persons with control of media enterprises to a degree which would result in “serious public interest consequences”, “unacceptable levels of dominance” and a “significant reduction in plurality”.
- A2.18 Sky highlighted several findings made by the Competition Commission in 2007 in relation to this issue, including:
- that Sky News had a comparatively low share of national television news viewing;
  - that whilst viewing shares and readership varied somewhat by socio-economic group, there were no fundamental differences in the significance of ITV, Sky and News Corp to particular sections of the UK population; and,
  - that no more than 1% of the population (and quite possibly less than this) took news from ITV and Sky and/or News Corp, but from no other source.
- A2.19 In light of these findings, Sky noted that Sky News’ audience share remained small, and that alternative sources of news had risen considerably in prominence since the Sky/ITV case (particularly via the internet). Additionally, Sky argued that the percentage of the UK population who could be said to rely upon Sky News as such an independent “voice” (and who therefore would in practice suffer from a loss of plurality) would be extremely low.
- A2.20 Sky also noted that the Competition Commission did not seek to aggregate either Five News or radio services receiving news content from Sky into Sky News’ audience share in the Sky/ITV case, and argued that Sky’s wholesale news arrangements did not afford Sky control of the setting of the news agenda of the end providers.

*Future developments*

A2.21 Sky agreed that a consideration of future developments would be relevant to considering the potential impact of the proposed acquisition on existing levels of plurality. However, Sky argued that it would not be appropriate for such an analysis to set a new benchmark for "sufficient" plurality based on Ofcom's views of how news provision might develop following, or in the absence of, any transaction. The correct counterfactual for Ofcom's analysis was said to be the existing level of plurality.

**[X] [A submission]**

A2.22 [X]

A2.23 [X]

A2.24 [X]

A2.25 [X]

A2.26 [X]

A2.27 [X]

A2.28 [X]

A2.29 [X]

A2.30 [X]

A2.31 [X]

A2.32 [X]

A2.33 [X]

A2.34 [X]

A2.35 [X]

A2.36 [X]

A2.37 [X]

A2.38 [X]

A2.39 [X]

A2.40 [X]

A2.41 [X]

A2.42 [X]

A2.43 [X]

A2.44 [X]

Report on public interest test

A2.45 [X]

A2.46 [X]

A2.47 [X]

## News Corp

A2.48 News Corp provided a submission to Ofcom's Invitation to Comment, along with two annexes containing reports from FTI Consulting and Perspective Consulting on media public interest considerations. [X] All of these documents are summarised below.

### Background to the parties and the transaction

- A2.49 The submission outlined the operations (such as assets, revenues and organisational structure) of both News Corp and Sky. It noted that News Corp owned 39.14% of the shares in Sky, and was entitled to exercise 37.19% of the voting rights in Sky.
- A2.50 The proposed transaction contemplated the acquisition by News Corp of Sky's shares it does not already own. After the implementation of the Transaction, News Corp would exercise sole control over Sky. The transaction would be implemented by way of a public offer or court approved scheme of arrangement.
- A2.51 News Corp outlined the rationale for the transaction, noting that it would present an opportunity for News Corp to achieve financial consolidation for a company with which it has been closely associated for a long time, and which is mainly active in a sector that constitutes a core business for News Corp.
- A2.52 News Corp highlighted that the proposed acquisition would (amongst other things):
- allow News Corp to diversify the geographic scope of its activities by acquiring a significant presence in two territories (UK and Ireland) where News Corp's activities in the TV sector were rather limited; and,
  - allow News Corp to diversify its sources of earnings by consolidating a business whose earnings were less dependent on advertising than other News Corp activities (more linked to subscription fees paid by TV viewers)

### Legal framework: relevant public interest consideration and sufficiency of plurality

- A2.53 News Corp stated that the scope of Ofcom's report was limited to plurality concerns. This did not include third party submissions which suggested that the transaction would have detrimental effects on competition, as such theories were 'unsubstantiated and are based on hypothetical assertions of what "may" or "might" occur'. These submissions would, in News Corp's view, fall under the exclusive competence of the Commission.
- A2.54 The submission noted the Competition Commission's approach to the Sky/ITV case, and suggested an analysis of plurality that included:
- a qualitative assessment of the range and variety of voices available to audiences, taking into account both "external" and "internal" plurality;



- a focus on the provision of news – although any wholesale activities which did not confer control over the editorial policy of a third party were deemed not to be relevant to the public interest consideration; and
- in terms of audiences, the proposed transaction could only conceivably affect a cross-media audience, if at all; socio-economic groupings were suggested not to be relevant audiences for statutory purposes.

A2.55 Therefore, after establishing what would qualitatively change post-transaction, compared with pre-Transaction in respect of the provision of news to a cross-media audience, it would then be necessary to assess whether or not that change would result in insufficient plurality in the UK.

#### The relevant public interest consideration

A2.56 News Corp noted that the Competition Commission's approach to conducting an assessment of the sufficiency of media plurality in 2007 was accepted and followed by the Secretary of State.

A2.57 The submission highlighted one particular aspect of the Competition Commission's approach which was ultimately endorsed by the Court of Appeal – namely that when assessing the plurality of the aggregate number of relevant controllers of media enterprises and considering the sufficiency of that plurality, the actual extent of the control exercised and exercisable over a relevant enterprise by another can and should be taken into account.

A2.58 News Corp stated that it should not be necessary for Ofcom to re-open the debate in areas where the Competition Commission has already made clear findings.

#### Plurality requires an assessment of the range and number of voices

A2.59 News Corp noted the approach of the Competition Commission and findings of the Court of Appeal, which confirmed that an analysis of plurality involved more than an assessment of the number of controllers, and instead encompassed an assessment of the range and variety of voices available to audiences, taking into account both "external" and "internal" plurality.

A2.60 The submission stated that the provisions of section 58A(4) and (5) of the Enterprise Act meant enterprises may be treated as ceasing to be distinct if there is a change in the quality of control, but did not preclude additional qualitative analysis. It was therefore necessary for the Secretary of State to consider to what extent the transaction would change the status quo ante (whereby News Corp had a degree of control of Sky), so as to create a situation of insufficient plurality.

#### Focus of analysis should be news

A2.61 News Corp said that the Competition Commission had decided in Sky/ITV that the best metric to assess the range of information and views presented to the public (and to assess plurality) was the provision of news.

A2.62 News Corp argued that consideration of other types of content provision would not assist in assessing plurality and other content types should be regarded as irrelevant to a plurality analysis.

Report on public interest test

Wholesale supply of news content is not within the scope of the legal consideration of sufficiency of plurality

- A2.63 The submission stated that the Secretary of State would be required to consider only the plurality of persons with control of media enterprises, and noted that (as per the Enterprise Act) an enterprise is a media enterprise if it "consists in or involves broadcasting". A "media enterprise" would therefore not be one which consisted in or involves the provision of news content or services to broadcasters.
- A2.64 This approach was said by News Corp to be logical and consistent with the overall regulatory framework, where the focus is not on the provider of content but on the owner of channels and programming and editorial control.
- A2.65 News Corp therefore believed that activities of Sky or News Corp in relation to the supply of raw news content to third parties which did not confer control over editorial policy were not within the scope of the public interest consideration. This encompassed the supply of news services to both Channel Five and those commercial radio stations who were customers of IRN.

Relevant audiences

- A2.66 News Corp stated that the concept of an "audience" for a particular media outlet should be based on those people who are exposed to the views and opinions of that media outlet and could therefore be impacted by any alteration in its presentation of the news. For a merger between a newspaper enterprise and a TV broadcaster the relevant audience was said to be necessarily a cross-media one.
- A2.67 The submission said that for statutory purposes, socio-economic groupings or regions or "nations" of the UK were not themselves audiences, citing the Competition Commission's conclusion that there were no fundamental differences between these groupings in the Sky/ITV case. The FTI report demonstrated that the same conclusion could be drawn in regard to the proposed transaction.
- A2.68 News Corp stated that the only audience for whom plurality could conceivably be reduced as a result of the transaction was a cross-media audience. The number of controllers of television news broadcasters would not be reduced. Neither would the number of controllers of newspapers.
- A2.69 Thus the only context in which the number of controllers of news sources for any audience would conceivably have reduced would be examining an audience's consumption of news across multiple media, taking into account exposure to both television news and newspapers.

"Sufficiency" of plurality for relevant audience pre and post-Transaction

- A2.70 News Corp said that there was no indication that Parliament considered plurality to be insufficient at the time of the Communications Act. Therefore it would be legitimate to assume that intervention on plurality grounds would only be appropriate where a transaction reduced plurality to a level materially below that when the legislation was introduced (i.e. 2002).
- A2.71 The submission stated that today's 'rich and diverse media environment' meant it could not be established that the transaction would give rise to serious public interest concerns.

- A2.72 News Corp noted that the Competition Commission had treated Sky and News Corp as a single enterprise in the case of Sky /ITV. It found that Sky had acquired material influence over ITV, yet still concluded that sufficient plurality remained for both for a TV audience and a cross-media audience. News Corp said that a cross-media audience would have access to a wide range of sources (including TV, radio, newspapers, magazines and online).
- A2.73 News Corp concluded that it was extremely difficult to see how a transaction which did not involve ITV and only involved a change in the quality of control between two enterprises which were previously deemed to form a single enterprise could have any adverse impact on the sufficiency of plurality for any audience within the UK.

### **Editorial influence over Sky News**

- A2.74 News Corp drew a distinction between the degree of News Corp's control over Sky's commercial policy and whether such control would result in influence over the editorial policy of Sky News. The two concepts were said not to be aligned, a conclusion which the Competition Commission and Court of Appeal had reached in Sky/ITV.

#### News Corp's existing control over Sky

- A2.75 News Corp said that it already had a degree of commercial influence over Sky which resulted in "control" for Enterprise Act purposes. This had been recognised by a number of UK authorities during the Sky/ITV case (the OFT, Competition Commission, Ofcom and the CAT).
- A2.76 The submission stated that a number of factors highlighted the relationship between News Corp and Sky, namely:
- Shareholding - News Corp was a founding shareholder of Sky, had remained its major shareholder since it was listed, and currently was the largest shareholder by far (with the next major shareholder holding only 5.02%).
  - News Corp's position on the Sky Board – there had always been (since the public listing) between four and five directors on the Board of Sky affiliated with News Corp. The position of Chairman has been occupied by Mr. Rupert Murdoch and Mr. James Murdoch.
  - [X]

#### Commercial influence and editorial influence

- A2.77 News Corp stated that, despite its degree of control over Sky, it did not exert editorial influence over Sky News.
- A2.78 The submission argued that the Court of Appeal judgement meant that one could not assume that commercial influence necessarily translated into editorial influence. Therefore, increasing News Corp's level of control to full legal control would not translate into the loss of Sky News' editorial independence.
- A2.79 News Corp said that the Competition Commission had recognised the independence of Sky News in the Sky/ITV case.
- A2.80 Editorial decisions were not subject to alteration as a result of the change of a shareholders' level of commercial influence in News Corp's view. The submission

Report on public interest test

noted that the Competition Commission report in the Sky/ ITV case had confirmed that editorial decisions in TV news broadcasting were not taken at board level.

A2.81 News Corp stated that the proposed acquisition would not jeopardise the editorial independence of Sky News because:

- Sky's editorial policy was not a matter for Board determination (to date, editorial policy had not been a debated issue at Board level);
- despite its commercial influence over Sky, News Corp had not sought to influence the editorial policy of Sky News;
- the Sky News editorial directors were experienced individuals with expertise to manage and direct the editorial policy of Sky News;
- there was no evidence that independent directors had had to "defend" the editorial policy of Sky News against influence by News Corp executives; and
- News Corp had no special arrangements with Sky News which would confer on it control over editorial policy.

A2.82 News Corp also highlighted the importance of broadcasting impartiality requirements, which the Competition Commission had noted reduced the scope for influence over editorial decisions on TV news by owners. Sky News could not, for example, favour one particular party line, or it would risk losing its licence. This was contrasted with the position regarding newspapers.

A2.83 News Corp concluded that its ability and incentive to influence the Sky News editorial agenda would not be affected by the proposed transaction and that the current situation was likely to continue. The editorial independence of Sky News would not be jeopardised following the transaction, and there was no evidence to support the assertion that it would be.

### **Impact on setting of the news agenda**

A2.84 News Corp highlighted the DTI's Guidance, which stated that the plurality analysis involved the assessment of the ability to "influence opinions and control the agenda". In relation to the latter point, the submission stated that two conditions would have to hold for the transaction to influence or control the wider news agenda, namely:

- News Corp would need to be able (and have an incentive) to exert control over the Sky News agenda; and,
- this would need to lead to significant changes in the wider news agenda.

News Corp did not consider either condition likely. The analysis in this section was explained in further detail in the Perspective report (detailed below).

### **Sufficient plurality post-transaction**

A2.85 News Corp stated that even if Ofcom assumed that there would be a "head count" reduction in the number of voices for a cross-media audience, it must go on to consider whether that reduction will result in insufficient plurality for any relevant audience. To do this, Ofcom must consider:

- i. how to measure the variety of voices available to each audience; and
- ii. what the transaction changed (if anything)

- A2.86 News Corp noted that Competition Commission analysed the sufficiency of plurality for television audiences and cross-media audiences in 2007 and had no concerns. Plurality had increased since that time, meaning that the 'only reasonable conclusion' was that the proposed acquisition would not lead to insufficient plurality for any audience in the UK.
- A2.87 The grouping of particular individuals within the UK population who relied only on news content from Sky News and News Corp was said to be minimal (0.3%).
- A2.88 The FTI report indicated that the level of plurality in the provision of news to UK audiences across different media platforms was increasing, in terms of both the number of voices and the range of voices. Penetration of digital TV and broadband was high, as was the number of TV channels available.

#### News provision

- A2.89 News Corp stated that these changes had increased the availability of a wide number of voices. There were far more TV news options to the UK audience over and above the traditional PSBs. The number of voices in newspapers and magazines had not materially increased but nor had it materially decreased (although it was noted that this medium was becoming less important as a source of news).
- A2.90 The submission argued that the internet had had a transformative effect on news plurality as a means of accessing multiple news sources:
- there had been an 'explosion' in the number of online news sources (675 UK news websites)
  - the internet increased plurality in news reporting adding to conventional/offline news sources/providers (for example, news aggregators presented a vast range of sources to their audience, including many they would otherwise likely never come across).

#### News consumption

- A2.91 Developments in news provision were said to be accentuated when considered alongside trends in news consumption:
- News Corp stated that it was easier for consumers to access multiple sources of news (most consumers used 4-5 sources daily across 3-4 different platforms).
  - Although TV was the most popular medium for accessing news, News Corp noted that Sky News accounted for just 6% of TV news consumption.
  - Circulation of print media was noted as being in long term decline.
  - Proportion of people listening to radio was up, while total time listening was down.
  - The internet was, according a recent Mintel report, the second most important source of news with around 46% of UK population using it regularly.
  - Time spent watching TV news and consuming news on the internet were about equal
- A2.92 News Corp highlighted that online news consumers tended to use a high number of news sources. Therefore as the internet became an increasingly important source of news, News Corp expected that an increasing proportion of the population would be regularly exposed to a wide variety of "voices".

Report on public interest test

### Sufficient plurality post-transaction

- A2.93 The transaction would not, in News Corp's view, detract from the high degree of variety and range of voices available to a cross-media audience which 'comfortably meets the criteria of sufficiency of plurality'. In particular:
- The importance of online as a source of news would continue to grow and so would the plurality of voices inherent in this medium, with News Corp / Sky having a 'diminutive share of voice';
  - The number of TV voices would remain unaltered, and still be lead by the BBC and ITV;
  - The number of radio news voices would be entirely unaffected; and,
  - The number of newspaper voices would be unaffected (and in any event, the relative importance of print newspapers as was in long term decline).
- A2.94 News Corp highlighted the FTI finding that only 0.3% of the population receive news only from Sky and News Corp. FTI also found that no socio-economic grouping or nation in the UK was disproportionately affected.
- A2.95 News Corp argued that regardless of this finding, consumers could switch to different providers or expand their choice of sources. The potential availability of sources of news for this audience would be 'no different from the wide range and number of different voices available to the UK population as a whole'.

### **Conclusion**

- A2.96 News Corp concluded that there was no basis to conclude that the transaction 'would operate, or be expected to operate, against the public interest by way of any reduction in the plurality of enterprises serving any relevant audience in the UK'.

### **News Corp Annex I – FTI Consulting**

- A2.97 FTI researched the following areas:
- trends in news provision by provider by medium/platform;
  - trends in news consumption by audiences by medium/platform; and
  - differences pre- and post-transaction.
- A2.98 The study covered the provision and consumption of news in the UK. FTI stated that in respect of consumption such consumers are defined as an "audience served by an enterprise". Socio-economic groupings or regions or nations of the UK are members of an audience. While such groupings are therefore not an audience per se, FTI also examined whether there are any key differences between the nations and demographic groupings.
- A2.99 In respect of news provision, FTI examined news provision on TV, radio, the internet and the press. The study did not examine news provision in magazines in detail as these represented a minor source of news consumption and were not deemed of sufficient importance to be subject to sector-specific regulations in respect of ownership or content.

## Key conclusions

- A2.100 FTI stated that it was clear that the number of platforms and sources from which people take their news had increased during the past 3-5 years. Digital TV penetration stood at more than 92% and would reach 98.5% by the end of 2012 once digital switchover was complete.
- A2.101 Around 75% of the population used the internet – this was expected to increase as the government (and private sector) addressed broadband “notspots”. Radio listening (until recently when there was a rebound) and newspaper circulation had been on a consistently downwards trend.
- A2.102 The internet was stated to be ‘a cross-media environment [where] distinctions between traditional media blur’. FTI noted the vast range of services available, and suggested that this typified plurality in media.

### *Sufficiency of plurality*

- A2.103 FTI stated that the study demonstrated that there had been a significant increase in plurality of sources in news provision. Access to platforms had increased and FTI therefore concluded that the availability of this increased provision had also increased. It was noted that access could be expected to continue to increase.
- A2.104 There had been no major changes in the provision of news on radio or in the press, and there was a sufficient number of voices in both sectors.
- A2.105 Given the benchmark of the 2003 media landscape, and on the basis that since then there had been significant increase in the number and range of voices in news provision since then, FTI stated that it was ‘axiomatic’ to conclude that there was sufficiency in plurality in news provision on a cross-media basis.
- A2.106 Overall, cross-media consumption had increased both in terms of number of providers accessed and number of sources used. FTI found:
- The plurality of cross-media consumption of news had increased in line with its increased provision;
  - Press and radio were reducing in importance in the cross-media share of voice as both usage and user perceptions of their importance as news media had fallen;
  - The internet was expected to continue to grow in importance in terms of time spent and usage;
  - There was a shift in cross-media news consumption patterns towards the more plural environment of online;
  - These trends were expected to continue as internet penetration increased; and
  - In the media in which it has a presence, the BBC remained the leading player by a significant margin.
- A2.107 FTI highlighted that the balance of usage (reach, number of outlets and time spent) and ascribed importance by consumers amongst the various media had been changing – a trend of reducing radio and press consumption, with TV remaining steady and online increasing.
- A2.108 The study found the share of voice of each medium within the cross-media consumption mix to be changing. The weight remained towards the TV voice, with online voices increasing and radio and press voices in decline.

Report on public interest test

A2.109 FTI identified no fundamental differences between the significance of Sky and News Corp to nations and socio-economic groups.

*Comparison of pre- and post-transaction*

- A2.110 FTI assumed a reduction of one voice at the cross-media level. The study argued that the loss of one voice could not be considered to be substantial given the range and number of such enterprises, and particularly given that the number and range of voices had increased since 2003. FTI said there was no change within each of TV, radio and press.
- A2.111 In the off-line cross-media environment, FTI stated that a reduction in the number of players by one could not be regarded as material, particularly as these sectors had many players and no concerns regarding the sufficiency of the number of voices.
- A2.112 Sky had a relatively weak position in TV broadcast news, so the study did not consider that this reduction in headcount could have a material impact.
- A2.113 FTI noted that online there were hundreds of news voices, along with several other players (primarily the BBC) that enjoyed a much stronger market position than Sky and News Corp.
- A2.114 Sky was said to have a weak position in the cross-media environment, with a negligible share online and a low share in TV news (which was not expected to increase in the future, a digital penetration was already at a high level).
- A2.115 News Corp was also said to have a weak position in the online environment. It held a strong position in press, but FTI stated that this medium was in decline in importance and had a decreasing share of the cross-media voices from a consumption perspective.
- A2.116 FTI stated that the combined entity would not enjoy a strong position in TV, the most important news media from the consumer perspective. Its position would be strong in press, although the medium is in long term decline. In online its share would be around 6% and subject to competition from strong players and little expectation of increasing this share significantly.
- A2.117 Based on this assessment, FTI concluded that the transaction would not materially reduce the range and number of voices in the cross-media environment and therefore that it would not have a material impact on the sufficiency of plurality.
- A2.118 FTI also identified whether there were particular individuals within the UK who took news from Sky and News Corp and no other source. The study found that the proportion of the population that took news from Sky and News Corp was 4% excluding online and 6% including online. FTI found that the proportion of these groups that took news from no other source was negligible - 0.3% - (and lower than the proportion affected in the Sky/ITV case).

## **News Corp Annex II – Perspective Consulting**

A2.119 Perspective were asked to consider:

- How the news agenda is in practice set in the UK market
- Trends in UK media plurality, and in particular news plurality, since the Communications Act of 2003



- How the UK market is likely to develop in the coming years.

### Setting of the news agenda

A2.120 Perspective noted that TV news operates under a requirement of impartiality, but that this might leave a concern that a broadcaster might seek to influence opinion via choice of stories covered. The ability of a broadcaster to pursue an independent news agenda and to influence the agenda of other outlets was therefore a key consideration.

A2.121 Perspective focused on Sky News, as this outlet was subject to 'speculation that it might see a change in its output'.

A2.122 The report found that TV news operated under a range of practical constraints that would make it very difficult to alter the news agenda of a given outlet in such a way as to have material impact on plurality. In particular:

- Audiences have very particular expectations of TV news, encouraging similarity between outlets.
- Much of the TV news agenda is driven by events of the day and access to shared news gathering resources.
- Impartiality requirements act as constraints by influencing story choice as well as how stories are treated.
- For areas where plurality is most important (for instance, election coverage), it was 'inconceivable' that a broadcaster would choose not to provide coverage of a key story of the day, and impartiality rules apply once covering a story.
- TV news rooms have their own particular ethos, and imposing a newspaper approach would be difficult.

A2.123 Perspective stated that even if there were to be a change in Sky News' agenda following the transaction and that Sky News' output was altered, the combination of Sky and News Corp would still be most unlikely to materially alter the wider news agenda, for a number of reasons:

- There were numerous competitors of News Corp and Sky which were unlikely to become 'followers' of a news agenda. The BBC acted as a powerful independent voice; with secure funding, a substantial audience lead in each of TV, radio and online news; and a very high reputation with consumers.
- Sky News had only a 6.3% share of TV news consumption, suggesting a limited ability to influence third parties
- News Corp/ Sky News outlets did not represent a particularly important source of stories for other outlets. The Perspective Report demonstrated that newspapers were not the sole source of the stories they represent. An analysis of sources cited by Reuters indicated that Al Jazeera was as important as Sky News for that purpose.
- Consumers were increasingly consuming news from specialist and international outlets that are all the less likely to be influenced by a change in news agenda at one generalist, UK outlet.

### Trends in plurality since 2003

A2.124 Perspective stated that there had been an increase in plurality since the enactment of the Communications Act, noting the effects of increased TV news provision

Report on public interest test

through uptake of digital TV, the increase in online consumers and the rising importance of online news.

- A2.125 As of 2009 TV remained the most important source of news for consumers, with the internet predicted to overtake newspapers. Perspective argued that this marked a shift from a media with less plurality of individual consumption to a media with more (since most consumers only take one newspaper, if any), and shift away from areas where News Corp and Sky were relatively strong to areas where they were relatively weak.
- A2.126 Thus Perspective believed that plurality had risen appreciably since 2003, and News Corp and Sky's 'share of news voice' had fallen. This made it much less likely that the transaction in question would reduce plurality to the level of the market in 2003, and Perspective stated that it would 'seem unreasonable to reject a transaction that left plurality at a level higher than that that existed at the time the requirement was created'.

### Future developments in the UK market

- A2.127 Certain future developments in the UK media market were highlighted. Convergence was expected to continue with a focus on online platforms, leading to increased competitive intensity and plurality. Consumers were expected to be more active in searching for their own stories, as well as generating content themselves (e.g. through social networks), which would lead to greater plurality. Similarly, consumption via mobile devices was likely to increase, meaning more plural consumption would be more widely available.
- A2.128 Perspective noted that this would result in a range of evolving approaches to capturing news. The different editorial demands of broadcast news and regulatory requirements meant TV and print newsrooms were likely to remain separate for the foreseeable future. Broadcasters operating in new media markets would place a central focus on audio and video news, with text and graphics in a support role, and so the 'culture' of the TV newsroom would be likely to remain central.
- A2.129 The report stated that these trends pointed to a continuation of the increase in plurality and of declining 'share of voice' for News Corp and Sky. In Perspective's view, this made it hard to make the case for intervening in the market now to preempt a hypothetical future threat to plurality, given that the wider context is of generally increasing plurality and a weakening of the influence of News Corp and Sky.

### Conclusion

- A2.130 Perspective concluded that for each of the individual issues examined, the evidence suggested that there would not be a material impact on plurality, and that in aggregate across these issues the case was even stronger.

### [X] [A submission]

A2.131 [X]

A2.132 [X]

A2.133 [X]

- A2.134 [X]
- A2.135 [X]
- A2.136 [X]
- A2.137 [X]
- A2.138 [X]
- A2.139 [X]
- A2.140 [X]
- A2.141 [X]
- A2.142 [X]
- A2.143 [X]
- A2.144 [X]
- A2.145 [X]
- A2.146 [X]
- A2.147 [X]
- A2.148 [X]
- A2.149 [X]
- A2.150 [X]
- A2.151 [X]
- A2.152 [X]
- A2.153 [X]
- A2.154 [X]
- A2.155 [X]
- A2.156 [X]
- A2.157 [X]
- A2.158 [X]
- A2.159 [X]
- A2.160 [X]
- A2.161 [X]

Report on public interest test

A2.162 [X]

A2.163 [X]

A2.164 [X]

A2.165 [X]

A2.166 [X]

A2.167 [X]

A2.168 [X]

A2.169 [X]

## **BBC**

A2.170 The BBC stated that it made an important contribution to news provision in the UK, but that it was imperative that a variety of other viable news providers also continue to exist to ensure plurality.

A2.171 The submission noted that the proposed acquisition would have the effect of combining two of the largest voices in the UK media. It highlighted that News Corp was the largest supplier of national newspapers in the UK, while Sky was the leading supplier of pay-TV wholesale and retail services in the UK.

A2.172 The BBC suggested that Ofcom should explore a number of issues when preparing its report, namely:

- A reduction in the number of entities setting the news agenda for the UK cross-media news audience (and, possibly, for particular socio-economic groups)
- The incentive and ability for News Corp to exert editorial influence over Sky's TV and radio news operations (both current and future), and align them with its national newspapers
- The potential impact of increased financial and other leverage (e.g. cross-promotion) between Sky channels and News Corp publications
- Future possible adverse developments in the UK newspaper sector as a result of the acquisition; and
- Future possible adverse developments in the provision of national television news as a result of the acquisition

## **Content types**

A2.173 National news was the relevant content type to be considered for these purposes in the BBC's view.

## **Audience and media platforms**

A2.174 The BBC stated that there were a variety of audiences – both by platform and by socioeconomic group – that would potentially be relevant to Ofcom's analysis.

A2.175 The BBC noted a number of points regarding relevant media platforms, namely:

- that television was the largest and most trusted source of news, cited by 74% of the population as their main source. Sky News was the second biggest provider of TV news in the UK by hours broadcast and the third biggest provider by total hours viewed.
- that newspapers and radio were considered to be the next most important sources of news, with the BBC and Sky / IRN as the only two significant suppliers of national radio news in the UK.
- that the majority of people still rely largely on traditional sources of news and traditional news providers rather than the internet as a source of news (only 6% of people rated online as their main source of UK news in 2009)

A2.176 BBC Management had undertaken audience analysis which indicated that between 3.5 million and 5 million people (depending on the definition used to measure newspaper consumption) consumed news from both a national newspaper title from News Corp and Sky produced news (either Sky News or Five).

A2.177 Given this, the BBC felt that the transaction would have an impact on the plurality of national news providers available to:

- The audience for national news delivered by national newspapers
- The audience for national news delivered by television news, and
- The UK cross-media audience for national news.

A2.178 The transaction was considered potentially to have an impact on each audience as a whole and with respect to particular socio-economic groups within them.

### Control of media enterprises

A2.179 The BBC said that whether there is a change in control for the purposes of media plurality relied on: (1) either the standard merger change of control assessment, or (2) whether there is an "actual extent of the control exercised and exercisable over a relevant enterprise by another". The actual extent of the control exercised was therefore deemed to be a factual question for Ofcom based on what it considered the likely outcome in the shift in ownership to be.

A2.180 The BBC believed that the proposed change to the relationship between News Corp and Sky would significantly change Sky incentives, indicating a risk of a resulting loss of plurality. The directors of Sky could operate solely for the benefit of News Corp, taking actions that advantaged News Corp newspaper titles, such as cross-promotion. News Corp would be able to appoint and dismiss all Sky directors, and in the BBC's view, the editorial staff of Sky News would be under the control or influence of News Corp.

A2.181 The BBC stated that it was important to consider whether the transaction allowed – either directly or through an 'understanding' of the interests of their common owner – an alignment of the choices each media outlet would make in deciding the news agenda and whether such an alignment would be detrimental to the interests of the various news audiences highlighted.

A2.182 The current impartiality regulations were not thought by the BBC to would prevent the news agenda of Sky's news outlets being influenced (either directly or indirectly) by the agenda of News Corp's newspaper titles to the detriment of cross-media news audiences. The submission highlighted that previous evaluations by both

Report on public interest test

Ofcom and the Competition Commission had concluded that the impartiality requirements does not on its own ensure a sufficient plurality of news.

- A2.183 The BBC also believed that cross-promotion between Sky News and the News Corp newspapers could have a potential detrimental impact on competing news outlets and all news audiences.

### Future developments in the media landscape

#### *UK newspaper sector*

- A2.184 The BBC recognised that a strong and varied national newspaper sector is a vital component of news plurality in the UK.
- A2.185 Independent forecasts were highlighted which suggested that national newspaper industry revenues from advertising are likely to reduce between 2009 and 2014, whilst circulation revenues could hold roughly steady in nominal term. News Corp was predicted to increase its share of national press circulation to more than 40% by 2014.
- A2.186 The BBC stated that that having access to the revenue of Sky would strengthen News Corp's ability to grow its position still further, and that the proposed acquisition would give News Corp the ability and incentive to bundle its pay-TV subscriber base with newspaper and/or online subscriptions. Both of these outcomes would have potentially negative effects on other newspaper groups.

#### *UK TV news*

- A2.187 The BBC believed that TV news programme supply in the UK is already concentrated, with only three significant suppliers of television news. It expressed concern that ITV and Channel 4 could change their news provider from ITN to Sky, noting that Sky participated in the tender process when the ITV News contract was last up for renewal (2008) and was likely to do so again at the next tender in 2012. There was an incentive for both channels to seek the cheapest high quality bid that they could, although in the case of ITV, this might be countered by an ownership incentive to continue to select ITN (in which it has a 40% stake).
- A2.188 The BBC noted that under this scenario there would be a cross-media concentration of news supply covering the vast majority of commercial TV news, all national commercial radio news and a sizeable share of the newspaper market. The current cross-over of News Corp readership and news viewing on Sky News / Five News / ITV News / C4 News was estimated at between 7.5 million and 10.9 million.
- A2.189 The BBC highlighted the Competition Commission's statement in 2007 that the loss of ITN as a competitor to Sky News could reduce the ability of other channels to provide an independent voice. Given this role, the BBC believed it important to consider a scenario where the proposed transaction increases the risk of ITN being 'damaged irreparably'. It was thought that the combination of the newsgathering activities of Sky and News Corp may strengthen Sky's position when bidding for the opportunity to supply news to ITV and Channel 4 in the future.

### **BECTU**

- A2.190 BECTU's submission indicated strong support for the principle of media pluralism as a necessary component of democratic society. Given the role of the media in

reflecting and informing opinion, this ownership control was necessary over and above existing competition controls.

- A2.191 BECTU stated that its concerns over the proposed transaction stemmed in part from the existing size and range of the media assets (both in the UK and abroad) already owned by News Corp. It said that this scale, coupled with News Corp's strategy for growth and the 'editorially-interventionist' approach of Rupert Murdoch meant the requirement for media pluralism in the UK would be breached if the proposed acquisition went ahead.
- A2.192 BECTU did not accept the argument that increasing News Corp's stake in Sky from the existing level of 39% to 100% would make no difference. It highlighted that Sky currently had an existing independent editorial structure, independent directors and a different shareholding structure. Moving to 100% ownership would remove all such institutional barriers and independent interests, leaving Sky in the direct and immediate control of News Corp.
- A2.193 BECTU argued that any reduction in pluralism risked undermining impartiality requirements as well, noting that a dominant media owner could exert significant and undue influence over which issues were covered and how they are prioritized. Lying behind these concerns were BECTU's views on the editorial preferences of News Corp - the 'rabidly right-wing' approach of Fox News, conservative leanings of News Corp newspapers and the interventionist approach of Rupert Murdoch.
- A2.194 There was also concern that Sky could be successful in future bids for news provision to ITV and Channel 4, leaving only two providers of television news.
- A2.195 BECTU believed that the proposed acquisition would allow News Corp the opportunity to cross-subsidise and cross-promote. Such actions would not merely be a competition issue but would also have implications for media pluralism, with a further potential narrowing of media and editorial choice.
- A2.196 The submission rejected the argument that the rise in online news provision would offset any reduction in media plurality arising from the proposed transaction. Online bloggers were suggested to be subjective and focused more on commentary, lacking the resources to engage in significant newsgathering.
- A2.197 BECTU was strongly opposed to the proposed transaction. It also noted suggestions that the acquisition could be permitted to go ahead in the event of Sky divesting itself of the Sky News channel. BECTU was unconvinced of this proposal, questioning whether Sky would not then simply seek to initiate a further news and current affairs channel raising the same concerns.

### **[X] [A submission]**

A2.198 [X]

A2.199 [X]

### **BT**

- A2.200 BT believed that the proposed acquisition raised serious media plurality issues and that it would be in the UK national interest for this issue to be reviewed by the Competition Commission.

Report on public interest test

- A2.201 BT stated that the serious media plurality issue was that the proposed acquisition would vastly increase News Corp's ability to "set the agenda" for UK national life.
- A2.202 BT was already concerned about the extent to which News Corp's "world view" was reflected in its newspaper titles. It highlighted extracts from the Competition Commission report on the Sky/ITV case which indicated involvement from Rupert Murdoch and News Corp in decisions relating to newspaper titles. The submission also gave other examples, including the widespread support from News Corp newspapers of the Iraq war.
- A2.203 The submission acknowledged that News Corp did not have the means of controlling Sky's editorial policy, but said that after the proposed acquisition it would. BT believed this raised the risk that News Corp's "world view" would creep into Sky News. The submission stated that it was not reasonable to expect that internal controls would be sufficient to safeguard editorial independence. The loss of the independent Sky shareholders would allow News Corp greater opportunity to influence, tacitly or otherwise, the editorial coverage of Sky News and other Sky channels.
- A2.204 BT also highlighted that the transaction would allow News Corp control of Sky's operational approach. This could include the consolidation of the news and current affairs operations of the different entities into a single infrastructure or the production of single subscription products.
- A2.205 BT stated that the proposed acquisition would lead to a reduction in media plurality as a matter of law. It cited the Court of Appeal judgement of the Sky/ITV case, which considered the correct interpretation of the phrase "sufficient plurality of persons with control of ... media enterprises" in section 58(2C)(a). The effect of the judgment was that a change in the quality of control satisfies the test under section 58(2C) as to whether there is insufficient plurality of persons with control of media enterprises.
- A2.206 BT highlighted that the merged entity would have absolute control over 67% of content to UK pay TV customers and be the leading commercial provider of TV and radio news and print news, controlling 37% of the newspaper market. No other media organisation would control so much of the UK's media assets across such a broad range of media.
- A2.207 This extensive control over multiple media threatened plurality in BT's view because the merged entity, in particular through the consolidation of news and opportunities for bundling, would have an advantage over its competitors that it would be impossible to replicate, as a result of which one could expect a long term reduction in media "voices".
- A2.208 BT also highlighted Sky's 'dominant and increasingly aggressive competitive position in the UK TV markets', which the submission suggested would in itself have implications for plurality. The proposed transaction would in BT's view reinforce Sky's dominant position in pay TV markets, and this would threaten the market position and the number of retailers and wholesalers of alternative views and opinions.
- A2.209 BT also provided a copy of the submission it made to the OFT explaining why BT believed that the proposed acquisition by News Corp of Sky should be referred back to the OFT under Article 9(2) of the EU Merger Regulation.



## Campaign for Press and Broadcasting Freedom

- A2.210 CPBF believed that the proposed transaction would be a cross-media merger which would represent a transformative shift in UK media ownership and would have a considerable negative impact on media plurality. This impact would become more pronounced as Sky's operations became integrated into the overall global business and media operations of News Corp.
- A2.211 The submission highlighted that Sky and News Corp were already the largest companies in their respective sectors. It noted that News Corp would be able to absorb losses in order to gain market share where other competitors would be faced to make significant cost savings in order to sustain margins. Sky's high revenue was also noted, with increases being attributed to a growth in subscriber base, bundling of products and Sky's marketing approach.
- A2.212 CPBF outlined Sky's strong position in the provision of premium sports and movies on pay TV. It also highlighted acquisitions in other areas of programming (including the purchase of the Virgin Media TV portfolio), and Sky News' role as one of three TV news providers and two radio news providers.
- A2.213 Citizens' access to information sources and opinions was said to be provided overwhelmingly through the media. Concentration of ownership could lead to viewpoints being excluded or under-represented, while media owners could use outlets as a means of lobbying politicians to pursue policies which suit those owners' political and commercial interests. CPBF stated that Rupert Murdoch's position in relation to successive UK governments demonstrated this point.
- A2.214 CPBF rejected the viewpoint that the internet provided a diversity of news and information sources, suggested that citizens mainly accessed news stories by going to the online sites of traditional news outlets, or to news aggregators or search engines which rely on traditional news organisation sources.
- A2.215 The submission noted that News Corp already owned more media in the UK than it would be permitted to own in the US and Australia. If News Corp was to acquire the remaining 60.9% of Sky it would move from a minority shareholder to full ownership and gain important financial advantages which would allow it to destabilise other UK media groups and therefore have a direct impact on plurality.
- A2.216 CPBF gave examples of actions by News Corp which it suggested were aimed at weakening or destroying competitors, including Sky's acquisition of ITV shareholdings in 2007 and recent critical comments relating to the BBC.
- A2.217 Several potential policies if the transaction was permitted were highlighted which would have a 'deeply disruptive impact':
- Greater opportunity to influence the editorial coverage of Sky News and the content of other Sky channels, with the selection of news stories or the cross-promotion of stories from other News Corp sites to introduce indirectly particular viewpoints and issues.
  - The cross-promotion of stories from News Corp titles on Sky and vice versa would 'inevitably happen', resulting in the merging into one stream of fact and opinion, to the detriment of plurality.
  - Products currently offered separately by Sky and News Corp could be bundled, discounted or provided without charge. Other groups without such assets would find it difficult to compete with this practice.

Report on public interest test

- A2.218 The submission referred to the concept of 'infocapitalists' (identified by Manuel Castells) who build 'self-reinforcing networks of business and political power by owning the production of information and knowledge'. CPBF submitted that the expansion of News Corp's cross-media presence through the proposed Sky acquisition was an example of this process.
- A2.219 CPBF urged Ofcom to consider the 'vital issue' of journalistic standards. The submission suggested that journalistic endeavour was subordinated to News Corp's own national and international political or commercial considerations. It stated that 'a process of self-censorship' resulted in News Corp journalists avoiding subjects which contradict the views and interests of their owner, and that the influence of News Corp newspapers was used to persuade politicians to pursue policies which furthered News Corp business interests and to excoriate those which don't.

**[X] [A submission]**

- A2.220 [X]
- A2.221 [X]
- A2.222 [X]
- A2.223 [X]
- A2.224 [X]
- A2.225 [X]
- A2.226 [X]
- A2.227 [X]
- A2.228 [X]
- A2.229 [X]
- A2.230 [X]
- A2.231 [X]
- A2.232 [X]
- A2.233 [X]

**Church of England**

- A2.234 The Church of England welcomed the inquiry and said that the vitality and plurality of the media was essential to the maintenance of a well-informed democracy. It was noted that there was an ongoing need for strong and effective regulation of cross-media ownership and media plurality, with no diminution in the range of views and voices that could hold government and other interests to account.
- A2.235 The Church of England was not concerned about the nature of News Corp, but was concerned that a combined entity would comprise one of the three significant

suppliers of TV news (BBC, ITN and Sky), one of the two suppliers of radio news (BBC, Sky) and the group with the biggest market share of national press in the UK, thus dominating both the television and newspaper landscape.

- A2.236 The submission highlighted that Sky News demonstrated innovation and quality in its journalism, and that it had been influential in political debate despite its relatively small audience. The Church of England believed that News Corp could exercise subtle editorial influence if the transaction were permitted, including through selecting which news items are to be covered and which left out.
- A2.237 If the bid were to be allowed, the Church of England suggested that an assurance be sought that the independence and editorial integrity of Sky News would be preserved.

### Enders Analysis

- A2.238 Enders Analysis provided Ofcom with three documents: an updated version of the analysis submitted on a confidential basis to the Secretary of State in July 2010, a document addressing Issues 4 and 5 of Ofcom's invitation to comment and a report by Charlotte Brewer, Professor of English Language and Literature at Oxford University, on the meaning of the word 'plurality', which was amended on 12 December 2010.

### Updated submission to Secretary of State

- A2.239 The submission examined the proposed transaction's potential effects on 'plurality' in the UK in the context of the UK TV and newspaper markets.

### UKTV market

- A2.240 The UK TV market totalled approximately £11.11 billion in 2009, and comprised three significant sources of revenue: the licence fee (24%), advertising (27%) and pay subscription revenues (43%). The remaining 6% came from a variety of other sources, including global programme sales.
- A2.241 Enders noted the position of Sky as the UK's leading supplier of residential and business pay TV services, and also supplies residential telecommunication services.
- A2.242 The submission said that Sky had acquired growing economic significance in the UK TV market due to the surge in pay revenue in recent years. In contrast, the revenues from TV advertising that fund commercial PSB operators were relatively flat between 2004 and 2008 before plummeting in the recession, while the BBC's licence fee income has risen but at a lower rate than pay TV.
- A2.243 Between 2009 and 2014, Enders expected pay TV revenue to continue to show strong growth, rising from £4.75 billion to £6.4 billion, and accounting for over 70% of the projected increase in overall TV revenues. Structural change and a continued weak economic environment pointed to limited nominal annual average growth of about 2% over the next four years for TV advertising (i.e. to 2014) – in real terms a significant decline of around 20%. Meanwhile, a significant reduction in the licence fee funding allocated to the BBC's TV service was expected as a result of the spending review.

Report on public interest test

A2.244 The surge in Sky's pay revenues was attributed to a two-pronged strategy of expanding the number of subscribers and selling more products and services to each subscriber, thus lifting annual revenue per user. Sky pay TV subscriber growth had been assisted by very high levels of promotional spend. In addition, upfront costs to the Sky customer, chiefly installation and the Sky+ box, had been reduced and were nil for certain packages

A2.245 Enders noted that to spur product adoption, Sky had announced that it would provide HD capable boxes as standard equipment to new subscribers to enable an upgrade to HD without having to replace their set-top box. For Sky, this eliminated the incremental set-top box subsidy when a customer decides to upgrade, making it more difficult for new entrants relying on the sale of set-top boxes to engage the customer in paying for their services.

A2.246 Enders also noted that Sky has been cross-selling telecoms services to pay TV subscribers since July 2006, when Sky broadband launched.

*Sky's broader TV activities*

A2.247 Enders stated that Sky's activities and its ability to influence other players in the market extended well beyond its core pay TV retail operations into other areas, namely:

- News provision - Sky News was one of three substantial providers of UK TV news, supplying its own channels and also Five, while Sky News and the BBC were the only two suppliers of news for UK national radio.
- Freeview presence - Sky had three free-to-air channel feeds on Freeview, with a current offering of Sky News, Sky 3 and Sky 3+1.
- Advertising sales – Enders estimated that Sky would account for approximately 14% of UK TV advertising sales through its airtime sales house, making it the third largest group, and that this was expected to rise.
- Third party channel provision – the submission stated that Virgin Media's withdrawal from content ownership put Sky in a 'commanding position' over the market for pay channels, including third party basic channel carriage fees. Sky was said to be able to dictate terms that allow its third party channels to be viable, while at the same time offer other non-PSB channels incentives to stay exclusively on the pay TV platform. Enders understood that Sky was in the process of consulting on its EPG, the result of which could further strengthen Sky's position in relation to other parties.
- Premium sports and films – Enders stated that Sky occupied an 'uncontested position of dominance' in the provision of televised sports in the UK, reflected in its budget of over £1 billion for this programming segment (out of £1.9 billion total) in 2010. The submission also highlighted the strong investment of Sky in films, although noted that this was decreasing. The decrease in investment was said to be a result of Sky's market power as a wholesale purchaser, able over time to negotiate successively lower fees as the film contracts become due for renewal.

UK newspaper market

A2.248 The UK national press market was worth £4.1 billion in 2009 according to the Advertising Association, and comprised two significant sources of revenue: consumer purchases of newspapers (62%), and advertising (38%). Structural changes in the advertising market combined with cyclical pressures had reduced newspaper industry revenues from advertising, forcing greater reliance on consumer purchases.

- A2.249 News Corp's market position was noted, with its newspapers accounting for over 37% of national newspaper circulation in the UK (the same share as the two next competitors, Trinity Mirror and Daily Mail and General Trust combined). Enders highlighted that News Corp has been slowly gaining share in the UK national newspaper market.
- A2.250 Enders' view was that, despite some strong growth in advertising in recent months, the long-term pattern for the newspaper industry in aggregate would continue to be a decline in advertising in real terms due to structural factors, exacerbated by over-supply. The submission projected national newspaper industry revenues from advertising to compress by about 6% between 2009 and 2014 due to ongoing substitution of advertisers for new media, whilst circulation revenues could hold roughly steady in nominal terms.
- A2.251 Enders predicted that News Corp's share of national press circulation would steadily increase to more than 40% by 2014, assuming there were no material supply changes to the market. It was considered 'inevitable' that organisations able to absorb losses would gain market share over those that were forced to make significant cost savings to sustain margin.

