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News Corporation / British Sky Broadcasting:
Public Interest Intervention Pursuant to Enterprise Act 2002

1. Introduction

1.1 This paper outlines the clear legal case for issuing a public interest intervention notice to ensure proper assessment of News Corporation's acquisition of British Sky Broadcasting ("BSkyB") (the "Takeover").

2. Nature of Public Interest Intervention

Low standard for intervention

2.1 The Secretary of State has power to issue a public interest intervention notice under Section 42 or Section 67 of the Enterprise Act 2002 (the "Act") if "*he believes it is or may be the case that [a] public interest consideration is relevant*" to the Takeover (emphasis added).[1]

2.2 The Act therefore merely requires the Secretary of State to believe that the public interest consideration may be relevant to the Takeover.

2.3 This low hurdle for intervention is in keeping with the nature of the intervention decision: it is simply a decision to review the transaction with a view to assessing whether or not any substantive concerns arise.

Clear ground for intervention – cross-media plurality

2.4 The public interest grounds on which the Secretary of State is empowered to issue an intervention notice include cross-media "plurality" i.e. "*the need, in relation to every different audience in the United Kingdom…for there to be a sufficient plurality of persons with control of the media enterprises serving that audience*".[2]

2.5 Government guidance on Public Interest Intervention in Media Mergers[3] (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*

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[1] Section 42 relates to a conventional public interest intervention notice and Section 67 relates to a European Intervention Notice (the latter being used where the competition aspects of the case fall within the jurisdiction of the European Commission). The public interest test is identical under each section and the term "public interest intervention notice" is used in this paper to refer to both forms of notice.

[2] Section 58(2C)(a) of the Act.

[3] May 2004 DTI Guidance.

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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".[4]

2.6 Further guidance as to the meaning of "plurality" is given by the Competition Commission in its report on BSkyB/ITV.[5]

- There is a clear link between plurality and the democratic process.[6]
- The key concern is with the provision of news. The top priority placed on news of all TV genres is a consistent theme among independent audience research, for example the Competition Commission 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*".[7]
- 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.[8]
- Plurality of news should be looked at across newspapers and television.[9]

<u>Secretary of State cannot rely on competition review</u>

2.7 We understand that News Corporation is seeking to notify the Takeover to the EU Commission under the EU Merger Regulation. The role of the EU Commission under the EU Merger Regulation is to conduct a competition assessment (the same would be true of a UK merger review by the OFT or Competition Commission).

2.8 It is clear that the competition review is not a substitute for a proper consideration of media plurality. The Guidance makes clear that a competition assessment is not sufficient to safeguard plurality in cross-media mergers since e.g. the takeover of a TV channel by a newspaper group reduces plurality even if they are not considered

[4] Paragraph 7.7

[5] Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc, December 2007.

[6] Paragraph 5.9.

[7] Paragraph 5.32.

[8] Paragraph 5.12.

[9] Paragraph 5.35.

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competitors for competition law purposes.[10] Indeed, the EU Merger Regulation specifically provides for Member States to conduct their own parallel review of "legitimate interests" including "plurality of the media".[11]

Secretary of State cannot rely on broadcaster impartiality requirements

2.9 It is important to stress that the need for an assessment of the public interest in relation to plurality is not obviated by "due impartiality" requirements on broadcasters (like BSkyB). 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.

2.10 According to OFCOM "*while [due impartiality requirements]...represent important controls on impartiality and quality, they are not directly concerned with or a substitute for regulatory provisions aimed at ensuring sufficient plurality. They are not designed to remove the ability of broadcasters to set the agenda by selecting the issues and events that are covered in news broadcasting or by determining the relevant importance that are given to each of these.*"[12]

3. Substantial Effect of the Takeover on Media Plurality

3.1 The Takeover would substantially reduce media plurality in the UK.

News plurality is already limited

3.2 The supply of news in the UK is already very concentrated.

3.3 Television is the most widely used and most trusted platform for news.[13] It is the main source of UK news for 74% of the UK population (maintaining the increase noted between 2007 (68%) and 2008 (73%)).[14]

- There are only three significant suppliers of TV news: the BBC, ITN (supplying ITV and Channel 4) and BSkyB (supplying Sky News and Five).[15] These three providers supply virtually all TV news in the UK.

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[10] Paragraph 7.3 DTI Guidance.

[11] Article 21(4).

[12] Paragraph 4.39 OFCOM report into BSkyB/ITV.

