

SLAUGHTER AND MAY

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9 February 2011

Rt Hon Jeremy Hunt MP
 Secretary of State
 Department of Culture, Media & Sport
 2-4 Cockspur Street
 London
 SW1Y 5DH

Your reference

Our reference
BJFL/WHJE
 Direct line
020 7090 4173

Dear Mr Hunt

News Corporation / BSkyB (the "Takeover")

I write on behalf of BT, Guardian Media Group, Associated Newspapers Ltd, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group (the "Concerned Parties").

I refer to your news release of 25th January and to my subsequent correspondence with DCMS, OFT and Ofcom.

We understand that the process you envisage would require Ofcom (working with OFT) to assess undertakings in lieu of reference to the Competition Commission (the "CC") without the involvement of interested third parties. Third parties would instead only be consulted after Ofcom/OFT have reported to you and after you have concluded that you are minded to accept such undertakings.

It is our view that this process would be unfair and would fail to meet the normal procedural standards of merger control and public law more generally.

Those standards envisage that in the absence of a clear-cut remedy, a case raising potential concerns (as is clearly the case here) should be reviewed by the CC. As you will be aware, the CC process is transparent and provides for the full involvement of interested third parties.

At the very least, the Concerned Parties should be consulted upfront on the broad structure of any proposed remedy (consistent we understand with previous Ofcom practice).

CFI Saul
 SM Edge
 NPC Boardman
 GW James
 EA Codrington
 RMG Gouiding
 GES Seligman
 PFJ Bennett
 RM Fox
 RJ Thornhill
 GJ Ais
 GP White
 NJ Archer
 AC Balfour
 CM Horton
 EA Barrett

PP Chappatte
 RJN Cripps
 P Jolliffe
 CD Randell
 WSM Robinson
 RV Carson
 SL Edwards
 JM Featherby
 F Murphy
 PM Olney
 PH Stacey
 CWV Underhill
 OA Wareham
 RJ Clark
 SJ Cooke
 DL Finkler

CW Harvey-Kelly
 JD Rice
 MA Whelton
 MD Bennett
 RD de Carle
 SP Hall
 WJ Sibree
 RC Stern
 JR Triggs
 ECL Wylde
 A Beare
 JD Boyce
 MEM Hattrell
 KI Hodgson
 N von Bismarck
 PWH Brien

JM Fenn
 AN Hymn
 AC Johnson
 EF Keeble
 KR Davis
 SR Galbraith
 NDF Gray
 MS Hutchinson
 SRB Powell
 AC Ryde
 JAD Marks
 SD Warna-kula-suriya
 DA Wittmann
 TS Boxell
 SJ Luder
 AJ McClean

JC Twentymen
 GN Fabom
 HK Griffiths
 STM Lee
 AC Cleaver
 EJD Holden
 KM Hughes
 G Iversen
 DR Johnson
 RE Levitt
 S Middlemiss
 RA Swallow
 DCR Waterfield
 DJ Bicknell
 CS Cameron
 CA Conolly

PJ Cronin
 BJ-PF Louveaux
 MS Rowe
 MST Leung
 AC Cleaver
 R Doughty
 E Michael
 RR Ogle
 SL Patterson
 PC Snell
 HL Davies
 JC Putnis
 RA Sumroy
 GP Brown
 JC Cotton
 RJ Turnill
 WNC Watson

MJ Dwyer
 CNR Jeffs
 SR Nicholls
 MJ Tobin
 DG Watkins
 BKP Yu
 EC Brown
 RA Chaplin
 J Edwards
 AD Jolly
 S Maudgil
 JS Nevin
 JA Papanichota
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The Takeover raises substantive issues warranting a CC reference

Ofcom's advice to you was clear:

*"[W]e believe there is a need for a fuller second stage review of these [plurality] 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."*¹

It is apparent from your news release that you agree with that advice.

No clear-cut remedy has been proposed

A "clear-cut" remedy is one where the *"effectiveness or proportionality of the proposed undertakings in lieu may [not] be questioned"*.²

The Concerned Parties understand that no clear-cut remedy has been proposed. According to press speculation, the remedies being explored involve instead the divestment of Sky News or more likely, some form of behavioural commitment from News Corporation.