#### *News Corp strategy*

- A2.252 Enders stated that News Corp had a history of discounting cover prices to grow market share and reduce circulation decline. Purchasing the outstanding Sky shares it did not already own would provide News Corp with the financial resources to sustain its newspapers for the very long term. News Corp would also be able to experiment with media discounting and bundling in a much broader manner. These strategies could 'severely upset the competitive landscape to the detriment of competitors'.
- A2.253 The submission also suggested that that free editions and press and digital bundles for households could become critical developments for News Corp's UK operations as a whole in the future.
- A2.254 Enders also highlighted growing problems in newspaper distribution, noting that those publishers which were best able to absorb steep cost increases and overcome distribution challenges (such as News Corp) would clearly be better positioned to survive.
- A2.255 The submission stated that another core feature of News Corp's strategy was to market its titles aggressively through advertising.
- A2.256 Enders emphasised the importance of display advertising to newspapers, noting that the main challenges to display advertising categories were over-supply of titles and inventory. In this environment, the strongest titles would gain further market share, as some lesser titles fall off the roster for an increasing volume of campaigns.
- A2.257 The submission also considered that online news subscriptions may play an important role in determining the pace and scale of business model development. However, it highlighted the early difficulty which had faced the Times Online following its move to a paywall system, and speculated whether the Times may adopt a different strategy in the future. This could include aggregating services sourced from a variety of different assets and media, and so offering bundles.

Report on public interest test

A2.258 Enders outlined the relative size of major competitors to Sky and News Corp, separating the companies into three groups: multi-product, TV and newspapers. Sky and News Corp were already the largest companies in their respective sectors (in terms of adjusted consumer revenue) and following the acquisition, the combined group would have annual revenues in the region of £7 billion.

The potential impact on plurality

A2.259 Enders noted that UK governments and regulators had consistently maintained that a healthy and informed democratic society required media 'plurality'. In Enders' view, this required there to be a significant number of broadcasters (radio and TV) and newspapers designed to appeal to 'a wide variety of tastes and interests'.

A2.260 The submission noted that impartiality was distinct from plurality, referencing Ofcom's conclusion in 2007 that the broadcasting code requirements were not designed to remove the ability of broadcasters to set the agenda by selecting the issues and events that were covered.

*Implications on media plurality of the proposed News Corp transaction*

A2.261 Enders stated that News Corp already owned more media in the UK than it would be permitted to own in the US and Australia. If the proposed transaction were permitted, News Corp would gain financial advantages which would improve its ability to compete, notably in the newspaper market (noting the weak position of most newspaper publishing groups).

A2.262 The submission stated that the group would acquire several important new strategic opportunities, namely:

- The ability to take Sky and News Corp products and combine them in bundles, discount them or provide them without charge. Enders believed that strategic initiatives of this nature could lead to a much more rapid decline in competitor newspaper circulations than we have assumed, boosting News Corp's newspaper market share above 40% by 2014.
- The ability to cross-promote - stories from Sky News could be carried more and more frequently on News Corp websites, while links to newspaper stories could appear at the bottom of the Sky News screen. The submission stated that 'progressively, News Corp papers and Sky channels, particularly Sky News, may merge into one stream of fact and opinion', noting that plurality would decline in this situation, even if the combined organisation continued to maintain nominally separate newsrooms.
- A greater opportunity (through the loss of the independent directors) for News Corp to influence, tacitly or otherwise, the editorial coverage of Sky News and other Sky channels. Enders said that this concern was heightened by Mr Rupert Murdoch's position as a 'traditional proprietor' of certain media properties, exercising editorial control on key policy debates or political events.

A2.263 Enders rejected the argument that that the widespread availability of other news outlets, especially online, protected the UK public and its political leaders against the excessive influence of media proprietors. The submission argued that Newspapers and TV news programmes still provide the bulk of news gathering operations in the UK, rather than independent online news sources.

A2.264 Enders stated that the link between endorsement and voting intentions was not necessarily important. The crucial point was that newspapers and TV affected

citizen perceptions of political and economic life by deciding which stories were most important and how information, analysis and personalities were portrayed to their audience. Similar issues were said to apply to coverage by Sky News and/or News Corp's titles of product launches and pricing innovations from competitors.

- A2.265 The submission said that in this context, regulatory control of strong and increasingly powerful companies such as Sky was central to maintaining the conditions of competition on the relevant markets. Enders noted, however, that the process was 'challenging, expensive and time-consuming for Sky, its competitors and the regulator'.
- A2.266 Enders noted that if Sky were to win the ITV contract from ITN, ITN would have to dramatically reduce its costs and news gathering operations, potentially leading to a duopoly of TV news provision.
- A2.267 The submission stated that there was little evidence to date that IPTV would provide a threat to traditional TV. While about 72% of UK households were on broadband, online video consumption accounted for just 2% of all minutes viewed per day. Consequently, Enders continued to anticipate no material challenge to Sky from the Internet space in the next five years.

#### Conclusion

- A2.268 Enders concluded that there was a risk of a material reduction in media plurality, potentially to an unacceptably low level. It considered that the intervention was particularly timely as the leading positions of Sky on the UK TV market and of News Corp on the UK newspaper market would strengthen in the period to 2014.

#### **Issues 4 and 5 of Ofcom's invitation to comment**

##### Control of media enterprises

- A2.269 In Enders' view, News Corp exerted 'material influence' over Sky via its shareholding of 39.1%. This was established by the Competition Commission in its report issued in December 2007 on the purchase of ITV shares by Sky.
- A2.270 The submission further stated that the proposed acquisition by News Corp of the shares in Sky it did not already own would shift the latter's degree of control over Sky from 'material influence' to 'control'. This would imply the loss of any independent Sky shareholders, and the loss of the independent directors of the company, which also exerted some degree of influence over Sky, in addition to News Corp, its existing principal shareholder. Full ownership could lead to proprietor intervention.
- A2.271 Enders stated that a methodology for quantifying the amount of plurality before and after a transaction to ensure an intellectually robust assessment of the impact of a merger. However, it was noted that there was no consensus on any such methodology.
- A2.272 To this end, Enders assessed the loss of plurality implied by the proposed acquisition by measuring the anticipated changes in news supplier shares of adult viewing / reading / listening of national news combined. The submission outlined the assumptions and approach used for this assessment.
- A2.273 The key conclusions of this assessment were:

Report on public interest test

- The average person is exposed to news for about 60 minutes a day. About half the time spent is occupied by newspapers and slightly less than half is TV. Radio, internet news sites and news magazines were much less important.
- The BBC provided about 34% of all news exposure, via its broadcast and online activities (no print media), News Corp had a 17% share.
- Merging the Channel 4 audience share with that of ITN, and the Five audience share with that of Sky News, yielded adjusted audience shares. After this adjustment, the top four suppliers of news had a share of about 71% of all news consumption, and the UK had 10 separate companies each providing more than 1% of all news seen or heard by its adult citizens. Cross-media news concentration was therefore stated to already be high.
- Assuming the transaction was completed, the share of news consumption combined from News Corp audience shares of 17% (newspapers) with those of Sky's TV, radio and Five audience (4.5%), takes the new entity's share up to about 21.6% of UK news consumption. Other providers remain the same.
- The transaction increases the share of the top four providers of news to 75% and reduces the number of providers with more than 1% from 10 to 9.

A2.274 We received an updated analysis on 12<sup>th</sup> December 2010 correcting a number of issues with the original submission on minutes of news use. This new analysis showed:

- Average minutes of news use, per head per day increased to 70 minutes
- The BBC accounted for 39.3%, ITV had 6.7%, and Channel 4 had 7.7%.
- News Corp had a share of 14.6%, while Sky had a share of 7.4%.
- Enders estimated that the merged entity, including News Corp and Sky's TV, radio and Five News audience would account for 22.7%.

A2.275 Enders said that the previous Competition Commission and Ofcom investigations noted the increased penetration of News Corp and Sky offerings among people in the C2DE demographic group, and said that this would probably still be true today. The submission suggested Ofcom could assess the level of plurality in individual demographics.

A2.276 Enders also computed the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI rose from 1,793 to almost 2,000 after the transaction takes place, a measure of high concentration. The submission stated that 'plurality' was introduced into the Communications Act because competition law was not thought to be strict enough to protect consumers and citizens, but even on a standard competition measure, this transaction would create concern.

Further developments in the media landscape

A2.277 Enders forecast News Corp's UK newspapers market share rising from about 37.3% of UK national press circulation in 2009 to about 41.1% in 2015. Projections on Sky's subscribers and share of news viewing also indicated strong growth. Taken together, Enders believed that by 2015, News Corp's share of total consumption of news across all media could exceed 25%.

A2.278 The submission estimated that by 2015, if current trends continue, both Sky and News Corp's share of revenues in their respective markets would probably be 40% or more. These segments of the cross-media market were by far the most



financially important, meaning that News Corp's overall share would likely be particularly high. Enders suggested that it would be, for instance, above the 30% threshold of the KEK method of analysis which German law used to assess transactions.

A2.279 Enders repeated concerns outlined in the submission to the Secretary of State (detailed above) relating to the position of ITN in the future.

*Additional comments*

A2.280 Enders also identified four ways in which the proposed acquisition could result in future loss of plurality. These issues were all separate and additional to the immediate loss created by the combination of the two companies.

A2.281 The deep interconnectedness of UK media meant that News Corp could influence the future course of all other media companies. The British media landscape was said to be dominated by a small number of firms. The submission listed some factors which it stated would make the industry more likely to suffer from 'co-ordinated effects', the tendency for the participants in a market to work together rather than to compete actively. These factors included shared production and distribution facilities, Sky's control of the satellite platform and Sky's status as an advertiser with other media groups. Enders stated that the degree of genuine diversity would therefore be lower in a market like this with such strong links between the firms.

A2.282 News Corp had far greater financial strength than other companies in the news market. Similarly, Sky had substantially greater turnover than other major companies in the TV market and this disparity was tending to widen. Enders suggested that the influence of Sky over the media scene was thus even greater than its share of news provision. Its ability to influence the evolution of the wider media market would affect the prospective degree of plurality in the offerings of news and comment.

A2.283 Sky's growing share of the total media market could lead to the ability to request its TV advertising customers to direct a portion of their spending towards News Corp newspapers, at the expense of other media.

A2.284 Similarly, Sky may be able to disadvantage non-News Corp newspapers by bundling its associated papers, either in paper or electronic form, into an offer to TV customers.

**Additional comments on definition of plurality**

A2.285 Enders' third submission focused on the definition of the word plurality. It noted the Court of Appeal's judgement, which found that the word 'plurality' could connote more than just a number exceeding one, possibly carrying an implication of range and variety as well. Enders stated that neither the Court of Appeal nor the Competition Commission provided a definition of what 'plurality' means, or indicated what a 'sufficient plurality' would be.

A2.286 Enders commissioned Charlotte Brewer, Professor of English Language and Literature at Oxford University to assess the meaning of the word 'plurality' in current UK usage. Her report analysed a number of dictionary definitions of the term.

Report on public interest test

A2.287 Professor Brewer concluded that there was 'an overwhelmingly strong presumption that, in common usage (in which I include Standard English, as used by educated people), a sufficient plurality is to be interpreted as 'a sufficiently large number or quantity or profusion''. She stated that the only reason for thinking otherwise would be if those using the term gave explicit notice that they were attaching a specific technical sense to the term.

### **Goldsmiths Leverhulme Media Research Centre**

A2.288 With reference to a 4 year programme of research into new media and the news, the submission argued that the full acquisition of Sky plc by News Corp would mark a significant limitation of the public interest, particularly in the area of news plurality.

A2.289 The research project aimed to investigate the impact of new media on the news in the UK including local and national news, commercial and public service broadcasting, print, broadcast and online, mainstream and alternative news.

A2.290 The submission stated that this research revealed that news media are in crisis:

- newspaper circulation and readership levels are at an all time low;
- there has been a tremendous growth in the number of news outlets available;
- a decline in advertising revenue combined with increased investment in new media technologies alongside staffing cuts have all had a negative impact on journalism.

A2.291 The response suggested that the role of journalists was changing, with fewer exchanges with sources and a greater focus on 'cut and paste, administrative journalism'. In this context, journalists were now monitoring and often rewriting other news stories, with the result being that stories were often covered from the same angles and different news organizations repeatedly present the same information in their stories.

A2.292 The submission highlighted that UK citizens predominantly used sites that were run by existing news providers, further asserting their dominance. Other popular websites were run by internet based organisations, either as news aggregators or by relying in the main on almost entirely on news agency reports. This meant that online voices would be dominated by the larger, more established news providers, leading to 'anything but increased diversity'.

A2.293 It was also noted that there was little evidence to support the view that the internet has been established as a primary source of news except for a very small minority. Moreover, the organisation of web search tended to send more users to the most popular sites in a "winners take all pattern".

A2.294 News Corp was highlighted as dominating national newspaper circulation, with strong growth expected in its market share. Further market strength was predicted come from cover price revenues, with News Corp having a history of discounting cover prices to grow market share and reduce circulation decline, which would help to protect it from the structural shift in ad revenue.

A2.295 Sky News was also noted as being one of only three television news providers in the UK. The submission stated that there was a danger that further market power could be used to diminish the ITN news provision, either by forcing ITN to cut costs

to retain its contracts, or by Sky News successfully winning these news contracts itself. This would be far from the plurality of news providers expected.

- A2.296 The submission noted that Ofcom had raised concerns about the position Sky held in the pay TV market, and indicated concern that this would be intensified should News Corp acquire full control of Sky (with associated cross-promotion and cross-subsidisation of services and products). Similarly, it also highlighted the attitude of News Corp towards the exit from the market place of competitors, suggesting that, when combined with substantial economic resources, this was likely to 'present a serious challenge to the future of news provided in the public interest'.
- A2.297 The response concluded that despite the increase in media outlets, there was still a dominance of a limited number of players controlling news, information content and public debate. Plurality, in the context of a media environment in which News Corp is able to deploy the enormous revenues of Sky was likely to be further constrained.

### **Guardian Media Group**

- A2.298 GMG submitted that Ofcom should advise the Secretary of State that the Transaction may be expected to result in there being insufficient media plurality in the UK as a whole, and with respect to specific audiences in the UK, such that it may be expected to operate against the public interest. The submission covered concerns of GMG that were not covered adequately in that joint submission by Slaughter and May (see below).
- A2.299 The proposed transaction would involve the integration of the UK's largest newspaper group with a the UK's dominant pay TV company, the UK's second largest commercial television news provider, the monopoly third party provider of news content for UK commercial radio and a significant provider of online news content. As such, in GMG's view, it would represent an unprecedented and unacceptable concentration of cross-media news interests.
- A2.300 The submission noted the underlying policy behind the public interest assessment, highlighting that it was particularly focused on cross-media concentrations. In GMG's view, the change from a minority interest of 39.1 % to outright control would represent a material alteration of the relationship between News Corp and Sky that will have an impact on the companies' incentives and behaviour and thereby reduce plurality of the media to a level below the critical "minimum level" identified by Lord McIntosh.
- A2.301 GMG also emphasised that Ofcom should attach particular importance to the need to ensure sufficient plurality in the provision of news by commercial providers, over and above the BBC.
- A2.302 GMG considered that the transaction would reduce plurality across a range of content types, although viewed news as the key focus, given the strength of the merging parties in news provision and the importance of news plurality for the formation of opinion, for informing the terms of public debate and, ultimately, for the democratic process itself.
- A2.303 The impact of the transaction should, in GMG's view, first be assessed on the basis of a UK-wide cross-media news audience. The submission also suggested that it be assessed by reference to its impact on narrower audiences, including the group of people who would be solely served by the combined entity (which Ofcom should seek to identify).

## Report on public interest test

- A2.304 GMG stated that the proposed acquisition would create a unique cross-media news provider, being the only UK media company providing national news content on television, in print, on the radio and online (which neither the BBC nor other news providers replicated). GMG submitted that Ofcom should consider the impact of the transaction on each of these platforms, as well as on cross-media news provision.
- A2.305 GMG argued that 'external plurality' should be the focus of Ofcom's analysis, having due regard to the explanatory notes of the provision. The submission indicated support for the approach adopted by the Competition Commission in the Sky/ITV case, where the sufficiency of plurality was assessed qualitatively, by reference to the actual circumstances of the case. This would entail an assessment of editorial control, but GMG believed that such internal plurality would not ensure *sufficient* plurality in a situation where external plurality was not ensured.
- A2.306 The UK media landscape was said to be in a state of flux. A combined News Corp / Sky would, in GMG's view, be uniquely well placed to influence developments in this sector, given its presence in content across platforms, and its role in providing platforms itself.

**Specific GMG concerns**

- A2.307 The submission highlighted the strong status of Sky in TV and radio news markets, supported by its position in pay TV content and platforms. Similarly, News Corp was noted as holding a strong position in the newspaper market. A combination of the two would, GMG believed, account for 21 % of cross-media news consumption (the BBC providing 34% and DGMT 12%). Other commercial competitors were noted as being heavily reliant on one particular medium.
- A2.308 GMG's believed that the group of people who took news only from News Corp and Sky may span a wide demographic and age range. The submission stated that a situation in which consumers of news content from a range of sources would be consumer only news originating from and controlled by News Corp would raise significant concerns over media plurality and the implications for democratic debate.
- A2.309 GMG noted that were the transaction to be permitted, News Corp would gain full control and benefit of Sky's profit making ability. A merged business would have a strong incentive to offer consumers a bundle of Sky TV and a News Corp newspaper subscription, to the detriment of competitors. Given the fact that physical supply of newspapers often exceeded demand, GMG suggested that any diversion of readers to News Corp titles arising from such a bundling strategy would not lead to a material reduction in cost for the titles losing readers but would instead translate directly into greater financial losses for those titles. This could lead to a material weakening of competitors, or even exit from the market, reducing diversity and plurality.
- A2.310 The submission highlighted that changes in the state of the media sector were leading to new business models being considered, often involving some form of paid digital content. News Corp had led the way in charging for general online news content through the use of paywalls. Overall revenues generated from the bundling of paid-for access to online newspaper content with other products, such as Sky pay TV, telephony and internet access subscriptions, could materially impact the viability of News Corp's paywall strategy. As the only mainstream newspaper group currently charging for general online content, only News Corp was able to put together such a bundled offering.

A2.311 [~~X~~]

A2.312 Previous experience in relation to Sky subsidising set top boxes led GMG to expect a strategy in which devices were given away or sold cheaply to establish a user base that could then be exploited, at the expense of rival content sources.

A2.313 The potential adverse impact of a merged News Corp/Sky strategy of bundling a device with content could be exacerbated in GMG's view if combined with internet access, using Sky's own internet service provider. The merged group would be free to give preferential treatment on its own devices and internet delivery services to its own content, while degrading access to content from rival content providers.

A2.314 GMG would not support any remedy – short of outright prohibition of the acquisition of additional shares in Sky by News Corp – given its views on the deficiencies of relying on 'internal plurality' and the past behaviour of News Corp in this manner.

### International Consumer Policy Bureau

A2.315 The ICPB stated that the proposed transaction risked a serious reduction in media plurality. One of the consequences would be an increase in 'the use by News Corp of news and editorial channels of communication with citizens to promote its own commercial interests' to the detriment of competitors. Citizens would have less choice for sources of information, and thus would find it increasingly difficult to form a true picture of events that may be connected to one or other of News Corp's commercial ventures.

A2.316 The submission cited several examples in support of this viewpoint. These included Harper Collins' refusal to publish Lord Patten's memoirs, perceived critical attacks on the BBC, coverage of the launch of Sky in the late 1980s, interventions by Rupert Murdoch in the editorial affairs of *The Times* and the lack of focus on the recent phone hacking stories.

### [~~X~~] [A submission]

A2.317 [~~X~~]

A2.318 [~~X~~]

A2.319 [~~X~~]

A2.320 [~~X~~]

A2.321 [~~X~~]

A2.322 [~~X~~]

A2.323 [~~X~~]

A2.324 [~~X~~]

A2.325 [~~X~~]

A2.326 [~~X~~]

## Jewish Funds for Justice

- A2.327 The submission from the Jewish Funds For Justice (JFFJ) outlined the organisation's concern that the acquisition of Sky would further consolidate media power into the hands of News Corp, to the detriment both of media plurality in the UK and to democratic debate. It highlighted that the experience of the JFFJ in the US gave it a unique perspective on the risks to the public interest of media consolidation.
- A2.328 The JFFJ believed that should the proposed acquisition be permitted, News Corp could use Sky's television channels to pursue a political agenda in line with its political and commercial interests. This concern was based on News Corp's behaviour in the US, where it had aggressively promoted strategies which were not in the public interest. The proposed acquisition would be damaging both to fair and responsible reporting but also to specific audiences 'that [had] previously been targeted in the United States'.
- A2.329 Concerns were held over both News Corp's motivations in seeking to acquire Sky, and News Corp's ability to leverage ideological and political views across both free-to-air and pay TV channels. The JFFJ believed that News Corp in the US had a 'track record of failing to ensure fair and responsible reporting and broadcasting of news', with tolerance and even promotion of extreme views.
- A2.330 The submission suggested that Fox News broadcasted biased reporting, affecting specific audiences in the United States and that News Corp could continue to follow this policy in the UK if the transaction occurred. This would result in 'harmful' reports becoming more widely available in the UK and repeated across a number of media platforms due to News Corp's ownership of media outlets.
- A2.331 The submission cited as an example of this Fox News' broadcast of what JFFJF labelled 'unevidenced, unjustified and unacceptable anti-Semitic attacks' against George Soros in a series presented by Glen Beck. News Corp's political stance was said to have been noted by other bodies, including the Anti-Defamation League (ADL). Mr Beck was suggested to have carried out similar 'attacks' on other individuals, including Simon Greer, the CEO of the JFFJ.
- A2.332 News Corp's reporting style was said to have 'polarised' audiences in the United States, with the potential for a similar effect on UK audiences. The JFFJ indicated concern for the effect that such 'extreme and offensive' views would have on audiences in general.
- A2.333 [X]
- A2.334 [X]
- A2.335 The JFFJ stated that these materials demonstrated that the public interest would be harmed if media power was consolidated in the hands of News Corp. The submission suggested that it was inevitable that audiences and specific consumer groups were likely to be negatively impacted upon by the types of content that will be more widely disseminated across the UK. By being available across various media platforms, the potential harm caused by the acquisition of Sky by News Corp would be exacerbated. The JFFJ said that a loss of plurality combined with a politically motivated agenda could lead to the erosion of tolerance and cohesion within the UK.

**[X] [A submission]**

A2.336 [X]

A2.337 [X]

A2.338 [X]

A2.339 [X]

**[X] [A stakeholder]**

A2.340 [X] [A stakeholder] stated that it was particularly well placed to comment on the proposed acquisition as the only other UK media group with significant assets in both national newspapers and television. It was [X] [The stakeholder]'s belief that there were significant synergies to be gained from owning both print and television assets (including cross-promotion and cross-media buying opportunities).

A2.341 [X] [The stakeholder] highlighted the present market position of Sky and News Corp, noting that Sky was the 'best funded broadcasting business' in the UK, while News Corp owned the market leader in three of the four newspaper sub-markets alongside a 37% share of national newspaper circulation.

A2.342 [X] [The stakeholder] outlined its view of likely future trends in the relevant market. The submission highlighted that newspaper circulation was declining, with no guarantee that all existing titles would survive. Similarly, Sky was set to continue its growth following heavy investment in its platform and the benefits of having secured commercial agreements in a staggered manner.

A2.343 The submission described Sky's 'virtuous circle' as contributing to likely further growth – using its predominant position in pay TV to acquire exclusive content, which attracted more customer subscriptions, in turn boosting revenues and providing for a further investment cycle. [X] [The stakeholder] stated that this gave Sky a greater position in the market, made it more difficult for commercial free-to-air broadcasters to compete against it.

**The advantages of full acquisition**

A2.344 [X] [The stakeholder] believed that acquisition would strengthen Sky's position in the television market and increase the ability of News Corp to stifle competitors. Potential strategies included:

- Cross-subsidy of TV revenues to loss-making newspapers
- Amalgamation of news operations of Sky News and News Corp's newspaper titles, both in terms of staff and of content itself (particularly on websites as convergence develops further)
- Bundling of Sky and News Corp products at preferential rates, which standalone businesses under separate ownership would not be able to match
- Use of Sky's subscription database to offer products, services and subscriptions from the newspaper side
- Greater integration of other News Corp businesses and Sky (e.g. joint or preferential sourcing of programming from the Fox network). [X] [The stakeholder] suggested that as part of this, the merged company could expand into television production even becoming a vertically integrated production and

Report on public interest test

broadcast business (with no obligation to source any programming from independent producers)

- Cross-promotion and leverage of content, talent and acquisitions
- A reduction of the cost base of the business through merging back-office functions and other synergies such as cross-promotion and cross-media advertising sales

### The threat to media pluralism

A2.345 [X] [The stakeholder] believed that such developments would be likely to lead to a reduction in media plurality in both the short and the long term. The submission identified a number of risks:

- A reduction in the diversity of media ownership, through one company controlling 37% of newspaper circulation and the most lucrative TV platform, with a powerful position in the pay TV market and the television market as a whole.
- A likely reduction in the number of national newspaper titles, with News Corp being able to sustain losses and undercut rivals through cross-subsidy from Sky.
- A partial merger of news operations, reducing the range of available media voices and bringing Sky News and the newspaper titles under a single editorial control.

A2.346 [X] [The stakeholder] stated that the TV landscape had changed considerably. The relative decline in the revenues of free to air broadcasters and the parallel rise of multi channel and pay television meant that media plurality could no longer be considered in traditional terms.

A2.347 [X] [The stakeholder] concluded that the proposed acquisition would lead to the creation of a single powerful media business 'of exactly the kind that cross-media ownership rules have been designed to prevent', and as such should not be permitted.

### National Union of Journalists

A2.348 The NUJ indicated strong support for the principle of media pluralism as 'a necessary component of any democratic society, in which the range of opinions and information made available through the media should not be solely determined by market forces'.

A2.349 The NUJ opposed the transaction, believing that the proposed acquisition would represent 'a transformative shift in UK media ownership'.

A2.350 The submission noted that Sky and News Corp were already the largest companies in their respective sectors, and highlighted the sheer scale of the resources which News Corp could deploy against its UK competitors in broadcasting and publishing should the transaction be permitted.

A2.351 The NUJ highlighted the strong positions of both Sky (accounting for 80% of pay TV revenue in 2009) and News Corp, and outlined the substantial extent of the media assets. The NUJ expressed concern that if the acquisition were to be permitted, the 'market dominance of Rupert Murdoch coupled with his significant influence on the editorial decisions and stance of his publications and news outlets would breach the requirement for media pluralism in the UK'.



- A2.352 The submission rejected the claim an increase in ownership would make no practical difference, noting that Sky had an independent editorial structure, a separate board with independent directors and a different shareholding structure. The NUJ said that a move to 100% ownership would remove any institutional barriers or independent interests and leaving Sky in the direct and immediate control of News Corp.
- A2.353 The transaction would also, in the NUJ's view, allow News Corp opportunities to undertake activities such as cross-subsidisation and cross-promotion, joint subscriptions packages and joint operations (including newsgathering). These could act to the detriment of competitors, new market entrants and editorial independence.
- A2.354 The NUJ rejected the argument that the growth of online sites such as blogs would be sufficient to counter the significant influence of a combined News Corp / Sky entity. These were stated to 'lack the resources to provide any meaningful competition'.
- A2.355 The submission suggested that 'quality journalism' would be harmed by the proposed acquisition, and that it may also act to the detriment of media impartiality, allowing media to be used to exploit political and / or commercial power.
- A2.356 According to the NUJ, Rupert Murdoch's media power had 'played a corrosive role in UK politics with governments, fearful of antagonising him, shaping policies to win or hold on to his support'. The submission noted the recent phone hacking story, and expressed concern that the perceived power of News Corp may have played a role in dissuading politicians or other bodies from pursuing enquiries on this point.
- A2.357 The NUJ concluded that Ofcom should acknowledge the strong opposition from the NUJ, the Trade Union Congress (TUC), other stakeholders, organisations, campaigning groups and individuals and reject the proposed acquisition.

**Slaughter and May (responding on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror plc, Northcliffe Media and Telegraph Media Group)**

- A2.358 The submission outlined what Slaughter and May believed to be the 'clear case' for recommending a full assessment by the Competition Commission, given that the proposed transaction may be expected to operate against the public interest.

**European intervention notice – relevant law**

- A2.359 Slaughter and May highlighted the relevant section (58(2C)) from the Enterprise Act, noting the explanation provided in the DTI guidance in May 2004 that the plurality assessment was concerned with "ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons", because of the potential ability for a person to influence opinions and control the agenda.
- A2.360 Slaughter and May noted (with reference to Article 5(3) of the Enterprise Act) that if Ofcom considered that media plurality may be relevant to the proposed transaction, it must provide advice and recommendations on whether to refer this to the Competition Commission.

Report on public interest test

A2.361 The test was said to be a 'low hurdle', with a referral decision appropriate if it "is or may be the case" that the proposed transaction "operates or may be expected to operate" against the public interest. Slaughter and May stated that Ofcom's role was not to advise on whether media plurality concerns were conclusively established, but on whether there may be concerns, that would warrant a fuller second stage investigation.

**Content types**

A2.362 Although the transaction would, in Slaughter and May's view, reduce plurality across a range of content types, the submission focused on news plurality, given that the merging parties' position as important news providers, and the importance of news plurality to the democratic process. The submission cited various sources which supported this assertion, including the DCMS consultation on Media Ownership Rules in 2001, the Competition Commission's report in 2007 and academic research.

A2.363 Slaughter and May stated that the key social role of news had important implications for Ofcom's assessment. Any transaction that may result in insufficient news plurality would be expected to operate against the public interest.

**Audiences**

A2.364 The submission focused primarily on the UK cross-media news audience, noting that relevant legislation indicated that that plurality could be assessed on a cross-media basis, and that cross-media mergers could give rise to plurality concerns, and that this was supported by the DTI Guidance.

A2.365 Slaughter and May stated that the rationale for adopting this approach was that:

- most people consumed news from more than one medium, meaning a cross-media merger was at least as likely to reduce the choice of news sources available to the audience as a merger within a single medium; and
- each medium was influenced by the news agenda of other media when setting its own agenda (so that consumers of one medium indirectly receive news from other media), meaning that a cross-media merger had the potential to reduce the diversity of news by distorting the flow of news between media.

A2.366 It was noted that this assessment focused on plurality of the supply-side, academic literature also examined the importance of the demand-side. A full analysis would therefore consider whether substantial groups source their news wholly or mainly from News Corp and Sky, such that the transaction would result in those groups receiving little or no diversity of news. A proper consideration of the key aspects of media plurality would therefore, in Slaughter and May's view, require a Competition Commission referral.

**Media platforms**

A2.367 Slaughter and May outlined key features the relevant platforms, and the inter-relationship between these.

**TV**

A2.368 The submission noted that TV was the main source of UK news for the majority of people (74%). TV was also important because it set the news agenda in "real time"

such that the output of other media was often influenced by TV. Rolling news channels were noted as playing an influential rôle, providing coverage of breaking news and often framing the subsequent coverage by selecting early reactions / analysis. This influence extended to the agenda and approach of other non-TV news providers.

A2.369 The agenda-setting function of rolling news was also said to be reflected in the nature of their audiences in two ways:

- Their audience tended to include many people who are themselves opinion formers (e.g. newspaper newsrooms)
- Their audiences tended to be focused on news consumption (by virtue of the fact that they have selected a news channel) rather than being incidental viewers.

Slaughter and May suggested that rolling news channels therefore had a larger impact than their viewing figures may suggest.

#### *Newspapers*

A2.370 Newspapers were highlighted as an important source for news, playing a distinctive role in setting the news agenda.

A2.371 Slaughter and May noted that newspapers had a track record of investigative journalism, holding those in positions of authority to public account. Furthermore, it was highlighted that many newspapers were associated with a particular political viewpoint. In aggregate therefore, the newspaper sector generated news stories representing a diverse range of views.

A2.372 Slaughter and May believed that the ability of newspapers to influence the news agenda depended heavily on their content being reported on other platforms. The submission suggested that stories broken by newspapers would often receive a higher profile when subsequently reported on TV, citing the recent MPs expenses affair as an example of this.

#### *Radio*

A2.373 Although radio was only the third most popular source for news, Slaughter and May noted that radio audiences themselves were large (reaching over 90% of the UK adult population). Radio played an important role as a source of news for people who did not consume news pro-actively. The news agenda of radio was stated to be important in serving people who may not otherwise be engaged in the democratic process.

A2.374 Radio was also said to hold an important role in agenda-setting, with a day's major news stories often developing from interviews on early morning radio news programmes.

#### *Internet*

A2.375 The internet was growing in importance as a news source, becoming more popular with consumers and allowing for a proliferation of news outlets. However, Slaughter and May did not believe that online news outlets contributed significantly to plurality over and above that provided by the existing broadcast and print media, for three reasons:

Report on public interest test

- all of the most popular sites were provided by existing broadcast and print organisations – 80% of online news traffic in the UK was accounted for by five established titles (BBC, The Daily Mail, The Sun, The Guardian and The Telegraph);
- few independent websites were able generate original news content. Hardly any had a significant editorial staff, instead relying on news feeds. As such, Slaughter and May did not believe this contributed additional news plurality.
- Ofcom had found that online news still had gaps in demographic coverage (for example the elderly, or the poor)

*Cross-platform dynamics*

A2.376 Slaughter and May submitted that there was a two-way relationship between TV and newspapers. TV news influenced stories covered in newspapers, while newspaper content was more widely distributed by TV.

A2.377 Slaughter and May said that this process resulted in a 'cross-fertilisation of news and ideas', given both audiences exposure to a more diverse news agenda. It was highlighted that the process relied on objective reporting of each platform's output by the other which would be threatened where there is cross-ownership of important outlets in both newspapers and TV, due to 'the resulting loss of objectivity'.

**Control of media enterprises – external ownership and control**

A2.378 "External plurality" was stated to be the primary concern of the legislation. Slaughter and May examined both the current plurality of persons with control of news media organisations in the UK and the effect of the acquisition on that plurality.

*Current plurality*

A2.379 Slaughter and May stated that the supply of news was already highly concentrated, such that any significant further reduction in plurality would 'clearly give rise to concerns'. While the number of news outlets was noted as increasing, the submission stated that there were only a small number of news suppliers, which in turn set the news agenda for all other outlets.

TV news

A2.380 Slaughter and May highlighted that there were only three significant suppliers of TV news (accounting for 99% of total news hours viewed) – the BBC, ITN and Sky News. Sky was stated to be an important provider of TV news because:

- it is one of only two commercial TV news suppliers in the UK – especially important given the BBC's reliance on state funding
- it is the second biggest TV news supplier by hours broadcast, and the third by hours viewed
- Sky News was one of only two mainstream rolling news channels, accounting for 1/3<sup>rd</sup> of rolling new hours viewed
- as per the Competition Commission finding in 2007 (which, Slaughter and May suggested, concluded that day-to-day editorial control of output remained with the news provider), Sky could be said to have day-to-day editorial control over the news output of Five

Newspapers

A2.381 Slaughter and May noted that the newspaper sector exhibited a higher of plurality than TV. Eight groups accounted for national newspaper circulation, although this was dominated by the top three groups, with News Corp, DMGT and Trinity mirror accounting for 75% of circulation.

A2.382 News Corp was noted to be the largest UK newspaper supplier. It also occupied a unique position in owning both mass market quality newspapers and tabloids. This gave it unrivalled audience coverage, and Slaughter and May cited newspaper readership statistics which showed that News Corp was the only group with a title achieving more than 10% coverage in each socio-economic group.

Radio

A2.383 Slaughter and May noted that there were only two significant suppliers of UK national radio news (accounting for 97.7% of all national radio news), and that Sky was the only private sector supplier.

A2.384 Given the reach of commercial radio, the fact that almost all national commercial radio news was provided by Sky meant that it extended its broad coverage. The broad range of stations served also gave Sky wide coverage over different audiences of the population.

Online

A2.385 The submission reiterated that no company other than the existing broadcasters and newspaper publishers has a significant portion of the online news audience

Effect of the transaction

A2.386 Slaughter and May made a number of statements relating to the effect that the transaction would have on plurality.

The transaction would combine two of the largest contributors to plurality

A2.387 Slaughter and May stated that News Corp and Sky were two of the most important voices in UK news, and combining these two voices into one would result in 'a major reduction in plurality'.

A2.388 The potential scale of the merged organisation was demonstrated by reference to audience reach. Using a standard advertising measurement of reach (which ignored most of Sky's reach through commercial radio), Slaughter and May estimated that the news outlets of the merged entity would reach at least 52% of the adult population. In contrast, only one other newspaper group had a title that reaches more than 10% of the population.

A2.389 In addition to this, News Corp and Sky were considered important by Slaughter and May because of the scale of their news gathering and production capabilities. This was stated to be particularly important in light of the effect that financial constraints were having on the news-gathering infrastructure of news providers (such as the increasing reliance on news agency feed and PR material, with the result being that there was less diversity of news content than is suggested by the number of outlets).

Report on public interest test

- A2.390 Slaughter and May highlighted the strong revenue generating power of News Corp and Sky, which far outstripped the income of their competitors. It was estimated that News Corp and Sky combined had an editorial staff of over 2,100, almost as many as the other national newspapers combined (estimated at around 2,650). The submission stated that this illustrated the unrivalled ability of the merged entity to generate news content and set the agenda.
- A2.391 This scale meant that both entities could play a key role in offering an alternative view of events, which other organisations could not cover independently. Slaughter and May suggested that both News Corp and Sky were well placed to support investigative journalism, which could have a major influence on the news agenda.
- A2.392 The transaction would therefore have what Slaughter and May termed the 'particularly damaging effect' of combining the two commercial organisations with the greatest ability to invest in news-gathering.

The transaction would distort cross-platform dynamics

- A2.393 Slaughter and May stated that a merged entity would have the ability to distort the exchange of news between platforms, and so restrict the ability of other media organisations to contribute to news plurality.
- A2.394 Slaughter and May suggested as an example that Sky News could choose to give disproportionate coverage to stories featured in News Corp newspapers, reducing the likelihood that stories in other newspapers would be consumed by wider audiences. The role of Sky News in agenda-setting also meant that excluded stories would be less likely to be covered by other news outlets.
- A2.395 The submission stated that evidence from other jurisdictions suggested that the incentives created by cross-ownership could undermine the practice of objective reporting. It cited a US study which found that media outlets tended to give disproportionate coverage to the activities of their own corporate group.
- A2.396 The transaction would therefore, in Slaughter and May's view, undermine the ability of third party news providers to contribute to the broader news agenda.

There would be insufficient plurality post-transaction

- A2.397 Slaughter and May highlighted that following the proposed acquisition there would be two large UK news groups, with News Corp as the only major private sector news group.
- A2.398 ITN was noted as having a 'diminishing presence', with the submission highlighting the decline in audiences and the constraints placed on its news gathering capacity by the financial circumstances.
- A2.399 Only one remaining newspaper group would have that achieved coverage of more than 10% of the population. Slaughter and May also said that rival groups would be constrained by Sky News' incentive to feature News Corp content.
- A2.400 Slaughter and May also believed that the enhanced cross-media position of News Corp post-transaction would lead to a material weakening, or exit, of one or more newspapers, leading to a further loss of plurality.

A2.401 The submission stated that this analysis made clear that there would be an insufficient plurality of persons controlling the news media following the transaction, and that it should not be possible for Ofcom to conclude that no further investigation is required.

### **Control of media enterprises – internal control**

A2.402 Slaughter and May noted the 'limited relevance' of "internal plurality" in circumstances where each of the relevant enterprises will be 100% owned by News Corp.

#### *Law*

A2.403 Slaughter and May stated that the public interest test related to control of the enterprise rather than control of the enterprise's editorial policy. Where News Corp held 100% control over Sky, Slaughter and May said that nothing in the statute required or permitted an enquiry into whether that control would be used to control the enterprise's editorial policies.

A2.404 The submission stated that this approach was consistent with the Court of Appeal's judgement in the Sky/ITV case. Nothing in that case suggested that, where complete control of the enterprise was established, it would be permissible to consider how that control might be used. Slaughter and May said that it was not found in the Court of Appeal that, in circumstances of full control, *de facto* editorial independence was relevant to the statutory test.

#### *Policy*

A2.405 Slaughter and May said that this analysis was consistent with the underlying policy considerations: a clearance based on internal plurality considerations would delegate the task of safeguarding the public interest to the controlling party. The submission stated that such a vulnerable situation would not represent "sufficient" plurality of persons for the purposes of the statutory test, and that this was supported by the House of Lords Select Committee on Communications.

A2.406 Slaughter and May therefore stated that it was irrelevant to consider possible editorial diversity of separate media outlets under the 100% ownership of the same corporate group.

#### *News Corp internal plurality*

A2.407 Slaughter and May argued that, even if internal plurality were considered, News Corp outlets did not have sufficient editorial freedom to remedy the external plurality concerns.

A2.408 The submission stated that News Corp's Chairman and Chief Executive (Rupert Murdoch) had spoken of his interventionist role in *The Sun* and *The News of the World* to the House of Lords Select Committee on Communications.

A2.409 Slaughter and May also said that there was also 'significant evidence' that News Corp played a role in setting the agenda for the *Times* and the *Sunday Times*, citing accounts from previous editors. The submission also noted that Mr Murdoch had reported that he regularly spoke to editors, which Slaughter and May believed illustrated 'the fundamental difficulty of seeking to rely on internal diversity to uphold plurality'.

Report on public interest test

- A2.410 The support News Corp's newspapers for the Iraq War was also cited by Slaughter and May as indicative of both the 'dominant force of the proprietor', and the limits on internal plurality.
- A2.411 Slaughter and May submitted that News Corp appeared to have influenced the agenda of The Times titles despite the conditions set out in the DTI's consent to the original acquisition of those titles. None of the parties were aware of independent directors having exercised the right of veto and the submission highlighted that at least two former editors had expressed doubts over the effectiveness of this system.
- A2.412 The track record of News Corp was said to be significant by demonstrating that that, even if internal plurality was relevant to the assessment in this case:
- it was appropriate to treat the various News Corp titles as one voice for plurality purposes; and
  - when assessing the post-transaction situation, there would be no reason to believe that Sky News will enjoy editorial independence such that it could constitute a separate voice to News Corp.
- A2.413 Slaughter and May stated that the plurality issue would not be addressed by broadcasting impartiality requirements, noting the Competition Commission's conclusion that the measures do not cover what content selected or the prominence given to particular stories.
- A2.414 Slaughter and May concluded that it was clear that there was 'no sound basis' to expect significant internal plurality within the merged entity.

**Future developments**

- A2.415 Slaughter and May stated that a thorough consideration of future developments was essential to the proper application of the public interest test. When considering whether the level of news plurality was "sufficient" for the purposes of Section 58, it was essential to consider future reductions in plurality that might be expected regardless of the relevant merger. To be sufficient, the level of plurality must be sufficient in light of any reductions in plurality that might be expected to occur in the foreseeable future.

*Key developments – declining revenue*

- A2.416 Slaughter and May said that the main news media groups had suffered downward pressure on revenues for several years, noting the decline in TV and newspaper advertising revenues. In contrast, online advertising revenues had been increasing, although this had not been matched by investment in news gathering.
- A2.417 The online experience was said to be presenting a challenge to the traditional model of financing news gathering. Traditional media relied on a degree of cross-subsidy between inexpensive but popular content and costlier news content. Conversely, consumers could access very specific content directly online, and along with targeted advertising technology, this meant that significant traffic and revenues had been diverted away from news content. This trend was expected to continue.



- A2.418 Slaughter and May said that the threat to plurality of declining revenues arose from there being fewer companies in the future (or at least those with the resources to invest in news-gathering).
- A2.419 The submission stated that the financial health of ITN was a key point in this regard, with concerns over ITN's ability to contribute to news plurality in the coming years. ITN was said to be heavily reliant on its contracts for the supply of news to ITV, and the loss of this contract would threaten ITN's viability.
- A2.420 Similarly, Slaughter and May said that the recent BBC licence fee settlement would result in the BBC having to fund a wider range of operations from the same level of funding, which could adversely affect its ability to fund news-gathering at its current levels.

*Key developments – media convergence*

- A2.421 Media convergence was said by Slaughter and May to be an ongoing process, with developments in technology and evolving consumer preferences reducing the differences in the output and consumption of media which used to be distinct. The submission gave examples such as VoD services and the use of video and audio on newspaper websites.
- A2.422 Slaughter and May believed that convergence presented challenges for news production and distribution. For example, a scheduled TV bulletin or a daily newspaper may not be deemed sufficient to meet consumers' expectations, with other content (e.g. an up-to-date website) required. Convergence therefore required a greater investment in technology.
- A2.423 Additionally, media was said to be converging around web-based platforms, meaning the internet was an important route to market for media companies. Slaughter and May noted Sky's position as a major broadband provider, giving it a substantial marketing advantage over competitors. The submission stated that because of this, convergence was likely to lead to an increase in Sky's share of audience even absent the transaction.

*Implications for plurality assessment of transaction*

- A2.424 These trends were said to have a number of effects on the transaction:
- the pressures on news media organisations meant it would be 'unjustifiable' for Ofcom to assess sufficiency of plurality on the assumption that all of the existing voices in UK news media would continue to exist in their current form for the foreseeable future;
  - News Corp and Sky were particularly well-placed to survive the current pressures even in the absence of a merger, meaning that a takeover would combine two of organisations that would otherwise be important contributors to news plurality; and,
  - it was necessary to consider the possibility that the transaction would give the combined entity the ability and incentive to engage in strategic behaviour that had the effect of removing or weakening other news suppliers.

**Effect of the transaction on Sky**

- A2.425 Slaughter and May outlined why the transaction would result in a relevant change for plurality purposes notwithstanding News Corp's existing 39% stake in Sky.

Report on public interest test

*The legislation specifically provides for intervention in these circumstances*

A2.426 Slaughter and May stated that the media plurality provisions in the Enterprise Act specifically provide that where two media enterprises serving the same audience are part of a "merger situation" and thereby "cease to be distinct" (which would include a move from 39% to 100%), then "the number of such enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards".

A2.427 The submission noted statements relating to this provided in the DTI Guidance and the Court of Appeal judgement in the Sky/ITV case. Slaughter and May stated that, even if it was the case that News Corp already had material influence over Sky for the purposes of the Enterprise Act 2002, it was 'clear as a matter of law' that an increase to 100% ownership could result in a relevant reduction in plurality.

*Sky is separate from News Corp*

A2.428 Slaughter and May emphasised the limits of News Corp's existing influence over Sky, which indicated that a move to 100% ownership would be of a significant impact.

A2.429 It was highlighted that the Sky directors had a duty to promote the success of the company for the benefit of the shareholders as a whole, and treat all shareholders equally. They also had to ensure that certain transactions with News Corp were carried out on terms that were fair and reasonable to shareholders as a whole and to seek the prior approval of minority shareholders for certain transactions.

A2.430 Therefore, the directors could not seek to favour News Corp. If the transaction were permitted, however, directors would be able to take account of the benefit to the News Corp group as a whole, and Sky's operations could then be directed for the benefit of News Corp.

A2.431 Slaughter and May noted that Sky had put procedures in place to ensure that the company did not discriminate in favour of News Corp. News Corp's minority ownership meant that it only had limited influence over the appointment of Sky's management (with five of the fourteen directors as being News Corp employees or former employees). This would not be maintained if Sky were 100% owned by News Corp.