[13] OFCOM: Annexes to New News, Future News, 26 June 2007 paragraph A1.88 and paragraph 5.40 of Competition Commission report into BSkyB/ITV.

[14] OFCOM Media Ownership Rules Review (July 2009).

[15] Enders Analysis. See also BARB/TNS Infosys cited paragraph 4.14 Competition Commission report into BSkyB/ITV.

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- The five main broadcasters (BBC, ITV, BSkyB, Channel 4 and Five) accounted in 2008 for 91.6% of television news viewing. BSkyB is the second biggest TV news provider in the UK by hours broadcast and third biggest by total hours viewed.[16] It also operates the second most popular 24 hour news channel after the BBC.[17]

- The Competition Commission found that day-to-day editorial control of output remains with the news provider.[18] As a result, BSkyB has editorial control over the news output of both Sky News and Five News.

3.4 After television, newspapers and radio are the next most important sources:

- There are only two significant suppliers of national radio news: the BBC and BSkyB. These two supply 97.7% of all national radio news.[19]

- Eight groups account for 100% of national newspaper circulation. News Corporation is by far the largest supplier, with a circulation of almost 8 million[20] and 37% of the audience.[21]

3.5 It is true that there has been a dramatic increase in the number of outlets providing news content in particular over the internet. Both the Competition Commission and OFCOM have concluded however that for the foreseeable future, online sources of news are more likely to complement than to replace radio, television and newspapers as news platforms.[22] In 2009, only 6% of consumers rated online as their main source of UK news.[23]

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[16] OFCOM Media Ownership Rules Review (July 2009).

[17] 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.

[18] Paragraph 5.55 Competition Commission report into BSkyB/ITV.

[19] Rajar as cited in paragraph 4.29 OFCOM report into BSkyB/ITV (Sky News and IRN (which is now obtains its news supply from BSkyB)).

[20] ABC.

[21] Enders Analysis. See also paragraph 5.48 Competition Commission report into BSkyB/ITV.

[22] Paragraph 5.44 Competition Commission report into BSkyB/ITV. The Competition Commission also note that most online news is provided by the traditional news suppliers. As such, online has a limited ability to introduce plurality where the traditional media is concentrated.

[23] OFCOM Media Ownership Rules Review (July 2009).

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The supply of news is expected to become more concentrated

3.6 There is general consensus within the industry that even without the Takeover, the supply of news will become even more concentrated. For example, News Corporation's share of national press circulation is forecast to increase by over 3% by 2014[24] and BSkyB's presence in pay-TV continues to grow rapidly, with net customer additions of 418,000 in the 12 months to June 2010.[25]

3.7 In addition, ITV and Channel 4 could potentially change news provider to BSkyB. Were both over time to change news provider to BSkyB, the viewing hours of TV news provided by either the BBC or BSkyB would increase to over 90%.[26]

3.8 The Takeover is expected further to weaken the position of rival newspapers:

- BSkyB can leverage its strength in pay-TV to enhance News Corporation's position in the newspaper market. BSkyB is the dominant player in pay-TV: with almost 10 million subscribers,[27] it accounts for 67% of total UK residential subscriptions.[28] This market power in pay-TV would allow it to bundle News Corporation newspaper subscriptions with pay-TV subscriptions. It is already the case that BSkyB bundles broadband and telephony (24.8% of its customers also purchase broadband from BSkyB and 21.8% also purchase telephony from BSkyB).[29] The Takeover would likely give BSkyB the incentive to pursue such a bundling strategy including newspapers with a view foreclosing other newspapers' access to market.

- BSkyB's ability to generate cash (its revenues were almost £6bn last year) could support a campaign of "predatory pricing" by News Corporation newspapers.[30]

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[24] ABC and Enders Analysis forecasts.

[25] BSkyB Annual Report 2010.

[26] OFCOM Media Ownership Rules Review (July 2009).

[27] BSkyB Annual Report 2010.

[28] Enders Analysis.

[29] Enders Analysis.

[30] BSkyB Annual Report 2010.

The Takeover will further reduce plurality

3.9 The Takeover will have the direct effect of combining two of the largest voices in the UK media (the largest newspaper supplier and one of the three providers of broadcast news). This structural change alone would substantially reduce the "plurality of persons" supplying news in the UK.

