[redacted]

From: Ellison, Jordan [redacted]
Sent: 13 December 2010 19:40
To: [redacted]
Cc: LOUVEAUX, Bertrand
Subject: News Corporation/BSkyB - remedies
Attachments: Remedies.PDF

CONFIDENTIAL EMAIL FROM SLAUGHTER AND MAY - THIS EMAIL AND ANY ATTACHMENT MAY BE PRIVILEGED

Dear Sophie/Vera

Please see attached a further submission in respect of News Corporation/BSkyB.

Please do not hesitate to contact us if you have any queries.

Best regards

Jordan

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Case COMP M. 5932 – News Corporation/BSkyB – Potential Commitments

1. Introduction

1.1 This paper is submitted on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc and Telegraph Media Group (together, the "Concerned Parties").

1.2 We understand that the review timetable in *News Corporation/BSkyB* has been extended to pursuant to Article 10(1) EUMR for the consideration of possible remedies commitments by the merging parties. The Concerned Parties have not had the opportunity to comment on any remedies proposal and would appreciate the opportunity to do so as soon as possible.

1.3 However, in the absence of information on the specific proposal, this paper provides the Concerned Parties' general comments on appropriate remedies in this case.

2. Key Principles

2.1 It is clear that any Phase I commitment needs to remove completely the competition concerns. The Commission's Remedies Notice makes clear that any remedy needs to "*eliminate the competition concerns entirely.*"[1] In particular, any Phase I remedy must be "*so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out serious doubts.*"[2]

2.2 It is also clear that behavioural commitments are rarely appropriate to address concerns in merger cases. The Remedies Notice states that commitments related to the future behaviour of the merging parties "*may be acceptable only exceptionally in very specific circumstances.*"[3]

2.3 Importantly, the Remedies Notice also states that commitments should be rejected if they are so complex that they are not susceptible to effective ongoing monitoring.[4]

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[1] Paragraph 9 Remedies Notice.

[2] Paragraph 81 Remedies Notice.

[3] Paragraph 17 Remedies Notice.

[4] Paragraph 14 Remedies Notice.

3. Remedying the Competition Concerns

3.1 We consider below some of the key issues identified by the Concerned Parties during the EU's investigation. Applying the above principles to the current case, it is clear that only substantial divestments would address these concerns effectively (especially at Phase I).

Consolidation in the Supply of Basic Pay TV Channels

3.2 There is serious concern that, by strengthening the merged entity's position in basic Pay TV channels, the merger will give it the ability and incentive to (i) restrict competition in that market, and (ii) restrict the supply of channels to downstream Pay TV competitors. [5]

3.3 These concerns could only be addressed by removing the merger increment in respect of Pay TV channels i.e. divesting the relevant TV channel business of either News Corporation or BSkyB.

3.4 It is clear that horizontal concerns cannot be addressed by behavioural commitments.[6] Even as regards the vertical issue, there is no clear-cut behavioural commitment. To remove the concern it would be necessary for the merged entity to supply its Pay TV channels to downstream competitors on fair, reasonable and non-discriminatory terms. A merger commitment in this form would be unworkable: it would effectively require the monitoring trustee to act as a price regulator and to consider the wide range of service parameters which could be flexed to degrade the level of service to downstream competitors. In reality, monitoring would be so complex and subjective that it would be impossible to ensure compliance.

Restricting Supply of Premium Movies to Pay TV Competitors

3.5 There is a serious concern that by vertically integrating Fox content with BSkyB, the merger will give the merged entity the ability and incentive to restrict the supply of premium movies to Pay TV competitors.[7]

3.6 This concern can only be addressed by a divestment to avoid the vertical integration of Fox content with BSkyB i.e. divesting either the relevant Fox business or the BSkyB Pay TV business. There is no clear-cut behavioural commitment. To address the concern it would be necessary for the merged entity to supply its movie channels to downstream competitors on fair, reasonable and non-discriminatory terms. As above, a merger

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[5] See paragraphs 3.1 to 3.5 of the parties' paper on an Article 9 referral request dated 16 November 2010.

[6] Paragraph 17 Remedies Notice.

[7] See paragraphs 4.1 to 4.5 of the parties' paper on an Article 9 referral request dated 16 November 2010.

4. Conclusion

4.1 Only structural divestments would address the competition concerns in a manner appropriate for a Phase I remedy. Behavioural commitments are highly unlikely to be effective, especially given the complexity of the markets in question.

4.2 The complexity of the sector also means that any commitments need to be subject to thorough market testing to ensure they would address the concerns effectively. The Concerned Parties would therefore welcome the opportunity to review and comment on any specific remedies proposal.

Slaughter and May
13 December 2010

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