A2.432 Slaughter and May stated that News Corp's own actions suggested that it did not have control over Sky. News Corp had notified the transaction to the EU Commission for competition clearance, and since jurisdiction only arose under the European Union Merger Regulation in the event of a change of control of the target company, News Corp must itself recognise (and the EU Commission must accept) that the Transaction would result in a change in the control of Sky.

A2.433 Slaughter and May also said that News Corp's minority shareholding in Sky did not translate into any ability to influence the news agenda of Sky News. The submission noted findings from the Competition Commission's report into the Sky/ITV case, which suggested that News Corp did not have the ability to influence Sky's news content. This was said to be consistent with Rupert Murdoch's submissions to the House of Lords Select Committee on Communications.

A2.434 The editorial independence of Sky News from News Corp was also said to be demonstrated by its strong record of reporting on stories even where they are

potentially prejudicial to News Corp, such as the allegations of illegal phone-tapping by The News of the World or BBC Director-General, Mark Thompson's riposte to criticisms made by News Corp executive, James Murdoch in 2009.

A2.435 Slaughter and May concluded that it was clear that Sky's news output should be treated as distinct from News Corp for the purposes of assessing the impact on plurality of a move to outright control over Sky.

### Remedies

A2.436 None of the parties were aware of any measures (short of divestment) which would provide an effective remedy. Slaughter and May emphasised that behavioural undertakings to guarantee the editorial independence of Sky from News Corp were likely to be ineffective, for a number of reasons:

- the output of Sky News was likely to be influenced by the preferences of News Corp – 'editorial self-censorship' was said to be likely as Sky News editors would not be expected to act with disregard to the views of their owner.
- it would be possible to undermine or circumvent any behavioural remedy without necessarily breaching the letter of the undertaking (for example by encouraging the departure of a news editor by cutting their budget).
- a behavioural remedy based on editorial independence would be unlikely effectively to secure the need for any independent editor to have access to an independent news-gathering capacity – therefore if News Corp sought to cut costs and share news gathering functions, Sky News stories would be selected from the same sources as News Corp ones.

A2.437 Slaughter and May stated that it was clear that, whatever behavioural remedies were put in place, Sky could not provide an independent contribution to news plurality when under the 100% control of News Corp.

### Conclusion

A2.438 Slaughter and May concluded that there was a compelling case for OFCOM recommending that the Secretary of State refer the transaction to the Competition Commission.

### Trinity Mirror plc

A2.439 Trinity Mirror submitted a response in addition to the Slaughter and May submission

A2.440 Trinity Mirror outlined its position in the market and its media assets, including, five national newspapers (direct competitors of *The Sun* and *The News of the World*), 150 regional newspapers, 400 digital products and its role as the largest newspaper contract printer.

A2.441 [X]

### Public interest

A2.442 Trinity Mirror stated that news was essential to the proper functioning of democratic society, and that a free flow of news from various sources (which Trinity Mirror took to mean plurality) was at the centre of societal importance. It followed that if the number of sources of news was reduced or if its supply was concentrated in ownership, plurality would be diminished and the democratic process threatened.

Report on public interest test

A2.443 Trinity Mirror was concerned that the scale of a merged News Corp/Sky would have a detrimental effect on the viability of Trinity Mirror and the long term health of its newspapers. It highlighted that the Mirror titles were the only national newspapers to adopt a consistent left of centre political position and as such were a vital part of the democratic system in the United Kingdom.

A2.444 Similarly, the regional press was stated to play a very significant role in local communities. Local and regional newspapers were often the only media outlets that reported on the work of individual members of parliament and allowed them to speak directly to their constituents.

**Ofcom test**

A2.445 Trinity Mirror believed that the test Ofcom was required to apply was set at a low hurdle and that a recommendation of a referral to the Competition Commission would be appropriate if it "is or may be the case" that the proposed transaction "operates or may be expected to operate" against the public interest.

A2.446 Trinity Mirror asserted that transaction would be highly likely to operate against the public interest by the mere fact of the reduction in the number of owners of news suppliers.

**Change in control**

A2.447 Trinity Mirror argued that at its present level of ownership News Corp could only exert negative control (i.e. preventing certain events) but could not impose positive control (i.e. compel Sky to take a particular direction).

A2.448 The submission acknowledged that News Corp had material influence over the running of Sky both by the size of its shareholding and by the number of News Corp employees or representatives on the Sky board, but stressed that a move to 100% ownership would be a 'clear change in status'.

A2.449 Trinity Mirror believed there had been an attempt to 'underplay' the influence of the presence of independent non-executive directors on the Sky board, and noted that their constraining influence would disappear in the case of a successful takeover.

**News Corp / Sky presence in the market**

A2.450 Trinity Mirror noted that the newspaper market was highly concentrated, with News Corp possessing by far the biggest share (more than the next two players combined). By combining both popular titles and influential 'quality' titles, News Corp was said to have 'an unparalleled readership drawn from the widest spread of socio-economic groups'.

A2.451 The TV news sector was also said to be highly concentrated, with only three significant suppliers of TV news. Sky was noted as being the second biggest TV news supplier in the UK by hours broadcast and third biggest by total hours viewed.

**Editorial interference**

A2.452 Trinity Mirror stated that there was a 'well documented' culture of "proprietary" interference or influence on editorial policy and coverage within News Corp. The submission highlighted that this was a concern only in the context of the number of media "voices" being reduced.

A2.453 Trinity Mirror provided two attachments in support of this assertion. One was a Times editorial dated 13 October which criticised the BBC's comments on the proposed News Corp takeover of Sky. The other was an article by Kelvin MacKenzie in the Sun dated 14 October which was critical of other media providers commenting on the proposed acquisition.

A2.454 The submission rejected the argument that impartiality regulations precluded any influence editorially, saying that such an argument ignored the impact that could be exerted over the news agenda by the choice of stories to cover.

### Potential for Commercial actions against Trinity Mirror

A2.455 Trinity Mirror stated that News Corp was 'aggressively protective of its market share', citing previous strategies in support of this. Trinity Mirror was concerned that, if the proposed transaction were permitted, decisions that were not commercially sound in the short term could be taken in the perceived greater long-term good of News Corp.

A2.456 Possible actions included:

- [~~X~~]
- A bundling of products (e.g. TV, newspaper and online subscriptions). Trinity Mirror suggested that such a proposition would be entirely unmatchable by stand-alone newspaper publishers.
- Cross-promotion, whether through straight "house ads" or through cross fertilisation of star columnists, presenters and flattering TV reviews and features.
- The ability to create "packages" for advertisers which would be unmatchable by other media outlets, giving a combined News Corp and Sky an 'unfair advantage'.
- Negotiation of "solus" arrangements or share deals with advertisers. Trinity Mirror asserted that the size of a combined News Corp/Sky and its reach within the UK would give it a significant advantage in this respect.
- Cross subsidy of cover price discounting on News Corp titles, to the long-term detriment of their competitors.

A2.457 Trinity Mirror recognised that a number of these concerns could be categorised as "competition" matters rather than having any immediate and direct impact on plurality. However, the submission indicated that it was the ability of the combined entity to use a all or some of these activities to protect its position to the detriment of others that was of concern.

A2.458 Trinity Mirror expressed concern that the long-term impact of these activities would have a detrimental impact on the commercial viability of its existing portfolio of products, with an additional threat to the plurality of news supply in the UK.

### [~~X~~] [A submission]

A2.459 [~~X~~]

A2.460 [~~X~~]

A2.461 [~~X~~]

A2.462 [~~X~~]

Report on public interest test

A2.463 [X]

A2.464 [X]

A2.465 [X]

## Individual submissions

### Avaaz

- A2.466 Avaaz presented Ofcom with a spreadsheet of 39,105 messages indicating opposition to the proposed acquisition.
- A2.467 Most of these messages repeated the Avaaz standard text, which stated that independent analysis indicated that the proposed acquisition could enable News Corp to own half of UK media in a few years time. This would, in the view of signatories, 'dangerously limit' media choices, stifling democratic debate.
- A2.468 Around 1,330 submissions contained substantially different text and raised points in addition to the standard message.
- A2.469 Many signatories highlighted News Corp's (and Rupert Murdoch's) perceived track record of editorial influence with News Corp newspapers. Similarly, a number of submissions indicated that News Corp already exercised a strong influence on politicians, with several respondents making reference to (amongst other examples) the Sun switching its support to the Conservative party ahead of the general election in 2010.
- A2.470 There was a focus by some on the fact that Rupert Murdoch was able to exercise such political influence through his media assets despite not being a UK citizen. Several signatories indicated that this meant that there was a lack of accountability to the UK public of News Corp's editorial stance.
- A2.471 Some messages suggested that there would be a lack of commitment to UK original programming, which could undermine the UK content industry and culture.
- A2.472 Many submissions expressed concern that the acquisition would result in Sky News becoming more akin to Fox News. Respondents often implied that this would encompass a lowering of standards, or more partisan coverage of issues.
- A2.473 Other respondents were concerned that a greater News Corp would seek to target the position of the BBC. Some submissions suggested this was already an increasing trend, evidenced by public comments by both Rupert and James Murdoch
- A2.474 Some submissions argued that the News Corp paywall strategy served to limit the public access to content/news and therefore limiting the democratic process
- A2.475 A number of messages highlighted News Corp's past record of offering undertakings in relation to transactions of this nature, with references to the "broken promises" in relation to acquisition of The Times and other non-UK newspapers
- A2.476 There were also references to a variety of competition arguments outside the public interest test, mainly centring on the Sky platform. These included the possibility of

content exclusivity limiting consumer choice, and the perceived existence of excessive prices.

### 38 Degrees

A2.477 The 38 Degrees submission consisted of around 19,500 messages to Ofcom, the majority (up to 15,000) of which replicated the standard text proposed by 38 Degrees. This argued that Rupert Murdoch controlled too much of the media already, and that the proposed transaction would result in:

- Too much media control in the hands of one individual
- Less choice for consumers
- Too much political influence for Rupert Murdoch.

A2.478 Many of the 'customised' messages advanced similar arguments as those described above for the Avaaz submissions. In addition, a number of other arguments were raised:

- Concerns about giving Murdoch more opportunity to cross-promote his TV and newspaper holdings
- That the proposed transaction would have a negative effect on democratic trade union activity
- Some submissions voiced concerns about the impact on British journalism. For example- that News Corp fails to develop in-house talent and just poach talented people from the public sector – which leads to extra expense for the public, and that independent journalists would be forced to work abroad.
- There was a concern that News Corp could later be sold on to someone with dubious/dangerous political or religious beliefs, with serious consequences.
- There were a number of references to the fact that this transaction would cause the UK's media to be similar to Berlusconi's situation in Italy
- That the proposed transaction would have a negative effect on innovation
- There were a number of references to content being effected, particularly on the news – in particular that it might be "dumbed down", overly-inflammatory, or racist.
- Some people expressed general concerns about this transaction setting a precedent for big business to dominate the UK (not just in terms of media industry).

### Private individuals

A2.479 Ofcom also received 104 direct submissions in response to our Invitation to Comment. The vast majority opposed the proposed transaction, although some (7 in total) were in favour or suggested that it did not create media plurality concerns.

A2.480 Individuals who opposed the proposed transaction presented arguments in keeping with those identified above in the Avaaz and 38 Degrees summaries.

A2.481 Those who were in favour of the transaction cited a number of reasons for this, including:

- That the transaction would facilitate further investment and innovation in broadcasting

Report on public interest test

- That media choice and plurality would remain high regardless of the transaction being permitted
- That Sky / News Corp should not be 'penalised' for establishing and growing successful companies
- That News Corp already exercised control of Sky by virtue of its large shareholding

A2.482 Some individual submissions submitted anecdotal evidence such as articles to support their views. One individual submitted a significant volume of documents to support his view that the proposed acquisition formed part of a coordinated effort between many parties to exert influence in the interests of particular religious or cultural groups.

A2.483 Some specific individual responses are summarised below.

**David Elstein, former Sky employee**

A2.484 Mr Elstein noted the concerns of parties opposed to the proposed transaction, and in particular the submission to the Secretary of State by Enders Analysis. He stated that Enders had 'misunderstood' the nature of Sky, treating it as a media business along the lines of ITV or the BBC, when in fact it derived a significant part of its revenue from technical aspects rather than content (e.g. set-top box installation, Sky+ set-top boxes etc). In this respect, it was more similar to Virgin Media or BT.

A2.485 Mr Elstein asserted that Sky's relative position in the pay TV sector was not relevant to Ofcom's assessment, which should instead be focused on 'control of viewership'. The submission also stated that the terms of the review 'explicitly exclude cross-media ownership issues, as these are dealt with under the 2003 Communications Act, and clearly do not apply to the News Corp proposal'.

A2.486 The submission argued that the sale of the remaining shares in Sky to News Corp would not constitute a reduction in the number of media owners. This was partly because the current shareholders could not, in Mr Elstein's view, be characterised as 'media owners' given their identity (i.e. largely investment institutions) and that News Corp had previously been treated by UK authorities as being in effective control of Sky.

A2.487 Mr Elstein further argued that the number of media outlets was not likely to be reduced by the proposed acquisition. Sky News accounted for only a small amount of viewing, but would remain in operation on account of being 'a creation of News Corp's'.

A2.488 Mr Elstein stated that in his previous role of having had responsibility for all Sky programming for four years, no pressure was ever applied to Sky News. The only 'blemish' on its impartiality in Mr Elstein's view related to reporting on the Sky bid for Manchester United in 1998, which was quickly addressed. The submission highlighted a number of recent stories which had been fully reported despite being potentially negative for News Corp (for example, the recent phone hacking stories).

A2.489 It was stated that if Sky were compelled to sell Sky News to allow the deal to go through, the most likely outcome would simply be a closure of the channel, as it would be difficult to sell given that the service was loss-making.

A2.490 Mr Elstein rejected the suggestions that News Corp would divert Sky's cash flows to News Corp's newspapers (to the detriment of its rivals), or to allow the cross-media



opportunities that would not be available to News Corp's disadvantaged newspaper competitors. It highlighted that these opportunities were already available and did not require Sky / News Corp to be a combined entity. The fact that they had not already been acted suggested that they were not sufficiently attractive opportunities. Mr Elstein also said that it was unclear why some kind of merged operations between News Corp's newspapers and Sky would be an issue, as there was no legal or regulatory inhibition to such co-operation.

A2.491 The submission stated that some concerns expressed by third parties – such as the use of pay-walls, and aggressive strategies including price cutting by News Corp – did not appear relevant to the matter of the proposed acquisition of Sky. It also highlighted that the launch of Sky TV had led to the provision of a large number (14) of 24 hour news channels, which would not have been possible otherwise.

A2.492 Mr Elstein concluded that third party concerns were not enough to trigger a formal plurality investigation into a transaction that 'clearly does not reduce media ownership or outlets now, and cannot be realistically projected as doing so in the future'.

### **Dr Des Freedman**

A2.493 Dr Freedman's submission focused on competing definitions of plurality which he stated had 'very different public policy consequences'. It was noted that plurality in this context refers to both 'external control' (the number of different people owning media organizations) and 'internal control' (the diversity of content circulated to audiences by individual companies).

#### **'Narrow' plurality**

A2.494 Dr Freedman submitted that there was an assumption in some quarters that the new digital environment would inevitably deliver competition, choice and plurality (the submission highlighted that Rupert Murdoch had previously made this argument). This definition referred to a conception of plurality related simply to the number of media outlets available, as opposed to the distinctive character of these outlets and the contribution they make to diversity.

A2.495 Dr Freedman argued that this definition served two purposes for News Corp:

- it supports criticism of existing regulatory regimes by arguing that plurality is best served through market forces, unrestricted by competition legislation, content regulation and restrictions on ownership. Plurality, according to this approach, is facilitated even when competition leads to the closure of titles and services.
- it allows News Corp to challenge the BBC's position in the UK media market (hiding what Dr Freedman referred to as 'the greater truth' that Sky's income is far greater than the BBC's). This interpretation denied the significance of the 'internal pluralism' of a publicly-funded, public service institution.

#### **'Robust' plurality**

A2.496 Dr Freedman argued (with reference to Ofcom's discussions on plurality in the Media Ownership Review in 2009) that plurality should not be reduced to the number of different outlets, as there is no guarantee that a 'plural' media environment of competing groups will provide a platform for the range of views and information sufficient for a democratic society.

A2.497 The submission highlighted that the DCMS consultation on ownership rules in 2001 conceived of plurality in a more robust fashion, via four functions:

- 'Plurality ensures that no individual or corporation has excessive power in an industry which is central to the democratic process.'
- 'A plurality of ownership should secure a plurality of sources of news and editorial opinion...A healthy democracy depends on a culture of dissent and argument, which would inevitably be diminished if there were only a limited number of providers of news.'
- 'A single, dominant source of news would be in a position fully to define the news agenda'.
- 'Plurality maintains our cultural vitality...A plurality of approaches adds to the breadth and richness of our cultural experience'

Dr Freedman stated that it would be difficult to argue that these functions would not be affected by a News Corp / Sky merger.

A2.498 Dr Freedman said that News Corp with full ownership of Sky would be in a particularly powerful position to withstand current economic pressures and to place severe pressure on the viability of its rivals. Furthermore, the organisation would be under no obligation to cater for a range of editorial views nor to promote 'a culture of dissent'.

A2.499 News Corp would also be able, in the event of acquisition, to leverage its already significant influence on the news agenda onto the emerging digital news environment, with Dr Freedman citing Claire Enders analysis on the possibility of Sky News and News Corp newspapers increasingly becoming similar. In addition, the submission argued that in the event of the transaction being permitted, Sky would have no obligations other than to serve the long-term financial interests of its owners and would be highly unlikely to prioritise 'cultural vitality' as a strategic aim.

A2.500 Dr Freedman concluded that the impact of News Corp being allowed to take full control of Sky would be to limit the plurality of the UK media environment. News Corp would have strategic control over a large portion of the UK television, newspaper and broadband markets, and would be likely to occupy a dominant position, with negative implications for plurality.

**[X] [A submission]**

A2.501 [X]

A2.502 [X]

A2.503 [X]

A2.504 [X]

A2.505 [X]

A2.506 [X]

A2.507 [X]

A2.508 [X]

## Lord Puttnam

A2.509 Lord Puttnam's submission highlighted the debate in the House of Lords on November 4, 2010 entitled "To call attention to the case for maintaining a broad plurality of media ownership in the United Kingdom". It noted that in the course of that debate, various speakers set out the reasons why they believe allowing News Corp to acquire 100% ownership of Sky would lead to a serious reduction in the plurality of the media in the UK.

A2.510 The debate is available at <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101104-0002.htm#10110446000798>

## Professor Vincent Porter

- A2.511 Professor Porter argued that the acquisition by News Corp of the remaining shares in Sky plc would constitute the takeover of a British broadcaster by an American company, and thus reduce the plurality of media organisations fulfilling the needs of UK audiences.
- A2.512 The submission stated that Ofcom should look beyond the five issues identified in the Invitation to Comment, and consider the relations between these issues.
- A2.513 Professor Porter noted that the acquisition would reduce by one the plurality of persons with control of media enterprises in the UK. He further submitted that section 58 of the Enterprise Act 2002 appeared to be concerned with the effect on *audiences*, a term which would not seem to include the citizen's need for newspapers, and therefore suggested that Ofcom's advice would be restricted to the plurality of persons serving television audiences.
- A2.514 Professor Porter highlighted that News Corp held a material influence over Sky's affairs, but that the proposed acquisition would give it control over Sky. The submission noted that UK competition law draws a distinction between material influence and control, recognising that the latter gives the controlling party more powers than mere material influence.
- A2.515 The submission also stated that as News Corp was registered in the USA, the transaction would effectively move the control of the new enterprise outside the United Kingdom. This could lead to a de facto reduction in the plurality of people serving the UK television audience.
- A2.516 Professor Porter noted that Sky was a commercially successful company, highlighting the attractiveness of the Sky platform as a reason for this.
- A2.517 The submission urged Ofcom to take a long-term view of the future relationships between a global media market and the information and media needs of UK audiences. It highlighted that there may be possible 'tensions' between a narrow interpretation of EU competition law and the public interest provisions of both the Communications Act 2003, and the Enterprise Act 2002.
- A2.518 Professor Porter proposed that if the transaction were permitted, the UK authorities should seek to ensure six undertakings from News Corp in order to ensure that there continues to be a sufficient plurality of persons with control of the media enterprises serving UK audiences:

Report on public interest test

- Sky would remain as a UK-based company, which is accountable to the UK regulatory and tax authorities
- The new enterprise would fulfil the minimum quotas for transmitting EU programmes and commissioning independent producers required by the EU Audiovisual Media Services Directive
- The new enterprise would not transfer outside the UK (or possibly the European Economic Area) the ownership of any of the intellectual property rights either in its own programmes, or of those programmes which it produces in the UK in the future.
- The new enterprise would not prevent, by means of exclusive contracts, other UK broadcasters from acquiring the UK rights to foreign films and television programmes which Sky also seeks to broadcast in the UK
- After a specified period of time – possibly one month – the new enterprise would offer its own productions for sublicensing to UK free-to-air channels.
- News Corp would require any third party, to which it assigned control of new enterprise, or to which it sold any of its assets, to fulfil these same conditions.

### **Robert Beveridge, Lecturer in Media Policy**

- A2.519 Mr Beveridge said that Ofcom should recommend that the matter be examined by the Competition Commission. The submission stated further that it could be argued that changes in the media ecology warrant a Royal Commission to examine questions of pluralism and diversity of voice in the media as a whole.
- A2.520 The submission cited evidence in Cardiff University research on the quality of broadcast reporting of impartiality and accuracy in news in the context of devolution, which suggested that ITV, Channel 4 and Sky only achieved accuracy in some 35% of their content.
- A2.521 It was argued that the proposed acquisition would increase the likelihood of costs and content to be shared across the gathering and reporting of news between the two organisation. Mr Beveridge argued that this would lead to an increasing emphasis on headlines rather than impartial analysis.
- A2.522 The submission noted that there may be a move towards partnership and content sharing (particularly in the context of increasing cost cutting), and that the sourcing of media content from a limited or smaller number of newsrooms might have implications for levels of impartiality or plurality as a whole.
- A2.523 Mr Beveridge stated that it was 'self evident' that Rupert Murdoch already held what many would perceive as an 'undue influence' on British politics and democracy.

### **Professor Steven Barnett**

- A2.524 Professor Barnett highlighted the existing market share of News Corp, noting it's strong position relative to competitors and also that it was predicted to grow further in the near future. The submission also outlined Sky's strong position in the pay TV market, and the role that premium sport and movie rights played in maintaining and strengthening this position.
- A2.525 The submission noted that Sky was one of three television news providers in the UK, and that ITN was in a particularly vulnerable position. If ITN existed the market, Sky News would become the only commercial television news alternative to the

BBC. This would match the structure of the radio news sector, where by virtue of its contract with IRN, Sky was 'the only radio news competitor to the BBC'.

- A2.526 Professor Barnett stated that, were the acquisition to be permitted, there would remain just one viable commercial provider of television and radio news in the UK, wholly owned by a single corporation and ultimately controlled by a single individual who also owned over a third of Britain's national press. This concentration was, in Professor Barnett's view, 'surely... unacceptable for a healthy democracy'.
- A2.527 Professor Barnett said that News Corp and its Chairman Rupert Murdoch had 'a long and well established track record both in direct intervention and in exercising indirect influence over his media properties'. The submission argued that impartiality rules would not guarantee that internal plurality was maintained, as they did not cover the selection or omission of stories.
- A2.528 It was also noted that editorial influence could be achieved through the selection of of like-minded senior editorial staff who are trusted to pursue styles or news agendas which are more acceptable to the owner', and noted the editorial stances of News Corp newspapers in relation to the Iraq war as indicative of this.
- A2.529 Professor Barnett stated that a broadcaster's output could be shifted without 'heavy-handed intervention'. He said that plurality did not only mean allowing opposing views to be aired on matters of controversy, but that it involved recognising that corporate influence could be exercised in a number of ways throughout a media company's output, and that a prevalent "news culture" could reflect the worldview of an interventionist owner without breaching any statutes on impartiality.
- A2.530 The submission said that corporate values and editorial positions were likely to be heavily influenced by the commercial interests of the parent company. It stated that News Corp had previously used its editorial presence to generate interest in new product launches, pricing innovations, major sports contracts or Hollywood movies. Conversely, News Corp had also, in Professor Barnett's view, failed to publicise rival initiatives on occasions, or distorted coverage against in this respect.
- A2.531 Professor Barnett gave examples of this practice, including the establishment of the Sadler Inquiry on cross-promotion following complaints from British Satellite Broadcasting over the amount of promotion that News Corp titles were granting to the launch of Sky in 1989.
- A2.532 The submission stated that if the transaction were approved, similar editorial pressures could be applied which would lead to extensive reporting of negative stories involving competitors, or minimal coverage of controversial stories related to News Corp itself, such as the recent phone hacking allegations.
- A2.533 Professor Barnett rejected arguments that there an 'explosion' of news and information outlets (most notably through the internet) had rendered any merger restrictions unnecessary. He highlighted that the origination of news stories was still largely undertaken by mainstream news organisations, and that the role of television as the primary source of news remained for most people. Professor Barnett emphasised the latter point, highlighting that the importance of television had remained high despite technological changes, and that this indicated that it was likely to remain significant in the future.
- A2.534 Professor Barnett stated that this analysis was applicable to content types beyond news and journalism, given that a 'corporate ethos' could spread through all

Report on public interest test

aspects of a media organisation's operations, including the commissioning of content such as drama or comedy.

A2.535 The submission concluded by stating that there were arguably already too few voices dominating the main media outlets, and to reduce this further would be contrary to the public interest.

014

[Redacted]

**From:** [Redacted]  
**Sent:** 31 December 2010 14:02  
**To:** [Redacted] Rab, Suzanne; [Redacted]  
**Cc:** [Redacted]  
 [Redacted] ZEFF JON; [Redacted] KILGARRIFF PATRICK; [Redacted]  
**Subject:** RE: News Corporation/ Sky: Ofcom

Dear [Redacted]

Thank you for your email to [Redacted]

Both this firm and Allen & Overy are instructed by News to advise and represent them on all UK aspects of this matter.

If you are able to provide only one copy of the redacted report, may I suggest that you send it to [Redacted] (replied) at Allen & Overy who will make sure the we all receive a copy.

Yours sincerely,

[Redacted]  
Partner

Hogan Lovells International LLP  
 Atlantic House  
 Holborn Viaduct  
 London EC1A 2FG

Tel: +44 20 [Redacted]  
 Direct: + [Redacted]  
 Fax: + [Redacted]  
 Email: [Redacted]  
[www.hoganlovells.com](http://www.hoganlovells.com)

**From:** [Redacted]  
**Sent:** 31 December 2010 13:55  
**To:** [Redacted]  
**Cc:** [Redacted] ZEFF JON; [Redacted]  
 [Redacted] KILGARRIFF PATRICK; [Redacted]  
**Subject:** RE: News Corporation/ Sky: Ofcom

Dear [Redacted]

Thank you for your email.

Redactions to the report in order to be able to pass a copy to News Corp are being undertaken by Ofcom, and we cannot therefore confirm when we will be in a position to pass this to you. However, indications are that it will certainly not be today, and is likely to be towards the tail-end of next week.

We have received communications both from yourselves (Hogan Lovells) and Allen and Overy. Could you please confirm that both firms are representing News Corp, and whether representation is on different

matters relating to the merger? As you will appreciate, we wish to address communications to the appropriate recipient. You ask in your email that we include each of News Corp's external counsel in circulation of the report. We may only provide one hard-copy of the report to a named individual. If so, it will therefore be for you and your client to discuss to whom the report should then be disseminated. I should be grateful if you could confirm that you, at Hogan Lovells, would be the appropriate person to whom that report should be addressed.

Regards,

[Redacted]

Legal Advisers to the Department for Culture, Media and Sport

Email: [Redacted] Tel: 020 [Redacted]

From: [Redacted]

Sent: 27 December 2010 20:33

To: [Redacted]

Cc: [Redacted]

Subject: RE: News Corporation/ Sky: Ofcom; KILGARRIFF PATRICK; [Redacted]

Dear [Redacted]

Thank you for your email.

With regard to the provision of the redacted copy of Ofcom's report to News Corp, we would be grateful if you could confirm when you anticipate being in a position to make this available to News Corp. I note from your email below that Ofcom are planning to provide a redacted version to DCMS shortly after the unredacted version is made available. We appreciate that the precise timing of provision of the report to DCMS may not be clear at this stage. In order to assist planning on 31 December and in the period immediately thereafter, we would be grateful if you could confirm that you propose to make the redacted copy available to News Corp and its advisers on 31 December (subject to its receipt from Ofcom on that day).

It would be very helpful if you could include each of News Corp's external counsel on your circulation of the report when this is available (i.e. the copy recipients above: [Redacted] and myself).

Best regards

[Redacted Signature]

Counsel

Hogan Lovells International LLP  
Atlantic House  
Holborn Viaduct  
London EC1A 2FG



+44 [redacted]  
t: +4 [redacted]  
Mobile: +4 [redacted]  
Fax: +4 [redacted]  
Email: [redacted]  
www.hoganlovells.com

---

**From:** [redacted]  
**Sent:** 23 December 2010 15:02  
**To:** [redacted]  
**CC:** [redacted]; ZEFF JON; [redacted]  
[redacted] KILGARRIFF PATRICK; [redacted]  
**Subject:** RE: News Corporation/ Sky: Ofcom

[redacted]

As I believe you are aware, Jon Zeff is the lead policy official in DCMS dealing with this matter. I have spoken to him about your letter, and he has agreed the reply below.

I thank you for the letter from John Pheasant dated today to Andrew Rees at BIS. As you know, DCMS is now leading on News Corporation's proposed acquisition of the remaining British Sky Broadcasting Group plc shares.

I confirm that Ofcom will prepare a redacted copy of the report which can be shared with NewsCorps, which they are planning to send to DCMS shortly after the unredacted version is delivered.

I can also confirm that the intention is for NewsCorp to be given reasonable opportunity to make written and oral representations before the Secretary of State takes his decision. You will be aware that there is an administrative target for the Secretary of State to take his decision within 10 working days from receipt of Ofcom's report.

Regards

[redacted]  
[redacted]  
Public Service Broadcasting & Competition  
Media Directorate  
Dept for Culture, Media & Sport  
2-4 Cockspur Street  
London SW1Y 5DH  
[redacted]

---

**From:** [redacted]  
**Sent:** 23 December 2010 13:43  
**To:** [redacted]  
**Cc:** [redacted]; ZEFF JON; [redacted]  
[redacted] KILGARRIFF PATRICK  
**Subject:** RE: News Corporation/ Sky: Ofcom

[Redacted]

Many thanks for your reply.

We will relay this information to News.

Regards

[Redacted]

Counsel

Hogan Lovells International LLP  
Atlantic House  
Holborn Viaduct  
London EC1A 2FG

Tel: +44 20 [Redacted]  
Direct: [Redacted]  
M: [Redacted]  
Fax: [Redacted]  
Email: [Redacted]  
www.hoganlovells.com

---

**From:** [Redacted]  
**Sent:** 23 December 2010 13:41  
**To:** [Redacted]  
**Cc:** [Redacted]; ZEFF JON; [Redacted]  
[Redacted] KILGARRIFF PATRICK  
**Subject:** RE: News Corporation/ Sky: Ofcom

[Redacted] Thank you. On your question about future process, DCMS officials will now be handling this case and the relevant contacts are Jon Zeff, [Redacted] and Patrick Kilgarriff. I have forwarded your letter to them and they will reply shortly. In the meantime I can confirm receipt of your FOI request.

[Redacted]

---

**From:** [Redacted]  
**Sent:** 23 December 2010 11:39  
**To:** [Redacted]  
**Cc:** [Redacted]  
(LE [Redacted])  
**Subject:** News Corporation/ Sky: Ofcom

[Redacted]

Please find attached a letter for your attention.

Regards



Broadcasting

27 Cockspur Street Tel: [redacted]  
London SW1Y 5DH Fax: [redacted]  
www.culture.gov.uk [redacted]

015

Allen & Overy LLP  
One Bishops Square  
London  
E1 6AD

Your Ref [redacted]

Our Ref.

4 January 2011

Dear [redacted]

News Corporation – British Sky Broadcasting Group Plc

Thank you for your letter of 23 December, addressed to the Secretary of State.

Your letter asks the Secretary of State for confirmation on or before 31 December 2010 how he proposes to proceed. I emailed [redacted] in your office on 23 December to confirm that Ofcom would be providing the Secretary of State with a redacted copy of its report, which will be shared with you, and your clients will be offered a reasonable opportunity to make written and oral representations in advance of the Secretary of State taking a decision in this matter.

I also confirmed to Hogan Lovells that the redacted report is expected from Ofcom towards the end of this week, and will be forwarded on receipt. I understand from [redacted] that you are the appropriate person to send a copy to.

On that note, I understand that both Allen and Overy and Hogan Lovells are acting on behalf of News Corporation. It would, of course, be easier for the Department to deal with one named contact on behalf of your client in order, amongst other things, to arrange for delivery of the redacted report, and arrange any representations which your client may wish to make to the Secretary of State. I should be grateful if you could confirm therefore that you will be that contact, as envisaged in [redacted] email.

Yours sincerely

[redacted signature box]



016

BY EMAIL ONLY

STRICTLY CONFIDENTIAL

Mr Jon Zeff  
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 [redacted]  
Direct [redacted]

Our ref [redacted]

January 2011

Dear Mr Zeff,

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

We understand from the e-mail, received from [redacted] on 23 December 2010, that you will be the lead policy official within the Department for Culture, Media and Sport (DCMS) dealing with the Secretary of State's public interest intervention concerning the proposed acquisition by News Corporation (News) of the remaining shares in British Sky Broadcasting Group (Sky) that it does not own (the **Transaction**).

It would be helpful if you could confirm whether you should be our first point of contact on matters concerning the public interest review of the Transaction or whether we should, instead, approach someone in your legal team.

As was explained to your colleague, [redacted] before Christmas, Allen & Overy LLP and Hogan Lovells International LLP both represent News in this matter and the core team to which correspondence should be addressed consists of [redacted] and [redacted] [redacted] at Allen & Overy and [redacted] and [redacted] from Hogan Lovells. As you will be aware, at this stage, News has not yet received a copy of Ofcom's report which was delivered to the Secretary of State on 31 December 2010. News would hope to receive a copy of the report as soon as possible so that it is in a position to make submissions to the Secretary of State. We would therefore request that DCMS encourage Ofcom to produce and deliver a non-confidential version of the report to News with the shortest possible delay. In order to ensure timely consideration of the report by News and its advisors, we request that the non-confidential version of the report be sent by email to the above addressees. We note that DCMS is in a position to send one hard copy only of the report to News' advisors. In response to the letter received from [redacted] on 4 January 2010 I can confirm that, as indicated by [redacted] on 31 December 2010, this should be sent for the attention of [redacted]

We would also be grateful if you could send us a copy of the report delivered by the Office of Fair Trading as soon as possible.

Naturally, the delay in News receiving a copy of the report may well also impact on the timing of the Secretary of State's decision if the Secretary of State is to allow an appropriate time period for consideration of the issues and for discussions with News.

News appreciates the opportunity it will have, as confirmed in the letter of 4 January 2011 from [redacted] to make written and oral submissions to the Secretary of State before he takes his decision on whether or not to refer the Transaction to the Competition Commission. Once we have received the Ofcom report, we will be in contact to arrange a suitable time.

In that regard also we note that in [redacted] e-mail of 23 December 2010, [redacted] referred to the 10 day administrative target for taking a decision which is acknowledged, albeit in the context of a merger which is subject to review by the UK authorities rather than the European merger authorities, in the DTI's Guidance on Public Interest Intervention in Media Mergers (the Guidance) at paragraph 4.11. This 10 day time limit has also been widely reported in the press.

Given the importance of this matter, News would urge the Secretary of State to take the necessary time to review the facts of the case and to hear submissions from News, whose commercial interests would be significantly impacted by any decision which is taken to refer the Transaction to the Competition Commission, before taking his decision.

News would also note that in the only other case in which a media public interest consideration has been applied in the UK – the case of Sky/ITV – the Secretary of State did not take a decision within 10 days. Indeed, in that case, a decision to refer was made almost a month after the Secretary of State received reports from the OFT and from Ofcom and just before the statutory deadline of 4 months from completion which applied in that case (because it was a completed merger). In this case, no legal time limit is running at all as the acquisition of shares by News has not yet taken place.

If Ofcom's report (the content and conclusion of which are not known to News at this time) recommends that the Secretary of State refer the Transaction to the Competition Commission, and as the Secretary of State will want to give due consideration to Ofcom's advice before taking a final decision on reference, News believes that a 10 day period for consideration is likely not to be sufficient for the Secretary of State to take a decision in a contested case such as this one. This is particularly the case in the present circumstances where News is concerned by the issues set out in the letter from Hogan Lovells to the Department for Business, Innovation and Skills on 23 December 2010 and where the administrative process leading up to the issue by Ofcom of its report has, by any measure, been seriously flawed, with responsibility having to be transferred from the Secretary of State for Business, Innovation and Skills (who had taken the initial decision to intervene in relation to the Transaction) to the Secretary of State for Culture, Olympics, Media and Sport.

In the contrary case, should Ofcom's report conclude that the Secretary of State need not refer the Transaction to the Competition Commission, it may be that in that scenario, the Secretary of State's decision is in fact quite straightforward. News continues to be confident that the proposed Transaction poses no threat whatsoever to the sufficiency of plurality when considered on an impartial and objective basis and in the framework of the applicable statutory test.

Yours sincerely

[redacted signature box]

Partner

cc:

[redacted] DCMS

[redacted] News Corporation

[redacted] Hogan Lovells International LLP

[redacted] Allen & Overy LLP



The Treasury Solicitor  
Broadcasting

2-4 Cockspur Street Tel [redacted]  
London SW1Y 5DH  
www.culture.gov.uk [redacted]

017

Allen & Overy LLP

Your Ref [redacted]

One Bishops Square  
London  
E1 6AD

Our Ref

5 January 2011

Dear [redacted]

News Corporation – British Sky Broadcasting Group Plc

Thank you for your letter of today's date addressed to Jon Zeff.

I should be grateful if you could address correspondence from either your firm or from Hogan Lovells to me. Correspondence from your client to the Department should be addressed in the first instance to Mr Zeff, and copied to [redacted]

We are aware that your client has not yet received a copy of Ofcom's report. We are aware that Ofcom is working on the appropriate redactions to prepare both a copy for your client and for Sky, together with an appropriately redacted report for publication. Ofcom are, of course, aware of the necessity to provide both these documents as quickly as possible, but it is, of course, important that the redactions are effectively made. We will make the report available to you as soon as we are able to do so.

You mention the timetable in your letter under reply. As we have already indicated the Secretary of State does not wish to delay in making a decision, and I enclose a copy of an email sent to your client today which makes clear that the Secretary of State is prepared to meet your client to discuss process and also, subsequently, to receive representations, and, if your client wishes, to meet further to discuss the substance of the report.

I hope that this clarifies the issues raised in your letter, but please do let me know if you have further queries.

Yours sincerely

[redacted signature box]



~~5110~~  
018

Note of a Meeting with News Corporation re BSkyB merger – 6 January 2011

Attendees

DCMS

1. Secretary of State (SoS), Jon Zeff (Director, Media), Patrick Kilgarriff (Director, Legal), Adam Smith, (Special Advisor), [redacted] (Private Secretary).

News Corporation

2. James Murdoch (Chairman, CEO Europe & Asia, News Corporation), Frederic Michel (Director, Public Affairs), [redacted]

Points Discussed

3. The SoS made the following opening remarks:
  - i. The purpose of the meeting was to set out the process that will be followed from this point. Given that News Corp had not yet seen the OFCOM report there would be no substantial discussion at this stage of its substance. A full copy would be sent to News Corp tomorrow (7 January) with redactions for commercially sensitive material. In the meantime the report summary would be made available to News Corp at the end of the meeting.
  - ii. SoS gave assurances that the process will be fair and legally robust and any decisions taken by the SoS would need to be reasonable. The OFCOM recommendation and advice the advice the Secretary of State said he had received from Counsel meant he was minded to refer the merger to the Competition Commission (CC).
  - iii. The decision on whether to refer the matter to the CC was not about whether the merger would reduce plurality but whether the SoS believed that it may be the case that the merger may be contrary to the public interest in plurality. The threshold for referral was therefore very low.
  - iv. The next step was for News Corp to consider the OFCOM report and decide whether to make representations. These should be made in writing within a week. The SoS would consider any representations before deciding whether to proceed with the referral.
  - v. In the event that the SoS was minded not to refer, the SoS would invite other interested parties to submit representations. This process would ensure that all interested parties, including News Corp, would have had the opportunity to state their cases.

4. The following points were made in discussion by News Corporation:



- i. There were serious concerns around OFCOM's preliminary analysis contained in the report, including the general reasonableness and direction of their work. There were two areas where they could engage: i) providing a rebuttal of the OFCOM report itself and ii) to the extent that the SoS remained concerned there were issues of substance, to seek remedies that would allow the merger to move ahead without further investigation. There were ideas for possible remedies that News Corp had which they thought could be implemented as part of a fair process.
- ii. News Corp would want to explore remedies ahead of a possible referral and under the Enterprise Act the SoS clearly has the power to accept undertakings in lieu of referral.
- iii. Government needed to acknowledge the costs of a further review both to the public purse and to business and the implications for the prospective sale (ie whether it happens). This could lead to increased risk on the sale, the timetable could become an issue for News Corp shareholders and there may well be problems getting to a price with an open ended process. Referral in effect decreased the likelihood of the sale being completed.
- iv. News Corp wanted a robust process but questioned the robustness of the process so far. News Corp was reserving all their rights including on the legitimacy of the OFCOM report and the initial decision to refer the matter to OFCOM.

***Clarification on aspects of the OFCOM report***

5. There were four areas where SoS wanted to seek clarification on the OFCOM report. For the sake of openness and transparency the SoS would share those questions, and the answers, with News Corp. They were:
  - i. Clarification on the weight given to the impartiality requirements of the Broadcasting Code
  - ii. Clarification on why the potential change in plurality is significant enough to move from sufficiency to insufficiency
  - iii. Clarification on the number of people who will be served by fewer cross news services as a result of the merger
  - iv. Clarification of the position of wholesale news provision
6. These questions were not asking for any additional work, but were to clarify points already contained within the report.
7. In subsequent discussion News Corp made the following points:
  - i. Impartiality safeguards had previously been considered by Lord Pannick, and the conclusion had been that the requirements applied equally to choosing the news story as well as the presentation of the news story and there were sufficient safeguards in place.
  - ii. DCMS should look at the precedent of past CC deals and take them into consideration as part of this process. Precedent showed that previous merger

decisions at a time when there was less plurality than at the present time had gone through with the conclusion that there was no plurality case to answer.

- iii. One possible outcome could be a reduction in plurality if News Corp had to cease some services. There were also fiduciary duties to be considered.
  - iv. News Corp also questioned whether it was legally robust for the SoS to read submissions on this issue from other parties. Those in opposition to the merger had already had a chance to contribute to the OFCOM report.
  - v. If written representations were not successful News Corp would seek further meetings to discuss their submission and potential remedies as necessary. It would be unreasonable to refuse a remedy if what is proposed would work.
8. DCMS officials made the following points in discussion:
- i. The SoS would need to receive submissions from a range of interested parties in the event of a decision not to refer - there must be equal treatment for proponents of both sides.
  - ii. Any representations could not be a re-submission of News Corp's evidence to OFCOM. Instead, it had to be an evidenced explanation of why the OFCOM report, in News Corp's view, was fundamentally flawed in its facts and analysis.
  - iii. It was agreed to add clarification on the role played by precedent in the questions for OFCOM.

**Timing**

9. SoS said that he expected a decision by early next month at the latest – but the process would only last that long if he decided to accept News Corp's evidence and had to consult other interested parties.
10. It was agreed that subject of these discussions would be kept confidential at this stage but both sides would be open about the fact meetings that had taken place. It was expected that the OFCOM and any News Corp submissions would be released no later than the SoS' decision on referral.

To: Jeremy Hunt

From:

Team: Media

Tel:

Date: 04/01/2011

019

## OFCOM'S REPORT ON NEWS CORP/BSKYB PROPOSED MERGER

### Issue

An aide memoire on the immediate next steps in terms of handling the above report.

### Timeline

You have by now seen the Ofcom report. As you know, there is an administrative guideline for the decision of 10 working days from receipt of the report, though it is acceptable to take longer. The key dates coming up are below:

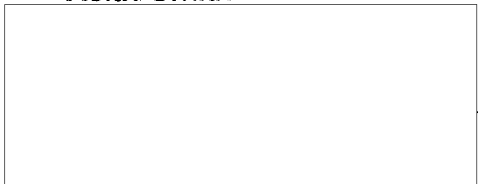
- 6, 7 January: receive a further two redacted versions from Ofcom, one that can be published, and one that can be sent to and discussed with News Corp.
- 6-11 January: we suggest that that you discuss the report with Ed Richards.
- 11-14 January: we suggest that News Corp be given an opportunity to make oral representations to you. We will ask for written representations in advance of the meeting. You will want to consider whether there should also be a discussion with the main opponents of the merger, in which case we also need to decide whether they should see the "for publication" version of the report and whether it should be published at this stage rather than that at the time of your decision.
- 17-21 January: Decision announced and redacted version of Ofcom report published if not already done so.

We will arrange for a meeting with you (involving Counsel) as soon as possible to discuss the above process.

### Clearance

Cleared by Jon Zeff and Patrick Kilgarriff.

cc. Jonathan Stephens  
Jon Zeff  
Patrick Kilgarriff  
Keith Smith



**Process and Indicative timings**

6/7 January

Redacted report from Ofcom expected. On receipt, it will be sent to News Corp and BSkyB with a "minded to" refer letter. The threshold for referral is low: the Secretary of State may make a reference to the Commission if [he] believes that it is or may be the case that... [the merger] is or may be contrary to the public interest.

13 January

Written representations

Week commencing 17 January

Meeting (if requested)

Week commencing 24 January

Referral and publication of redacted report and decision

OR (if minded not to refer)

Redacted report published and my reasoning for not referring sent to main parties opposed to the merger for comments.

Week commencing 31 January

Consider representations from parties opposed to the merger.

Week commencing 7 February

Decision on referral.

## Meeting with News Corp – Aide Memoire

- I have carefully read the Ofcom report and I find it very difficult on the basis of what I have seen to date to see any grounds which would allow me to not refer this case to the Competition Commission, especially given that the threshold for referring is relatively low.
- Once I have a redacted copy from Ofcom, expected [today or tomorrow], I will send it to you. I will also send you a letter saying I am “minded to” refer this case.
- I will consider carefully any arguments you subsequently put to me and would be happy to have a further meeting on the substance of the report. But my feeling at this stage is that that you will have to identify some very serious flaws in Ofcom’s facts or analysis before I could consider not referring.
- Under the circumstances, you may decide that it is better (and quicker in the long run) to allow the referral to the CC where the threshold for blocking such a merger is higher. This must, of course, be a matter for you to decide.
- If you do want a further meeting, I would ask you to provide me with full written representations at least two days in advance of the meeting.
- I recognise that you do not want me to rush a decision, and I will not do so, but it would be unhelpful to drag out a decision to refer as it will simply prolong the whole process. If you do decide that you want a further meeting, I suggest that it takes place [week commencing 17<sup>th</sup> January]. **Here is a short note on the likely process and timetable.**
- If you persuade me that Ofcom’s analysis is seriously flawed, in order to be even-handed, I will then have to share the report and my reasons for not referring with the main opponents of the proposed merger to give them the chance to make their own representations.
- Only once I have considered any further representations will I be able to take a final decision on whether or not to refer.