I have previously written to you outlining the concerns around a divestment of Sky News. A copy of my earlier letter is attached at Annex 1. I note that Ofcom also concluded that such a divestment would risk *"a potentially perverse outcome for plurality"*³ in the absence of a credible purchaser. It is clear that such a remedy cannot be "clear-cut".

The OFT's policy on behavioural remedies generally is clearly stated (and consistent with established procedure in other jurisdictions). The OFT considers it "unlikely" that such remedies would be acceptable absent a CC reference.⁴ Ofcom also reported that there *"was significant scepticism as to the effectiveness of behavioural remedies as a mean of guaranteeing the editorial independence of Sky News from News Corp"*.⁵ I attach at Annex 2 a paper which outlines the concerns with such a remedy in this case. Such concerns mean that a behavioural remedy

¹ Paragraph 7.2 Ofcom report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation (the "Ofcom Report").

² Paragraph 8.4 OFT Guidance: Mergers – substantive assessment guidance

³ Paragraph 7.6 Ofcom Report.

⁴ Paragraph 8.10 OFT Guidance: Mergers – substantive assessment guidance

⁵ Paragraph 7.4 Ofcom Report.

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cannot be "clear-cut" and is therefore inappropriate in the absence of a full investigation by the CC.

Accepted merger procedure requires a reference to the CC

Under the accepted merger procedure there is a reference to the CC whenever the initial investigation identifies potential concerns which are not subject to a clear-cut remedy. In respect of competition cases, the OFT's guidance notes 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."*⁶

Where no clear-cut remedy is available, the standard approach is to refer the case to the CC.

The current procedure fails to reflect these considerations

It appears that you envisage a process which would depart from the accepted practice of the competition authorities and which would as a consequence be unfair to third parties in several respects. In particular:

- The advice which Ofcom and OFT is to provide to you would not be able to take into account the views of third parties. It is not clear whether Ofcom/OFT would be required to review and revise their advice following the public consultation. Nor is it clear whether such advice will be published.
- You, as the decision maker, will therefore be reaching a provisional ("minded to accept") conclusion based solely on discussions with the merging parties. Third parties opposing any proposal will be fundamentally and unfairly disadvantaged by being denied the opportunity to make informed submissions in advance of such a decision.
- The proposed process only envisages a 15 day consultation period. We understand that the merging parties have been in discussions over remedies for several weeks already. As a result, third parties would have substantially less time/opportunity than the merging parties to consider the proposed remedies and to influence the OFT, Ofcom and the Secretary of State.

If your decision is to meet public law requirements of fairness, it is essential that interested third parties are properly consulted before Ofcom/OFT report to you and before you propose to accept undertakings.

⁶ Paragraph 8.5 OFT Mergers Jurisdictional and Procedural Guidance.

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The procedure should therefore be changed to give interested third parties a meaningful opportunity to comment.

We are not suggesting that interested third parties should necessarily have access to the detailed drafting of any undertaking. Our position is only that it is essential that they should be aware of the key features of any remedy proposal so that they are able to comment in an informed and timely manner.

In order to remedy the defects in the current proposal, the Concerned Parties therefore request that:

- You provide an outline of the key features of any remedy proposals that are made by News Corporation; and
- The Concerned Parties are given the opportunity to discuss the remedy proposals with Ofcom and the OFT prior them advising you.

In the absence of the above safeguards, the review will be procedurally unsound.

Yours sincerely,

Bertrand Louveaux
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Copy to:

Steve Unger, Ofcom

Sheldon Mills, OFT

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 reference¹ 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."*²

- 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".³ 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.⁴ Given the challenges of ensuring editorial independence whilst under 100% ownership, any behavioural undertaking would inevitably be too complex to constitute an appropriate UIL.

¹ 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.

² Paragraph 8.5 OFT Mergers Jurisdictional and Procedural Guidance.

³ Paragraph 5.5 OFT Guidance on Exceptions to the Duty to Refer and Undertakings in Lieu of Reference.

⁴ 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."*⁵

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.⁶ 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).⁷

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.

⁵ Paragraph 5.41 OFT Guidance on Exceptions to the Duty to Refer and Undertakings in Lieu of Reference.

⁶ Paragraph 7.1 OFCOM Report.

⁷ 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.*"⁸

- 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

⁸ 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.*"⁹ 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 UIL. 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...*"¹⁰

⁹ Interview with Australian Broadcasting Corporation 12 October 2010.

¹⁰ 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.

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