3.10 A further impact on plurality arises from the Takeover's effect on cross-media dynamics. Specifically, the takeover of a broadcaster by a newspaper group threatens the ability of the more diverse newspaper sector to contribute to plurality in the broadcast news sector. The Competition Commission has said that national newspapers are an important source of stories covered on broadcast news. Placing a key news broadcaster (BSkyB) under the same ownership as the largest newspaper group (News Corporation) with an incentive to favour its own stories would curtail the ability of non-News Corporation newspapers to offer a plurality of views beyond their immediate readership.[31]

4. Intervention is Consistent with the Purpose of the Legislation and the Government's Own Guidance

Purpose of the legislation

4.1 The provision for a public interest intervention on the grounds of plurality was inserted into the Act to deal with exactly this kind of situation. One of the key drivers was Lord Puttnam, who as Chair of the Joint Committee on the Communications Bill proposed two successive sets of amendment to introduce a media plurality consideration.[32]

4.2 In a recent article in The Observer[33] Lord Puttnam stated:

"The desire of News Corporation to buy the almost 61% of pay TV operator BSkyB it does not already own goes to the heart of arguments about media plurality in a modern democracy."

"It was precisely to protect such plurality that in 2002, as Chairman of the Joint Scrutiny Committee on the Communications Bill, I and colleagues from all sides of the House fought the government (and the opposition front bench) to ensure that provisions were inserted in the Bill that gave the Secretary of State the power to intervene and make

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[31] Paragraph 5.45 Competition Commission report into BSkyB/ITV. See also the OFCOM report into BSkyB/ITV on the importance of cross-media dynamics.

[32] Each of these was withdrawn but the Government introduced its own amendments, in the form of the provisions now in force.

[33] The Observer 19th September 2010.

referrals in relation to takeovers and mergers involving TV, radio and newspaper companies".

Government guidance

4.3 Consistent with the legislation, a sensible reading of the Guidance (as outlined above), suggests that the Secretary of State should intervene. There is a statement in the Guidance which suggests that, save in exceptional circumstances, the Secretary of State will consider intervention only in cases where media ownership rules have been removed by the Communications Act 2003.[34] However, this statement is not expressed as an absolute rule and the Secretary of State cannot reasonably apply this here. The following points are relevant to this:

- The Secretary of State acting reasonably should take a purposive approach taking into account both the purpose behind the public interest regime and developments in the market.
- The previous media ownership rules can be traced back to the Broadcasting Act 1990. At the time these were put into place, BSkyB was clearly not the news powerhouse it is today. BSkyB was only formed in 1990. Indeed BSkyB has grown considerably since the Guidance was issued in 2004.
- Were the Secretary of State to decline to intervene on this basis, it would therefore produce bizarre consequences. By way of example, the previous media ownership rules would have prevented News Corporation (as the owner of national newspapers with more than 20% of the market) acquiring the Channel 5 licence holder. And yet Five has a lower viewing share than BSkyB's[35] and receives its news supply from BSkyB (which is also clearly a provider of news to other channels). Similarly, the previous media ownership rules would have prevented News Corporation (as the owner of national newspapers with more than 20% of the market) acquiring a national radio operator. And yet BSkyB provides the news supply of virtually every (non-BBC) radio station in the UK. It is therefore clear that the Takeover has more serious implications for plurality than some of the transactions previously prohibited by Broadcasting Act 1990.

4.4 It must be recalled that the Guidance does not have the force of law. A non-intervention decision based on an interpretation of the Guidance which produced the bizarre consequences outlined above would fail to meet basic public law requirements of reasonableness and would be susceptible to judicial review.

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[34] Paragraph 8.2.

[35] Channel 5's viewing share as measured by BARB as at December 2009 was 3.8%. The equivalent figure for BSkyB is 7.3%.

4.5 It is also worth noting that Communications Act 2003 would prohibit outright News Corporation from acquiring more than 20% of ITV (under the "20/20" rule).[36] The Takeover would involve News Corporation acquiring 100% of the only other significant privately owned broadcast news supplier. This further demonstrates that it was precisely to deal with this type of merger that the media plurality provisions were inserted into the Act.

5. BSkyB's Current 39% Ownership Cannot Justify a Lack of Scrutiny

<u>The legislation specifically provides for intervention in these circumstances</u>

5.1 For the avoidance of any doubt, it is not correct to assume that News Corporation's existing 39% stake in BSkyB means that there is no scope for a media plurality review of BSkyB for these purposes.