### Notes

The threshold for referral is low; a “double may” test: the Secretary of State may make a reference to the Commission if [he] believes that it is or may be the case that... [the merger] is or may be contrary to the public interest.

News Corp lawyers yesterday [Wednesday] wrote to officials saying that they think that a 10 day period is too short a period for making a decision to refer and encouraging you to “to take the necessary time to review the facts of the case and to hear submissions from News”.

Department for Culture, Media and Sport  
Rt Hon Jeremy Hunt MP  
Secretary of State

2-4 Cockspur Street  
London SW1Y 5DH  
www.culture.gov.uk

Tel  
Fax

D20

**CONFIDENTIAL**

CMS 162631/mk



department for  
culture, media  
and sport



host government  
department

Jeremy Darroch  
Chief Executive  
British Sky Broadcasting Ltd  
Grant Way  
Isleworth  
TW7 5QD

7 January 2011

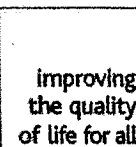
Dear Jeremy

**NEWS CORP/BSKYB PUBLIC INTEREST INTERVENTION**

As you know, the Secretary of State for Business, Innovation and Skills asked Ofcom on 4 November to provide advice and recommendations on the specified public interest consideration concerned with the sufficiency of plurality of persons with control of media enterprises. I received a copy of this report on 31<sup>st</sup> December and I am now sending you a redacted copy.

I have carefully considered this report, and, given the nature of the statutory threshold for reference to the Competition Commission, on the basis of the evidence and analysis presented by Ofcom, I am minded to refer the matter.

Before doing so, however, in accordance with section 104(2) of the Enterprise Act 2002, I am consulting you about my proposed decision in order to give you the opportunity to make further written representations and, if you request it, a meeting to discuss the issues raised before I reach my final decision on referral. I attach an indicative timetable for the next steps in the process.

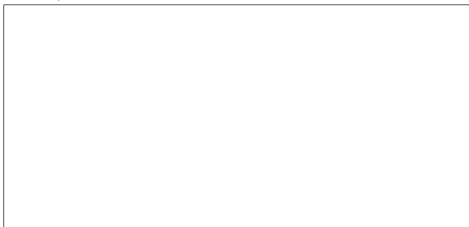


Department for Culture, Media and Sport

**CONFIDENTIAL**

I am also enclosing the OFT's report on jurisdictional issues relating to the anticipated acquisition by News Corp of BSKyB.

I am copying this letter to James Murdoch at News Corporation.



**The Rt Hon Jeremy Hunt MP**  
**Secretary of State for Culture, Olympics, Media and Sport**

Enc/

**Process and Proposed Timings**

13 January

Written representations

Week commencing 17 January

Meeting (if requested)

Week commencing 24 January

Referral and publication of redacted report and decision

**OR** (if minded not to refer)

Redacted report published and my reasoning for not referring sent to main parties opposed to the merger for comments.

Week commencing 31 January

Consider representations from parties opposed to the merger.

Week commencing 7 February

Decision on referral.



Department for Culture, Media and Sport  
Rt Hon Jeremy Hunt MP  
Secretary of State

2-4 Cockspur Street  
London SW1Y 5DH  
www.culture.gov.uk

Tel [redacted]  
Fax [redacted]

021

**CONFIDENTIAL**

CMS 162613/mk

James Murdoch  
Chairman and Chief Executive  
News Corporation  
3 Thomas Square  
London  
E98 1EX



department for  
culture, media  
and sport



host government  
department

7 January 2011

Dear James

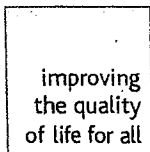
**NEWS CORP/BSKYB PUBLIC INTEREST INTERVENTION**

Thank you for coming in to see me last night at such short notice.

As you know, the Secretary of State for Business, Innovation and Skills asked Ofcom on 4 November to provide advice and recommendations on the specified public interest consideration concerned with the sufficiency of plurality of persons with control of media enterprises. I received a copy of this report on 31<sup>st</sup> December and I am now sending you a redacted copy.

I have carefully considered this report, and, given the nature of the statutory threshold for reference to the Competition Commission, on the basis of the evidence and analysis presented by Ofcom, I am minded to refer the matter.

Before doing so, however, in accordance with section 104(2) of the Enterprise Act 2002, I am consulting you about my proposed decision in order to give you the opportunity to make further written representations and, if you request it, a meeting to discuss the issues raised before I reach my final decision on referral. I attach an indicative timetable for the next steps in the process.

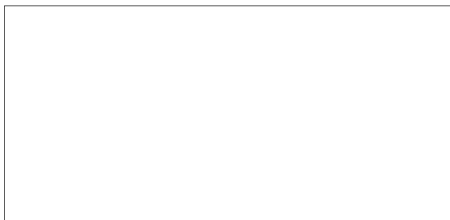


Department for Culture, Media and Sport

**CONFIDENTIAL**

I am also enclosing the OFT's report on jurisdictional issues relating to the anticipated acquisition by News Corp of BSkyB.

I am copying this letter to Jeremy Darroch at BSkyB.



**The Rt Hon Jeremy Hunt MP**  
**Secretary of State for Culture, Olympics, Media and Sport**

Enc/

**Process and Proposed Timings**

13 January

Written representations

Week commencing 17 January

Meeting (if requested)

Week commencing 24 January

Referral and publication of redacted report and decision

**OR** (if minded not to refer)

Redacted report published and my reasoning for not referring sent to main parties opposed to the merger for comments.

Week commencing 31 January

Consider representations from parties opposed to the merger.

Week commencing 7 February

Decision on referral.

UNCLASSIFIED

022

To: 1. Jeremy Hunt

From: [redacted]

Team: Media

Tel: [redacted]

Date: 07/01/2011

**RELEASE OF OFCOM AND OFT REPORTS INTO NEWS CORP/BSKYB MERGER**

**Issue**

The arrangements for sending the Ofcom and OFT reports to News Corp and Sky.

**Recommendation**

That you write as per the attached draft which has been cleared with Counsel.

**Timing**

Immediate.

**Background**

As well as the redacted Ofcom report, you should also send both organisations the much less controversial OFT report which simply confirms that you have the jurisdiction to refer the merger to the Competition Commission if you decide to do so.

**Clearance**

Cleared by Jon Zeff.

cc:

Jonathan Stephens

Jon Zeff

Patrick Kilgarriff

Carola Geist-Divver

Keith Smith

[redacted]

[redacted]

UNCLASSIFIED

James Murdoch,  
Chairman and Chief Executive,  
News Corporation,  
3 Thomas Square,  
London E98 1EX

**NEWS CORP/BSKYB PUBLIC INTEREST INTERVENTION**

Thank you for coming in to see me last night at such short notice.

As you know, the Secretary of State for Business, Innovation and Skills asked Ofcom on 4 November to provide advice and recommendations on the specified public interest consideration concerned with the sufficiency of plurality of persons with control of media enterprises. I received a copy of this report on 31<sup>st</sup> December and I am now sending you a redacted copy.

I have carefully read and considered this report and my initial view is that it makes a very strong case for concluding that, using the somewhat tortuous language of the Enterprise Act, it may be the case that the proposed acquisition may be expected to operate against the public interest since, in broad terms, there may not be a sufficient plurality of persons with control of media enterprises. This "double may" test represents a low threshold for referral and I am satisfied that the evidence amassed in the Ofcom report makes a strong case for so doing.

I am therefore minded to refer this merger to the Competition Commission. Before doing so, however, in accordance with section 104(2) of the Enterprise Act 2002, I am consulting you about my proposed decision in order to give you the opportunity to make further written representations and, if you request it, a meeting to discuss the issues raised before I reach my final decision on referral. I attach an indicative timetable for the next steps in the process.

I am also enclosing the OFT's report on jurisdictional issues relating to the anticipated acquisition by News Corp of BSkyB.

I am copying this letter and enclosures to Jeremy Darroch at BSkyB.

**Jeremy Hunt**

Enc/

**Process and Proposed Timings**

13 January

Written representations

Week commencing 17 January

Meeting (if requested)

Week commencing 24 January

Referral and publication of redacted report and decision

**OR** (if minded not to refer)

Redacted report published and my proposed decision and reasons for not referring sent to main parties opposed to the merger for comments.

Week commencing 31 January

Consider representations from parties opposed to the merger.

Week commencing 7 February

Decision on referral.

2

023

[Redacted]

**From:** [Redacted]  
**Sent:** 07 January 2011 14:33  
**To:** [Redacted]  
**Cc:** KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; ZEFF JON; STEPHENS JONATHAN  
**Subject:** RE: RELEASE OF OFCOM AND OFT REPORTS INTO NEWS CORP/BSKYB MERGER

[Redacted]

I have talked through your advice with the SoS and he is now happy with the latest form of words below.

If you or [Redacted] could send me an amended letter I will get SoS' signature block added.

Many thanks for your help.

[Redacted]

---

**From:** [Redacted]  
**Sent:** 07 January 2011 14:23  
**To:** [Redacted]  
**Cc:** KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; ZEFF JON  
**Subject:** RE: RELEASE OF OFCOM AND OFT REPORTS INTO NEWS CORP/BSKYB MERGER

[Redacted]

Further to our discussion, I've discussed some more with Daniel. How about the following:

"I have carefully considered this report, and, given the nature of the statutory threshold for reference to the Competition Commission, on the basis of the evidence and analysis presented by Ofcom, I am minded to refer the matter."

Then the next sentence of the following para should be removed.

[Redacted]

**Legal Advisers to the Department for Culture, Media and Sport**  
**Email:** [Redacted] **tel:** 020 [Redacted]

---

**From:** [Redacted]  
**Sent:** 07 January 2011 13:59  
**To:** [Redacted]  
**Cc:** KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; ZEFF JON  
**Subject:** RE: RELEASE OF OFCOM AND OFT REPORTS INTO NEWS CORP/BSKYB MERGER

[Redacted]

You mentioned that Jeremy did not like the second (substantive) paragraph of the letter. I've discussed with Daniel Beard, and we are content for this to be much shorter, and would suggest the following:

"I have carefully considered this report, and, given the nature of the statutory threshold for reference to the Competition Commission, my initial view is that the evidence amassed in the Ofcom report makes a strong case for doing so".

[redacted] don't know if you want to run this past BIS at all?

[redacted]  
[redacted]  
[redacted]  
Legal Advisers to the Department for Culture, Media and Sport  
Email [redacted] Tel: 020 [redacted]

---

**From:** [redacted]  
**Sent:** 07 January 2011 13:12  
**To:** [redacted]  
**Cc:** [redacted]  
**Subject:** FW: RELEASE OF OFCOM AND OFT REPORTS INTO NEWS CORP/BSKYB MERGER  
**Importance:** High

[redacted]  
I have just noticed that these papers are wrongly marked "unclassified". They should, of course, be "confidential".

Apologies,

---

**From:** [redacted]  
**Sent:** 07 January 2011 12:50  
**To:** [redacted]  
**Cc:** STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; SMITH KEITH; GEIST-DIVVER CAROLA; [redacted]  
**Subject:** RELEASE OF OFCOM AND OFT REPORTS INTO NEWS CORP/BSKYB MERGER  
**Importance:** High

[redacted]  
Please find a letter for SoS to send to News Corp and BSkyB covering the Ofcom and OFT reports. We haven't received the Ofcom reports yet (and have chased) but it would be very helpful to have the letter signed and ready to go.

I'll bring down a hard copy as well.

[redacted]  
[redacted]  
DCMS  
2-4 Cockspur Street  
London SW1Y 5DH



~~SECRET~~  
024

Note of a Meeting between Secretary of State and OFCOM – 10 January 2011

Attendees

DCMS

Secretary of State (SoS),

[redacted] and Adam Smith (Special Advisor)

OFCOM

Ed Richards, [redacted]

Points Discussed

1. SoS explained that the purpose of the meeting was to seek clarification on aspects of the Ofcom report into the proposed News Corp/BSkyB merger. It was not to seek further work or advice not already contained in report.
2. SoS explained he had met James Murdoch (JM) on Thursday 6 January to set out the process that would be followed from this point. SoS had told JM that based on the Ofcom report he was minded to refer the matter to the Competition Commission (CC). Before referral however, and in order to ensure a fair and legally robust process, it was important that News Corp had the opportunity to submit any evidence they felt they had in relation to the facts and analysis contained in the Ofcom report. Should the SoS be persuaded by that evidence and be minded not to proceed to referral, he would then offer the opponents of the merger an opportunity to submit their evidence before taking a decision. In this scenario, a decision could take up until early February.
3. SoS said that he had agreed to provide News Corp with the minutes of today's meeting with Ofcom. Ofcom would be able to agree the minutes in advance.
4. SoS wanted to understand to what extent the proposed merger would lead to a material change in plurality. SoS understood the report to be saying that there is sufficient evidence at this stage that there may be a change.
5. Ofcom explained that in the 40 days given to it, Ofcom had not reached a view on whether concerns were conclusively established. Ofcom's role was to advise on whether there were concerns such that a fuller second stage investigation is warranted.
6. There were 5 areas where the SoS would be grateful for Ofcom's comments:

**1. Clarification on the weight given to the impartiality requirements of the Broadcasting Code**

7. Ofcom explained that the impartiality requirements of the Broadcasting Code were highly relevant and may contribute as a safeguard. However, they cannot by themselves ensure against potential influence on the news agenda by media owners. The requirement for "due impartiality" is not absolute and broadcasters' have a degree of editorial discretion in the selection of the news agenda. This was the view reached by the CC when it looked at the BSkyB/ITV deal. To rely on the impartiality rules alone would mean relying on behavioural

rather than structural solutions (ex post vs ex ante). These are generally considered much less effective, as they are applied after the event on a case by case basis. (See para 5.80 – 5.88 of the report).

**2. Clarification on why the potential change in plurality is significant enough to move from sufficiency to insufficiency**

**3. Clarification on the number of people who will be served by fewer cross news services as a result of the merger**

8. Ofcom explained that the report had looked at the likely relative ability to influence as a result of the merger. This wasn't just the number of news sources available as much as how they were used. The share of reference tables [found at pages 8 and 10] show that a merger of News Corp and Sky would see them moving from positions of 3<sup>rd</sup> and 4<sup>th</sup> respectively (behind the BBC and ITV) into 2<sup>nd</sup> behind the BBC. This was new and significant data, highly relevant to the issue in question.
9. In relation to multi-sourcing, the report recognises that after the merger, the level of multi-sourcing across the population as a whole decreases only slightly. The report notes that the size of the audience that relies solely on Sky or News Corp is very small and this would remain the case post the merger. Ofcom explained that the implications of multi-sourcing are complex and if this were referred for further investigation, this would be an area the CC could look at further. The question here was whether News Corp in moving from a shareholding of 39% to 100% could be considered to make sufficient difference to warrant further investigation from a plurality perspective. After considering the Broadcasting Code, multi-sourcing and the growth of online news provision all to be relevant, Ofcom's view was that it remained reasonable to believe that the merger may raise plurality concerns and these should be investigated further.

**4. Clarification of the position of wholesale news provision and its relative importance**

10. Ofcom explained there were three layers in relation to provision of news: retail, wholesale and the newswires. In relation to the newswires, Ofcom's view was that editorial control was exercised primarily in newsrooms rather than in the production of the newswires and, as such, newswires were not included in the assessment. In the event of a reference, this may be something the CC could look at further. Wholesale was considered relevant as the bulk of editorial decision-making was decided by the provider. Ofcom recognised that while contracts could be cancelled and/or new contracts secured, its view was that these decisions, as seen with radio companies, were highly likely to be taken on price and other strategic questions rather than routine editorial judgments. In any event, Ofcom considered that for both the wholesale and the retail positions, a similar picture of an increase in ability to influence is shown by the research. (See paragraphs 5.21 to 5.52).

**5. Clarification on the role played by precedent, given that the previous Competition Commission investigation into the proposed BSkyB deal with ITV identified no issues with plurality.**

11. Ofcom explained that the CC report into the proposed deal with BSkyB/ITV found that there were competition concerns but no plurality concerns with the proposed acquisition of a 17.9% shareholding in ITV. With regard to plurality, a 17.9% shareholding is different to the current situation of moving to 100% ownership. The issue came back to whether there may be a material difference to plurality with News Corp moving from 39% shareholding to 100%. Ofcom's view, as set out in the report [paragraphs 5.3-5.7 ] was that the change in the level of control represents a material change to control of the company and one that may be considered to have subsequent consequences for plurality.

SLAUGHTER AND MAY

One Bunhill Row  
 London EC1Y 8YV  
 T +44 [ ]  
 F +44 [ ]

025

Confidential

12 January 2011

Rt Hon Jeremy Hunt MP  
 Secretary of State  
 Department for Culture, Media & Sport  
 2-4 Cockspur Street  
 London SW1 5DH

Your reference

Our reference

Direct line

Dear Mr Hunt,

News Corporation/BSkyB

I write to you on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group (together the "Concerned Parties").

It has been widely reported (most recently in this morning's Financial Times) that News Corporation has received a copy of Ofcom's advice to you (or at least an executive summary of that advice). It has also been suggested that your department may be in discussions with News Corporation over possible remedial undertakings in lieu of reference to the Competition Commission ("CC").

The Concerned Parties have asked me to stress the following:

- (i) The legal threshold for reference to the CC is a low one. You only need to believe that "it is or may be the case that ... [the merger] operates or may be expected to operate against the public interest" (Article 5 EA 2002 (Protection of Legitimate Interests) Order 2003; emphasis added).
- (ii) There is no precedent for accepting remedies in such a case prior to a CC investigation. The legislation envisages that remedies be considered during (and following) a reference to the CC (Articles 6 and 12 EA 2002 (Protection of Legitimate Interests) Order 2003). Consistent with the low threshold for reference, that is the only sensible procedure in cases such as this one where the issues are complex and warrant an in-depth debate and are therefore beyond the scope of the pre-CC procedure. There are clear parallels here with the UK merger regime, under which the OFT's stated position is that undertakings in lieu can only be appropriate where the remedies provide a "clear cut" solution to identified concerns.

CFI Saul  
 SM Edge  
 NPG Boardman  
 GW James  
 EA Godington  
 RMC Goulding  
 CES Seligman  
 PF Bennett  
 RM Fox  
 RJ Thornhill  
 CJ Ains  
 CP White  
 NJ Archer  
 AG Balfour  
 CM Horton  
 BA Barrett

PF Chappatte  
 RJN Cripps  
 P Gilliffe  
 CD Randell  
 WSM Robinson  
 RV Carson  
 SL Edwards  
 JM Featherby  
 F Murphy  
 PH Olney  
 PH Stacey  
 CNY Underhill  
 OA Wareham  
 RJ Clark  
 SJ Cooke  
 DL FuRler

CW Harvey-Kelly  
 DJ Rice  
 MA Whelton  
 MD Bennett  
 RD de Carle  
 SP Hall  
 WJ Sibree  
 RC Stern  
 JR Tigges  
 EGE Wyllie  
 A Beare  
 JB Boyce  
 FHEP Hattrell  
 KI Hodgson  
 N von Bismarck  
 PWH Brien

JM Fenri  
 AN Hyman  
 AC Johnson  
 EF Keeble  
 KR Davis  
 SR Galbraith  
 NDF Gray  
 MS Hutchinson  
 SRB Rowell  
 AG Ryde  
 JAD Marks  
 SD Wama-huta-suriya  
 DA Witzmann  
 TS Bonell  
 SJ Linder  
 AJ McClean

JC Twentyman  
 GN Ebbson  
 HC Griffiths  
 STM Lee  
 AC Cleaver  
 EJD Holden  
 KM Hughes  
 G Inge  
 DR Johnson  
 RE Leitch  
 S Middleton  
 RA Swallow  
 DCR Waterfield  
 DJ Bicknell  
 CS Cameron  
 CA Connolly

DJ Cronin  
 BJ-P Courvaux  
 MS Rowe  
 MST Loring  
 R Doughty  
 E Michael  
 RR Ogle  
 SP Paterson  
 PG Small  
 HL Davies  
 JC Puthis  
 RA Summoy  
 GP Brown  
 JC Cotton  
 RJ Birrell  
 WNC Watson

MJ Dwyer  
 CHR Jeffs  
 SR Nicholls  
 MJ Tobin  
 DC Watkins  
 BKP Yu  
 EC Brown  
 RA Chaplin  
 J Edwards  
 AD Jolly  
 S Maudgil  
 JS Nixon  
 JA Papanicolaou  
 JM Zaman  
 RA Byle  
 CA Miles

GE O'Keefe  
 T Pharoah  
 MD Zerdin  
 SFL Cardell  
 BL Cousin  
 BJ Kingsley  
 IAM Taylor  
 DA Ivie  
 MC Lane  
 IHC Chung  
 RJ Smith

Regulated by the Solicitors  
 Regulation Authority  
 Firm SRA number 55388

Document number  
 EC 0053298d

SLAUGHTER AND MAY

- (iii) There are no clear remedies here short of outright divestments and any effective remedy would require detailed consideration.
- (iv) In any event, it would be procedurally wrong for remedies to be agreed with News Corporation without those remedies having been the subject to detailed scrutiny – including that of interested third parties (as is provided for in the course of a CC reference). That would also require those third parties to have received a copy of the Ofcom advice. The Concerned Parties therefore request (a) confirmation as to what (if anything) has already been provided to News Corporation and (b) equal access to the Ofcom advice as well as to any correspondence with News Corporation and/or BSKyB on the subject of remedies.

More generally, the Concerned Parties remain available to meet with you and to provide such further assistance as you would find helpful.

[Redacted]

[Redacted]

cc.

[Redacted]



**Response to Ofcom's Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation dated 31 December 2010**

**1. Introduction**

- 1.1 We refer to Ofcom's report dated 31 December 2010 ('the Report'). We are grateful to the Secretary of State for the opportunity to make representations to him in relation to the Report. This document comprises Sky's representations on the Report.
- 1.2 As noted in Sky's response to Ofcom's Invitation to Comment,<sup>1</sup> the paramount consideration for the Independent Directors and the Executive Directors of Sky in relation to News Corporation's ('News Corp') proposal is to ensure that the interests of Sky, and Sky's shareholders and employees, are safeguarded. In the context of the present intervention, there are two important aspects to this consideration:
- a) First, the Independent Directors consider that an offer from News Corp could be in the interests of Sky shareholders in the future, provided that it is at an acceptable price. The prevention of such an acceptable offer would be adverse to those interests.
- b) Second, Sky wishes to ensure that, in any review by the appropriate authorities of News Corp's proposal, no precedent is set which would inappropriately or unduly restrict any merger or acquisition opportunities which may be available to Sky (for example, as a result of Sky's continuing operation of Sky News).
- 1.3 Each of these matters speaks to the need for the present intervention to be:
- a) properly focused on the relevant question, and rigorously evidence based, treating with due scepticism submissions by commercial competitors; and
- b) conducted in a manner which is mindful of the need for transparency and predictability in merger control, so as not unduly to undermine the ability or incentive for companies to expand, invest and innovate.
- 1.4 We note that, in preparing the Report, Ofcom has set itself the task of deciding whether, having assessed the available evidence, "[it reasonably believes] that the proposed acquisition may operate or be expected to operate against the public interest".<sup>2</sup>
- 1.5 It is to be noted that Ofcom's role is to advise the Secretary of State, in order to assist the Secretary of State in deciding how he should answer the questions posed to him by the Enterprise Act 2002 ("EA02"). The EA02 requires that the Secretary of State should, on the basis of his own reasonable assessment of the evidence:
- a) decide whether *he* believes that it is or may be the case that the proposed merger operates or may be expected to operate against the public interest; and
- b) if so, decide whether he should refer the case to the Competition Commission ("CC") for further investigation.
- 1.6 It would not be appropriate for the Secretary of State simply to adopt the advice of Ofcom in a case such as the present one. It falls to the Secretary of State to make his own assessment of the evidence, on the basis of which he might reasonably reach different conclusions from Ofcom's as to whether the 'threshold' for a reference to the CC is met. But, if the threshold is met, it is also necessary to address the second question, namely

<sup>1</sup> [Confidential].

<sup>2</sup> Paragraph 1.4 of the Report

**Non-confidential version**

whether it is appropriate for the Secretary of State to exercise his discretion to refer the case to the CC. (We mention this second question, in particular, as the Secretary of State's letter of 7 January 2011 makes no reference to it, but appears to envisage that he is minded to refer the matter to the CC simply in the light of Ofcom's evidence and analysis of the first question.)

1.7 Sky submits that, in the present case:

- a) Ofcom has subtly recast the statutory formulation of the "media plurality" test, with the result that it has approached in a distorted manner the questions which it should have answered; and
- b) perhaps in consequence, Ofcom has given undue weight to particular pieces of evidence, and has discounted other relevant evidence.

1.8 Sky submits that it is therefore particularly important that, in the present case, the Secretary of State should assess the "raw" evidence summarised by Ofcom in its Report with an open mind, and by reference to a correct understanding of the relevant media plurality test.

1.9 Sky submits that such an assessment is likely to lead the Secretary of State to conclude that:

- a) Ofcom has overstated the risk that the proposed transaction might operate against the public interest;
- b) on a proper assessment of the issues, there is a minimal, if any, risk that the proposed transaction might operate against the public interest; and
- c) accordingly, it would be reasonable for the Secretary of State to exercise his discretion to decide not to refer the matter to the CC for further investigation.

Sky elaborates on these points in the remainder of this Submission.

**2. Ofcom's advice and recommendations**

2.1 We note at the outset that, despite its final advice and recommendation that the Secretary of State should refer the matter to the CC for further investigation, Ofcom has, in fact, concluded that the proposed transaction poses a threat to media plurality only in certain limited respects:

- a) in technical (and purely numerical terms), the merger of News Corp and Sky will reduce by one the number of independently owned/controlled media enterprises active in the UK;<sup>3</sup>
- b) but it is a separate question whether there will be a reduction in the number of independent voices, since it remains possible that internal plurality will be maintained within the enlarged News Corp group to such an extent as to lead to no diminution in the number of independent voices, relative to the status quo ante. Ofcom does not find that there will be a loss of internal plurality, but merely concluded that, having conducted only a first stage review, "*we do not consider that we can reach the view that internal plurality will ensure sufficient plurality in the provision of news and current affairs*";<sup>4</sup>
- c) in terms of its static (immediate) effects the transaction would bring together News Corp's existing newspaper interests with Sky's retail and wholesale TV /radio news services, thereby conferring on News Corp an enhanced presence in terms of its share of total news consumption, its overall reach, its presence on several distribution platforms, its qualitative influence, and - allegedly in consequence - its "*ability to influence opinion*";<sup>5</sup>

<sup>3</sup> Paragraph 1.36 of the Report.

<sup>4</sup> Paragraph 1.39 of the Report.

<sup>5</sup> Paragraph 1.48 of the Report.

**Non-confidential version**

- d) no special concerns arise in respect of particular audiences (whether defined by geography, age, socio-economic status, or use of particular news sources). The concerns identified relate to UK audiences generally; and
- e) although one can speculate as to (longer term) dynamic developments which might occur in respect of the provision of news services, there is no sufficiently tangible concern arising from such speculation as to justify its forming part of the evidence on which Ofcom relies.<sup>6</sup>

- 2.2 It is self-evident that News Corp's acquisition of 100% ownership of Sky will lead, in purely numerical terms, to a reduction – by one – in the number of independently owned/controlled media enterprises. This is of no substantive significance. Nor does Ofcom in fact conclude that the proposed transaction is, in fact, likely to lead to any significant reduction in internal plurality as between Sky News and News Corp's newspaper interests. It merely proceeds on the precautionary basis that it cannot rule out the possibility that that might happen. It follows that, if the Secretary of State were satisfied that such internal plurality would be maintained, then there would be no basis for a reference.
- 2.3 Furthermore, in suggesting that the Secretary of State might wish to consider putting new legislation before Parliament to allow ad hoc interventions on grounds of media plurality, unrelated to any particular merger in the media sector, Ofcom effectively acknowledges that the present transaction does not itself pose a dynamic threat to media plurality (but it would like to see additional powers of intervention, just in case anything unexpected happens).
- 2.4 Thus, Ofcom's advice that the present case should be referred to the CC ultimately rests entirely on an assessment of the potential immediate effect on external plurality of the combination of News Corp's newspaper interests with Sky News's TV/radio interests. For the reasons explained below, Ofcom has misdirected itself as to how to conduct that assessment, and its resulting advice is therefore flawed and unreliable.

**3. Ofcom's assessment of external plurality**

- 3.1 The specified public interest consideration which arises in the present case is a consideration which is concerned with the sufficiency of plurality of persons with control of media enterprises, that 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"*.<sup>7</sup>
- 3.2 In the Sky/ITV case, the CC and the Court of Appeal made clear that, in assessing whether a transaction may be expected to operate against the public interest, by reference to this public interest consideration, the authorities should have regard to whether the merger will have the effect of so diminishing the number and range of voices serving a relevant audience as to mean that there will, after the merger, be an insufficient number and range of voices to protect the public interest.
- 3.3 Thus, the CC summarised the concept of plurality as follows in the Sky/ITV case:

*"There is no statutory definition of plurality in section 58A or elsewhere in the Act. We took the concept of plurality of persons with control of media enterprises to refer both to the range of and the number of persons with control of media enterprises."*<sup>8</sup>

and which was endorsed subsequently by the judgment of the Court of Appeal in the same case:

*"We agree with the Commission on this ... The word plurality can connote more than just a number exceeding one. It may carry an implication of range and variety as well."*<sup>9</sup>

<sup>6</sup> Paragraph 1.54 of the Report.

<sup>7</sup> Paragraph 1.2 of the Report.

<sup>8</sup> Paragraph 5.7 of the CC Report in B SkyB/ITV.



**Non-confidential version**

- 3.4 In the present case, Ofcom has looked beyond the wording of the statutory test, and the approach approved by the CC and the Court of Appeal for the application of that test, and has instead laid emphasis on an informal explanation of the test advanced in Parliament at the time of the enactment of the EA02, or advanced in subsequent statutory guidance.<sup>10</sup>
- 3.5 Accordingly, Ofcom appears to have concluded that its assessment should focus not on whether the presently proposed transaction will lead to such a diminution in the number and range of independent voices as to lead to insufficient plurality. Instead, its assessment focuses on whether the merged News Corp/Sky would have a "louder" voice, relative to other voices, with the implication that News Corp/Sky would then drown out other voices, such as to render the state of plurality insufficient to protect the public interest (a proposition which itself is not self evident): Ofcom has sought to decide who has greatest ability to influence the formation of public opinion, when it should instead have focused on whether there remained a sufficient number and range of sources of news provision to the public.
- 3.6 Sky submits that this approach distorts Ofcom's assessment. Ofcom has strained to quantify the relative ability to influence which a merged News Corp/Sky would have, using unreliable metrics, and making questionable judgments as to the way in which users of one news source can be expected indirectly to influence wider public opinion by debating what they have seen/read with other members of the public.
- 3.7 We elaborate on these errors in section 4 below.

**4. Ofcom has adopted a flawed methodology**

- 4.1 There is no established metric for analysing a media enterprise's ability to influence and inform opinion, as these are, arguably, not measurable concepts. As established above, "*the range of and the number of persons with control of media enterprises*" effectively acts as a proxy for all the concerns underlying the statutory test precisely in order to avoid this issue.
- 4.2 In this context, Ofcom has taken 'ability to influence' as being synonymous with consumption. Such an approach is questionable as even Ofcom notes that it does not take into account the varying ability of different media to influence opinion,<sup>11</sup> the impact of multi-sourcing on opinion forming, or, indeed, consumers' own judgments as to whether to accept everything that they read, see or hear.<sup>12</sup>
- 4.3 This is particularly so in relation to the use of 'share of minutes of news' as a relevant metric. Ofcom's analysis of the relative weights of 'minutes of use' across different media is, at best, speculative, without empirical basis. For example, Ofcom asserts that a TV news minute' would hold greater weight in terms of ability to influence than other media as "*TV news broadcasts are designed to deliver information and messages effectively in a relatively short time period compared to that available to newspapers*". No attempt is made to assess the relative influence of (non-linear) media that provide for in depth reporting or investigation as compared to the brief news reports that are usually contained in linear broadcast media with limited schedule time.
- 4.4 At best, Ofcom's three metrics demonstrate consumers' actual use of media and their views on their sources of news on a cross-media basis.
- 4.5 However, whilst Ofcom acknowledges the limitations of these three factors it considers in its assessment (audience share and reach, minutes of use per day, and share of references), considering them to provide "*useful insight*", Ofcom then goes on to rely solely on this analysis to conclude that "*the proposed transaction will result in an increase in News's ability to influence public opinion*".

---

<sup>9</sup> Paragraph 90 of the Court of Appeal judgment. See also paragraphs 114 and 116 of that judgment.

<sup>10</sup> Paragraphs 1.5 and 1.11 of the Report.

<sup>11</sup> Paragraph 1.25 of the Report.

<sup>12</sup> Paragraphs 4.81 - 4.87 of the Report.

**Non-confidential version**

- 4.6 As demonstrated above, this conclusion does not follow from the evidence.
- 4.7 Furthermore, by exclusively focussing on 'relative ability to influence', Ofcom's methodology obliges it to adopt further distortions of the plurality test in order to overcome evidence pointing to a sufficiency of plurality post-transaction.
- 4.8 For example, Ofcom discounts the lack of direct harm to plurality that might result from the transaction. Only a very small number of people rely solely on News Corp and Sky for news content and would therefore lose an alternative source of news content.<sup>13</sup> Furthermore, Ofcom's research shows that regular Sky News users source news from more providers than the general population.
- 4.9 This is dismissed by Ofcom as not being adequate to ensure sufficient plurality as what matters more than the consumption of news by individuals is "*the number and range of news providers used by all consumers and their relative significance*".<sup>14</sup> It is not clear to Sky why public debate and discussion of news by individuals should be given greater weight than the number of news providers used by each individual. The two seem inextricably linked and should be given equal weight in any assessment of whether there will be sufficient plurality.<sup>15</sup>

**5. Discounting of relevant evidence and considerations**

- 5.1 Sky submits that, instead of seeking to evaluate the relative value/strength of the "voice" which a merged News Corp/Sky would represent, Ofcom should instead have sought to evaluate the number and range of voices which would remain post-transaction. Much of the evidence which Ofcom cites would be relevant to a properly-directed assessment. But Sky submits that, if Ofcom's assessment had been more appropriately directed, it would have attached more weight to:
- a) the range of other news providers who will remain active, independently of News Corp/Sky, post-merger, and will continue to generate and disseminate diverse news content and comment. Such news providers include numerous newspaper groups and powerful TV broadcasters who are committed to the continued provision of TV news coverage;
  - b) the readership/audience share which such other providers already achieve, and the scope for them to reach additional readers/audiences if the quality/diversity of news coverage offered by News Corp/Sky were to diminish (in a context where Sky News' share of national TV news is only around 7% (and under 10% if Five News' share is included), compared to the BBC at 71% and ITV at 15%);
  - c) the fact that News Corp/Sky would not control any scarce resources or privileged means of distribution of news services, since News Corp/Sky would not control any scarce spectrum resources (e.g. terrestrial TV frequencies/franchise) or have access to public funding (such as the BBC's licence fee). Indeed, Ofcom fails to assess the relative impact of the BBC as "*the strongest provider of news and current affairs in the UK*".<sup>16</sup> Ofcom merely notes its institutional and editorial independence, and that this is "*fundamentally different from other media enterprises, including News Corp*";
  - d) the fact that there is no real prospect that News Corp/Sky could prevent a full range of news stories and opinions from being made known to UK audiences, since other news providers (providing content and/or editorial control) would remain sufficiently numerous and well-established to provide a diverse range of content and comment; and
  - e) the fact that the growth of access to the internet, and the unique facility which it provides to disseminate news stories and comment very quickly to end users, provide

<sup>13</sup> Paragraph 5.112 of the Report.

<sup>14</sup> Paragraph 5.116 of the Report.

<sup>15</sup> Sky notes that this argument was not put to it as part of Ofcom's Issues Letter.

<sup>16</sup> Paragraph 5.51 of the Report.

**Non-confidential version**

a strong protection against the risk that any media enterprise could deny 'airtime' to the widest possible range of content and commentary.

- 5.2 Instead of recognising the contribution which these factors necessarily make to media plurality (in terms of the number and range of providers), Ofcom has sought to quantify the significance of such factors,<sup>17</sup> with the result that it has discounted the significance of some of these factors for no good reason. Thus, for example, Ofcom discounted the significance of the internet, because not all consumers have access to it,<sup>18</sup> whilst (inconsistently) relying on the power of conventional news providers to influence public opinion, on the basis that their influence is not limited to their own immediate audience, but extends further, since their immediate audience can be expected to pass on views sourced from such providers to other members of the public.<sup>19</sup> Likewise, Ofcom discounted the significance of 'raw' news providers, who have no editorial control, without attaching weight at all to the range of websites which provide comment on raw news stories.<sup>20</sup>
- 5.3 In addition, Ofcom's analysis places greater emphasis on the position of the merged entity in relation to the wholesale provision of news content than at the retail level. This has the effect of increasing significantly the cross-media share of consumption of the merged entity due to Sky News' supply of news content to Five and to commercial radio stations, particularly via IRN.
- 5.4 In doing so, Ofcom fails to give due consideration to the following:
- a) the editorial control exercised by Five in relation to the Five News service; and
  - b) the different news content services available to commercial radio stations which enable them to select news stories to suit their own target audiences and editorial requirements.
- 5.5 Accordingly, even if Ofcom's methodology were appropriate, its conclusions are flawed. For example, Ofcom asserts that "*a similar picture [to that at the wholesale level] is displayed when considering all sources of retail news provision, ..., and when considering the main source of news at the retail level*".<sup>21</sup> Ofcom has not considered that the increments resulting from the transaction at the retail level (which correctly counts Five News and commercial radio stations as having separate voices to Sky News) are significantly less (around half) the level in the wholesale analysis and cannot be viewed as being significant, at 5% and 10% for 'share of references' and 'reach' respectively. It cannot be the case that any increase in such shares should result in a reference to the CC.
- 5.6 Thus, Ofcom's resulting assessment is no more than the sum of a series of idiosyncratic weightings attached to different inputs to media plurality, from which it concludes that a merged News Corp/Sky would be likely to have too much influence over public opinion. The consequence of Ofcom's error is well-illustrated by examining the graphs contained in paragraphs 5.33 to 5.44 of the Report, which divide media enterprises into numbered Groups, according to their relative contribution to plurality on different measures. It is self-evident that Ofcom has erred in discounting the significance, in terms of their contribution to plurality, of the combined membership of Groups 3 and 4 in each graph. In effect, Ofcom decides that these Groups provide no voices capable of contributing sufficient plurality alongside the BBC, a merged News Corp/Sky and ITV. Sky submits that this is self-evidently wrong.

**6. The Secretary of State should exercise his discretion not to make a reference**

- 6.1 For the reasons outlined above, Sky submits that the evidence clearly demonstrates that the presently proposed transaction poses no threat to the sufficiency of media plurality.

---

<sup>17</sup> Paragraphs 4.39 ff of the Report.

<sup>18</sup> Paragraph 4.31 of the Report.

<sup>19</sup> Paragraph 5.116 of the Report.

<sup>20</sup> Paragraph 2.21 of the Report.

<sup>21</sup> Paragraph 1.34 of the Report.

**Non-confidential version**

Absent any such threat, the Secretary of State may not therefore reasonably conclude that it is or may be the case that the proposed transaction may operate or be expected to operate against the public interest. Ofcom's advice to the contrary is based on its erroneous approach to the assessment of the sufficiency of media plurality, and, in consequence, its distorted evaluation of the evidence.

- 6.2 In addition, in making his assessment, the Secretary of State needs to give due consideration to the following factors:
- a) the DTI Guidance makes clear that the purpose of the media plurality public interest provisions is to *"prevent unacceptable levels of media and cross media dominance"*<sup>22</sup> and to act as a safeguard against *"a significant reduction in plurality"*.<sup>23</sup> Furthermore, this is a case in which the media plurality public interest provisions are intended to operate only *"in exceptional circumstances"* where such mergers give rise to *"serious public interest concerns"*. Ofcom's Report singularly fails to provide evidence of such concerns; and
  - b) Ofcom has confirmed that, in its view, any media plurality concerns relate solely to Sky News. Sky therefore repeats the point made in its response to Ofcom's Invitation to Comment that it has invested for many years, and continues to invest, in the operation of Sky News as a distinct, impartial and independent news service. Indeed, the Board of Sky (including the members of the Board connected to News Corp) have for many years authorised growing investment in Sky News to that end as part of Sky's overall annual budgeting process. Such investment serves to enhance the overall attractiveness to customers of the services Sky offers. The availability of Sky News to audiences, therefore, is the result of a strong commercial incentive, not of any obligation to provide television news. This commercial investment incentive would remain irrespective of a change in ownership of Sky. Conversely, it has the potential to be undermined if merger control were to operate such that the operation of Sky News inappropriately or unduly restricted any merger or acquisition opportunities which may be available to Sky. Thus, a conclusion that the proposed transaction would result in a loss in plurality could perversely increase the risk of that very situation by undermining the incentives which have resulted in the provision of Sky News to date. This would be a wholly unwelcome outcome, and itself contrary to the public interest.
- 6.3 Accordingly, it would be appropriate in the circumstances for the Secretary of State to exercise his discretion not to make a reference in the present case.

**Sky**

**13 January 2011**

---

<sup>22</sup> Paragraph 7.7, DTI Guidance.

<sup>23</sup> Paragraph 7.11, *ibid.*



# News Corporation

## SUBMISSION TO THE SECRETARY OF STATE

### FOR CULTURE, OLYMPICS, MEDIA AND SPORT

#### 1. INTRODUCTION/OVERVIEW

##### (a) Background/decision to be taken by the Secretary of State

1.1 This submission is made on behalf of News Corporation (**News**) in relation to its proposed acquisition of those shares in British Sky Broadcasting Group plc (**Sky**) that it does not already own (the **Transaction**).

1.2 On 4 November 2010, the Secretary of State for Business, Innovation and Skills (Secretary of State for **BIS**) issued an European Intervention Notice which identified the following public interest consideration (**PIC**) as potentially relevant to a consideration of the Transaction:

*"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 media enterprises serving that audience;" (section 58 (2C)(a) of the Enterprise Act 2002)*

1.3 Ofcom was required to provide advice and recommendation with regard to the PIC pursuant to Article 4A of the Enterprise Act (Protection of Legitimate Interests) Order 2003 (the **Order**) and OFT was required to advise as to the creation of a European relevant merger situation pursuant to Article 4(4) of the Order.

1.4 Following the revelations which emerged in the press on 21 December, indicating clear bias against News by the Secretary of State for BIS, the Secretary of State for BIS and his department were removed from a decision making role in relation to the Transaction and decision making powers were transferred to the Secretary of State for Culture, Olympics, Media and Sport (**Secretary of State**) who must now take the decision on whether or not to refer the Transaction to the Competition Commission (**CC**) under Article 5 of the Order.

1.5 Ofcom issued its report to the Secretary of State on 31 December 2010 (the **Report**).<sup>1</sup> A redacted copy of the Report was provided to News on Friday 7 January 2011, after business hours. OFT issued its report to the Secretary of State on 30 December 2010 (the **OFT Report**) and a copy of the OFT Report was also provided to News on 7 January 2011, after business hours.

1.6 In its Report, Ofcom has advised the Secretary of State that, in Ofcom's view, the Transaction "*may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences*" (paragraph 1.57) and has indicated that in its view, there is a need for a full review of the issues and the Secretary of State should refer the Transaction to the CC for a more detailed review.

<sup>1</sup> All paragraph references are to the Report except where stated otherwise.

Non-confidential version of Submission dated 14 January 2011

- 1.7 The Secretary of State is not bound to follow Ofcom's recommendation. Under Article 5(3) of the Order, the Secretary of State is obliged to take his own decision taking account of the PIC and considering whether the Transaction may be expected to operate against the public interest. Moreover, 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.
- 1.8 Up to now News has been subject to an administrative review process which was seriously flawed: the initial decision to intervene in relation to this Transaction on the basis of a public interest concern was taken by a Secretary of State for BIS who was biased against the interests of News and its shareholders.
- 1.9 News believes that Ofcom has failed to approach the effects of this Transaction with an open mind and has carried out a review process with the intention of identifying concerns.
- Ofcom has been notably more receptive to submissions made by third party complainants than it has been to submissions made by News and has selectively omitted relevant evidence.
  - As an example, Ofcom quotes vague evidence from Andrew Neil (widely reported in the press as having left his position as editor of The Sunday Times in 1994 "on bad terms") in support of its arguments but does not refer at all to the direct oral evidence provided to Ofcom by John Witherow (editor of The Sunday Times since 1994) who reported that no editorial influence whatsoever was exercised by News over the content of The Sunday Times.
- 1.10 The Report contains a number of serious errors in legal and analytical approach which undermine the validity of the Report and which render Ofcom's conclusions unreliable. Therefore there can be no presumption that rejecting its recommendation for a reference to the CC, on the weight of evidence available to him, would be unreasonable. On the contrary, for the reasons set out below, the Report provides no legitimate basis for a decision that the Transaction should be reviewed by the CC in more detail.
- (b) **Serious legal and analytical errors in Ofcom's Report mean that Ofcom's recommendation to refer to the CC cannot be relied upon in a number of key respects**
- (i) **Ofcom does not address the question of whether media plurality is currently "sufficient" and whether plurality may be rendered "insufficient" as a result of the Transaction.** Therefore, it fails to address the fundamental question on which the Secretary of State has to decide. It cannot be the case that *any reduction of plurality* is to be considered to lead to insufficient plurality - otherwise every media merger would need to be subject to a detailed review or blocked
  - (ii) **Ofcom also confuses the permissive nature of a first stage review. A lower standard of proof does not mean that Ofcom is permitted to stop short of an analysis whether the Transaction will result in insufficient plurality** - the key question posed by the PIC. The fact that the Secretary of State may make a reference to the CC if he believes that it is or "*may be the case*" that the transaction "*may be expected to operate against*" the relevant PIC does not remove the fact that the relevant PIC concerns "*sufficiency of plurality*" of "*persons with control of media enterprises serving that audience*".
  - (iii) **Ofcom's mistreatment of Sky's wholesale activities lead it to dramatically overstate the potential impact of the Transaction.** The provision of news content to third party media enterprises, who themselves maintain editorial control over content, is an activity which falls outside of the statutory definition of a media

enterprise and, even if Ofcom considers that it should be taken into account, it cannot be equated with the audience share of a broadcast entity. Ofcom attributes the full extent of independent commercial radio's share of news consumption (which is itself overstated) to Sky. Moreover, while Ofcom generally analyses data both including and excluding the wholesale supply of news, in drawing its conclusions it inevitably relies on the data which takes account of the wholesale supply of news by Sky News to Channel 5. Indeed, in its analysis of cross-media consumption (key to its overall conclusions) it *only* presents data including the wholesale supply of news.

- (iv) **Ofcom's approach to assessing plurality, based primarily on measures of reach and share, contains a number of flaws.** Once key errors are corrected, it is clear that the Transaction does not result in insufficient plurality.
- (v) **Ofcom fails to explain why internal plurality does not ensure sufficient cross-media plurality.** Sky News is a TV broadcaster operating within the culture of editorial independence and impartiality in TV news which is reflected in statute and the Broadcasting Code. Ofcom avoids the issue, concluding that "*in light of conflicting views*" they "*do not consider that we can reach the view that internal plurality will ensure sufficient plurality in the provision of news and current affairs as part of a first stage review*". The Secretary of State, reviewing all of the evidence, should come to the only reasonable conclusion which is that, given the existing level of external plurality, and the predictable continuance of Sky News as an independent voice due to internal plurality mechanisms (both cultural and regulatory), there is no threat to the sufficiency of plurality as a result of this Transaction.
- (vi) **Ofcom's forward looking "dynamic assessment" is speculative and, by Ofcom's admission, provides no basis for a decision that there may be plurality concerns.** Ofcom explicitly does not rely on these issues in recommending to the Secretary of State that a reference to the CC be made (at paragraphs 6.72 and 6.73 of the Report) and the Secretary of State should ignore these speculative concerns which provide no reasonable basis for a reference to the CC. Moreover, Ofcom fails to distinguish in its assessment between effects on plurality and effects on competition; the latter is subject to the exclusive jurisdiction of the European Commission which unconditionally cleared the Transaction in a first stage review on 21 December 2010.
- (vii) **Any potential need for additional regulatory mechanisms in order for media plurality to be monitored on an ongoing basis is irrelevant** to the review of the Transaction and any decision by the Secretary of State relating to this Transaction.

1.11 Should the Secretary of State decide to refer the Transaction on the basis of the Report, the flaws identified in this submission would taint his decision.

1.12 Furthermore, there are a number of areas where Ofcom either fails to provide advice to the Secretary of State at all or fails to draw the natural positive conclusion from its findings (purportedly on the basis that it is unable to decide on the relevance of various factors to an assessment of media plurality in the time available to it). These are crucial factors on which the Secretary of State can and should come to a view and which would enable him to conclude that the Transaction may not be expected to operate against the public interest without the need of a CC reference. For example:

- (i) The UK consumer group currently consuming news from Sky and News only is minimal, less than 1%. This is accepted by Ofcom (paragraph 5.109) and follows a similar finding by the CC in Sky/ITV.

Non-confidential version of Submission dated 14 January 2011

- (ii) Plurality in news consumption is crucial to the required qualitative assessment. Ofcom acknowledges that the multi-sourcing of news is of relevance to plurality (paragraph 4.59) and even "important" (paragraph 5.115). However Ofcom states at paragraph 5.114 that: "*The implications of multi-sourcing in relation to this proposed transaction are complex and as a first stage authority we do not have sufficient time to consider it fully*". In fact, multi-sourcing by consumers is a key feature contributing to the sufficiency of media plurality in the UK and this follows on from the CC's analysis of plurality in Sky/ITV. It is hard to see how increased access to news sources, including the internet, does not enhance plurality. The Transaction will have a minimal impact on the plurality of consumption by consumers and consumers will, on Ofcom's analysis continue to access on average 2.8 independent sources of news if News and Sky were treated as a single source (as opposed to 2.9 if they are treated separately).
- (iii) Given the recognised ongoing existence of a multiplicity of other media enterprises cross media the effect of the Transaction on the broader UK news agenda is crucial. Ofcom concludes paragraph 5.123 that: "*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.*"
- (iv) The importance of internal plurality for Sky News as a TV broadcaster operating within the culture of editorial independence and impartiality in TV news which is reflected in statute and the Broadcasting Code has been accepted by the CC in Sky/ITV. As noted above Ofcom avoids the issue, concluding that "*in light of conflicting views*" they "*do not consider that we can reach the view that internal plurality will ensure sufficient plurality in the provision of news and current affairs as part of a first stage review*".

**(c) In fact, the Transaction poses no threat whatsoever to the sufficiency of plurality in the UK**

- 1.13 News has always submitted, and continues to submit, that the proposed Transaction poses no threat whatsoever to the sufficiency of plurality when considered on an impartial and objective basis and in the framework of the evidence which is relevant to the applicable statutory test.
- 1.14 Indeed, many of News' propositions are supported by Ofcom's own analysis and/or are based upon the detailed analysis which was already carried out by the CC of how to assess plurality in the context of the Sky/ITV transaction and which does not, as a consequence, need to be revisited in the context of this Transaction.
- 1.15 It is necessary, as a starting point to assessing plurality, to step back and to consider the broader media environment and the number of voices available to and accessed by consumers in the UK.

**(i) The Transaction can only affect a cross-media audience and there is no reduction in the number of independent newspaper proprietors or TV broadcasters in the UK as a result of the Transaction**

The number of newspaper enterprises in the UK remains entirely unaffected by this Transaction. Enterprises such as DGMT plc, Guardian Media Group, Telegraph Media Group and Pearson are well funded, with a strong commitment to the continued provision of news in the UK and with distinct approaches to reporting and commenting on news. Alexander Lebedev's 2010 acquisition of the Independent, and the successful subsequent launch of its sister title, "i", demonstrates that it is still possible for support to be found even for loss-making newspaper enterprises in the UK. Indeed, after Lebedev acquired the Evening Standard in 2009 and made it a free paper, circulation had increased to over



Non-confidential version of Submission dated 14 January 2011

610,000 by February 2010, the highest in the paper's 180 year history and more than twice as high as the September 2009 figures (256,000).<sup>2</sup>

The number of TV news broadcasters in the UK also remains entirely unaffected. Sky News will continue to face competition from competitors including both larger ones (such as the BBC, ITV, Channel 4) and smaller ones (including, but by no means limited to, Euronews, CNN, CNBC, Bloomberg, Al Jazeera).

Online, each of these enterprises and more compete for audience attention and provide distinctive sources of news reporting.

The BBC dominates each of TV, radio and online news and, as result, cross-media news provision in the UK. On Ofcom's own numbers, the BBC's share of consumption is in each of these media at least three times as large as the combined News/Sky group (even on the basis of Ofcom's inflated 'wholesale' calculation of the group's share). For TV, the media that on Ofcom's own research is by far the most important for UK news consumers, the BBC's share is eight times that of the combined News/Sky group. News references and reach tell a similar story:

*"The BBC has the largest share, representing 37% of the total [wholesale news] references" (paragraph 1.28). "In terms of reach, the BBC (in the form of TV, online or radio) is used by 81% of UK adults at least once a week. This compares to 40% for ITN, 33% for Sky News and 32% for News Corp." (paragraph 1.30).*

The BBC has also recently reached an agreement with the government which secures its funding for the next six years.

**(ii) News' position in newspapers (a declining segment within cross-media consumption) is unchanged and Sky's relatively modest share of TV news provision is unchanged.**

Ofcom calculates that News titles have a reach of 29.4% of UK adults (paragraph 4.23 and Figure 10). News still faces competition from a wide variety of strong newspaper competitors. Newspapers are in any event, a declining segment, as acknowledged by Ofcom:

*"Newspaper readership is also in decline, with the number of people reading a Sunday title falling by almost 5% per annum over the nine years to 2009, while daily readership has fallen at an average annualised rate of almost 3% over the same period" (Report paragraph 4.20).*

Sky News' position in TV news remains relatively modest. Ofcom calculates Sky News to represent 6% of TV news viewing (paragraph 4.16 and Figure 7). Consumers of Sky News, by definition, have access to digital channels and therefore have a wide range of alternative news channels available to them. In other words, they consume news in a more plural TV environment.

Ofcom acknowledges that there is no change in the relative influence of News or Sky within each traditional media platform:

*"This transaction does not result in a change in the number, range or relative ability to influence within three of the individual platforms – TV, radio and newspapers." (paragraph 5.19)*

<sup>2</sup> See <http://www.pfi.co.uk/news/london-evening-standard-enjoying-record-circulation-figures-news-03139182187>.

Non-confidential version of Submission dated 14 January 2011

- (iii) A culture of editorial independence in broadcast news supported by regulatory requirements (the Broadcasting Code) will continue to ensure that Sky News remains as an independent voice and that internal plurality within the broader News group will be secured. This, together with the existing level of external plurality, removes any doubt that might arise as to the sufficiency of plurality post-Transaction.

Ofcom recognises that these factors play a role in the analysis, but Ofcom fails to draw the requisite conclusion that the Transaction raises no cause for concern.

*"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 may be expected to go some way to maintaining the editorial impartiality of Sky News" (paragraph 5.96).*

In fact, the broadcast segment is characterised by consumer expectations for greater impartiality than in other media, which News can hardly ignore:

*"Many consumers do however understand that newspapers are more prone to expressing a particular position than TV news" (paragraph 4.85).*

- (iv) In Sky/ITV, News was already assumed to have control/material influence over Sky and no concern about plurality was identified.

The OFT stated that "[BSkyB's] largest shareholder is News Corporation (News Corp) with a 39.02 per cent stake, along with several directorships, which is sufficient to confer control over BSkyB."<sup>3</sup>

In fact Ofcom assessed plurality in the previous Sky/ITV case precisely on the basis that Sky and News were assumed to be part of the same enterprise. Ofcom took into account the links between News and Sky in its plurality assessment on the basis that it treated "all media enterprises under the same ownership or the same control as being controlled by one person."<sup>4</sup> **Ofcom has entirely reversed its position in this case** and in its substantive assessment of the effects of the Transaction it treats Sky as an entity which is entirely unconnected with News. This clear reversal by Ofcom was entirely unexplained.

The CC also took into account that News had material influence over Sky when assessing media plurality in Sky/ITV and, having carried out a detailed review, advised that there was no concern about plurality raised by Sky's acquisition of an interest in ITV.

- (v) Ofcom ignores the importance of multi-sourcing and online news as a significant contributor to plurality.

The average consumer in the UK accesses five different sources of news. Multi-sourcing exposes consumers to a variety of different views and enables them to take their own decisions as to which sources of news coverage they find most interesting and attractive.

As acknowledged by Ofcom, the Transaction will not affect the number of sources to which consumers have access, and will not impact on the fact that most consumers consume news from a variety of sources.

<sup>3</sup> OFT Report, paragraph 25.

<sup>4</sup> Ofcom Report, paragraphs 4.4-4.7.

*"The loss of Sky as a distinct media enterprise would not materially change this average number of news providers used by individual consumers" (paragraph 1.44).*

The internet encourages more plurality in consumption and facilitates access to a greater range and variety of voices. Ofcom acknowledges that the internet is an expanding medium.

*"we consider the internet and wider online news provision to be relevant in any consideration of the sufficiency of plurality in the provision of news and current affairs" (paragraph 2.18).*

**(vi) Ofcom acknowledges that the actual impact of the Transaction on consumers of news will be minimal.**

Replicating the analysis of media plurality which was carried out by the CC in Sky/ITV (as set out in Appendix 1 to the CC's report in Sky/ITV) News calculated that the number of consumers in the UK who would in reality be directly impacted by a combination of Sky News and News International newspapers is very small.<sup>5</sup>

- Only 6% of UK adults actively watch Sky News or visit SkyNews.com and actively read News International newspapers or actively visit News International websites (the "Sky/ NI Overlap Group").
- Approximately 96% of the Sky/ NI Overlap Group make use of other news sources, in addition to Sky and News International sources.
- Only 0.3% of the Sky/ NI Overlap Group use only Sky and News International news sources.

These figures appear to have been accepted by Ofcom (although Ofcom, misleadingly, describes this consumer group as "relying on" news from Sky and News when in fact they simply choose to consume news from Sky and News).

*"Across the population as a whole, we found that few regular news consumers rely solely on Sky titles or solely on News Corp titles: at the retail level, 2% rely solely on news from Sky; and 1% rely solely on news from News Corp; these shares do not change materially if considering wholesale news provision" (paragraph 4.79).*

*"News Corp estimated that 6% of all UK consumers relied on both News Corp and Sky for news. Of these, approximately 96% also sourced news from other sources as well. News Corp therefore estimated that the proportion of consumers who would, post transaction, rely on only News Corp and Sky News and no other news provider would be 0.3% of the population" (paragraph 5.109).*

**(vii) Ofcom acknowledges that the Transaction will have no impact whatsoever on the setting of the wider news agenda within the UK**

Having considered carefully the evidence as to influence over the broader news agenda in the UK, Ofcom concludes that:

*"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)*

<sup>5</sup> See FTI Report paragraphs 6.24 to 6.44 and paragraph 2.9 of the Response to the Issues Letter

Non-confidential version of Submission dated 14 January 2011

- 1.16 The fact that Ofcom acknowledges both the minimal impact on consumers and the lack of any impact on the broader news agenda should provide the Secretary of State with significant comfort that it is reasonable to conclude, having reviewed the evidence relied upon by Ofcom in its Report, that the Transaction does not result in insufficient plurality for any audience in the UK.
- 1.17 News has made a number of submissions to Ofcom setting out its view of how the PIC should be applied to the current Transaction. Each of the key submissions is attached to this submission to the Secretary of State, as follows:

- (i) News' Initial Submission to Ofcom (**Initial Submission**) – attached at **Annex 1**;
- (ii) FTI Report measuring plurality in news (Annex I of the Initial Submission, **FTI Report**) – attached at **Annex 2**;
- (iii) Perspective Report on past and future trends in plurality and the setting of the news agenda (Annex II of the Initial Submission, **Perspective Report**) – attached at **Annex 3**;
- (iv) News' Response to Ofcom's Issues Letter (**Response to Issues Letter**) – attached at **Annex 4**;
- (v) Opinion of Lord Pannick QC (Annex 1 of the Response to Issues Letter, **Lord Pannick Opinion**) – attached at **Annex 5**; and
- (vi) Perspective analysis of media's use of other media outlets as a source for stories (**Perspective Sources Analysis**) – attached at **Annex 6**.

- 1.18 Without seeking to replicate this comprehensive body of evidence, News summarises the main points of its case below, at the same time as addressing the key flaws in Ofcom's report.

**(d) News is prepared to offer undertakings which eliminate Ofcom's concerns**

1.19 [REDACTED]

- 1.20 A decision on UIL rests with the Secretary of State. Ofcom has not provided the Secretary of State with advice on this issue. 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. In fact, remedies were not discussed with Ofcom. In fact, no advice on this issue is required to be given by Ofcom and 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 unfettered discretion. Specifically, if the Secretary of State would otherwise intend to make a reference to the CC, he has the power to accept UIL from News under paragraph 3 of Schedule 2 of the Order:

*"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 [he] considers appropriate undertakings to take such action as [he] considers appropriate."*

- 1.21 Should the Secretary of State still have concerns, having reviewed and considered News' submissions, News is prepared to offer UIL in order to remedy, mitigate or prevent those concerns from arising. These arguments will be addressed more fully in a UIL Proposal which will be separately submitted to the Secretary of State, if required.

Non-confidential version of Submission dated 14 January 2011

1.22 Pending a decision by the Secretary of State all News' rights in relation to a possible legal challenge based on the significant flaws in the way the administrative process has been run and/or the serious flaws in the Ofcom Report are reserved.

**2. THE RELEVANT STATUTORY QUESTION: THE KEY ISSUE IS THE SUFFICIENCY OF PLURALITY WHICH OFCOM SIDESTEPS ENTIRELY**

**(a) The PIC which the Secretary of State must take into account**

2.1 In this case the PIC which the Secretary of State must take into account 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 media enterprises serving that audience;" (section 58 (2C)(a) of the Enterprise Act 2002)*

2.2 Ofcom, at paragraph 2.8 of its Report quotes from Paragraph 7.7 of the Guidance on Public Interest Intervention in Media Mergers published by the DTI in 2004 which makes clear that the PIC:

*"is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This 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." (emphasis added)*

2.3 Ofcom does not acknowledge the clear implication of this formulation which is that, ultimately, the relevant public interest threshold is set at a high level. It is not any reduction in plurality which would lead to preliminary concerns but only a reduction in plurality which threatens a "minimum level of plurality". It is not any increase in the strength of one voice which would lead to concerns but only an increase which leads to "unacceptable levels of media and cross-media dominance" where dominance, in competition law terms, is a well understood and high threshold describing a significant degree of market power. Furthermore, sufficient plurality is concerned with an ability to "control the agenda". As noted above, the Report acknowledges at paragraph 5.123 that the Transaction will have no impact whatsoever on the setting of the wider news agenda within the UK.

2.4 It must also be borne in mind that when the Transaction has been evaluated in parallel on competition grounds, it has been unconditionally cleared by the European Commission in a first stage review concluded on 21 December 2010 meaning that no concern as to the continued existence of effective competition in media markets arise in this case.

2.5 It would therefore be unreasonable for the Secretary of State to trigger a lengthy and costly CC process where, on an objective view, he is not convinced that the threshold for intervention is met (as should be the case, in News' submission, taking an objective view of the evidence set out in the CC's Report).

2.6 While media plurality is important and a matter of public interest, it is not the case that any reduction in media plurality must be the subject of close examination, otherwise all media mergers would automatically be required to be reviewed by the CC. Ofcom appears to have fundamentally ignored this and to have drafted a Report to the Secretary of State based on a misunderstanding of the legal test.

**(b) Need for counterfactual assessment is clear – this should not be confused with an assessment of sufficiency of plurality**

Non-confidential version of Submission dated 14 January 2011

- 2.7 Ofcom is correct that it is necessary to assess the possible effects of the Transaction with reference to the current situation/ the situation where the Transaction does not occur.
- 2.8 However, at paragraph 1.14 of its Report, and paragraphs 2.9 to 2.12 of its Report Ofcom confuses two issues which should in fact be distinct steps in the statutory process. The first is for the effects of the merger to be compared with the expected situation absent the merger – a counterfactual analysis. The second is the need for an assessment of sufficiency of plurality post-Transaction.
- 2.9 Ofcom makes no real attempt to consider (and provides no advice to the Secretary of State on) whether there is sufficient plurality in the UK before the Transaction and what difference the Transaction makes to the sufficiency of plurality. Ofcom ignores the concept of sufficiency altogether and purports to treat any potential reduction in the level of plurality which currently exists as a reason for a reference to the CC. This is explicit in paragraph 2.12 of the Report:

*"We consider how the proposed transaction may affect the level of plurality in the market today, and whether this may raise risks for the public interest in terms of a potential reduction in media plurality such that a fuller second stage investigation is warranted."*

- 2.10 This is a misstatement of the legal test on the basis of which the Secretary of State is to make his decision on reference to the CC under Article 5 of the Order. The PIC does not arise in every case where two media voices which were previously distinct cease to be distinct. The PIC is narrower than this and is potentially relevant only where a reduction in the number of voices is such that it threatens to result in insufficient plurality. The Report has failed to provide advice on the fundamental question to be addressed by the Secretary of State in his decision on reference.
- 2.11 The Secretary of State must form a view on the level of plurality which is/would be sufficient in order to assess the potential effects of the Transaction and to decide whether the Transaction raises concerns which might justify a reference to the CC. In addressing the former question, it is highly relevant that (a) at the time of entry into force of the Communications Act 2003 Parliament must have assumed that plurality was sufficient; and (b) in 2007 as result of the Sky/ITV review, plurality both in TV and cross-media was found sufficient, even if Sky had retained its stake in ITV. This suggests that the CC felt that the level of plurality was not only sufficient in 2007, but that there was an appreciable margin of safety. Moreover, media plurality has increased since both 2003 and 2007 for reasons set out in the FTI and Perspective Reports. The assumption must therefore be that pre-Transaction plurality was already sufficient by some margin. Ofcom has failed to demonstrate that plurality would be reduced, as a result of the present Transaction, to a level below that subsisting in 2003 (or 2007) that could reasonably be said to lead to insufficient plurality.
- 2.12 Ofcom sidesteps this question at paragraph 2.10 of its Report by referring to a number of submissions from third parties<sup>6</sup> which claim that plurality is insufficient in the UK. In a controversial case such as this one, the fact that two lobbying organisations, the NUJ and two academics (cited by Ofcom in footnote 35) express a particular view can hardly be taken as evidence that that view holds any weight whatsoever and it is not acceptable for Ofcom to refrain from taking its own view on this issue and advising the Secretary of State accordingly. Ofcom's failure to engage with the issues calls into question the reliability of its Report and the Secretary of State must come to a conclusion on whether or not he would be minded to refer in full awareness of the flaws in the Report.
- (c) **A lower standard of proof for a preliminary "phase I" review does not mean that the statutory test can be disregarded or changed or that Ofcom is permitted to avoid difficult questions altogether**

<sup>6</sup> Specifically, Ofcom refers to submissions from: 38 Degrees, Campaign for Press and Broadcasting freedoms, the NUJ and two academics.

Non-confidential version of Submission dated 14 January 2011

- 2.13 Ofcom also confuses the permissive nature of a first stage review in terms of the threshold to be met before Ofcom can recommend to the Secretary of State that the Transaction might merit further review (described at paragraph 2.4 of its Report) with an ability to stop short of analysing the key question posed by the PIC – whether there is a risk that the Transaction will result in insufficient plurality.
- 2.14 The fact that the Secretary of State is only required at this stage to determine whether it is or "*may be the case*" that the Transaction "*may be expected to operate against*" the relevant PIC does not remove the fact that the relevant PIC concerns "*sufficiency of plurality*" of "*persons with control of media enterprises serving that audience*". Ofcom has side-stepped the key question of the statutory test.
- 2.15 Throughout the Report there are many places where Ofcom's view is that it is unable to decide on the relevance of various factors to an assessment of media plurality in the time available to it. In many cases, these "open" questions are not specific to this Transaction but would apply equally to any merger between media enterprises operating on different media platforms.
- 2.16 For example, Ofcom states at paragraph 5.114 that: "*The implications of multi-sourcing in relation to this proposed transaction are complex and as a first stage authority we do not have sufficient time to consider it fully*". In fact, multi-sourcing by consumers is a key feature contributing to the sufficiency of media plurality in the UK and this follows on from the CC's analysis of plurality in Sky/ITV. It is hard to see how increased access to news sources, including the internet, does not enhance plurality. Ofcom is a specialist regulatory body which carries out regular, broad reviews of media consumption by consumers in the UK. Ofcom understands very well that consumers use varying platforms to consume content and that access to content is being increasingly facilitated by the growth of the internet and digital media. Ofcom also had 40 days to carry out its "first stage" review (having been warned in advance by the Secretary of State that a reference might well be made). In a similar length of time, the European Commission, assessing the competition impact of the Transaction, carried out a full and detailed review, consulted with all interested parties, and came to the decided view, set out in a reasoned decision of 60 pages, that the Transaction raised no competition concerns.
- 2.17 Ofcom's struggle with these issues is even more baffling given that only three years ago Ofcom, and then the CC, had to assess the sufficiency of media plurality for a cross media audience in Sky/ITV, where Sky's existing links with News were already taken into account. In any event, there is ample evidence to conclude that the Transaction would not result in insufficient plurality, as summarised in section 1(c) above.
- 2.18 It is therefore unacceptable that News should be penalised, by means of a reference of this Transaction to the CC for a more detailed review, because Ofcom had not decided what they believe the appropriate framework for the analysis of plurality in cross-media markets to be and/or were not able to progress to form a view on the facts within the reasonable time allotted.
- 3. OFCOM'S MISTREATMENT OF SKY'S ACTIVITIES PROVIDING NEWS CONTENT TO THIRD PARTIES PERVADES ITS ANALYSIS AND LEADS TO A DRAMATIC OVERSTATEMENT OF THE POTENTIAL IMPACT OF THE TRANSACTION**
- (a) **The share of media enterprises to whom Sky wholesales news cannot be attributed to Sky under the relevant statutory test**
- 3.1 The PIC specified in this case and set out at section 58 (2C) of the Enterprise Act requires an assessment of the sufficiency of the number of "persons with control of media enterprises serving [each different audience in the UK]".

Non-confidential version of Submission dated 14 January 2011

3.2 Section 58A provides a definition of media enterprises:

"(1) For the purposes of section 58 and this section an enterprise is a media enterprise if it consists in or involves **broadcasting**.

(2) In the case of a merger situation in which at least one of the enterprises ceasing to be distinct consists in or involves broadcasting, the references in section 58(2C)(a) or this section to media enterprises include references to newspaper enterprises.

(3) In this Part "newspaper enterprise" means an enterprise consisting in or involving the **supply of newspapers.**" (emphasis added)

3.3 Sky's wholesale provision of news is not an activity of a "media enterprise serving a relevant audience" under the Enterprise Act and should therefore be disregarded.<sup>7</sup>

3.4 It is the controller of Channel 5 who is responsible for the content and editorial policy of Channel 5 news, regardless of the fact that the content is in practice, at this time, sourced by Channel 5 from Sky. The same applies to Sky's wholesaling of news content to Independent Radio News (IRN). It is the radio broadcasters who remain responsible for their news content rather than Sky.

3.5 Ofcom acknowledges this to some extent. It comments, at paragraph 2.20, that:

*"Sky's provision of news...to other media enterprises may not, of itself, bring Sky within the definition of "media enterprise" for the purpose of the statutory test. However, it is relevant to the question of the contribution made by those other media enterprises to plurality. In any event, Sky...indirectly serves a variety of audiences besides its retail audiences, through wholesale news provision."*

3.6 Later, Ofcom generally analyses data both including and excluding the wholesale supply of news, but in drawing its conclusions inevitably relies on the data which takes account of the wholesale supply of news by Sky News to Channel 5 and IRN. Indeed, in its analysis of cross-media consumption (key to its overall conclusions) it *only* presents its data including the wholesale supply of news.

3.7 Ofcom treads a very fine line as regards wholesale provision, emphasising that the type of wholesale arrangement entered into by Sky and ITN must be taken into account, but that the upstream supply of stories by news agencies such as Reuters and AP does not need to be taken into account (paragraphs 4.6 to 4.8). Such a selective approach to defining the relevant sources of influence seems designed to emphasise the importance of Sky News, while minimising the relevance of other media players. By contrast, the CC in Sky/ITV reported submissions it had received as follows:

*"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".<sup>8</sup>*

(b) **Agreements for the supply of news content are temporary commercial arrangements**

<sup>7</sup> See, in addition News' Initial Submission, paragraphs 3.14 to 3.18.  
<sup>8</sup> At Appendix H of the CC Report.



Non-confidential version of Submission dated 14 January 2011

3.8 There is nothing permanent at all about the supply arrangements between Sky and Channel 5 or IRN 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.

**(c) News cannot interfere with the editorial content provided by Sky to third parties – this is highly relevant to the issue of internal plurality**

3.9 Ofcom does not even take into account the indirect, limited and temporary nature of these arrangements when assessing the extent to which "internal plurality" is relevant to the analysis in section 5 of its Report.

3.10 It does not consider that:

- (i) in practice, there is no reason to believe that News would interfere with editorial decision making at Sky News;
- (ii) there is a clear and important additional barrier preventing News from interfering with editorial decision making in relation to news provided to Channel 5 and IRN given that the broadcasters who remain responsible for broadcast news content could object to any interference by news and would certainly be likely to object to any bias in the news content presented to them; and
- (iii) in addition to drawing on the IRN feed, many commercial radio stations create their own national news bulletins drawing on a variety of sources.

3.11 As the CC noted in its Report in Sky/ITV (in the same paragraph 5.55 from which Ofcom selectively quotes in its Report):

*"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."*

3.12 By contrast, Ofcom did acknowledge the limits to wholesale provision to a greater extent in its Report to the Secretary of State for BIS in Sky/ITV in relation to the arrangements which were then in place between ITN and IRN (albeit later drawing the wrong conclusion as to a potential threat to media plurality, as was later found by the CC and the Secretary of State for BIS who identified no such threat):

*"since IRN self-supplies some news and ITN acts only as a sub-contractor of IRN in the provision of news content for radio stations, ITN's influence on radio news may be less significant" (paragraph 4.33 of Ofcom's Report in Sky/ITV)"*

**(d) Ofcom's analysis of the share and influence of Sky News is misleading**

3.13 It is not legitimate to attribute the audience share of Channel 5 and independent commercial radio to Sky when assessing the strength of different media enterprises and to treat this "indirect" audience as the equivalent of the direct audience of Sky News, which Ofcom does at paragraphs 1.23 and 1.27 of its Report and throughout section 5.

3.14 Sky's provision of News content to third party broadcasters accounts for the vast majority of the increment that Ofcom identifies as resulting from the Transaction. At paragraph 5.28 Ofcom claims

Non-confidential version of Submission dated 14 January 2011

that "News Corp will account for 23.7% of all minutes of news consumption – a 9.8 percentage point increment". A full 6.7 percentage points of the share of minutes attributed by Ofcom to Sky News in fact represents commercial radio listening. An additional 0.7 percentage points of the share attributed to Sky News represents viewing of Channel 5. Ofcom places appreciable weight on this analysis of consumption, saying it "provides a useful overview of the parties' relative positions and ability to influence public opinion". Stripping out the provisions of news via IRN and Channel 5, which is a wholly different activity from broadcasting directly to consumers, **the increment to News' existing share of consumption, on the basis of Ofcom's calculation, is a mere 2.4%**, representing a total share of consumption of 16.2%. This is hardly at a level where concerns would arise as to "*unacceptable levels of media or cross media dominance*" as required by the DTT's Guidance on the application of the media plurality test. If other flaws in Ofcom's exercise (identified below) were corrected, this share would be even lower.

- 3.15 In addition, there are two specific factual errors in Ofcom's calculation of the importance of news on commercial radio:
- (i) Ofcom's "share of minutes" analysis is based on a weighting of 5% of commercial radio output being national news, or three minutes per hour. Ofcom's "share of minutes" analysis is based on a weighting of 5% of commercial radio output being national news, or three minutes per hour. In fact, the actual amount of news included in such services will vary considerably, for example, the main news programming provided by Sky to IRN for on-sale to its client stations is a two minute news bulletin each hour.
  - (ii) Ofcom assumes that Sky (via IRN) supplies all national news on commercial radio. But this too is an error. Many stations do simply rebroadcast the IRN bulletins in off-peak hours, but in peak hours (obviously far more important for minutes of news consumption) many stations will create their own national news bulletins, writing their own scripts drawing from a number of sources, including but by no means limited to IRN.
- 3.16 Correcting for these two errors (based on a conservative assumption of half of radio news consumption being of bulletins created locally rather than by Sky), the impact of the transaction would drop significantly. If Sky was treated as providing two minutes of news per hour rather than three this would change from a 9.8 percentage point increase to 5.3 percentage point increase, even on Ofcom's inappropriate wholesale basis.
- 3.17 Ofcom's approach in emphasising the degree of trust which consumers place in Sky News, in addition to the aggregate share of Sky taking into account wholesale provision, is equally flawed. Nowhere in the Report does Ofcom suggest that commercial radio stations are a key source of news content or an influential source of news for consumers or that an acquisition by News of some level of influence over content provided to independent radio stations (which is ultimately under the editorial control of those stations) is a matter which would raise concerns. To be coherent, if the trust and authority of Sky News were to form any part of the Secretary of State's analysis, the consumption of news via independent radio stations and via Channel 5 must be ignored.
- 3.18 Stripping out Sky's wholesale of news to other news providers, it is clear that Sky News has only a very small share of minutes of consumption and a very limited audience reach; the increment to News existing share of news consumption is modest. If the Secretary of State were to take the reasonable view that Sky's provision of wholesale news must be discounted when assessing its audience share and its ability to influence consumers, this in itself would fundamentally change the conclusions which should be drawn from the Ofcom Report. The small increment to News' existing share of cross-media consumption (combined with the lack of any change in the number, range or News' relative ability to influence other news providers within newspapers or TV news

acknowledged by Ofcom at paragraph 5.123 of the Report) is in fact a reasonable basis for concluding that the Transaction does not raise media plurality concerns or pose any threat to the public interest.

#### 4. ERRORS IN OFCOM'S ANALYSIS OF NEWS PROVISION AND CONSUMPTION

4.1 Ofcom makes a number of key errors in analysing news provision and consumption:

- (i) It relies excessively on "share of minutes" which understates BBC's role and the importance of online and over-emphasises the importance of newspaper publishing.
- (ii) Ofcom attributes the entire reach and share of national commercial radio news to Sky News and essentially treats this as the equivalent of Sky News' ability to reach and influence consumers directly. This is both factually incorrect and nonsensical.
- (iii) It relies excessively on a narrow view of reach which is not a good proxy to measure the plurality of voices available to a cross-media audience.
- (iv) The issue of multi-sourcing, which is crucial to an assessment of cross-media plurality, is noted to be "important" but in practice is ignored in Ofcom's analysis of the impacts of the Transaction. In fact, multi-sourcing (which is increasingly being facilitated by use of the internet as a medium of accessing news) plays a crucial role in ensuring that consumers are exposed to a variety of opinions. The absolute level and the rise of multi-sourcing contribute substantially to the sufficiency of plurality and will continue to ensure a plural news environment in the UK.

4.2 Ofcom excludes from its analysis the regional newspaper groups (which publish numerous titles that provide national news) on the basis that "they do not provide news to a UK-wide audience, and will have lower circulations and readerships for individual titles compared to national newspaper groups". However, across their titles, these groups do provide news to a very significant portion of the UK population, and the reach of each of the groups is comparable to that of the FT or the Independent (which Ofcom does include in its analysis). While individual titles will have lower readership, Ofcom elsewhere in the Report dismisses the value of internal plurality, and as a practical matter national news may well be centrally provided to relevant titles within a group. Thus to be consistent, Ofcom should view regional press on a group basis, not a title-by-title basis (exactly as it does for News).

4.3 Ofcom has undertaken new research to investigate cross-media consumption (described in paragraph 4.39 of the Report), asking consumers which media outlets they regularly use. However, there are two substantial errors in this research:

- (a) It has defined 'regular' usage differently for Sunday newspapers ('once a month') from all other media ('once a week'). This is an arbitrary and highly distorting distinction. There is no reason to believe that, as regards influencing public opinion, reading a Sunday newspaper once per month is equivalent to reading a daily newspaper once per week – the far more natural assumption is that the same frequency gives the same influence. The effect of this error is to materially overstate the starting share of News, since the importance of Sunday papers (where News is relatively strong) is likely over-weighted by a multiple of 4 or 5.
- (b) There was an error in the design of the questionnaire acknowledged by Ofcom in footnote 89 of the Report. Ofcom offered consumers a list of Sunday papers to select which ones they read. However this list omitted high circulation titles including the Mail on Sunday, Daily Star on Sunday, Sunday Express and People (none of which are News titles). While respondents were able to 'write in' other responses, it is a fundamental principle of consumer

Non-confidential version of Submission dated 14 January 2011

research that prompted responses will be higher than unprompted. Thus the effect of this error is to suppress reporting of usage of non-News Sunday titles, thereby exaggerating News' share.

4.4 In addition to its analysis of cross-media consumption based on market research, Ofcom also considers cross-media consumption based on minutes of usage (described in paragraph 5.24 onwards of the Report). However, this analysis is based on fundamental errors of fact, specifically in relation to the amount of news provided by Sky to IRN and Ofcom's erroneous assumption that Sky (via IRN) supplies all national news on commercial radio (as set out in more detail at paragraph 3.14 above). These errors have the effect of substantially overstating the impact of the Transaction. As discussed in section 3 above, it is a further error to attribute this wholesale share to News.

4.5 Given that correcting for even these basic factual errors would substantially reduce both the incremental impact of the Transaction (from 9.8 percentage points to 5.3 percentage points) and News' aggregate share, it calls into question whether (even on its own logic) Ofcom's overall conclusions regarding the Transaction are valid and adds weight to the argument set out at paragraph 3.16 above that in fact the analysis set out in Ofcom's Report, once key errors have been corrected, provides a basis for deciding that the Transaction does not result in insufficient plurality.

## 5. FLAWS IN OFCOM'S ANALYSIS OF THE POTENTIAL EFFECTS OF THE TRANSACTION

### (a) Ofcom does not take account of Sky's existing links with News

5.1 News accepts of course that the Transaction brings about a change in the nature of its legal control over Sky. However, as confirmed by the Court of Appeal in *Sky/ITV*, this does not mean that – in carrying out a qualitative analysis – it is permissible to ignore the current level of control exercised over Sky's editorial policy and the changes that the Transaction will bring about in that respect:

*"[...] 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."*<sup>9</sup>

5.2 In fact, Ofcom assessed plurality in the previous *Sky/ITV* case precisely on the basis that Sky and News were assumed to be part of the same enterprise. **Ofcom has entirely reversed its position in this case** and in its substantive assessment of the effects of the Transaction it treats Sky as an entity which is entirely unconnected with News. The CC also took into account that News had material influence over Sky when assessing media plurality in *Sky/ITV* and, having carried out a detailed review, advised that there was no concern about plurality raised by Sky's acquisition of an interest in ITV.

5.3 Although it acknowledges that pre-Transaction Sky is not an entity which is unconnected with News at paragraphs 5.3 and 5.4 of the Report, Ofcom proceeds to treat Sky News as: (i) an entity entirely separate from News pre-Transaction; and (ii) an entity under the editorial control of News post-Transaction.

<sup>9</sup> *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.

Non-confidential version of Submission dated 14 January 2011

- 5.4 In fact, News was a founding share-holder of Sky over which it initially had sole control. 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 Mr Rupert Murdoch on 8 June 1988.
- 5.5 At the present time, News clearly continues to have a degree of commercial influence over Sky which is sufficient to count as "control" for the purposes of the Enterprise Act. News holds 39.02% of the shares in Sky and from 2007 until the present day has had between four and five affiliated Directors on the board of Sky at any one time. Mr James Murdoch was the CEO of Sky from 2003 to 2007 and is currently the non-executive Chairman of Sky.<sup>10</sup>
- 5.6 Ofcom's attempts to consider what has changed as a result of the Transaction are unsatisfactory. At paragraph 5.6 Ofcom considers that, as a result of the Transaction, News would be able to take decisions that are in the exclusive commercial interest of News. At paragraph 5.7 Ofcom considers that, as a result of the Transaction, News "may also gain a greater ability to exert influence over editorial decisions". The first issue is irrelevant to plurality and the competition implications of News acquiring control over Sky have already been assessed by the European Commission. The second concern can be addressed entirely by establishing that there is adequate internal plurality (a question which is dealt with below).
- 5.7 Ofcom does not consider whether, if News was really motivated to interfere with editorial decisions at Sky News (which Ofcom appears to assume in identifying concerns about plurality), it already has some ability to do so **but does not**. Again, the failure to engage with the issues arising in this case fundamentally calls into question the reliability of Ofcom's analysis and the conclusion that any real risk to the sufficiency of plurality arises as a result of the Transaction. In contrast, the CC in its review of the Sky/ ITV transaction expressly recognised the editorial independence of Sky News:

*"BSkyB and the BBC, which both provide news in-house, emphasized the role of their editorial staff in determining the day-to-day content of their programming. BSkyB told us that all editorial decisions regarding the content of BSkyB's various news services were taken by the Sky News editorial staff. BSkyB board's role was to consider the competitive strategy and funding of BSkyB's news content at a high level; it had no role in the day-to-day editorial control of Sky News content on television or online. We received no evidence from third parties to suggest that senior executives at BSkyB or its parent companies exerted influence on the Sky News agenda."*<sup>11</sup>

**(b) Ofcom fails to give sufficient emphasis to the fact that the number of newspaper providers, and the number of TV broadcasters is unaffected**

- 5.8 Ofcom correctly identifies that in this case the only conceivable impact of the Transaction would be on a cross-media audience in the UK. On any analysis: (i) the number of newspaper voices in the UK remains unchanged post-Transaction; (ii) the number of TV broadcast voices in the UK remains unchanged post-Transaction; and (iii) radio is unaffected and/or the number of radio voices remains unchanged; and (iv) while News and Sky both provide news content via the internet, so do a multitude of other providers.
- 5.9 The Transaction therefore has no impact whatsoever on the sufficiency of plurality for consumers who only read newspapers and consume no other sources of news. It also has no impact whatsoever on consumers who only watch television news and consume no other sources of news. It is simply not credible to suggest that combining the internet platform of Sky with those of News International

<sup>10</sup> See paragraphs 4.4 to 4.11 of the Initial Submission. That these interests confer "control" over Sky was acknowledged by the Ofcom, the OFT and the CC in the 2007 review of Sky's acquisition of 17.9% of the shares in ITV (See paragraph 4.5 of Initial Submission in particular).

<sup>11</sup> At paragraph 5.57.

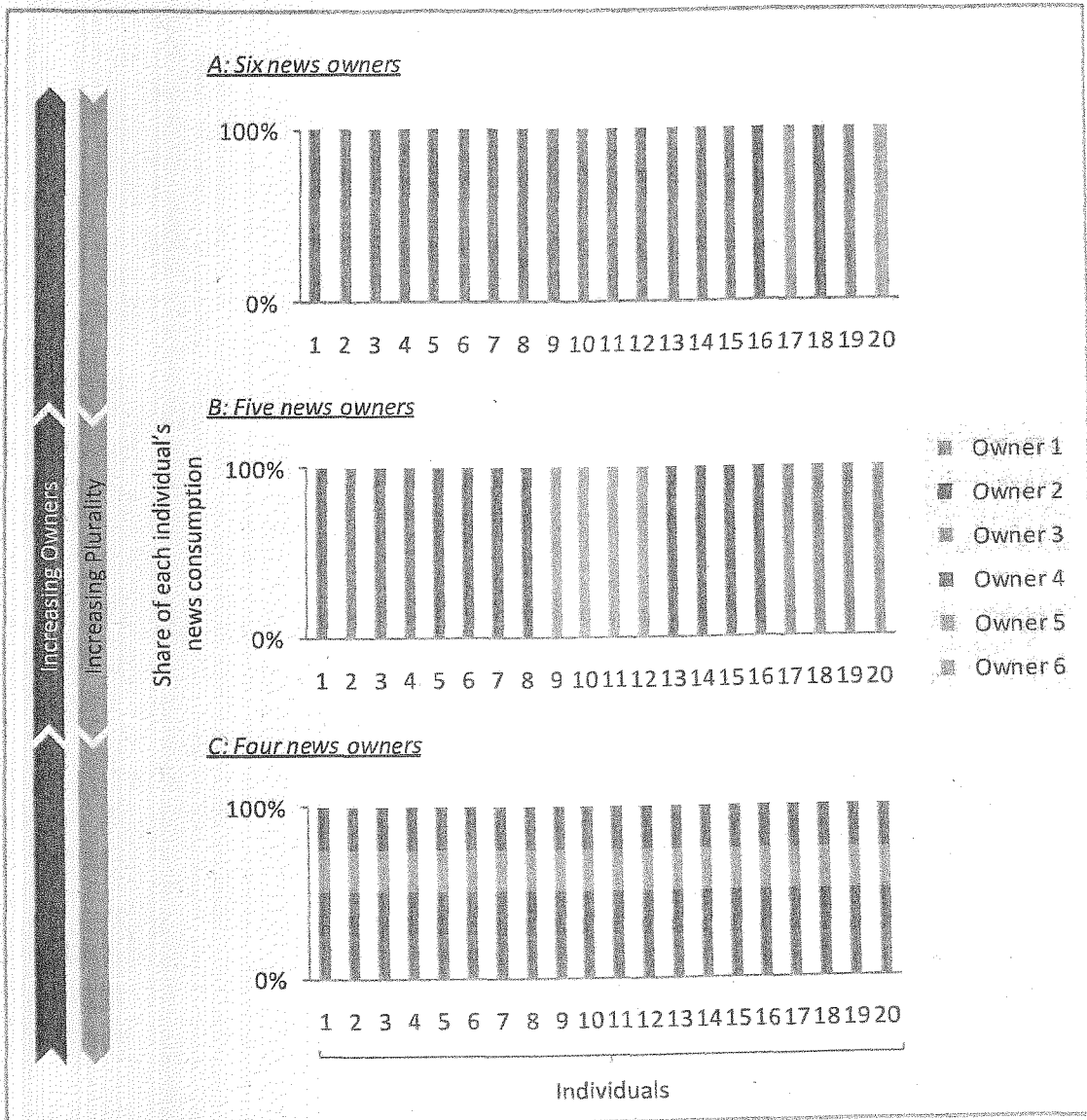
Non-confidential version of Submission dated 14 January 2011

newspapers could conceivably reduce plurality to any material extent or have an adverse effect on the public interest in the UK. **It is only consumers who consume news via multiple platforms who would potentially experience any change.**

- 5.10 Therefore, it must surely be the case that the fact that the existing number of providers will continue to provide news within each separate medium "raises the bar" in terms of identifying a public interest concern arising from this Transaction.
- (c) **Combination of Sky News and News International newspapers would have no material impact on the range and variety of cross-media voices available to and accessed by consumers in the UK**
- 5.11 Any analysis needs to take account of the fact that alternative sources of news are increasingly not "substitutes" in any meaningful sense. Those news media which are fastest growing (internet news and, to a lesser extent, TV news) are in most cases free at the point of consumption, enabling consumers to access multiple sources of news at no incremental cost and thereby encouraging consumption from multiple sites or channels, as the case may be. Furthermore an increase in audience for one source of news does not necessarily mean a reduced audience for another source of news. A qualitative assessment of cross media plurality is possible (and it has been done in the Sky/ITV case) but cannot be done in a meaningful way without looking at both news provision and news consumption - not separately (as Ofcom does) but in combination.
- 5.12 More multi-sourcing in consumption means that UK consumers are exposed to a variety of different views and should be able to take their own decisions as to which sources of news they find more interesting and attractive.
- 5.13 In fact, on average, in the UK each consumer of news currently consumes five different sources of news according to the FD Survey of news consumption in the UK (see FTI Report paragraph 5.38). Trends in multi-sourcing, and an increased tendency by consumers to access news via the internet (described further below) will continue to operate to increase plurality in the UK<sup>12</sup>:
- Most viewers of TV news consume one or two source of news (and most of those using a single source will exclusively watch BBC news given that the BBC has a 75% share of news viewing);
  - Most readers of newspapers read only one national paper, with a smaller group reading two.
  - Most people who use internet news sources consume 3 or 4 sources of news.
- 5.14 Ofcom acknowledges that the multi-sourcing of news is of relevance to plurality (paragraph 4.59) and even "important" (paragraph 5.115). News submits that, particularly given the need to focus on a cross-media audience (which by definition is consuming news across multiple platforms), the Secretary of State should acknowledge that the multi-sourcing of news by consumers is fundamental to any analysis of the sufficiency of plurality.
- 5.15 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 is more plural. This idea is illustrated further in the diagram set out at paragraph 2.5 of News' Response to the Issues Statement and reproduced below. It seems indisputable that scenario C is a more plural news environment than A or B (even though C has the smallest number of players and, as a market, C is more concentrated than B):

### **Illustrative Scenarios of News Consumption**

<sup>12</sup> (See paragraph 5.6 of the FTI Report which is based on data from Touchpoints and other sources. See also paragraphs 2.4 to 2.8 of the Response to the Issues Letter.)