5.2 The media plurality provisions in the Act[37] specifically provide that where two media enterprises (here News Corporation/News International and BSkyB) serving the same audience (which, as above, covers the cross-media provision of news)[38] are part of a "merger situation" and thereby "cease to be distinct " (which includes 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".[39]

5.3 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.*"

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[36] Paragraph 2 of Part 1 of Schedule 14 to the Communications Act 2003. The Competition Commission has confirmed that this regulatory framework "while relevant to the plurality of news...does not on its own ensure a sufficiency of plurality of news" (paragraph 5.38).

[37] Section 58A(4).

[38] 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*".

[39] 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*".

5.4 The Court of Appeal[40] put this succinctly as follows:

"*Section 58A(4) precludes an argument that, because B* [here BSkyB] *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]".

5.5 The Court of Appeal in the same case[41] went on to clarify:[42]

"*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 BSkyB], *whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control.*"

<u>There would be a fundamental change in the nature of control over BSkyB</u>

5.6 In practice the Takeover will result in the following relevant change in the nature of control over BSkyB:

(i) 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.[43] 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.

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, the UK Listing Rule 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.

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[40] Paragraph 53 BSkyB v Competition Commission.

[41] Paragraph 121 BSkyB v Competition Commission.

[42] Applying Section 58A(5).

[43] Section 172 Companies Act 2006.

(ii) 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.[44] However, in circumstances where BSkyB was 100% owned by News Corporation, News Corporation could unilaterally appoint and dismiss all of the BSkyB management.

(iii) Looking below Board level, it has previously been found that the editorial staff of Sky News are not currently under control or influence of News Corporation. The Competition Commission has previously 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*".[45] Therefore, it is clear that BSkyB's news output must currently be treated as distinct from News Corporation for the purposes of assessing plurality. Again, that can be expected to change post-Takeover.

5.7 The conclusion that the Takeover would result in a change in control over BSkyB appears to be confirmed by News Corporation. As above, we understand that News Corporation intends to notify the Takeover for competition clearance from the EU Commission.[46] Since jurisdiction only arises under the European Union Merger Regulation in the event of a change of control of the target company,[47] News Corporation must itself recognise that the Takeover will result in a change in the control of BSkyB.

5.8 Given the evidence that BSkyB is currently distinct from News Corporation and that this distinct status would be lost as a result of the Takeover, it is clear that the Takeover would result in a reduction in plurality notwithstanding News Corporation's existing minority ownership.

6. Conclusion

6.1 It follows from the above that there is a compelling legal case for issuing an intervention notice. In summary:

(i) The standard for intervention is low – the Secretary of State only needs to believe that it <u>may</u> be the case that a public interest consideration is relevant.

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[44] Page 38 BSkyB Annual Review 2010.

[45] Paragraph 5.57 Competition Commission report into BSkyB/ITV.

[46] News Corporation announcement dated 15 June 2010.

[47] Article 3(1) European Union Merger Regulation.

(ii) The legislation clearly provides for intervention on the basis of cross-media plurality – in particular in the provision of news. Such plurality is widely recognised to be a key part of the democratic process.

(iii) Plurality in the provision of news is already limited and is widely expected to become more concentrated. 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 UK national radio news supply. News Corporation accounts for a 37% share in the supply of national newspapers.

(iv) The Takeover would therefore combine one of the three TV news suppliers and two radio news suppliers with the largest supplier of national newspapers. The Takeover would also undermine the reporting of newspaper stories in the broadcast media (a key additional source of plurality).[48]

(v) Intervention is also consistent with the Government's own guidance (on any reasonable application). There is a statement in the Guidance which suggests that, save in exceptional circumstances, the Secretary of State will consider intervention only in cases where media ownership rules have been removed by the Communications Act 2003.[49] However, this statement is not expressed as an absolute rule and to interpret it as such would be at odds with the overall Guidance and the clear purpose behind the public interest regime. It would also fail to meet basic public law requirements of reasonableness.

(vi) The legislation specifically provides for intervention in circumstances like these i.e. where there is a move from 39% to 100%. Such a move would clearly change the nature of control over BSkyB – in future its operations would be directed not for the benefit of a wider group of shareholders but instead for the benefit (financial and/or political) of News Corporation.

6.2 It follows that the only appropriate course of action is to ensure proper assessment of the Takeover by issuing an intervention notice.

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[48] The Takeover would give BSkyB the ability and incentive to favour stories in News Corporation newspapers and incentivise News Corporation newspapers to favour the stories and actual output (e.g. video via the newspapers' websites) of BSkyB.

[49] Paragraph 8.2.