5.16 At paragraph 5.116, having said that the level of multi-sourcing of individual consumers is important, and having calculated that the Transaction makes essentially no difference to the number of distinct enterprises used by the average consumer (a drop from 2.9 to 2.8 on Ofcom's wholesale basis), Ofcom dismisses this factor on the basis that "what matters more [...] is the number and range of news providers used by **all** consumers and their relative significance, rather than the number of news providers used by each individual consumer."

5.17 The distinction that Ofcom purports to draw is meaningless and it cannot be relied upon rationally to dismiss a factor that Ofcom recognises to be important. If the range of news providers used by all consumers is acknowledged to be relevant, then the range of news providers used by individual consumers must be relevant to the overall assessment, since the latter represents an aggregate view of the range used by individual consumers. News has provided evidence on patterns of behaviour which in the aggregate enable a decision-maker to reach a view of degree of overall plurality. Moreover, in so far as Ofcom believes the "word of mouth" transmission of views between consumers to be an important factor, this would tend to increase the potential reach of smaller players by comparison with larger players. The vast majority of people will already be aware of the BBC's reporting of an issue but they might find out something new from discussions of Al Jazeera's coverage.

Non-confidential version of Submission dated 14 January 2011

- 5.18 The importance of multi-sourcing was implicitly recognised by the CC in Sky/ITV. In Appendix I to the CC's Report, setting out evidence used by the CC to assess plurality, the CC considers, among other metrics:
- The number of different media platforms through which consumers actively take news;
  - The number of different channels on which customers actively watch television news;
  - The proportion of the population who actively took news from ITV and Sky/News International but from no other source.
- 5.19 News has also estimated the proportion of consumers who would, post Transaction, rely only on News International and Sky News and no other news provider. It has done so using the same methodology used by the CC in Sky/ITV. This group accounts for only 0.3% of the UK population, a very similar share to that identified in Sky/ITV (see paragraph 1.15(vi) above for a more detailed summary of News' overlap analysis). Ofcom accepts that these estimates are broadly correct. Therefore, the Transaction would have no material impact on the range and variety of cross-media voices in the UK.
- 5.20 Given the plethora of choices of news provision available to consumers in the UK, if consumers should begin to dislike the approach taken by Sky News, they are far from obliged to continue to watch it. Consumers have more than sufficient other choices available to them and can easily switch channels, or, for that matter, switch newspapers if they prefer. By definition, consumers of Sky News have access to digital channels and a wide variety of alternative news content. Ofcom acknowledges that within TV (as well as within newspapers), this Transaction does absolutely nothing to reduce the continued existence of that field of choice. Should Sky News consumers wish to switch to a different news media, there are many sources of news available that are independent of News, both in paper copy and online.
- 6. OFCOM FAILS TO EXPLAIN WHY INTERNAL PLURALITY DOES NOT ENSURE SUFFICIENT CROSS MEDIA PLURALITY**
- (a) TV broadcast news operates in a particular cultural and regulatory context**
- 6.1 Ofcom does not adequately address the question of internal plurality in relation to Sky News as a TV broadcaster and its relevance to an overall assessment of plurality. Ofcom simply states that "*in light of conflicting views*" they "*do not consider that we can reach the view that internal plurality will ensure sufficient plurality in the provision of news and current affairs as part of a first stage review*" (paragraph 1.39).
- 6.2 Ofcom does not explain why it considers that internal plurality resulting from Sky News' position as a TV news broadcaster does not ensure sufficient cross media plurality *in combination with* other external factors. In contrast, the opinion by Lord Pannick QC (as provided by News to Ofcom and as attached at Annex 5), makes clear that 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. The Secretary of State can and should come to a definitive decision on this issue without the need for a protracted investigation by the CC.
- 6.3 TV news in the UK has traditionally been very different from news presented in newspapers and this tradition of strict impartiality in broadcast news is protected in the Broadcasting Code which



Non-confidential version of Submission dated 14 January 2011

prevents broadcast channels from displaying bias in their presentation or selection of stories.<sup>13</sup> As the CC found in Sky/ITV:

*"[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).<sup>14</sup>*

*"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".<sup>15</sup>*

6.4 The Report states that News' submissions on internal plurality "are made in the context of a regulatory framework" (paragraph 1.40). News' submission goes further than this - internal plurality in TV broadcasting results from practical/cultural factors which would prevent News from dictating the editorial policy of Sky News, and these factors are reflected in and reinforced by the regulatory environment and the Broadcasting Code. This is entirely consistent with the CC's findings in Sky/ITV and there is no need for further regulatory consideration of this issue.

**(b) There is no reason to believe that the independence of editorial decision making at Sky News will be impacted as a result of the Transaction**

6.5 As noted above Ofcom acknowledges but does not take account of the fact that pre-Transaction, Sky is not an entity which is unconnected with News. News' commercial influence has not in the past and will not in the future translate to an ability to dictate the editorial policy of Sky News due to: (i) the prevailing practice and culture of editorial decision making in TV news in the UK and (ii) the regulatory context within which broadcast news operates

6.6 At paragraph 5.100 and 5.101 the Report states "*We recognise that it is possible that Sky News may remain a strong and independent voice from an internal plurality perspective even while no longer part of a distinct media enterprise. However, in a situation where Sky is wholly owned by News Corp and where we have received a significant number of representations that a proprietor may want to interfere with editorial decisions, we need to understand what would in practice prevent such intervention.*"

6.7 The nature of editorial decision making, particularly in the specific environment of TV news in the UK means that it cannot be assumed that commercial influence necessarily translates into editorial influence. Editorial decisions will remain with the Sky News management and are not a matter for the shareholders or the board of Sky<sup>16</sup>. In reviewing Sky/ITV, the CC commented that:

*"the evidence that we received suggested to us that there was a strong commitment to editorial independence across television news broadcasting which would lead to editors resisting any direct board intervention or intervention from shareholders to set the news agenda." (Paragraph 5.68 CC Report)*

6.8 News would also argue strongly that the experience with The Times, which operates under the supervision of an independent board specifically established to maintain impartiality and prevent interference with editorial content, shows that the independence of specific titles can be maintained

<sup>13</sup> These arguments are set out further in paragraph 4.20 of the Initial Submission, in paragraphs 4.4 to 4.7 of the response to the Issues Statement and in the Lord Pannick's Opinion. Lord Pannick's Opinion shows that the position set out by the CC in Sky/ITV which is relied upon by Ofcom in paragraph 1.42 of the Report is not correct.

<sup>14</sup> CC Report, paragraph 41.

<sup>15</sup> CC Report, paragraph 5.54.

<sup>16</sup> This was described further at paragraphs 4.12 to 4.19 of News' Initial Submission.

Non-confidential version of Submission dated 14 January 2011

even in the newspaper context which is very different, indeed at the other end of the spectrum, from broadcast news and where no general obligation of impartiality applies.

- 6.9 Ofcom casts doubt on the practical independence of The Times at pages 68 and 69 of its Report in an egregious example of the selective quoting of evidence. Ofcom quotes vague evidence from Andrew Neil (widely reported in the press as having left his position as editor of the Sunday Times in 1994 "on bad terms") and does not refer at all to the direct oral evidence provided to Ofcom, in a meeting on 2 December 2010, by John Witherow who has been the editor of the Sunday Times since 1994. John Witherow reported that no editorial influence whatsoever was exercised by News over the content of the Sunday Times.
- 6.10 In addition, evidence in relation to the independence of Sky News (summarised in paragraph 5.76 of the Report) is unreasonably dismissed without explanation on the basis that "past behaviour may not necessarily be a reliable indicator of future behaviour." In fact, as News maintained in the Initial Submission, the acquisition by News of full legal control over Sky would not jeopardise the editorial independence of Sky News for the following reasons: (a) Sky's editorial policy is not a matter for Board determination. In fact, to date, editorial policy has not been a debated issue at Board level; (b) as recognised by the CC, despite its commercial influence over Sky, News has not sought to influence the editorial policy of Sky News; (c) the Sky News editorial directors are experienced individuals, each with expertise to manage and direct the editorial policy of Sky News (d) there is no evidence that independent directors have had to "defend" the editorial policy of Sky News against influence by News executives; and (e) News has no special arrangements with Sky News which would confer on it control over editorial policy.

## **7. OFCOM ACKNOWLEDGES THAT THE TRANSACTION WOULD HAVE NO IMPACT ON THE SETTING OF THE WIDER NEWS AGENDA IN THE UK**

- 7.1 Ofcom considers the evidence as to influence as to whether the Transaction will give News any significant degree of influence over the broader news agenda carefully and finds that News' ability to influence the broader news agenda (the news agenda of other media outlets) would not be enhanced as a result of the Transaction (paragraph 5.123).
- 7.2 The fact that the Transaction will have no influence whatsoever on the broader news agenda in the UK should provide significant comfort to the Secretary of State should he decide (as he should) not to refer the Transaction to the CC.
- 7.3 In fact, the various powerful media enterprises in the UK, with the BBC an enormously powerful influence and with a large number of well funded independent voices providing a multiplicity of different views, mean that the UK has a very healthy and very plural media environment within which the overall news agenda is broadly set and within which a combined News/Sky would continue to operate<sup>17</sup>.
- 7.4 The Secretary of State should rely on the conclusion reached by Ofcom in this respect where the weight of the evidence was clearly overwhelming. It is self-evident that News does not now influence the news agenda in the UK to any material extent, nor will it do so post-Transaction. While News International's newspapers (more so than Sky News) do indeed break news stories and generate controversy in the UK they are merely individual voices in an environment which is one of healthy, if not fierce competition among news providers. If the volume of negative comment and media coverage about the proposed Transaction illustrates anything, it is that News and Sky together are very far from being able to influence the news agenda in the UK or to silence voices of dissent.

<sup>17</sup> See also, paragraph 5.7 of News' Initial Submission, the Perspective Report, paragraphs 5.1 to 5.3 of News' Response to the Issues Letter and the Perspective Sources Analysis.

**8. THE TRANSACTION DOES NOT RESULT IN INSUFFICIENT PLURALITY**

**(a) The level of plurality post-Transaction must be compared with a "sufficient level of plurality"—there needs to be a benchmark**

8.1 It is a necessary part of the statutory test to assess whether plurality would be "sufficient" post-Transaction, which necessarily involves forming a view as to whether plurality is sufficient pre-Transaction.

8.2 It can be assumed that plurality was considered to be sufficient in the UK by Parliament at the time of the enactment of the Communications Act 2003 which relaxed controls on media ownership. It can also be assumed that the plurality was considered to be sufficient in the UK by the CC and by the Secretary of State when they applied the media public interest test to Sky's acquisition of 17.9% of the shares of ITV in 2007. Neither the CC nor the Secretary of State found concerns about the sufficiency of plurality arising from that acquisition (which has subsequently been partly unwound).

8.3 In fact, since both of these benchmarks, news provision in the UK has become significantly more plural. The implication of News' submission is that plurality would need to be reduced, as a result of the present transaction, to a level below that subsisting in 2003 (or 2007) before it could reasonably be said to lead to insufficient plurality.

**(b) Trends in plurality in the UK are towards greater rather than lesser plurality**

8.4 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, and assuming that plurality was at that stage "sufficient", 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.

8.5 Trends are towards greater rather than lesser plurality and any dynamic analysis of likely future impacts most assume that these trends will continue:

- (i) There has been a dramatic increase in the range of TV news available to consumers in the UK, largely due to the rise in digital TV penetration and in the choice of channels across all platforms. The UK now has one of the highest levels of digital penetration in Europe and UK consumers have access to the largest number of TV channels in Europe, including a wide variety of digital news channels;
- (ii) The internet has had (and continues to have) a transformative effect on access to and consumption of news, and has meant that many more consumers access a significantly broader variety of news sources;<sup>18</sup>
- (iii) Consumers are increasingly shifting from media with comparatively less plurality in the provision of news and the consumption of news: while there are a large number of newspaper providers in the UK there are a far greater number of sources of news accessible via the internet; consumers tend to read one paper newspaper (if they read a newspaper at all) but to access multiple news sources online;<sup>19</sup>
- (iv) The easy accessibility of information via internet search and the ease with which information can be disseminated by individuals via Twitter, YouTube, blogs and so on has an important

<sup>18</sup> The circulation of paid-for newspapers declined by 3.5% between 2003 and 2010 (FTI Report figure 8).

<sup>19</sup> The circulation of paid-for newspapers declined by 3.5% between 2003 and 2010 (FTI Report figure 8); time spent on online news sources has grown by 214% since 2007 (Perspective Report page 27); and Mintel has found that the internet is currently the second most important source of news in the UK with 46% of consumers accessing it regularly (Initial Submission, paragraph 6.7).

Non-confidential version of Submission dated 14 January 2011

influence on the news agenda. Controllers of media enterprises are simply not in a position to block the dissemination of information and stories to a broad UK audience.

8.6 Further information on trends in the UK media landscape since 2003/2007 through to the present day which demonstrate that there is more than sufficient plurality in the provision of news in the UK both pre and post-Transaction can be found at paragraphs 5.8 and 6.5 to 6.6 of News' Initial Submission.

(c) **For the reasons set out in section 1(c) above, the Transaction poses no threat to the sufficiency of plurality in the UK**

8.7 To summarise and conclude, News believes that the Secretary of State can reasonably rely on the following significant factors in deciding against a reference to the CC:

- (i) The Transaction can only affect a cross-media audience and there is no reduction in the number of independent newspaper proprietors or TV broadcasters in the UK as a result of the Transaction.
- (ii) Ofcom acknowledges that News' position in newspapers (a declining segment within cross-media consumption) is unchanged and Sky's relatively modest share of TV news provision is unchanged:

*"This transaction does not result in a change in the number, range or relative ability to influence within three of the individual platforms – TV, radio and newspapers." (paragraph 5.19)*

- (iii) A culture of editorial independence in broadcast news supported by regulatory requirements (the Broadcasting Code) will continue to ensure that Sky News remains as an independent voice and that internal plurality within the broader News group will be secured. This, together with the existing level of external plurality, removes any doubt that might arise as to the sufficiency of plurality post-Transaction.
- (iv) In Sky/ITV, News was already assumed to have control/material influence over Sky and no concern about plurality was identified.
- (v) Multi-sourcing of news by consumers, facilitated by an increase in the consumption of news over the internet, contributes significantly to plurality and is an increasing trend.
- (vi) Ofcom acknowledges that the actual impact of the Transaction on consumers of news will be minimal:

*"Across the population as a whole, we found that few regular news consumers rely solely on Sky titles or solely on News Corp titles: at the retail level, 2% rely solely on news from Sky; and 1% rely solely on news from News Corp; these shares do not change materially if considering wholesale news provision" (paragraph 4.79).*

- (vii) Ofcom acknowledges that the Transaction will have no impact whatsoever on the setting of the wider news agenda within the UK:

*"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).*

Non-confidential version of Submission dated 14 January 2011

**9. CONCLUSION**

- 9.1 It is highly unfortunate that the administrative process leading to this point has been seriously flawed and that the initial decision to intervene in relation to this Transaction on the basis of a public interest concern was taken by a Secretary of State for BIS who was biased against the interests of News and its shareholders. News is still unclear as to the extent to which the biased and prejudiced approach of the Secretary of State for BIS has tainted the wider process and has requested that it be provided with copies of relevant correspondence in order to establish whether there is direct evidence of this.
- 9.2 News believes that Ofcom has failed to approach the effects of this Transaction with an open mind and has carried out a review process with the intention of identifying concerns. Ofcom has been notably more receptive to submissions made by third party complainants than it has been to submissions made by News and has chosen to present the evidence in a one sided way (in some cases selectively omitting relevant evidence).
- 9.3 For the reasons set out above, News believes that the Report issued by Ofcom to the Secretary of State is flawed, misinterprets the test which the Secretary of State is obliged to apply to the Transaction under the Order, contains fundamental flaws in analysis and should not be relied on by the Secretary of State. Any decision to refer the Transaction to the CC which was taken by the Secretary of State on the basis of the Ofcom report would itself suffer from legal flaws.
- 9.4 Pending receipt of all relevant information and a further consideration of its position News reserves its rights as regards the possibility to challenge earlier steps in the administrative process and/or the Report by way of judicial review.
- 9.5 News hopes that the Secretary of State, applying the legal test objectively on the basis of the relevant evidence, will take the view that no reference to the CC is necessary or appropriate given the facts of this case.
- 9.6 If the Secretary of State does believe, having considered News' submissions, that he has remaining concerns about the sufficiency of plurality in the UK, News is, without prejudice to its views as to the effects of the Transaction, prepared to offer UIL which would remedy, mitigate or prevent all of the effects adverse to the public interest which Ofcom erroneously identifies may result from the Transaction. The Secretary of State has the power to accept such a UIL from News under paragraph 3 of Schedule 2 of the Order:

*"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 [he] considers appropriate undertakings to take such action as [he] considers appropriate."*

9.7 [REDACTED]

**Allen & Overy LLP**

**Hogan Lovells International LLP**



The Treasury Solicitor  
Broadcasting

2-4 Cockspur Street Tel   
London SW1Y 5DH  
www.culture.gov.uk

028

Slaughter and May  
One Bunhill Row  
London EC1Y 8YY

Your Ref   
Our Ref

14 January 2011

By email only

Dear

**News Corporation/BSkyB**

Thank you for your letter of 12 January 2011, addressed to the Secretary of State.

In your letter, you ask in particular on behalf of your clients for confirmation as to documentation provided to News Corporation, and to equal access to Ofcom's report prepared for the Secretary of State. You also confirm that your clients would be available to meet with the Secretary of State and provide any further assistance he would find helpful.

I can confirm that it is the Secretary of State's intention to publish Ofcom's report, with the redaction of commercially sensitive information, in due course, and no later than the publication of his decision as to whether to refer.

The Secretary of State is committed to reaching a decision in a fair and even-handed way, and is satisfied that the decision-making process he is following will ensure that your client's concerns are all properly considered.

We will be in touch with you further should the Secretary of State consider that any further representations from your clients are needed in order to assist him in making a decision.

Yours sincerely,



(S)

029

BY COURIER

STRICTLY CONFIDENTIAL

[redacted]  
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 [redacted]  
Direct [redacted]

Our ref [redacted]

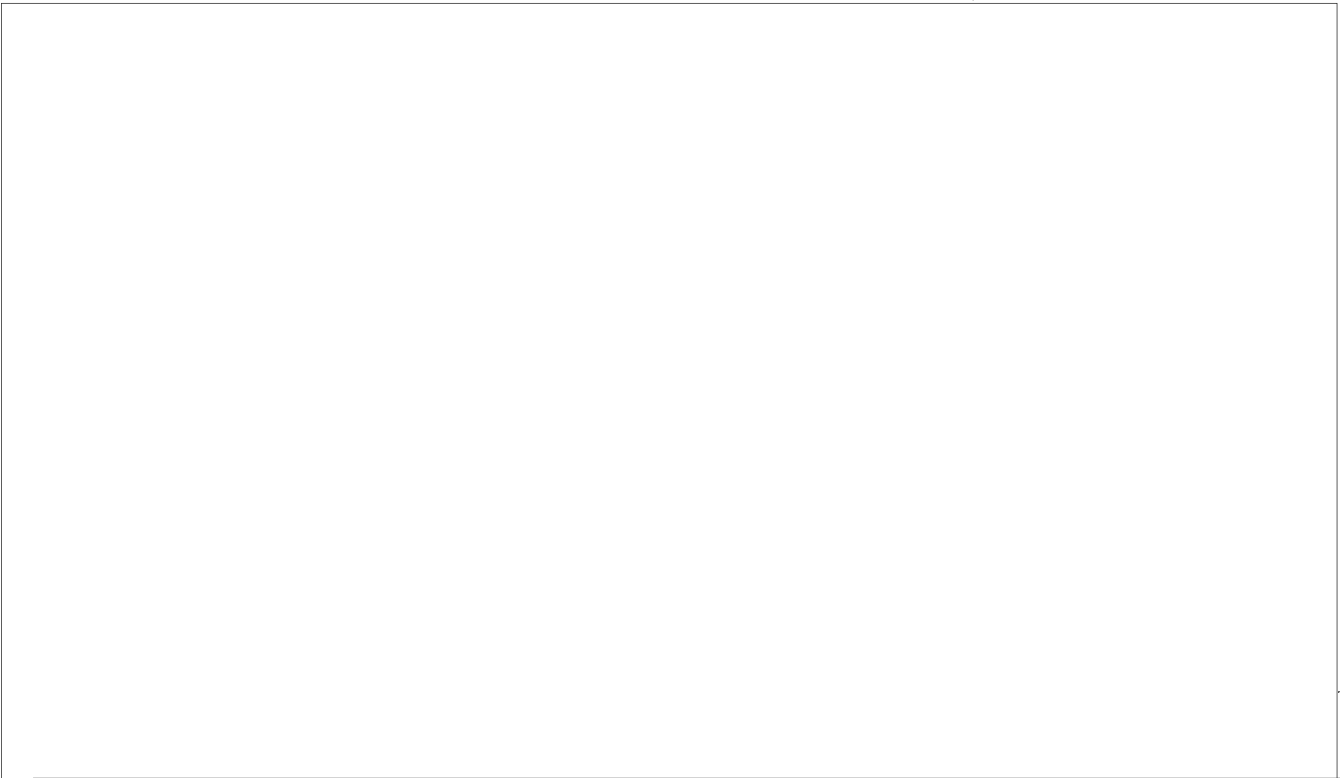
14 January 2011

Dear [redacted]

News Corporation - British Sky Broadcasting Group Plc

[redacted]

[redacted]



[Redacted]

Partner

cc: [Redacted] News Corporation [Redacted] Hogan Lovells  
International LLP [Redacted] [Redacted] Allen & Overy LLP





Privileged and Confidential  
Outside Counsel Work Product

# News Corporation

## SUBMISSION TO THE SECRETARY OF STATE FOR CULTURE, OLYMPICS, MEDIA AND SPORT

1. INTRODUCTION/OVERVIEW
  - (a) Background/decision to be taken by the Secretary of State

Privileged and Confidential  
Outside Counsel Work Product

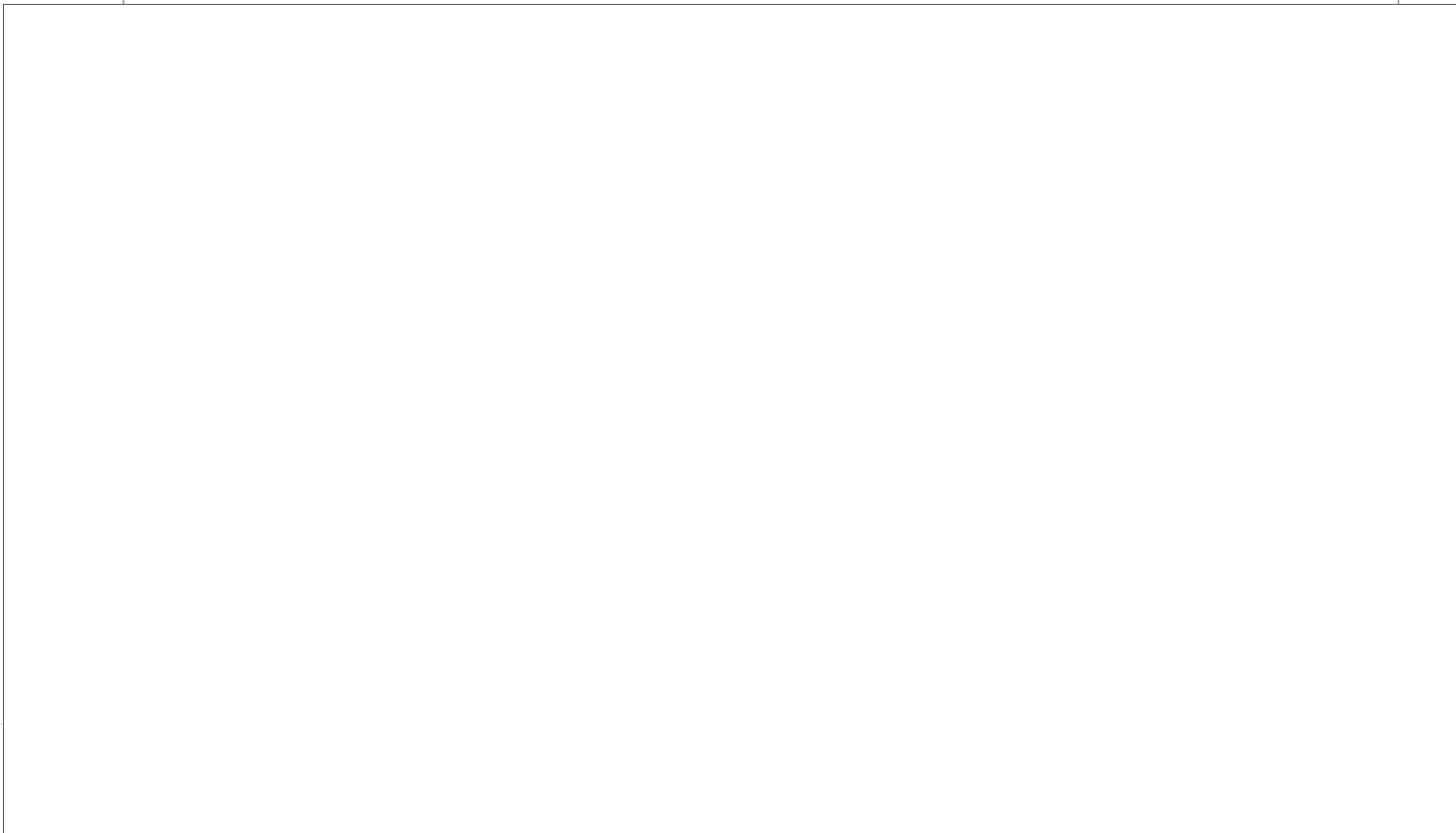
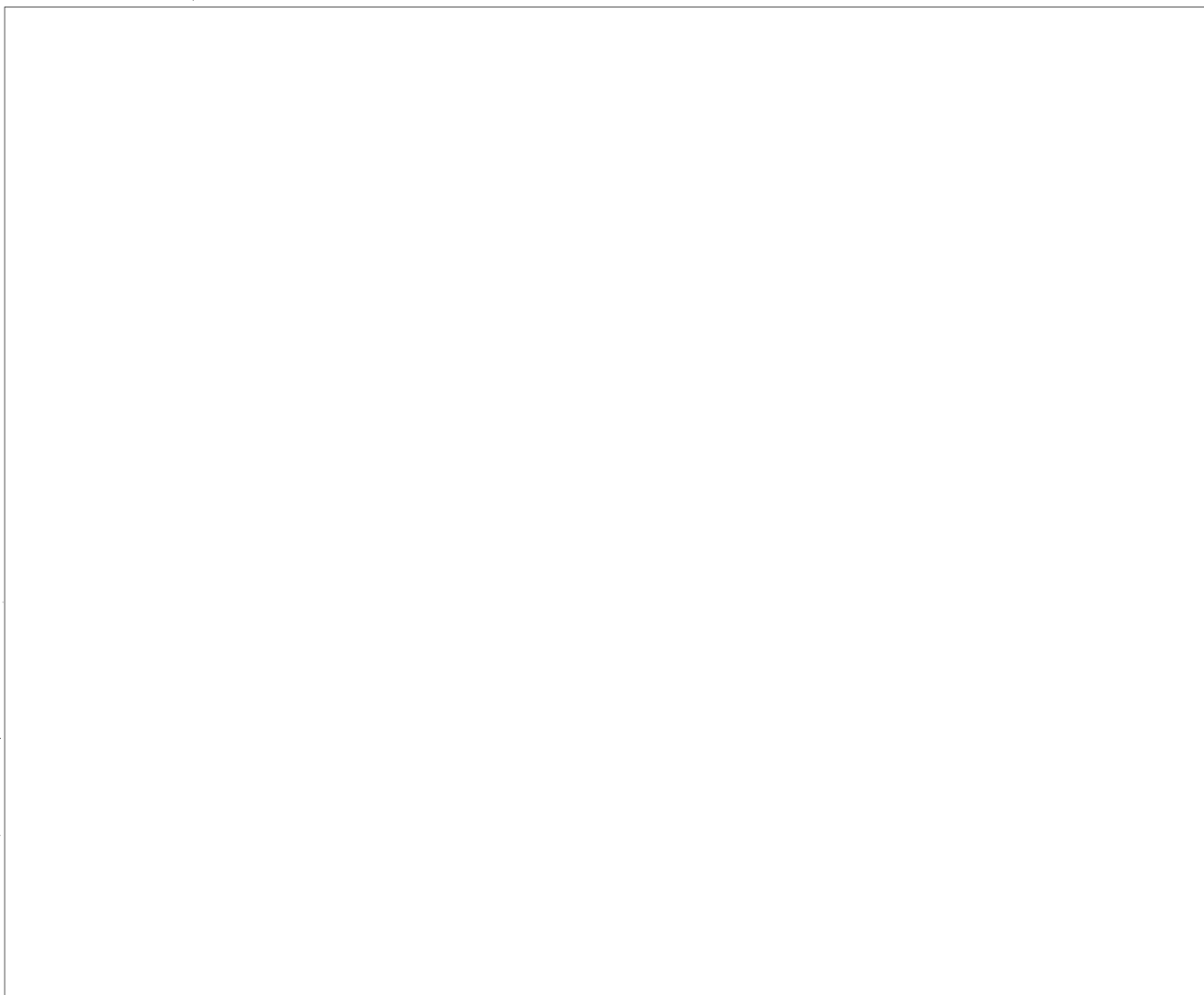




Privileged and Confidential  
Outside Counsel Work Product

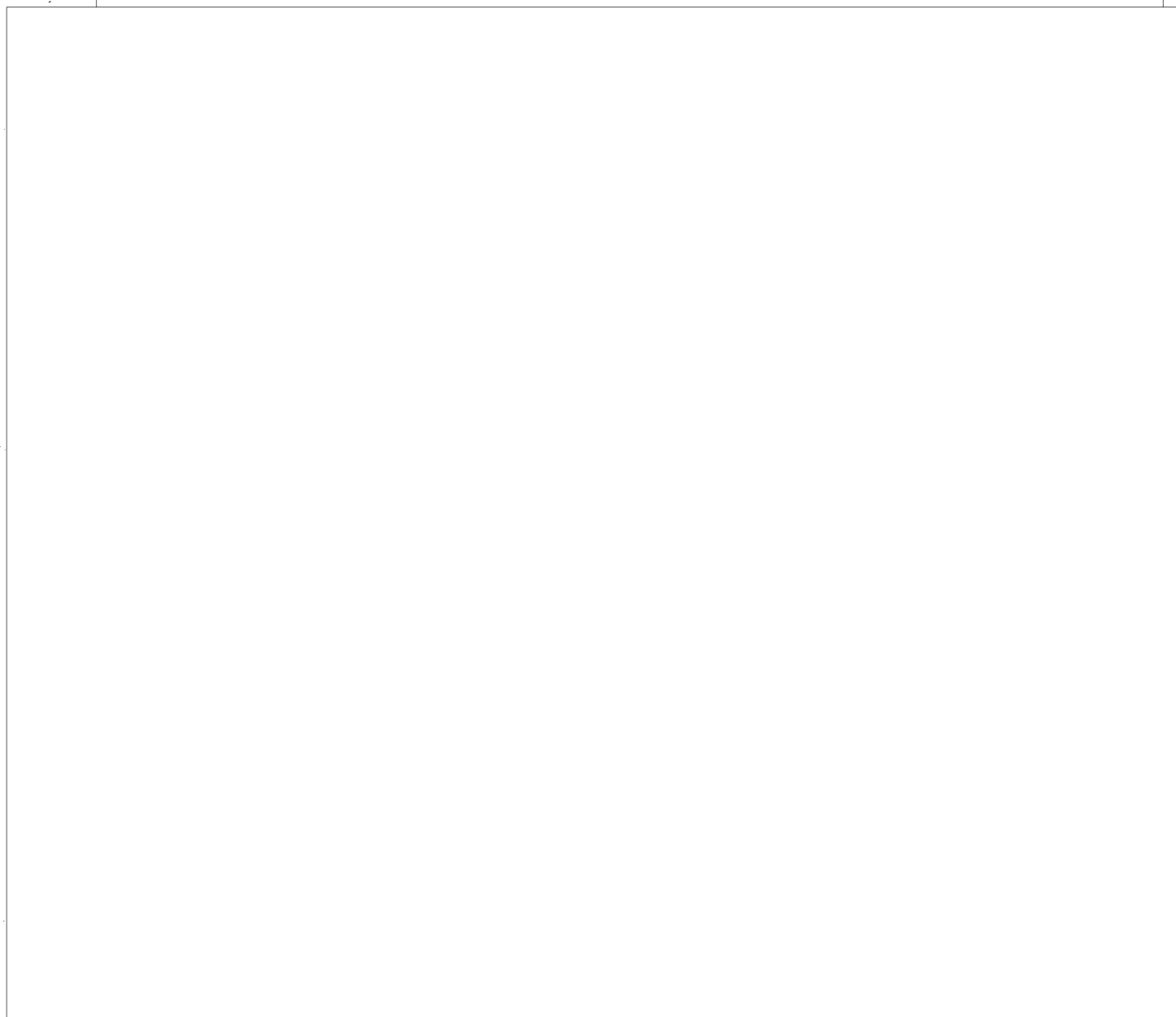
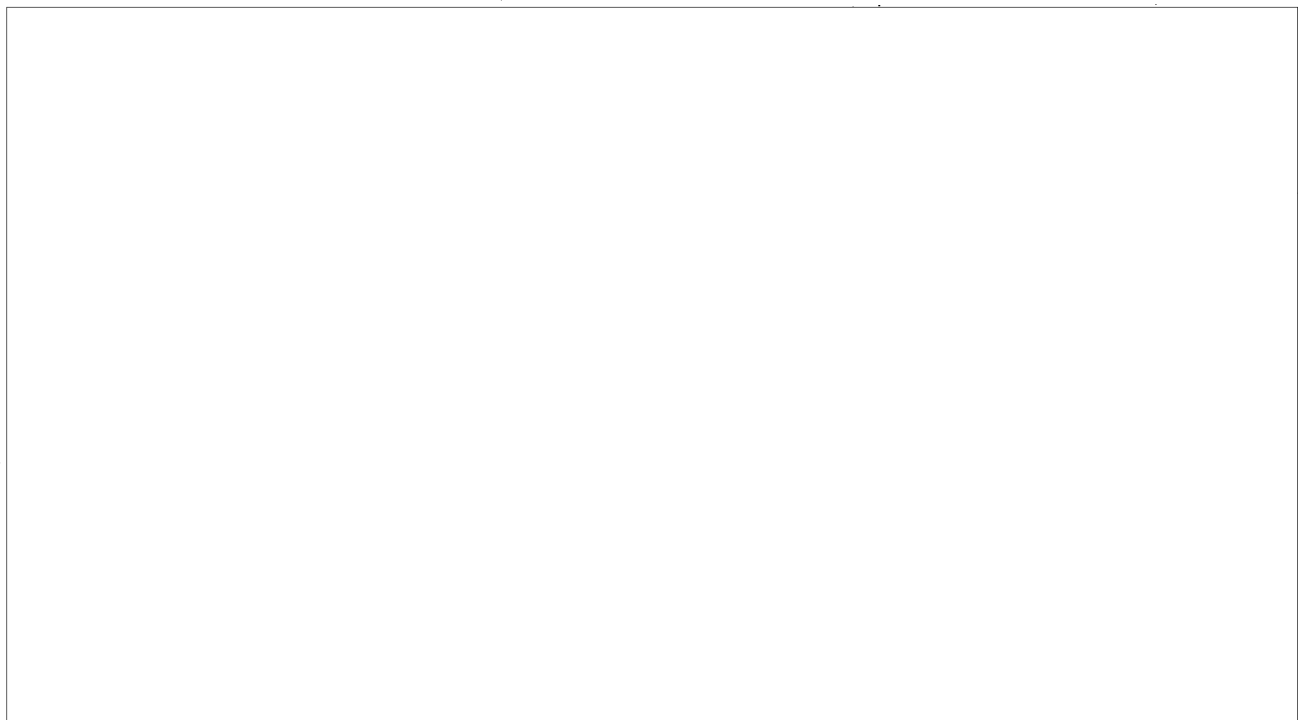


Privileged and Confidential  
Outside Counsel Work Product



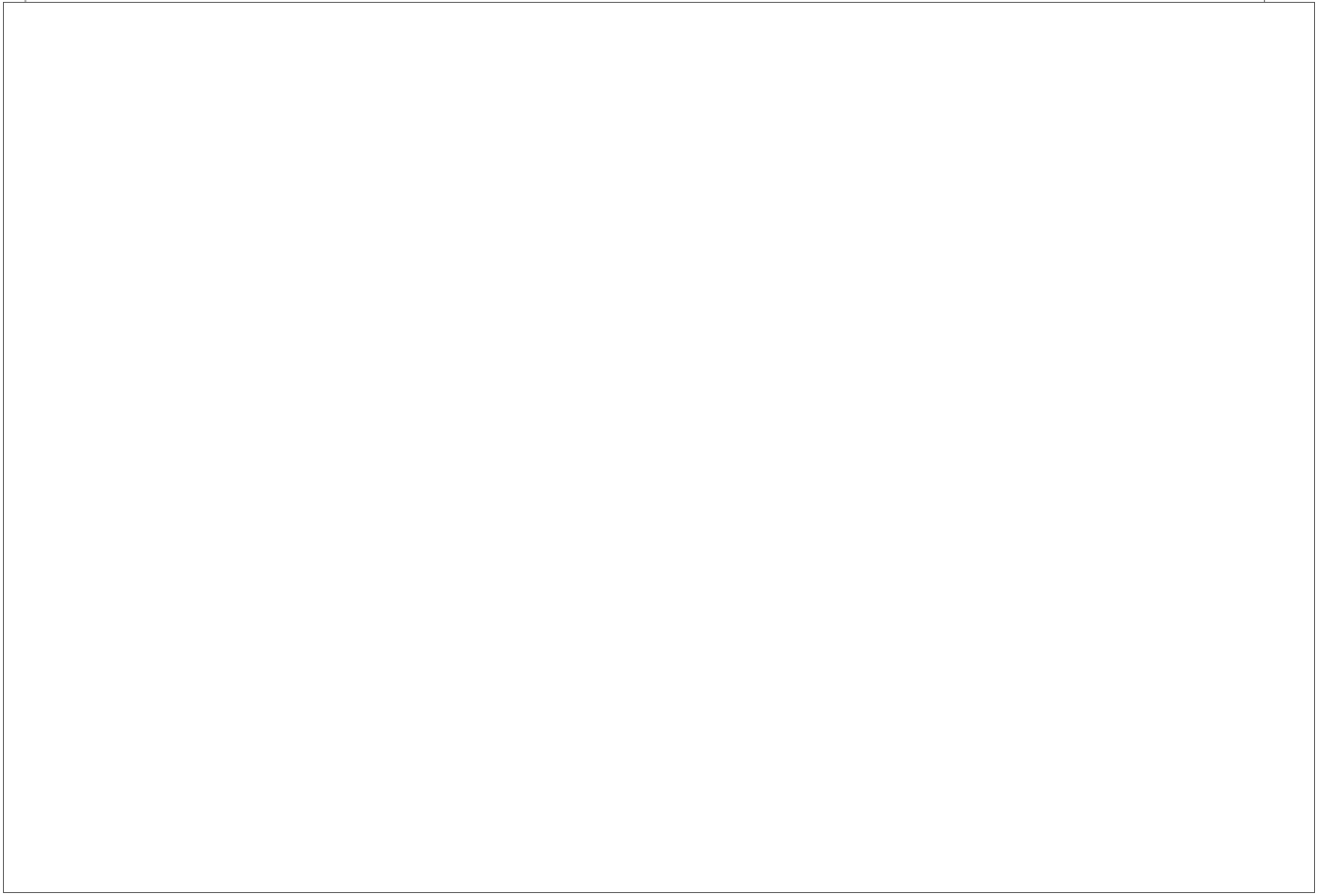
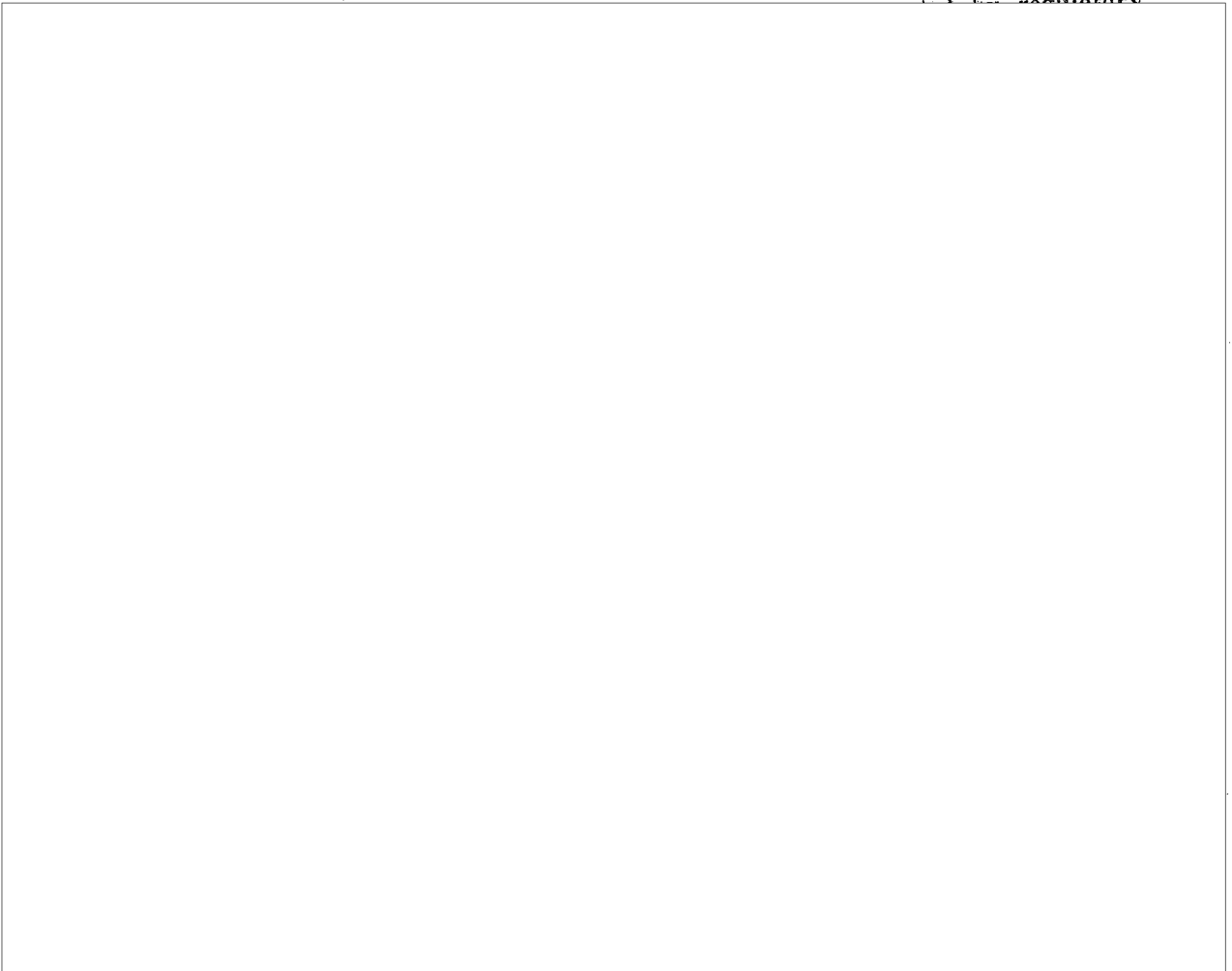


Privileged and Confidential  
Outside Counsel Work Product



Privileged and Confidential  
Outside Counsel Work Product

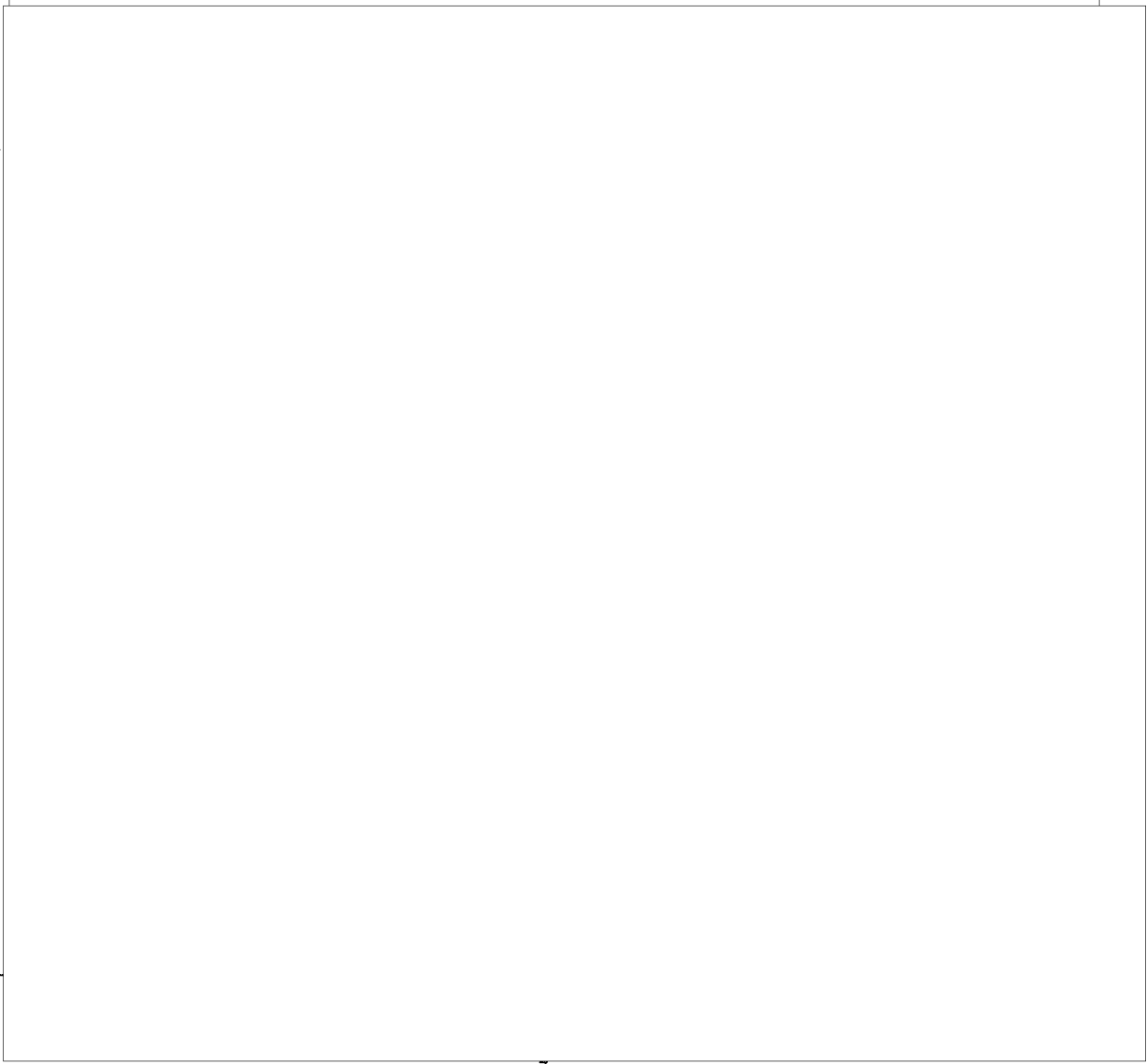
Regulatory





Privileged and Confidential  
Outside Counsel Work Product

*... would not materially change this*



5

**Privileged and Confidential  
Outside Counsel Work Product**



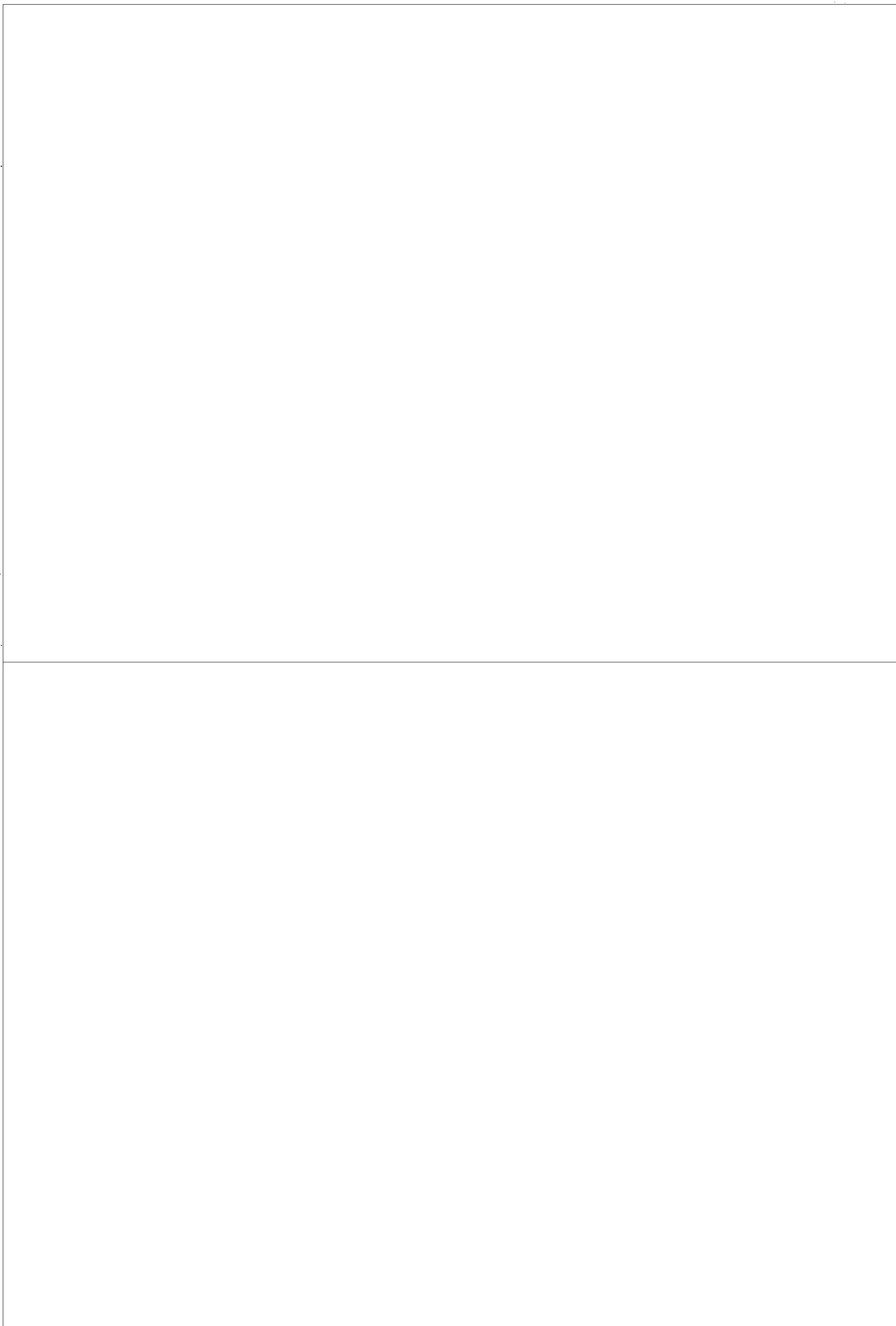




Privileged and Confidential  
Outside Counsel Work Product

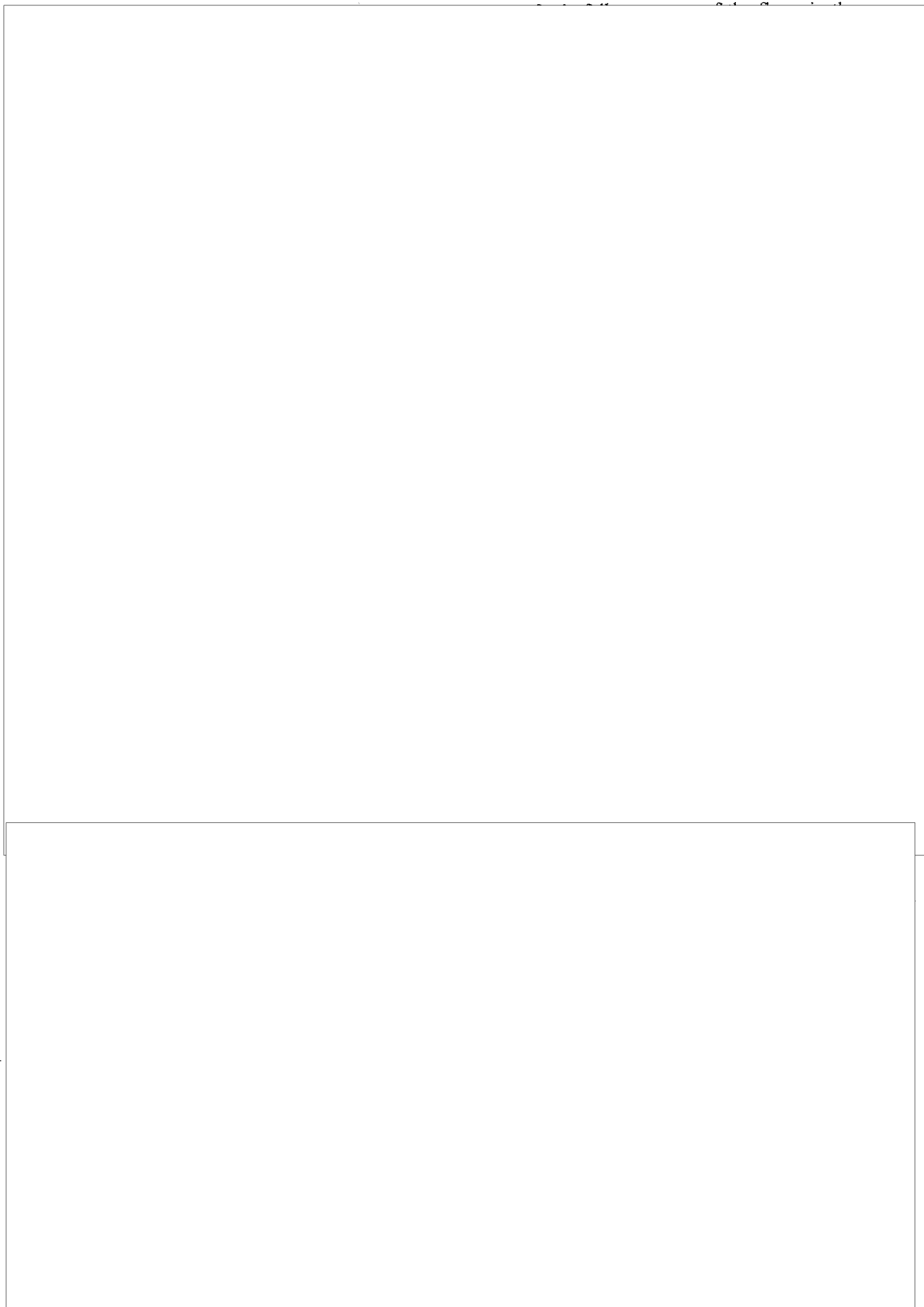


Privileged and Confidential  
Outside Counsel Work Product



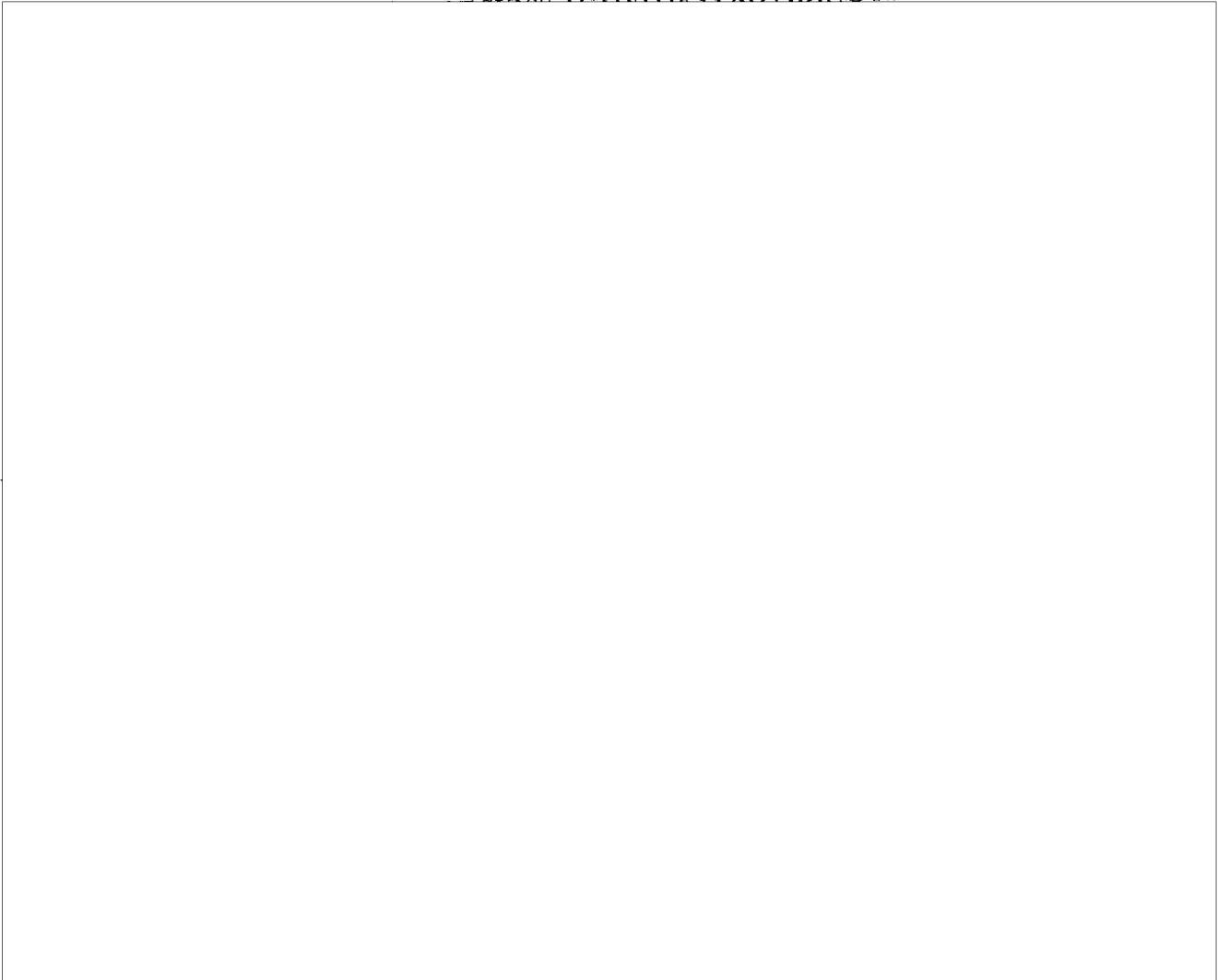


Privileged and Confidential  
Outside Counsel Work Product



Privileged and Confidential  
Outside Counsel Work Product

... ACTIVITIES PROVIDING NEWS CONTENT TO





Privileged and Confidential  
Outside Counsel Work Product



(b)

3.8

(c)

3.9

3.10



Privileged and Confidential  
Outside Counsel Work Product





Privileged and Confidential  
Outside Counsel Work Product

3.

4.

4.1

[Redacted content]





























ALLEN & OVERY 030-

BY COURIER

STRICTLY CONFIDENTIAL

[Redacted]

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 [Redacted]  
Direct [Redacted]

[Redacted]

18 January 2011

Our ref [Redacted]

Dear [Redacted]

News Corporation - British Sky Broadcasting Group Plc

[Redacted]

[Large redacted area]

Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC308763. It is regulated by the Solicitors Regulation Authority of England and Wales. The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at its registered office, One Bishops Square, London E1 6AD.  
Allen & Overy LLP or an affiliated undertaking has an office in each of: Abu Dhabi, Amsterdam, Antwerp, Athens, Bangkok, Beijing, Bratislava, Brussels, Bucharest (associated office), Budapest, Doha, Dubai, Düsseldorf, Frankfurt, Hamburg, Hong Kong, Jakarta (associated office), London, Luxembourg, Madrid, Mannheim, Milan, Moscow, Munich, New York, Paris, Perth, Prague, Riyadh (associated office), Rome, São Paulo, Shanghai, Singapore, Sydney, Tokyo and Warsaw.

The attached UIL proposal involves a commitment from News that 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, as far as possible, in the same proportions as their existing shareholding (so that 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. In particular, after closing:

- (a) 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;
- (b) a majority of the board of Newco shall comprise non-executive Directors determined by the board to be independent;
- (c) 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. In addition 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).

There will also be a number of commercial agreements between News/Sky and Newco, including a long-term carriage agreement which will provide Newco with a significant and committed long term revenue stream. None of the commercial agreements between News/Sky and Newco will give News/Sky any right to influence the editorial content of Sky News.

A business plan for Sky News and a letter from News' financial advisers regarding the suitability of Sky News for admission to trading will be made available to the Secretary of State in due course.

Ofcom states 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 attached UIL proposal, under which Sky News would be spun off as an independent legal entity, will fully safeguard the status quo as regards the editorial independence of Sky News and will ensure that Sky News remains as a distinct media enterprise and independent broadcast voice. This 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 will therefore remedy, mitigate or prevent any purported effects resulting from the Transaction which have been identified by Ofcom as potentially adverse to the public interest.

With such a robust structural remedy being offered by News, it is clear that a reference to the CC would serve no useful purpose. News submits that even if the Secretary of State would otherwise be minded to refer the Transaction to the CC, the only reasonable course in light of this offer of remedies is for the Secretary of State to accept UIL at this stage.

Yours sincerely

[Redacted Signature]

Partner

cc: [Redacted], News Corporation; [Redacted] Hogan Lovells International LLP; [Redacted] Allen & Overy LLP

**NEWS/SKY**  
**UNDERTAKINGS IN LIEU PROPOSAL**

**1. Introduction**

... 2011 01 Broadcasting Group plc

[Redacted content]

[Redacted content]

1.6

1.7

cc

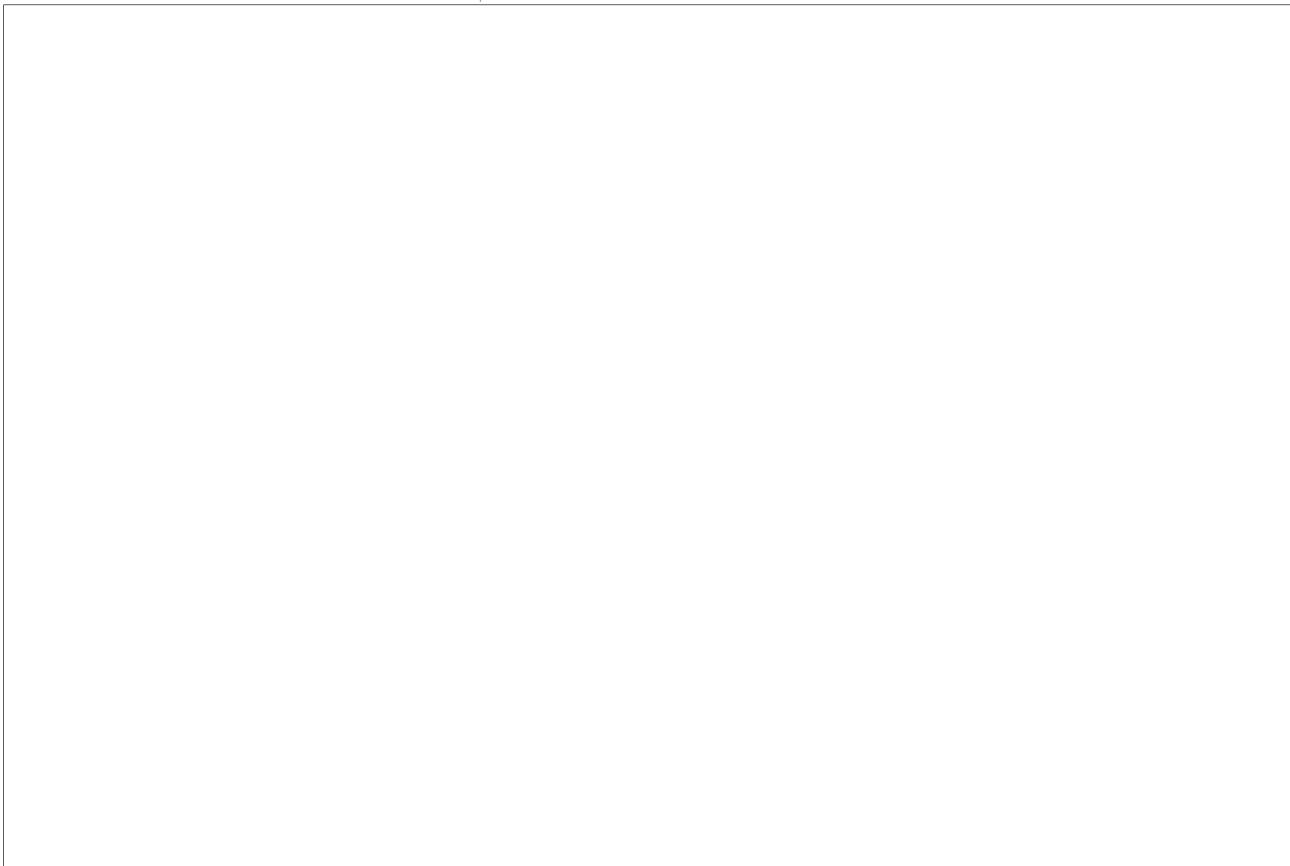
18 January 2011

- 1.8 Regardless of News' view that more than sufficient cross-media plurality would remain post-Transaction in any event, the concerns identified by Ofcom could not arise if Sky News was maintained as a distinct media enterprise as per the situation pre-Transaction.
- 1.9 Without prejudice to News' views on the outcome of a properly conducted media plurality analysis, in order to forestall any potential concerns which have been identified by Ofcom and avoid a CC reference which would create a serious risk to the successful completion of the Transaction, News is prepared to offer the UIL described below for the purpose of remedying, mitigating or preventing the potential effects of the Transaction which are perceived to be adverse to the relevant PIC.
- 1.10 This UIL is a structural solution which ensures the continued existence of Sky News as a distinct media enterprise and an independent editorial voice and preserves the pre-Transaction status quo, therefore negating any possible need for further regulatory review by the CC.
- 2. UIL Proposal - structural solution which will maintain the status quo with respect to Sky News**
- 2.1 News is prepared to offer a structural commitment that 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 (so that News will retain the same shareholding in Newco as it currently has in Sky, i.e. 39.1%, following completion).
- 2.2 News envisages that the structural solution will involve the following elements:
- (i) Sky will form a new public limited company incorporated under the laws of England and Wales as a subsidiary of Sky to which the business of Sky News (including its employees) will be transferred in exchange for shares in Newco. The transfer will extend to all the activities of Sky News, including the provision of wholesale news inputs to third party media enterprises.
  - (ii) Shares in Newco will be spun-off to existing shareholders of Sky (including News which will remain a shareholder) and will be publicly traded.
  - (iii) Sky will enter into a long-term carriage agreement with Newco under which Sky will pay a carriage fee to Newco for the provision of its news services to Sky for distribution to end users, thereby providing Newco with a significant and committed long-term revenue stream.
  - (iv) Sky will license to Newco the "Sky News" brand (subject to payment of a royalty and standard terms and conditions).
  - (v) Ongoing agreements for support services between Sky and Newco (including in relation to access to facilities, premises and other assets owned by Sky to the extent required by Newco) will be dealt with on an arms'-length basis. Sky will also provide advertising sales representation for Newco on agreed terms.
  - (vi) Newco will be adequately financed by virtue of Sky News being demerged [X] and via the long-term carriage agreement with Sky, together with other revenue streams, including existing revenues from activities such as the sale of advertising space, licensing and international distribution.
  - (vii) The corporate governance structure of Newco will be established to substantially replicate the effects of the existing corporate governance structure of Sky. In particular:

---

the foreseeable future). Consequently, these issues are irrelevant to the decision-making process and should be ignored by the Secretary of State.

18 January 2011



2.3



CO:13564333.1

MOD300004624





Note of a Meeting with News Corporation to discuss BSkyB merger - 20 January 2011

031

Attendees

DCMS

1. Secretary of State (SoS); Jon Zeff (Director, Media), Patrick Kilgarriff (Director, Legal), Daniel Beard (Counsel), Adam Smith (Special Advisor); Sue Beeby (Special Advisor), [redacted]

News Corporation

2. James Murdoch (Chairman, CEO Europe & Asia, News Corporation), Frederic Michel (Director; Public Affairs), [redacted]

Points Discussed

3. SoS made the following opening remarks:
  - i. The News Corp submission made some strong points but on the basis of the evidence presented he was still minded to refer the case to the Competition Commission (CC).
  - ii. It was essential to a robust outcome that the SoS act reasonably in coming to a decision. There was clear disagreement between the reports from News Corp and OFCOM respectively, and given the low threshold for referral, sending the case for further investigation was, in the SoS's view, the reasonable approach.
  - iii. However, SoS acknowledged News Corp had additionally submitted an Undertakings In Lieu (UILs) aimed at addressing any potential impact on the sufficiency of plurality (of news) from the proposed merger. The legal framework was clear that undertakings were permissible at this stage, and it was reasonable to give the UILs appropriate consideration before taking a final decision on whether to refer.
  - iv. This meeting would give News Corp the opportunity to discuss their submission, the subsequent UILs and the process to be followed from this point.
4. News Corp made the following points in discussion on their submission:
  - i. The News Corp submission starts from the point that the evidence compiled in the OFCOM report was not a legitimate foundation to base a decision on whether to refer to the CC. There were fundamental errors in the analysis, particularly around measures of reach and share alongside inappropriate weighting given to key assessment areas, not least the treatment of wholesale news. There was also a disregard of the impact of internet news consumption and the safeguards that ensure editorial independence.
  - ii. Moreover at the heart of the problem were errors in the way that OFCOM had undertaken the assessment of sufficiency of plurality. Plurality in the UK market had

increased hugely in recent times. Instead of assessing whether there was likely to be a change in plurality, as a result of the proposed merger, OFCOM should have undertaken an assessment of whether there was currently a sufficiency of plurality in the market, and if so, whether the proposed merger moved this assessment to one of insufficiency. In doing this, News Corp felt Ofcom should have given due weight to the precedents set in the BSkyB/ITV deal which failed to identify plurality issues in the UK market.

- iii. Had the assessment been undertaken in this way, Ofcom should have arrived at a different conclusion. There was a much higher threshold for CC referral than was suggested. Ofcom's approach to the 'Double May test' (set out in the 2003 Communications Act) would mean that all media mergers would be automatically referred to the CC.
  - iv. The dynamic analysis was wholly speculative and there was a need to ensure this aspect did not form part of the decision process.
  - v. OFCOM had not drawn the right conclusions despite acknowledging that multi-sourcing is relevant but not crucial to the decision, and that News Corp could not widen its influence on the overall news agenda as a result of this transaction.
  - vi. OFCOM should have given more weight to the presence of internal as well as external editorial independence constraints. The culture of internal editorial independence within News Corp was clearly recognised by Ofcom but this was not taken into consideration.
  - vii. The OFCOM assessment of minutes spent consuming news should have reflected the differences between reading a newspaper and watching a news programme on TV.
  - viii. The report reflected the bias displayed in the early part of this process, on which News Corp still reserved their rights.
  - ix. Under the Enterprise Act, SoS was not bound to follow Ofcom's recommendations. For the reasons explained in News Corp's submission, SoS's discretion to act in this case was key. This discretion was likely to reduce as the process and once CC had made recommendations.
5. In discussion of these points DCMS officials made the following observations:
- i. The interpretation of the 'double may' test had been established in the IBA merger case and it was not clear how the SoS decision could reasonably diverge from this. In the Sky/ITV merger it had been established that it was appropriate to consider sufficiency in the context of a change as deciding absolutes in these cases was extremely difficult.
  - ii. While a benchmark might be attractive the idea was likely to be contentious. Benchmarks would be continually shifting with issues dealt with ex ante and every

case assessed differently. While the statutory scheme didn't preclude such an approach it was difficult to see how it might be applied. There were many theoretical approaches to understanding sufficiency but it was not clear that there was any one right way to make an assessment. OFCOM had however clearly followed a precedent.

**6. Consideration of the UILs**

**7. News Corp made the following points in relation to their proposed remedy:**

- i. The main argument put forward by Ofcom and opponents of the merger was that it would result in the loss of Sky News as an independent voice. The UILs had therefore been constructed to ensure that there was no material change in the position of Sky News as an independent entity with independent status.
  - ii. This would essentially be achieved by separating Sky and Sky News into two entities and proceeding with the merger without Sky News as part of the deal. News Corp would guarantee a level of funding on a long term basis to ensure financial viability of Sky News. This would allow Sky News to operate independently as a UK plc and means that news provision no longer forms part of the proposed merger.
  - iii. Under the Enterprise Act, SoS has the power to accept UILs.
8. SoS explained that he was prepared to explore the proposal but would want to look very closely at the detail, including the implications for financial viability of an independent Sky News.

**9. Next steps**

**10. SoS wanted to ensure the process remained fair and transparent for all interested parties and next steps should therefore be:**

- a. Publish the Ofcom report (redacted for confidential information)
- b. Publish non-confidential version of News Corp's submission
- c. To announce that SoS was minded to refer to the CC, however News Corp have come back with a potential remedy which we were going to explore
- d. Alongside this, invite OfT to act on SoS's behalf to explore whether acceptable UILs could be reached.
- e. Ask OFCOM to offer specific advice on the UILs in relation to (i) plurality and (ii) financial sustainability
- f. Having worked through the detail, if SoS is minded to accept, there would follow statutory public consultation of 15 days, otherwise this would be referred to the CC

**11. In advance of that SoS would need:**

- a. An undertaking that the representations and UILs reflected the position of BSKyB.

- b. A summary of the UILs and the News Corp submission ready for public release
- c. Fully worked up UILs, upon which DCMS would seek OFCOM advice and publish in due course

56

# SLAUGHTER AND MAY

One Bunhill Row  
London EC1Y 8YY  
T +44 (0)20 7600 1200  
F +44 (0)20 7090 5000

032

Confidential

20 January 2011

Rt Hon Jeremy Hunt MP  
Secretary of State  
Department for Culture, Media & Sport  
2-4 Cockspur Street  
London SW1 5DH

Your reference

Our reference

Direct line

Dear Mr Hunt,

## News Corporation/BSkyB

I write to you further to my letter of 12<sup>th</sup> January. As before, I write on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group (together the "Concerned Parties").

It is now being reported (notably in today's Financial Times) that News Corporation has offered to divest Sky News – by way of remedial undertakings in lieu of reference to the Competition Commission ("CC").

This suggests a recognition by you of the substantial plurality issues raised by the proposed merger.

In order to be an effective remedy to those issues however, a divestment of Sky News would require editorial, operational, financial and commercial independence:

- Freedom from direct editorial influence – this would require, at least, that News Corporation (i) has no role in appointing or dismissing editors, (ii) has no role in setting editors' remuneration or other terms of employment, (iii) be prohibited from offering financial inducements such editors, such as positions in other News Corporation outlets (iv) be prohibited from communicating its preferences to the editor.
- Operational independence – this would require that News Corporation could not impede the operation of Sky News in order to influence content. For example, it would not be acceptable for (i) Sky News to be reliant on a pool of journalists shared with News Corporation; or (ii) Sky News to be reliant on News Corporation's broadcasting infrastructure, where News Corporation could provide less favourable distribution in the event that it wished to influence Sky News.

CP Sait  
SM Edge  
NPG Boardman  
GWF James  
EA Collington  
RMC Goulding  
GEO Seligman  
PJS Bennett  
RPE Fox  
KJ Thornhill  
CJ Ains  
CP White  
AG Archer  
AG Barker  
GM Horton  
EA Barrett

PP Chappera  
RKH Orling  
E Jelliffe  
CB Nield  
WSP Robinson  
RV Saxon  
St Edwards  
JM Featherby  
F Murphy  
MCGilroy  
PNSacey  
GWF Woodhill  
CA Woodham  
EJ Clark  
S Cooke  
DL Fisher

GW Harvey-Kelly  
JB Rice  
MA Whelan  
MD Stewart  
RD de Carlo  
SP Hall  
WJ Sorens  
AC Sturt  
JR Tings  
TCL Wyde  
A Beave  
D Boyce  
MEX Pittrell  
KJ Hodgson  
N van Buren  
Patterson

MEgan  
AM Hyman  
AC Johnson  
EF Gibbs  
CR Davis  
SR Campbell  
NDP Gray  
MS Hutchinson  
SBS Powell  
AC Hyde  
JAD Pickett  
SD Wainwright  
DA Wilkinson  
TS Reed  
S Lister  
A McCann

JC Tweedman  
EN Sabon  
HK Griffiths  
STM Lee  
AC Cheever  
EJR Holden  
GPH Hughes  
C Benson  
DR Johnson  
RE Levin  
S Pridemore  
SA Swallow  
DCA Waterfield  
DJ Woodard  
GS Cameron  
CA Conolly

PC Crobin  
SPPT Louveau  
MS Rowe  
MST Young  
S Doughty  
F Mitchell  
AR Ogle  
SA Parsonson  
PC Pratt  
HE Davies  
JC Puzos  
EA Stribey  
GF Brown  
JC Gorton  
RJ Smith  
WPC Watson

MF Dwyer  
GMR Jeffs  
SA Roberts  
MJ Tobin  
DC Watkins  
SAP Ho  
EC Brown  
NA Chapman  
J Edwards  
AD Kelly  
S Marshall  
JE Smith  
JA Spink  
JM Zeman  
SA Pitt  
CA Miles

GE O'Keefe  
T Harrold  
MJC Zander  
SFC Daniel  
R Gibson  
B Grogan  
MJA Taylor  
DA Lee  
MC Lane  
SNC Chung  
JP Smith

Registered by the Financial  
Regulation Authority  
firm SRA number 53388

Document number  
EC 3056122

SLAUGHTER AND MAY

- Financial independence – this would require Sky News to have access to sufficient sources of income to continue to fund its own news-gathering and distribution. It would not be acceptable for Sky News to be reliant on News Corporation for a substantial portion of its income, such that News Corporation could threaten to reduce funding in the event that it wished to influence Sky News. On the other hand, it is difficult to see how Sky News would be viable as a stand alone operation. I note here that in its submission to Ofcom, BSKyB emphasised how reliant Sky News is on financial support from BSKyB:

*"It is also relevant that Sky has invested for many years, and continues to invest, in the operation of Sky News as a distinct, impartial and independent news service, despite the unattractive returns available from such investments given the presence (among other services) of publicly funded rivals such as BBC News. Indeed, the Board of Sky (including the members of the Board connected to News Corporation) have for many years authorised growing investment in Sky News to that end as part of Sky's overall annual budgeting process."*

- Commercial independence – this would require Sky News to have its own market presence e.g. with its own marketing capability. For example, it would not be acceptable for Sky News to rely on News Corporation to market its advertising slots, such that News Corporation could materially affect Sky News' commercial success. Any commercial deal with New Corp would have to be at arms length.

The Concerned parties find it difficult to see how that could be achieved without wholesale divestment of BSKyB.

Divestment of stand alone Sky News would also not address concerns around bundling and other forms of exclusionary behaviour.

More generally, the issues are complex and not "clear cut". As per my earlier letter, the only sensible procedure in such a case is to refer the matter to the CC where those issues can be fully debated.

Yours sincerely,

[Redacted signature block]

[Redacted contact information]

cc.

[Redacted recipient list]

## Annex 2 - Behavioural Remedies

### 1. Introduction

- 1.1 The Concerned Parties have not yet been informed of the nature of any undertakings in lieu ("UILs") of reference to the Competition Commission ("CC") proposed by News Corporation in respect of its proposed takeover of BSkyB (the "Takeover").
- 1.2 However, the Concerned Parties wish to make some general observations on the risks of accepting behavioural undertakings without a full investigation by the CC.

### 2. UILs Must Provide a Clear-cut Remedy

- 2.1 The low threshold for a CC reference<sup>1</sup> means that a reference will be appropriate unless the UILs clearly eliminate all potential plurality concerns.

- 2.2 This is consistent with the approach of the OFT in merger cases. The OFT states that:

*"Undertakings in lieu of reference are...appropriate only where the...concerns raised by the merger and the remedies proposed to address them are clear-cut, and those remedies are capable of ready implementation."*<sup>2</sup>

- 2.3 The OFT explains that the clear-cut requirement has two dimensions:

- (i) **Effectiveness** - There must be no "material doubts about the overall effectiveness of the remedy".<sup>3</sup> Importantly, it goes on to explain that the greater the potential harm "the greater the belief must be on the part of the OFT that the undertakings comprehensively resolve" the concerns. Since news plurality is fundamentally important to the operation of a liberal democracy, the error risk of accepting inadequate UILs in respect of the Takeover is very high. As a result, UILs will only be appropriate where the Secretary of State is certain that they address the issues.
- (ii) **Complexity** - A remedy must not be so complex as to require unworkable resources during the first phase review.<sup>4</sup> Given the challenges of ensuring editorial independence whilst under 100% ownership, any behavioural undertaking would inevitably be too complex to constitute an appropriate UIL.

---

<sup>1</sup> A referral is appropriate if it "is or may be the case" that the Takeover "operates or may be expected to operate against the public interest" (Article 5(3) The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003).

<sup>2</sup> Paragraph 8.5 OFT Mergers: Jurisdictional and Procedural Guidance.

<sup>3</sup> Paragraph 5.5 OFT Guidance on Exceptions to the Duty to Refer and Undertakings in Lieu of Reference.

<sup>4</sup> Paragraph 5.5 OFT Guidance on Exceptions to the Duty to Refer and Undertakings in Lieu of Reference.



2.4 The OFT has noted that a behavioural remedy is especially unlikely to constitute an appropriate UIL, emphasising that *"it is difficult to design them so as to ensure that there are no loopholes and, even if this is achieved, circumvention can go undetected."*<sup>5</sup>

### 3. Remedy Must Ensure Sky News is Genuinely Independent

3.1 Ofcom advised that following the Takeover there may not be a sufficient plurality of persons providing news and current affairs to UK audiences.<sup>6</sup> Ofcom was especially concerned about bringing together one of the three main providers of TV news (BSkyB) and the largest provider of newspapers (News Corporation).<sup>7</sup>

3.2 It is clear that in order to address these concerns in a clear-cut manner, any UIL must ensure the separation of at least the news and current affairs operations of BSkyB's TV business from News Corporation's newspapers. Unless Sky News is entirely free from control or influence by News Corporation, the undertaking will not address the concerns identified by Ofcom.

### 4. Essential Requirements to Ensure Independence of Sky News

4.1 In the absence of information on News Corporation's remedy proposals, we assume that any behavioural remedy would attempt to ring-fence (at least) Sky News from control or influence by News Corporation.

4.2 The Concerned Parties consider that Sky News could only be properly ring-fenced from News Corporation if it had (i) editorial, (ii) operational, and (iii) financial independence:

- (i) Freedom from direct editorial influence – this would require that News Corporation (i) has no role in appointing or dismissing senior managers or editors, (ii) has no role in setting editors' remuneration or other terms of employment, (iii) be prohibited from offering financial inducements to editors, such as positions in other News Corporation outlets and (iv) be prohibited from communicating its preferences to editors.
- (ii) Operational independence – this would require that News Corporation could not impede the operation of Sky News in order to influence content. The editors of Sky News could not pursue an independent agenda if, for example, they were reliant on a pool of journalists shared with News Corporation or if Sky News was reliant on News Corporation for its effective distribution.

---

<sup>5</sup> Paragraph 5.41 OFT Guidance on Exceptions to the Duty to Refer and Undertakings in Lieu of Reference.

<sup>6</sup> Paragraph 7.1 OFCOM Report.

<sup>7</sup> Paragraph 5.124 OFCOM Report.

- (iii) Financial independence – this would require Sky News to have access to sufficient sources of income to continue to fund its own news-gathering and distribution. The editors of Sky News could not pursue an independent agenda if, for example, News Corporation could threaten to reduce funding.

The importance of financial influence has been noted by Andrew Neil (a former editor of The Sunday Times whose independence was notionally protected by a behavioural undertaking (see further below). Neil explained that if he sought to remain in post following a serious disagreement with Rupert Murdoch "my position would have become untenable...he would have found ways of making life pretty intolerable for the editor. It would not have been a case of just being fired right away, but it would have been a case of money drying up, budgets not appearing."<sup>8</sup>

4.3 It is clear from the above that an undertaking relating only to editors or editorial staff would be wholly inadequate to ensure that Sky News was genuinely independent of News Corporation. First, even if the editors' positions were safeguarded, it would be unrealistic to expect that they would be indifferent to indirect influence. Secondly, even if the Sky News editor was entirely free from influence, News Corporation could still use operational or financial control to reduce Sky News' ability to contribute to plurality. There are a range of means that could be used to indirectly influence editors or reduce Sky News' contribution to news plurality. For example, even if News Corporation is restricted from appointing/dismissing editors, it could influence editors or otherwise reduce Sky News' contribution to news plurality if it was able to, for example:

- (i) Appoint other senior management who were hostile to the editors;
- (ii) Dismiss staff whom the editors considered to be important team members (but who are not covered by any undertakings);
- (iii) Cut the Sky News budget; or
- (iv) Reduce Sky News' distribution on the BSkyB network.

4.4 Furthermore, it is not sufficient to maintain Sky News in stasis – with the risk that its contribution to plurality gradually diminishes through lack of investment and innovation. Any effective remedy must ensure that it has the means to develop and innovate such that it can continue as a leading news provider in a rapidly evolving media market. For example, it would be necessary to ensure that News Corporation could not withhold any investment in Sky News which is essential to take advantage of future technological developments. If this investment is not guaranteed by the undertakings, the threat of

---

<sup>8</sup> Paragraph 189 House of Lords Select Committee on Communications "The Ownership of the News" (2008).

withholding investment is another means by which News Corporation could influence Sky News or otherwise reduce its contribution to new plurality.

4.5 Finally, any behavioural undertaking needs to prevent not only deliberate attempts by News Corporation to influence Sky News but also address the risk that individuals at Sky News exercise voluntary (even subconscious) self-censorship such that it does not pursue a genuinely independent agenda. This process of self-censorship within News Corporation has been described by Bruce Guthrie (former editor of The Herald Sun) who explained that *"At News Limited, the almost instinctive reaction to everything is 'What will Rupert think?'". It doesn't matter whether you're an editor, or a commercial manager or a section head, you put your views through this kind of filter.*<sup>9</sup> As outlined in the Concerned Parties submission to Ofcom dated 19 November 2010, this form of self-censorship seems inevitable given that any editor must be expected to give some regard to the views of the ultimate boss. It is not clear how a behavioural undertaking can guard against the Sky News agenda being influenced as a result of this type of self-censorship and such issues require a full investigation by the CC.

4.6 It is clear that any behavioural undertaking which sought to address the above issues would be immensely complex and therefore inappropriate as a ULL. For example, it would be necessary to specify the circumstances in which News Corporation would be required to invest in Sky News. This complexity in turn increases the risk that any behavioural undertaking could not be effectively enforced because it would be very difficult to distinguish a legitimate commercial decisions from illegitimate attempts to influence Sky News' policy. For example, in the event that News Corporation refused a proposed investment in Sky News it would be very difficult to discern whether this was an attempt to discipline an unsatisfactory editor or a legitimate decision based on a commercial analysis of the proposal.

## 5. Precedents Confirm Difficulties with Behavioural Undertakings

5.1 The above concerns in respect of behavioural undertakings are compounded by experience in previous cases where News Corporation has given behavioural commitments to safeguard editorial independence.

5.2 The Concerned Parties submission to Ofcom dated 19 November 2010 provides a range of evidence on the ineffectiveness of the editorial independence undertakings provided by News International when it purchased The Times in 1980. This includes evidence from two editors and one of the independent directors that the undertakings were ineffective. This evidence is consistent with the view of the House of Lords Committee on Communications which stated that *"it is questionable how effective the Independent National Directors [the system required by the undertakings] have been..."*<sup>10</sup>

<sup>9</sup> Interview with Australian Broadcasting Corporation 12 October 2010.

<sup>10</sup> Paragraph 217 House of Lords Select Committee on Communications *"The Ownership of the News"* (2008).

5.3 When News Corporation acquired Dow Jones (the company that owns The Wall Street Journal) it agreed to appoint a Special Committee. The Special Committee's approval is required (amongst other things) to dismiss an editor. However, reports suggest that News Corporation was able to change the editorial staff of the newspaper notwithstanding these arrangements. For example, it is reported that managing editor Marcus Brauchli was induced to resign (avoiding the need for approval from the Special Committee) shortly after the acquisition was completed.

**6. Conclusion**

6.1 In light of the above issues, the Concerned Parties consider that a behavioural remedy will not satisfy either limb of the OFT's "clear-cut" criteria.

6.2 First, given the range and complexity tactics that News Corporation might use to influence Sky News, it is not possible to draft behavioural undertakings which would effectively preserve Sky News' independence to the exclusion of any material doubt. Secondly, any undertaking which sought to address all of the relevant issues would be much too complex to be appropriate as a UIL.

6.3 Accordingly, it is clear that no behavioural undertaking would be appropriate in lieu of a reference to the CC.

506908394

~~032A~~

032A

BY EMAIL ONLY

STRICTLY CONFIDENTIAL

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

Tel +44 (0)20 3088 0000  
Fax  
Direct

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

Our ref

24 January 2011

Dear

**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.

Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. It is regulated by the Solicitors Regulation Authority of England and Wales. The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at its registered office, One Bishops Square, London E1 6AD.

Allen & Overy LLP or an affiliated undertaking has an office in each of: Abu Dhabi, Amsterdam, Antwerp, Athens, Bangkok, Beijing, Bratislava, Brussels, Bucharest (associated office), Budapest, Doha, Dubai, Düsseldorf, Frankfurt, Hamburg, Hong Kong, Jakarta (associated office), London, Luxembourg, Madrid, Mannheim, Milan, Moscow, Munich, New York, Paris, Perth, Prague, Riyadh (associated office), Rome, São Paulo, Shanghai, Singapore, Sydney, Tokyo and Warsaw.

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.

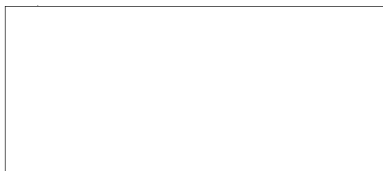
**Conclusions**

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



**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

---

OPINION

---

Allen & Overy

One Bishops Square

London E1 6AD

Tel : 0203 088 0000

Fax : 0203 088 0088

Ref :

032B

## ENDERS|ANALYSIS

24 January 2011

The Right Hon. Jeremy Hunt, MP  
Secretary of State  
Department of Culture, Olympics, Media and Sport  
2-4 Cockspur Street  
London  
SW1Y 5DH

Dear Jeremy,

### News Corp/BSkyB – Private and Confidential

I apologise for troubling you in what must be a very busy week for you and your Department. I thought that I should write to you to point out some of the implications of the reports about phone-hacking. This letter will not be made public by Enders Analysis and will not be circulated to our clients or to journalists. I have compiled the letter to support your own thinking.

The public interest consideration established in the 2003 Communications Act includes three separate clauses. The first, plurality, was the basis of the intervention notice issued by Vince Cable in the proposed News Corp/BSkyB transaction. The third consideration is whether the acquiring company shows 'genuine commitment' to broadcasting standards.

The guidance note issued by the then Department of Trade and Industry after the passage of the Communications Act makes clear that you (in your role as the responsible Secretary of State) should take note of the behaviour of the acquiring company in other media industries. The precise wording on page 31 is as follows.

*...in considering how such a merger may impact on the range and quality, or the standards, of UK broadcasting, the Secretary of State considers it is reasonable to have regard to any relevant information as to the track record both of the enterprise seeking to acquire a broadcaster and of those who control it. In particular, where a relevant merger or special merger situation involves a broadcast media enterprise and a newspaper enterprise, she may look at any relevant information as to how either the broadcasting or newspaper enterprise has run their affairs.*

Page 1 of 3

46A Great Marlborough Street London W1F 7JW

T +44 (0)207 851 0900 F +44 (0)207 851 0919 E info@endersanalysis.com W www.endersanalysis.com

Enders Analysis Ltd. Registered in Scotland Number: SC170417. Registered Office: Whitehall House 33 Yeaman Shore Dundee DD1 4BJ. VAT Registration Number: 693 9750 74

MOD300004648



## ENDERS|ANALYSIS

Similarly, on page 36 the Guidance says that 'the Secretary of State will consider the likelihood that there will be a genuine commitment to broadcasting standards' at the business taking over a TV company. In assessing this likelihood, you are entitled to take note of

*the record of any non-broadcasting media enterprise's compliance with standards applicable to those media enterprises might also be considered, as adding to the overall assessment of an enterprise's commitment to standards in markets where it operates. This would include standards imposed under self-regulatory regimes.*

In the case of the proposed takeover of BSkyB, the record of the acquiring company's other UK ventures, including its daily and Sunday newspapers, should therefore be weighed in the balance. The last few weeks have seen considerable press coverage of one of News Corporation's UK newspapers, the News of the World. The newspaper is widely reported to be paying money to those involved in the phone-hacking episodes in order to procure their continued silence.

I have no information on whether these reports are accurate. But, if they were to be true, there must be a possibility that senior people in News Corporation's UK newspaper business are aware of the payments. If money has changed hands with the aim of silencing potential witnesses, this action might at some stage be determined to be an obstruction of justice.

If this were to happen, the fitness of News Corporation to own 100% of a broadcasting business in the UK and its 'genuine commitment' to broadcasting standards would be under question. Perhaps the News of the World's behaviour was no different to other British newspapers. But if so, this would not excuse its actions. It would simply mean that the ethical standards across the British newspaper industry are not sufficiently high for their owners to be fit and proper owners of TV companies broadcasting to UK audiences.

You will have noticed that Northern & Shell, owner of several newspapers, has just withdrawn from the self-regulatory body covering British newspapers. It now owns a public service broadcasting channel. As it turns out, Northern & Shell's behaviour in other media industries does not suggest a 'genuine commitment' to the demanding standards laid down in Ofcom's Broadcasting Code. But it is now too late to question whether Northern & Shell should have been allowed to purchase a PSB channel.

Page 2 of 3

46A Great Marlborough Street London W1F 7JW

T +44 (0)207 851 0900 F +44 (0)207 851 0919 E [info@endersanalysis.com](mailto:info@endersanalysis.com) W [www.endersanalysis.com](http://www.endersanalysis.com)

Enders Analysis Ltd. Registered in Scotland Number: SC170417. Registered Office: Whitehall House 33 Yeaman Shore Dundee DD1 4BJ. VAT Registration Number: 693 9750 74

MOD300004649

## ENDERS|ANALYSIS

On the other hand, a five month investigation by the Competition Commission of the BSkyB proposal would allow further time to assess whether News Corporation has behaved to the high standards required of owners of UK broadcasters. The civil court actions will be heard relatively quickly and the serious allegations made about News Corporation's conduct will eventually be tested in court and, hopefully, resolved one way or another.

I and my team are, as ever, at your disposal.

With best wishes,



Claire Enders

033

**PROPOSED ACQUISITION BY NEWS CORPORATION OF UP TO 60.9 PER CENT OF BRITISH  
SKY BROADCASTING GROUP PLC**

**UNDERTAKINGS GIVEN BY NEWS CORPORATION PURSUANT TO PARAGRAPH 3 OF  
SCHEDULE 2 OF ENTERPRISE ACT (PROTECTION OF LEGITIMATE INTERESTS) ORDER 2003**

**WHEREAS:**

- (a) News Corporation proposes to acquire the shares in British Sky Broadcasting Group plc that it does not already own.
- (b) On 4 November 2010 the Secretary of State for Business, Innovation and Skills issued a European Intervention Notice under section 67(2) of the Act and the Order in connection with the Transaction.
- (c) On 31 December 2010, Ofcom provided its report to the Secretary of State on issues of media plurality (as provided for in Article 4A of the Order) and on 30 December 2010 the OFT provided its report to the Secretary of State on the creation of a European relevant merger situation pursuant to Article 4(4) of the Order.
- (d) The Secretary of State considers that the conditions for referring the Transaction to the CC under Article 5 of the Order are met and, absent any offer of undertakings from News, he would be minded to refer the Transaction to the CC.
- (e) The Secretary of State has a discretion to accept undertakings in lieu of reference from News under paragraph 3 of Schedule 2 of the Order:

*"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 [he] considers appropriate undertakings to take such action as [he] considers appropriate."*

- (f) The Secretary of State considers that the undertakings given below by News are appropriate to remedy, mitigate or prevent the effects adverse to the public interest which may be expected to result from the creation of the European relevant merger situation.

**NOW THEREFORE** News hereby gives to the Secretary of State the following undertakings for the purpose of remedying, mitigating or preventing the effects adverse to the public interest which may be expected to result from the Transaction.

**1. EFFECTIVE DATE OF THE UNDERTAKINGS**

- 1.1 These undertakings shall take effect from the date that, having been signed by News, they are accepted by the Secretary of State.

**2. SPIN-OFF OF SKY NEWS BUSINESS**

- 2.1 News shall effect the spin-off of the Sky News business into an independent English public limited company, Newco, the shares of which will be publicly traded, using its best endeavours and acting in good faith, at the Closing Date or as soon as reasonably practicable following the Closing Date and

in any event within 9 months of the Closing Date, subject to any extension of time agreed with the consent of the Secretary of State. Shares in Newco will be distributed to the shareholders of Sky in the same proportions as their shareholdings in Sky.

2.2 News will take (or procure the taking of) the following steps to achieve the spin-off of Newco to the shareholders of Sky:

- (i) the formation of Newco as a new public limited company incorporated under the laws of England and Wales as a Subsidiary of Sky;
- (ii) the spin-off of shares in Newco to shareholders of Sky in the same proportions as their shareholdings in Sky under arrangements that cause the resulting News shareholding in Newco on completion of the spin-off to be 39.1%, equal to its current shareholding in Sky;
- (iii) the putting in place of arrangements for the public trading of Newco shares;
- (iv) the establishment of the corporate governance arrangements set out in section 3 below;
- (v) the transfer of the business of Sky News (as set out in section 4 below) into Newco in exchange for shares in Newco; and
- (vi) the entering into of the agreements between Sky and Newco set out in sections 4.3, 4.5 and section 5 below.

### 3. CORPORATE GOVERNANCE OF NEWCO

3.1 News shall ensure that the corporate governance structure of Newco shall be established to substantially replicate the effects of the existing corporate governance structure of Sky. In particular:

- (i) News shall be subject to a voting limitation of 37.19% of the total votes of Newco on the same terms as currently apply in relation to Sky;
- (ii) a majority of the board of Newco shall comprise non-executive directors determined by that board to be independent;
- (iii) material transactions between Newco and News or Sky shall require the approval of Newco's audit committee, which shall consist exclusively of independent non-executive directors. In addition Newco's constitutional documents shall 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); and
- (iv) Newco shall also adhere to the obligations imposed by the Listing Rules as regards compliance with the principles set out in Section 1 of the UK Corporate Governance Code.

### 4. SKY NEWS BUSINESS TO BE HELD WITHIN NEWCO

4.1 News will cause the Sky News business to be transferred, as a going concern, to Newco. This will require the transferring or making available of those assets required to conduct the Sky News business, including:

- (i) all or substantially all tangible assets currently used exclusively for the purposes of carrying on Sky News' business. Arrangements will also be made for Newco to have the use of assets

which are not used exclusively in the Sky News business on normal market terms if so requested by Newco;

- (ii) all Key Sky News Editorial Staff and all or substantially all staff currently engaged principally in the Sky News business, including news gathering staff, production, online and multimedia staff and Sky News international staff; and
- (iii) all or substantially all licences, permits, consents and authorisations issued by any governmental or regulatory organisation for the benefit or purpose of the Sky News business (and, to the extent that such licences, permits, consents or authorisations are not capable of transfer, News will endeavour to assist Newco in applying for new licences, permits, consents or authorisations).

4.2 Without prejudice to the generality of 4.1, and subject to obtaining the necessary third party consents, News will also use all reasonable endeavours to procure that there shall be transferred or made available to Newco:

- (i) the benefit and burden of any carriage agreements between Sky and third parties (including with Virgin Media and UPC) for the distribution of the Sky News TV channel. News will use all reasonable efforts to ensure that these agreements are transferred directly to Newco;
- (ii) Arqiva capacity for one standard definition channel until the expiry of Sky's existing capacity agreement with Arqiva in respect of the broadcast of Sky News on Freeview;
- (iii) the benefit and burden of wholesale contracts entered into by Sky for the supply of news content to Channel 5 and IRN; and
- (iv) the benefit and burden of all or substantially all contracts to which Sky News is party associated with fixed newsgathering.

4.3 In addition News will ensure that Sky enters into a **Carriage Agreement** with Newco under which Sky News channels and services will be provided to Sky on a wholesale basis for distribution by Sky to viewers or subscribers in return for the payment of a carriage fee by Sky to Newco in a form to be approved by the Secretary of State prior to the Effective Date.

4.4 News will be deemed to have complied with the obligation at 4.3 so long as Sky has entered into a Carriage Agreement with Newco which:

- (i) is for a term of 10 years;
- (ii) does not provide Sky (or News) with any ability to determine or influence the editorial content of Sky News output or the appointment or termination of editors or other staff of Newco;
- (iii) is terminable by Sky only in the event of material breach that has not been cured or in the event that Newco ceases to provide output which is branded "Sky News"; and
- (iv) (subject to EPG regulation and any FRND changes to Sky's EPG listing policy) obliges News to use its best endeavours to ensure that Newco is provided with an EPG slot which is no worse than Sky News' current EPG slot.

4.5 News will ensure that Sky will enter into a royalty-bearing **Brand Licensing Agreement** with Newco, under which Newco will receive a licence of the Sky News brand for an initial 7 year term,

with an automatic renewal for a further 7 years, and which may then be extended at the option of Newco for a further 3 years.

4.6 News will be deemed to have complied with the obligation at 4.5 so long as the Brand Licensing Agreement entered into between Sky and Newco:

- (i) permits Newco to use the Sky News brand in connection with its news output;
- (ii) does not provide Sky or News with any ability to determine or influence the editorial content of Sky News output or the appointment or termination of editors or other staff of Newco; and
- (iii) is terminable by Sky only in the event of a material breach that has not been cured and/or in the event of a change in Control of Newco.

## 5. OPERATIONAL AGREEMENTS BETWEEN SKY AND NEWCO

5.1 News will ensure that Sky will, if required by Newco, enter into the agreements listed below with Newco under which Sky will provide facilities and support services to Newco, on arms'-length terms, including:

- (i) an advertising sales agreement between Newco and Sky under which Sky will sell advertising and sponsorship on behalf of Newco for a term of up to 3 years (or such shorter time as required by Newco);
- (ii) a lease of land and buildings under which Sky will agree to lease the existing Sky News land and buildings to Newco for a period of up to 15 years (or such shorter time as required by Newco);
- (iii) a site support services agreement under which Sky will agree to provide certain support services to Newco while Newco leases premises from Sky including IT support services for a term comparable with the term of the lease; and
- (iv) a broadcast and technical services agreement under which Sky will offer satellite capacity, playout and uplink, DTT transmission, online transmission and mobile distribution to Newco for a term of up to 10 years (or such shorter time as required by Newco).

## 6. COMPLIANCE

6.1 News shall comply promptly with such written directions as the Secretary of State may from time to time give:

- (i) to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with these undertakings; or
- (ii) to do or refrain from doing anything so specified or described which they might be required by these undertakings to do or to refrain from doing.

6.2 News shall procure that any member of the same Group of Interconnected Bodies Corporate as News complies with these undertakings as if it had given them and actions and omissions of the members of the same Group of Interconnected Bodies Corporate as News shall be attributed to News for the purposes of these undertakings.

- 6.3 Where any Affiliate of News is not a member of the same Group of Interconnected Bodies Corporate as News, News shall use its best endeavours to procure that any such Affiliate shall comply with these undertakings as if it had given them. Post the Closing Date, Sky shall be treated as an Affiliate of News for the purposes of this paragraph.

## 7. PROVISION OF INFORMATION

- 7.1 News shall furnish promptly to the Secretary of State such information as the Secretary of State considers necessary in relation to or in connection with the implementation and/or enforcement of and/or the compliance with these undertakings, including for the avoidance of doubt, any confidential information.

## 8. INTERPRETATION

- 8.1 The Interpretation Act 1978 shall apply to these undertakings as it does to Acts of Parliament.
- 8.2 References in these undertakings to any English law term for any legal status, interest, concept or thing shall in respect of any jurisdiction other than England and Wales be deemed to include what most nearly approximates in that jurisdiction to the English law term.
- 8.3 In these undertakings the word "including" shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word and the word "include" and its derivatives shall be construed accordingly.
- 8.4 For the purposes of these undertakings:

"the Act" means the Enterprise Act 2002;

"Affiliate" of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on and any enterprise that the second person carries on from time to time would be regarded as being under common control for the purposes of section 26 of the Act;

"Brand Licensing Agreement" has the meaning set out in 4.5 above;

"business" has the meaning given by section 129(1) and (3) of the Act;

"Carriage Agreement" has the meaning set out in 4.3 above;

"CC" means the Competition Commission;

"Closing Date" means the date on which News acquires all or a majority of the share capital of Sky or, if the Transaction is effected by a scheme of arrangement, the date on which the scheme of arrangement becomes effective;

"Control" shall be construed in accordance with section 26 of the Act, and in the case of a body corporate, a person shall be deemed to Control it if he holds, or has an interest in, shares of that body corporate amounting to 40 per cent or more of its issued share capital or carrying an entitlement to vote at meetings of that body corporate of 40 per cent or more of the total number of votes which may be cast at such meetings;

"Effective Date" means the date that, having been signed by News, these undertakings are accepted by the Secretary of State, as described at 1.1 above;

"EPG" means Electronic Programme Guide;

DRAFT: 24 January 2011

**"Group of Interconnected Bodies Corporate"** has the meaning given in section 129(2) of the Act; references to a Group of Interconnected Bodies Corporate shall be to the Group of Interconnected Bodies Corporate as constituted from time to time;

**"Key Sky News Editorial Staff"** means the head of Sky News, the executive editor of Sky News and the head of newsgathering of Sky News;

**"Newco"** means the public limited company into which the business of Sky News will be transferred and which will continue to operate that business, as described at 2.1 above;

**"News"** means News Corporation;

**"OFT"** means the Office of Fair Trading;

**"the Order"** means the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;

**"Secretary of State"** means Secretary of State for Culture, Olympics, Media and Sport (except as context otherwise requires);

**"Sky"** means British Sky Broadcasting Group plc;

**"Sky News"** means the business of news gathering and production, and creating and offering (whether on a free to air or subscription basis) the broadcast news channels currently branded "Sky News" and "Sky News HD" and related services under the Sky News brand and/or news services provided to third parties, including the wholesale provision of news input to third party media enterprises. For the avoidance of doubt, "Sky Sports News" is a separate business which will remain under the sole control of Sky;

**"Subsidiary"** shall be construed in accordance with section 1159 of the Companies Act 2006 (as amended), unless otherwise stated; and

**"Transaction"** means the proposed acquisition by News of some or all of those shares in Sky that it does not already own.



034

[Redacted]

**From:** [Redacted]  
**Sent:** 24 January 2011 17:40  
**To:** [Redacted]  
**Cc:** STÉPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; [Redacted] BEEBY, Sue; SMITH, Adam; MARTIN LINDA  
**Subject:** RE: news corp/sky merger  
**Attachments:** WRITTEN STATEMENT.Final draftdoc.doc

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Thank you for your submission.

The Secretary of State has approved the recommendation to make a statement tomorrow indicating that he intends to refer the proposed merger to the CC subject to first considering the undertakings in lieu (UIL) proposed by News Corp.

I attach a final version of the statement with SoS amends. No more changes please unless Patrick or Counsel advise there are good legal reasons for doing so.

Very grateful if we could have a further submission before the end of the week setting out recommendations for next steps.

Many thanks

---

**From:** [Redacted]  
**Sent:** 24 January 2011 15:46  
**Cc:** STÉPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [Redacted] BEEBY, Sue; SMITH, Adam  
**Subject:** news corp/sky merger  
**Importance:** High

As promised.

[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

DCMS  
2-4 Cockspur Street  
London SW1Y 5DH





Broadcasting

London SW1Y 5DH Fax  
www.culture.gov.uk

035

Attention & Overy  
One Bishops Square  
London E1 6AD

Your Ref

Our Ref

24 January 2011

Dear

News Corporation – British Sky Broadcasting Group Plc

Thank you for your letter of 24 January 2011.

I note that draft undertakings will be received in these offices shortly.

We have taken on board the representations you made as to process, both at your meeting with the Secretary of State, and at our meeting on Friday. We understand that you are concerned that the process be transparent, expeditious and legally sound. The Secretary of State shares those concerns entirely.

Turning to the specific matters you raise:

**Role of the OFT**

We agree that the Secretary of State is not obliged, but has a discretion, to involve the OFT in process of consideration of undertakings. However, we do not agree that section 93 is as prescriptive as your letter implies. We do not read the section as requiring the Secretary of State to take an "in principle" decision to accept a proposal you have made before the OFT could become involved. Nor do we understand the basis for any suggestion that the OFT can only be involved in "issues regarding the implementation" of any UIL's, that does not seem to us consistent with the wording of s.93.

In addition, we would note that your reference to the words "...undertakings which [the Secretary of State] would be prepared to accept..." as support for an interpretation that the OFT can only be involved after an "in principle" decision seems to us not to recognise the impact of the directly preceding words of that sub-section: it is clear from them that the OFT can be required to consult with a view to discovering whether a person will offer such undertakings.

We consider that the statutory scheme permits the Secretary of State to take the view that he should consider whether to accept the undertakings your client has offered and allows him to



Department for Culture, Media and Sport

involve the OFT in that process of consideration. If the Secretary of State reaches a position that he proposes to accept the undertakings in lieu of a reference, he will, of course, put them out for consultation as required under the terms of the Enterprise Act.

### Role of Ofcom

We were not entirely sure we understood your observation that Ofcom does not have any defined statutory role in relation to undertakings. We consider that accepting any undertakings in lieu of a reference would amount to the taking of enforcement action by the Secretary of State and, as such, would fall within the scope of s.106B of the Enterprise Act (read with the Legitimate Interests Order). On that basis it would seem to us that the Secretary of State is clearly permitted to seek Ofcom's advice.

Quite apart from the statutory powers, however, it seems to us that there is a real benefit in understanding the views of Ofcom (and the OFT) in relation to any proposals you are making. It would seem to us that understanding those bodies' thoughts earlier rather than later in the process will ensure that any undertakings the Secretary of State might be minded to accept would be more fully worked out and any potential difficulties dealt with. Equally, if they raised concerns that the undertakings were unworkable or insufficient, it would, again be better to know sooner.

### Publication of the Ofcom report

As we discussed on Friday, the Secretary of State is required to publish the Ofcom report either on or before publication of his own decision on whether to refer a transaction subject to a European Intervention Notice. We do not accept that a decision to publish the report in advance of a substantive decision would harm the process. It is clearly envisaged by the statutory regime. In the present case the Secretary of State considers such a step appropriate.

### Conclusions

You have asked that we confirm whether the Secretary of State is minded to publish Ofcom's report in advance of the publication of any decision he may make in principle on the undertakings offered by your client. We can confirm that it will be published tomorrow and we have already had contact with News Corporation and indicated that to them. You indicated that upon such confirmation, you will provide a non-confidential bundle of News' submissions for publication alongside that report.

In relation to your final question, we can confirm that the Secretary of State is concerned that the requirements of due process under the statutory scheme are complied with and will, therefore, ensure that if he proposes to accept undertakings in lieu from News Corporation, he will consult on those undertakings in line with the statutory procedure.

I also confirm receipt of your second letter of today's date, which enclosed the confidential version of your client's submissions.

Yours sincerely



~~036~~

To: 1. Jeremy Hunt

From: [redacted]

036

Team: media

Tel: [redacted]

Date: 24/01/2011

**NEWS CORP BSKYB PROPOSED MERGER**

**Issue**

Next steps on proposed News Corp/BSkyB merger.

**Recommendation and Timing**

That you

- make a statement tomorrow saying that you intend to refer the proposed merger to Competition Commission but will first consider undertakings in lieu (UIL) proposed by News Corp (Annex A)
- inform News Corp and Sky of your decision.

**Background**

See attached PWS.

**Advice**

The Ofcom report concludes that it may be the case that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises. This "double may" test represents a low threshold for referral and following a number of discussions, including with legal advisers, I understand that you have concluded that this threshold is met. However, under the legislation you may consider undertakings in lieu offered by the negating parties. News Corp have now provided you with outline proposals for UIL and these would appear to offer a possible way of preventing or mitigating against the possible threat to plurality posed by the merger. Under these circumstances, if you believe that these UIL could offer a way forward, it is right for you to ask Ofcom and the OFT to consider them in more detail with a view to helping you to decide whether or not they would be acceptable. If, having had their further advice, you are satisfied that they are, you will need to have a formal consultation of at least 15 days during which all interested parties can comment. At the end of the consultation period it will be for you to reach a final decision on whether to refer the decision or accept the UIL and let the merger proceed,

**Clearance**

This has been cleared by Jon Zeff

cc.

**RESTRICTED**

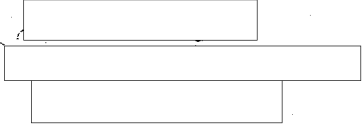
Jonathan Stephens

Jon Zeff

Patrick Kilgarriff

Linda Martin

Carola Geist-Divver





EST  
037

HOUSE OF COMMONS  
LONDON SW1A 0AA

The Rt Hon Jeremy Hunt MP  
Secretary of State  
Department for Culture, Media & Sport  
2-4 Cockspur Street  
London  
SW1Y 5DH

24<sup>th</sup> January 2011

Dear Jeremy,

In light of recent revelations I write to ask you to commission a further report from Ofcom, concerning the bid for BSkyB by Rupert and James Murdoch's News Corp.

As you know, the News Corp proposal was investigated by Ofcom under the public interest provisions of the Enterprise Act 2002. There are three sub-clauses: 'plurality', 'range of broadcasting' and 'commitment to broadcasting standards'. The original referral only looked at 'plurality'.

I would like the transaction investigated under the 'broadcasting standards' category.

Section 58 of the Enterprise Act 2002 provides the Specified Considerations of which 2 C specifies:

"The need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003".

Section 319 of the Communications Act contains the Ofcom code.

Paragraph 2 a) states "that persons under the age of 18 are protected".

Paragraph 2 b) of the code states "that material likely to encourage or to incite the commission of crime or lead to disorder is not included in television and radio services".

Paragraph 2 d) of the code "that news included in television and radio services is reported with due accuracy".

The investigation is entitled to study whether the acquirer has shown evidence of bad practice in its other media companies.

In terms of generally criminal conduct; you will well know of the News of the World's industrial use of material acquired by illegal phone-hacking. Two individuals formerly employed by the News of the World have been imprisoned for offences related to this practice and two current employees are suspended following material obtained by civil actions against the newspaper. The police have re-referred the matter to the CPS. There is no doubt that there is much more yet to come to reveal the extent of the activities.

In terms of criminal activity in addition to phone-hacking, in the Max Mosley trial it was noted by Mr Justice Eady that the News of the World's "Chief Reporter", Neville Thurlbeck, (who is also implicated in phone hacking but has not been suspended) committed blackmail in trying to coerce stories from the women involved. Mr Justice Eady expressed shock that the Editor Colin Myler had not deemed it fit even to discipline Mr Thurlbeck for this serious criminal offence.

In other News of the World stories, such as those involving Edward Terry (John Terry's father) and John Higgins, the snooker player, journalists have demonstrated that entrapment and inciting criminal activity is an integral part of their standard modus operandi. This approach is directly contrary to the requirement in 2 b) of the Ofcom code.

The continued payment of legal fees to the convicted private investigator Glenn Mulcaire and the enormous sums paid to settle and keep confidential civil actions raises further questions of News Corp's ongoing conduct in this matter and its commitment to revealing the truth.

The convicted phone hacker, Clive Goodman, was paid a substantial severance fee linked to a confidentiality agreement, despite being guilty of a criminal offence that would constitute gross misconduct. I refer you to the House of Commons Culture, Media and Sport Committee report on Press Standards, Privacy and Libel published last year and in particular the responses of the News International staff upon these issues. It was made clear in those investigations that the settlement of civil cases were approved at the very highest level including by James Murdoch personally.

In relation to paragraph 2 a) of the code, you may recall the coverage in the Sun newspaper in February 2009 concerning the 13 year-old alleged father Alfie Patten and his 15 year-old girlfriend Chantelle Stedman and the paternity of their child. The sensationalist coverage included a front-page photograph. These three children were not protected; they were exploited by News International.



Paragraph 2 d) of the code concerning accuracy does also not bear scrutiny when considering News Group Newspapers. The News of the World was one of a number of newspapers which had to pay damages for the falsehoods it published about the parents of Madeleine McCann. The same newspaper published a front page article "revealing" a kidnap attempt on the Beckham family which turned out to be little more than the construct of the journalists concerned. Other damages payments for false stories have been paid out to footballers such as Wayne Rooney and Ashley Cole and actors Angelina Jolie and Brad Pitt.

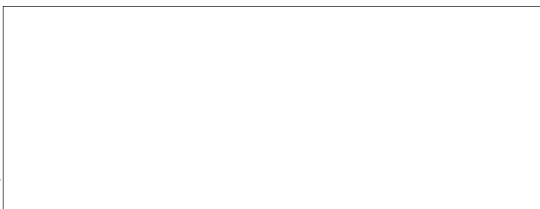
It has long been clear that journalists employed by newspapers in the News Corp group are licensed to show complete contempt for their own professional requirements (set out in the PCC Code, obviously infringed on each of the above occasions). Now News Corp's equally disdainful approach to the criminal law is being revealed by phone hacking, blackmail and other unlawful acts.

There is scarcely a provision of the relevant parts of these Acts - be it accuracy, the protection of children or complicity in crime and disorder - which News Corp is not serially, intentionally and disdainfully breaching.

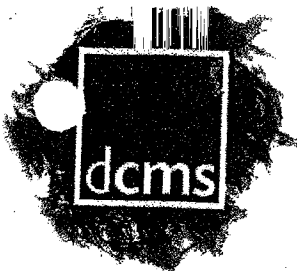
So egregious are these breaches that I am surprised that you have not already commissioned Ofcom to test News Corp's commitments to broadcasting standards. I request that you do so now as a matter of urgency.

I look forward to hearing from you as soon as possible.

Yours sincerely



**Tom Watson**  
Member of Parliament for West Bromwich East



038

department for  
culture, media  
and sport

009/11

25 January 2011

# news release

## NEWS CORP/BSKYB MERGER

Today the Secretary of State for Culture, Olympics, Media and Sport will give an update on the timeline and process that he has followed in his considerations of the relevant public interest in this proposed merger, and is publishing the following documents:

- Ofcom's report on the public interest issues relating to News Corporation's proposed acquisition of BSkyB that was sent to the Secretary of State on 31 December 2010 (redacted for confidentiality).
- The Office of Fair Trading's report on jurisdiction that was sent to the Secretary of State on 30 December.
- The Secretary of State's letters to News Corporation and BSkyB of 7 January 2011.
- BSkyB's response of 13 January 2011 with confidential information redacted.

2-4 Cockspur Street

London SW1Y 5DH

[www.culture.gov.uk](http://www.culture.gov.uk)

improving  
the quality  
of life for all

MOD300004666

- News Corporation's response of 14 January 2011 with confidential information redacted.

Secretary of State for Culture, Olympics, Media and Sport Jeremy Hunt said:

"After careful consideration of the Ofcom Report, which recommends referral to the Competition Commission, and as provided by in Section 104 of the Enterprise Act 2002 that sets out my duty to consult adversely affected parties, I met with News Corporation on 6 January to set out the process that I would follow and briefly explain Ofcom's conclusions. Having informed them of the process I then wrote to News Corporation and BSkyB on 7 January enclosing a copy of Ofcom's Report. In this letter I explained that I was minded to refer the case to the Competition Commission but that I would receive written, and if necessary oral, representations from them if they wanted to challenge my thinking.

"On 10 January I met with Ofcom to seek clarification on a number of aspects of their report.

"In response to my letter of 7 January BSkyB and News Corporation provided written representations challenging elements of Ofcom's report on 13 and 14 January respectively. These documents have today been published. After considering these responses and consistent with section 104 of the Enterprise Act 2002 I therefore met again with News Corporation on 20 January to hear representations on the issues they highlighted.

"As a result of these meetings and my consideration of the Ofcom report and subsequent submissions from the parties involved I still intend to refer the merger to the Competition Commission. On the evidence available, I consider that it may be the case that the merger may operate against the public interest in media plurality.

2-4 Cockspur Street

London SW1Y 5DH

[www.culture.gov.uk](http://www.culture.gov.uk)

"However, before doing so it is right that I consider any undertakings in lieu offered by any merging party which have the potential to prevent or otherwise mitigate the potential threats to media plurality identified in the Ofcom report.

"News Corporation says that it wishes me to consider undertakings in lieu which it contends could sufficiently alleviate the concerns I have such that I should accept the undertakings instead of making a reference. It is appropriate for me to consider such undertakings. In considering whether to accept undertakings in lieu, I will ask the Office of Fair Trading, under section 93 of the Enterprise Act 2002 as an expert public body with experience in negotiating undertakings in lieu, to be involved in the process from this stage. I will also ask Ofcom under section 106B for advice whether undertakings in lieu address the potential impact on media plurality.

"If this process produces undertakings in lieu which I believe will prevent or otherwise mitigate the merger from having effects adverse to the public interest, and which I propose to accept, I will then publish the undertakings in lieu and (as required under the Act) begin a formal 15 day consultation period during which time all interested parties will be able to express their views.

"It is in the nature of this process that I cannot give clear dates for each step as we move forward. My main concern is not to work to an arbitrary timetable but to ensure that I reach my decision in a fair and even-handed way which is transparent and ensures that all concerns are properly considered."

## **NOTES TO EDITORS**

On 3 November 2010 News Corporation notified the European Commission of its intention to acquire the shares in BSkyB that it does not already own. On 4 November 2010 the Secretary of State for Business, Innovation and Skills issued a European intervention notice in relation to the proposed acquisition. He asked Ofcom to

2-4 Cockspur Street

London SW1Y 5DH

[www.culture.gov.uk](http://www.culture.gov.uk)

investigate and report back to him by 31 December 2010 providing advice and recommendations on the public interest consideration in section 58 of the Enterprise Act 2002. This public interest consideration concerns the sufficiency of plurality of persons with control of media enterprises.


On 21 December 2010 the European Commission cleared the proposed acquisition of BSkyB by News Corporation. The Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area or any substantial part of it. The Commission made it clear that its decision did not prejudice the Secretary of State's jurisdiction in relation to the merger's impact on the separate question of sufficiency of plurality in the media.

Press enquiries:

Out of hours telephone pager: 07699 751153

Public enquiries: 020 7211 6000

[www.culture.gov.uk](http://www.culture.gov.uk)

 <http://twitter.com/dcms>

2-4 Cockspur Street

London SW1Y 5DH

[www.culture.gov.uk](http://www.culture.gov.uk)

039

## Written Ministerial Statement: Media Ownership

Tuesday 25 January 2011

### Secretary of State for Culture, Olympics, Media and Sport (Rt. Hon Jeremy Hunt):

On 3 November 2010 News Corporation notified the European Commission of its intention to acquire the shares in BSkyB that it does not already own. On 4 November 2010 the Secretary of State for Business, Innovation and Skills issued a European intervention notice in relation to the proposed acquisition. He asked Ofcom to investigate and report back to him by 31 December 2010 providing advice and recommendations on the public interest consideration in section 58 of the Enterprise Act 2002. This public interest consideration concerns the sufficiency of plurality of persons with control of media enterprises.

On 21 December 2010 the European Commission cleared the proposed acquisition of BSkyB by News Corporation. The Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area or any substantial part of it. The Commission made it clear that its decision did not prejudice my jurisdiction in relation to the merger's impact on the separate question of sufficiency of plurality in the media.

Following receipt of Ofcom's report and in the interests of transparency I want to inform the House of the timeline and process that I have followed to date in my considerations of the relevant public interest.

As such I am today publishing the following documents, copies of which will also be deposited in the Libraries of both Houses:

Ofcom's report on the public interest issues relating to News Corporation's proposed acquisition of BSkyB that was sent to me on 31 December 2010 (with redactions for confidentiality)

The OFT's report on jurisdiction that was sent to me on 30 December.

My letters to News Corporation and BSkyB of 7 January 2011.

BSkyB's response of 13 January 2011 with confidential information redacted.

News Corporation's response of 14 January 2011 with confidential information redacted.

All documents are available from the **publication section of the DCMS website**.

After careful consideration of the Ofcom Report which recommends referral to the Competition Commission, and as provided by section 104 of the Enterprise Act 2002 that sets out my duty to consult adversely affected parties, I met with News Corporation on 6 January to set out the process that I would follow and briefly explain Ofcom's conclusions. Having informed them of the process I then wrote to News Corporation and BSkyB on 7 January enclosing a copy of Ofcom's Report. In this letter I explained that I was minded to refer the case to the Competition Commission but that I would receive written, and if necessary oral, representations from them if they wanted to challenge my thinking.

On 10 January I met with Ofcom to seek clarification on a number of aspects of their report.

In response to my letter of 7 January BSkyB and News Corporation provided written representations challenging elements of Ofcom's report on 13 and 14 January respectively.

These documents have today been published. After considering these responses and consistent with section 104 of the Enterprise Act I therefore met again with News Corporation on 20 January to hear representations on the issues they highlighted.

As a result of these meetings and my consideration of the Ofcom report and subsequent submissions from the parties involved I still intend to refer the merger to the Competition Commission. On the evidence available, I consider that it may be the case that the merger may operate against the public interest in media plurality.

However, before doing so it is right that I consider any undertakings in lieu offered by any merging party which have the potential to prevent or otherwise mitigate the potential threats to media plurality identified in the Ofcom report.

News Corporation says that it wishes me to consider undertakings in lieu which it contends could sufficiently alleviate the concerns I have such that I should accept the undertakings instead of making a reference. It is appropriate for me to consider such undertakings. In considering whether to accept undertakings in lieu, I will ask the OFT under section 93 of the Enterprise Act 2002 as an expert public body with experience in negotiating undertakings in lieu to be involved in the process from this stage. I will

also ask Ofcom under section 106B for advice whether undertakings in lieu address the potential impact on media plurality.

If this process produces undertakings in lieu which I believe will prevent or otherwise mitigate the merger from having effects adverse to the public interest, and which I propose to accept, I will then publish the undertakings in lieu and (as required under the Act) begin a formal 15 day consultation period during which time all interested parties will be able to express their views.

It is in the nature of this process that I cannot give clear dates for each step as we move forward. My main concern is not to work to an arbitrary timetable but to ensure that I reach my decision in a fair and even-handed way which is transparent and ensures that all concerns are properly considered.

**Back to main**

**Back to top**

RESTRICTED

040.

To: Jeremy Hunt

From:

Team

Tel:

Date: 26/01/2011

**NEWS CORP BSKYB PROPOSED MERGER: NEXT STEPS**

**Issue**

Next steps on proposed News Corp/BSkyB merger.

**Recommendation**

That you agree:

1. To write immediately to Ofcom and the OFT sending them a copy of the more developed version of the UILs received today from News Corp. The letter to Ofcom asks them for a report on the extent to which the UILs have the potential to prevent or otherwise mitigate the merger from having effects adverse to the public interest (draft at Annex A). The letter to the OFT asks them to consult with both merging parties with a view to discovering whether those undertakings would, in terms of practical and financial viability, be acceptable to you.
2. That Officials meet with OFT as soon as possible to discuss process and timetable.

**Timing**

Immediate.

**Advice**



**RESTRICTED**

A very provisional timeline is attached which suggests that the process could take around two months, and probably bit longer (as it makes no allowances for weekends). Moreover this assumes that Ofcom can produce a report within a week, although Ofcom officials have indicated to me that they their best guess at this stage is that this work will take "weeks rather than days". Furthermore, the letter to the OFT asks for a report within 2 weeks, however officials at the OFT have reservations about meeting this deadline, their main concern being that they have not seen the full Ofcom report, nor been privy to the undertakings in lieu. The letter to the OFT acknowledges the tight deadline and recommends a meeting with officials as soon as possible at which time the OFT can flag up any serious doubts they have with the timetable.

You will also want to consider when in this process would be the best time to have a meeting with News Corp.

**Clearance**

This has been cleared by Jon Zeff

cc.

Jonathan Stephens

Jon Zeff

Patrick Kilgarriff

Linda Martin

Carola Geist-Diwer

[Redacted]

[Redacted]

[Redacted]

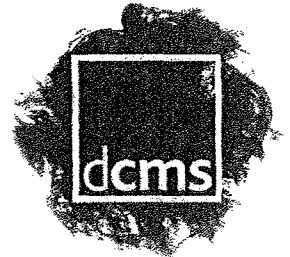
Department for Culture, Media and Sport  
Rt Hon Jeremy Hunt MP  
Secretary of State

2-4 Cockspur Street  
London SW1Y 5DH  
www.culture.gov.uk

Tel  
Fax



041



department for  
culture, media  
and sport

CMS 164661/DC

Ed Richards  
Chief Executive  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
LONDON  
SE1 9HA

27 January 2011

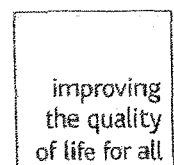
Dear Ed,

**NEWS CORP/BSKYB PROPOSED MERGER: NEXT STEPS**

I announced on Tuesday that I intend to refer the above merger to the Competition Commission but, before doing so, will consider undertakings in lieu offered by News Corporation which could have the potential to prevent or otherwise mitigate the potential threats to media plurality identified in the Ofcom report.

In accordance with section 106B of the Enterprise Act, I am therefore writing to ask you for advice on the extent to which you think that the enclosed News Corp undertakings in lieu (UILs) address the potential impact on media plurality identified in Ofcom's report. I would be grateful if you could provide me with your assessment within two weeks of receipt of this letter.

I would like your advice to focus on whether the UILs address the potential impact on media plurality that you raised in your report delivered on 31 December 2010. Separately I have written to the OFT under Section 93 of the Enterprise Act asking them for their views on the practical and financial viability of the proposals set out in the UILs. I have also asked them to consider the UILs and consult on my behalf with News Corporation. I would anticipate that should they require Ofcom's assistance with this you will be able to help.



Department for Culture, Media and Sport

My officials are obviously on hand to provide any clarification or assistance you may need throughout this process.

*Yes*



**Rt Hon Jeremy Hunt MP**  
**Secretary of State for Culture, Olympics, Media and Sport**

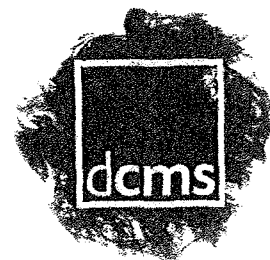
Department for Culture, Media and Sport  
Rt Hon Jeremy Hunt MP  
Secretary of State

2-4 Cockspur Street  
London SW1Y 5DH  
www.culture.gov.uk

Tel  
Fax



042



department for  
culture, media  
and sport

CMS 164661/DC

John Fingleton  
Chief Executive  
Office of Fair Trading  
2 – 6 Salisbury Court  
LONDON  
EC4Y 8JX

27 January 2011

*Dear John,*

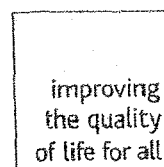
**NEWS CORP/BSKYB PROPOSED MERGER: NEXT STEPS**

I announced on Tuesday that I intend to refer the above merger to the Competition Commission but, before doing so, will consider undertakings in lieu (UILs) offered by News Corporation which could have the potential to prevent or otherwise mitigate the potential threats to media plurality identified in the Ofcom report.

In accordance with Section 93 of the Enterprise Act, I am therefore writing to ask you to consult with both merging parties with a view to discovering whether those undertakings are in your view practically and financially viable, so that they would be acceptable to me. I would like you to let me know your view on this within 2 weeks, but I suggest my officials meet with you or your officials at the earliest opportunity to discuss an appropriate timetable.

I have also written today to Ofcom to ask them for their advice on the potential impact of the UILs on the concerns they raised about media plurality in their report delivered to me on 31 December 2010. I have also asked that Ofcom provide any assistance you might require in considering the UILs.

I enclose a confidential version of Ofcom's report in order that you are aware of the issues which this merger raises, together with a draft of the undertakings offered by News Corporation. Whilst Ofcom are considering plurality issues, I would be grateful if you could consider if there are any practical issues which could undermine the operation of the undertakings and whether they would be effective over the medium



Department for Culture, Media and Sport

and long term. I understand that, of necessity, this will be a somewhat iterative process between the OFT, Ofcom, and my officials, as well as involving consultation with the merging parties who may agree to vary their undertakings to meet any specific concerns you raise.

*Yes*



**Rt Hon Jeremy Hunt MP**

**Secretary of State for Culture, Olympics, Media and Sport**

075

[Redacted]

**From:** SMITH, Adam  
**Sent:** 27 January 2011 14:09  
**To:** [Redacted]  
**Cc:** [Redacted] ZEFF JON  
**Subject:** RE: News Corp/BSkyB

043

i agree. Jeremy was pretty clear to me he wanted it done in two weeks unless, having looked at it, they come back with a good reason for needing longer.

**From:** [Redacted]  
**Sent:** 27 January 2011 13:58  
**To:** [Redacted] SMITH, Adam  
**Cc:** [Redacted] ZEFF JON  
**Subject:** RE: News Corp/BSkyB

I think SoS is clear it's two weeks. OFT should wait to see the material first. If it becomes clear, having assessed the work required, that they need more time then they should write to SoS requesting it.

However at this stage SoS will want to keep the pressure on to get a robust decision quickly. I understand Ofcom thought this is do-able.

We really need to get the letters out - can we send the final versions up to me please?

Thanks

[Redacted]

**From:** [Redacted]  
**Sent:** 27 January 2011 13:37  
**To:** SMITH, Adam  
[Redacted] ZEFF JON; [Redacted]  
**Subject:** FW: News Corp/BSkyB

Adam,

I assume that the latter is better - any views?

[Redacted]

**From:** [Redacted]  
**Sent:** 27 January 2011 13:21  
**To:** [Redacted]  
**Cc:** [Redacted] Sheldon Mills  
**Subject:** RE: News Corp/BSkyB

[Redacted]

In the letter, the Secretary of State states that:

I would like you to let me know your view on this within 2 weeks, but I suggest my officials mee with you or your officials at the earliest opportunity to discuss an appropriate timetable.

Just to clarify, is the intention that this 2 week deadline might be revised further to Monday's discussion (ie by another formal letter from the Secretary of State, revising the deadline for reporting back) or that we would definitely be expected to report formally within 2 weeks, but noting that the undertakings in lieu might require additional work?

Kind regards

[Redacted]

Office of Fair Trading

Market House | 2-6 Salisbury Square | London EC4Y 8JX | T: + 44 [Redacted]

**From:** [Redacted]  
**Sent:** 27 January 2011 11:39  
**To:** [Redacted]  
**Subject:** Fw: News Corp/BSkyB

Fyi

**From:** [Redacted]  
**To:** [Redacted] <[Redacted]@OFTEL.GOV.UK> <[Redacted]@[Redacted]>; Sheldon Mills  
**Cc:** [Redacted]  
**Ser:** [Redacted]  
**Subject:** News Corp/BSkyB

Hi [Redacted]

Further to our conversation, please find attached the draft letter which the SoS wishes to send out today. Although the 2 week deadline is included within the letter, I am pleased that I have been able to secure some flexibility. At the meeting on Monday morning (at Cockspur St) you will be able to flag up concerns over the timetable.

Best Regards

[Redacted]  
[Redacted]  
Public Service Broadcasting  
Media Directorate  
Dept for Culture, Media & Sport  
2-4 Cockspur Street  
London SW1Y 5DH  
[Redacted]

\*\*\*\*\*  
This email and its contents are the property of the Department for Culture, Media and Sport.  
If you are not the intended recipient of this message, please delete it.  
All DCMS e-mail is recorded and stored for a minimum of 6 months  
\*\*\*\*\*

Communications sent to or from the OFT are subject to recording and/or monitoring in accordance with relevant legislation. This email and any information transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you are not an intended recipient, please notify [administrator@oft.gsi.gov.uk](mailto:administrator@oft.gsi.gov.uk) immediately.

The Office of Fair Trading

Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX Switchboard (020) 7211 8000 Web Site: <http://www.oft.gov.uk>

This footnote also confirms that this email message has been swept for the presence of computer viruses.

\*\*\*\*\*



SLAUGHTER AND MAY

One Bunhill Row  
 London EC1Y 8YY  
 T +44 (0)20 7600 1200  
 F +44 (0)20 7090 5000

OLH4

Confidential

27 January 2011

Rt Hon Jeremy Hunt MP  
 Secretary of State  
 Department of Culture, Media & Sport  
 2-4 Cockspur Street  
 London SW1 5DH

Your reference

Our reference

Direct line

Dear Mr Hunt

**News Corp/BSkyB Merger**

I refer to your statement of 25<sup>th</sup> January.

I write on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group (together the "Concerned Parties").

In your statement, you conclude (consistent with Ofcom's advice) that the merger would give rise to plurality issues which warrant investigation by the Competition Commission.

You then set in motion a process under which OFT and Ofcom are asked to explore possible "undertakings in lieu" with News Corp and to report to you on whether such undertakings would be effective to address "the potential impact of media plurality".

You only propose to go out to public consultation however, after you have provisionally decided (in the light of the advice from OFT and Ofcom) to accept such undertakings.

In order to ensure that the overall process is both fair and thorough, it will therefore be critical for Ofcom/OFT and the Secretary of State to consult with key industry players (including the Concerned Parties) ahead of the provisional decision.

The Concerned Parties stand ready to take part in this earlier consultation and to provide such assistance as would be helpful.

In advance of which, it would be very helpful to understand the respective roles of Ofcom and OFT and the timing for next steps.

- |               |               |                 |                      |                |                |                |             |  |
|---------------|---------------|-----------------|----------------------|----------------|----------------|----------------|-------------|--|
| CFI Saul      | PP Chappatte  | CW Harvey-Kelly | JM Fenn              | JC Twentyman   | PJ Cronin      | MJ Dwyer       | GE O'Keefe  | Regulated by the Solicitors<br>Regulation Authority<br>firm SRA number 55388 |
| SM Edge       | RJN Cripps    | JD Rice         | AN Hyman             | GN Eaborn      | BJ-PF Louveaux | CNR Jeffs      | T Pharoah   |  |
| NPG Boardman  | P Jolliffe    | MA Whelton      | AC Johnson           | HK Griffiths   | MS Rowe        | SR Nicholls    | MD Zerdin   |  |
| CW James      | CD Randell    | MD Bennett      | EF Keeble            | STM Lee        | MST Leung      | MJ Tobin       | SFL Cardell |  |
| EA Codrington | WSM Robinson  | RD de Carle     | KR Davis             | AC Cleaver     | R Doughty      | DG Watkins     | RL Cousins  |  |
| RMG Goulding  | RV Carson     | SP Hall         | SR Galbraith         | EJD Holden     | E Michael      | BKP Yu         | BJ Kingsley |  |
| GES Seligman  | SL Edwards    | WJ Sibree       | NDF Gray             | KM Hughes      | RR Ogle        | EC Brown       | IAM Taylor  |  |
| PfJ Bennett   | JM Featherby  | RC Stern        | MS Hutchinson        | G Iversen      | SL Paterson    | RA Chaplin     | DA Ives     |  |
| RM Fox        | F Murphy      | JR Triggs       | SRB Powell           | DR Johnson     | PC Snell       | J Edwarde      | MC Lane     |  |
| RJ Thornhill  | PM Olney      | EGL Wyldie      | AG Ryde              | RE Levitt      | HL Davies      | AD Jolly       | LMC Chung   |  |
| GJ Airs       | PH Stacey     | A Beare         | JAD Marks            | S Middlemiss   | JC Putnis      | S Maudgil      | RJ Smith    |  |
| GP White      | CWY Underhill | JD Boyce        | SD Warma-kula-suriya | RA Swallow     | RA Sumroy      | JS Nevin       |             |  |
| NJ Archer     | OA Wareham    | MEM Hattrell    | DA Wittmann          | DCR Waterfield | GP Brown       | JA Papanichola |             |  |
| AG Ballfour   | RJ Clark      | KJ Hodgson      | TS Boxell            | DJ Bicknell    | JC Cotton      | JM Zaman       |             |  |
| CM Horton     | SJ Cooke      | N von Bismarck  | SJ Luder             | CS Cameron     | RJ Turnill     | RA Byk         |             |  |
| EA Barrett    | DL Finkler    | PWH Brien       | AJ McClean           | CA Connolly    | WNC Watson     | GA Miles       |             |  |

Document number  
 EC 506738397

SLAUGHTER AND MAY

I have sent a similar letter to the OFT and Ofcom.

[Redacted]

[Redacted]

cc.

[Redacted]