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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 Mergers¹ (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".*²

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*

¹ May 2004 DTI Guidance.

² Paragraph 7.7.

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

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."*⁴ (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*.⁵

2.8 The following sections consider each of the matters listed in OFCOM's Invitation to Comment.

³ 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.

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

⁵ 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).

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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 plurality⁶ 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.⁷
- 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.*"⁸
- 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*".⁹
- 3.6 The importance of media coverage of news in influencing citizens' political knowledge and preferences is the subject of respected academic research.¹⁰
- 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

⁶ "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.

⁷ Department for Culture Media & Sport Consultation on Media Ownership Rules (2001).

⁸ Department for Culture Media & Sport Consultation on Media Ownership Rules (2001).

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

¹⁰ 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.

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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).¹¹

4.2 The Enterprise Act 2002¹² and the Communications Act 2003¹³ 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.*"¹⁴

4.4 The rationale for assessing news plurality on a cross-media basis is that:

- Most people (directly¹⁵ or indirectly¹⁶) 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

¹¹ The Takeover may well raise concerns in respect of other audiences.

¹² For example, Section 58A(2) Enterprise Act 2002.

¹³ For example, Schedule 14 Communications Act 2003.

¹⁴ May 2004 DTI Guidance. See paragraph 7.2.

¹⁵ 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*.

¹⁶ 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*.

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pluralism”).¹⁷ 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.¹⁸

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.¹⁹

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.

¹⁷ On “exposure pluralism” see for example, “Deconstructing the Diversity Principle” by Philip M. Napoli Journal of Communication (Autumn 1999).

¹⁸ 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.

¹⁹ Figure 4 OFCOM Media Ownership Rules Consultation (2009).

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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."*²⁰

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 day²¹ and a readership of around 23.8m per day.²²

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.²³

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

²⁰ 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.

²¹ Paragraph 4.20 OFCOM Media Ownership Rules Consultation (2009).

²² NRS January-June 2010 (Monday-Saturday sales only).

²³ 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".

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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).²⁴
- 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).²⁵
- 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

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

²⁵ UKOM (September 2010) – based on page impressions.

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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.”²⁶

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.²⁷

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.

²⁶ Paragraph 104 House of Lords Select Committee on Communications “The Ownership of the News” (2008).

²⁷ Paragraph 4.22 OFCOM Media Ownership Rules Consultation (2009).

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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.²⁸

- 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.²⁹
- It operates one of only two mass market rolling news channels (Sky News and BBC News)³⁰ 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.³¹ Furthermore, whatever the editorial policy of Five News, it is reliant upon the news-gathering infrastructure of BSkyB and the stories it produces.)

²⁸ BARB cited at Figure 26 OFCOM Media Ownership Rules Consultation (2009).

²⁹ OFCOM Media Ownership Rules Review (2009).

³⁰ 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).

³¹ Paragraph 5.55 CC report into *BSkyB/ITV*.

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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.³²
- 6.6 News Corporation is by far the largest UK newspaper supplier, with a circulation of almost 8 million,³³ amounting to 37% of total circulation.³⁴
- 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.³⁵ 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.³⁶ Taken together, these two supply 97.7% of all national radio news.³⁷
- 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.³⁸ 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.

³² ABC.

³³ ABC.

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

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

³⁶ The only other supplier is the BBC.

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

³⁸ Paragraph 3.3.1 OFCOM Communications Market Report (2010).

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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.³⁹ In contrast, only one other newspaper group has a title that reaches more than 10% of the population.⁴⁰

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.

³⁹ 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.

⁴⁰ ABC. The Mail on Sunday reaches 10.4% of the population.

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- 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.”⁴¹

- 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).⁴² 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.

⁴¹ See paragraphs 3 House of Lords Select Committee on Communications “The Ownership of the News” (2008). See also paragraphs 54 to 57.

⁴² It is thought that ITN employs only around 110 journalists.

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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.⁴³
- 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).

⁴³ 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).

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- 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.⁴⁴ 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.⁴⁵
- 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]*".⁴⁶
- 7.3 Importantly, the test relates to control of the enterprise (i.e. the relevant business)⁴⁷ – 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 BSKyB), 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.

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

⁴⁵ 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.

⁴⁶ Section 58(2C)(a) Enterprise Act 2002.

⁴⁷ Section 129 Enterprise Act 2002.

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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*.⁴⁸ In that case the Court of Appeal⁴⁹ 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".⁵⁰ (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.

⁴⁸ [2010] EWCA Civ 2.

⁴⁹ Paragraphs 53 and 121 *BSkyB v Competition Commission*.

⁵⁰ Paragraph 80 *BSkyB v Competition Commission*.

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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.”⁵¹

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.”⁵²*

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

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

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

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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.⁵³

- 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.⁵⁴ 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,⁵⁵ 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.⁵⁶
- 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*".⁵⁷

⁵³ Pages 167 and 437 Andrew Neil "Full Disclosure" (1996).

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

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

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

⁵⁷ Harold Evans "Good Times, Bad Times" (1983).

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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.”⁵⁸

- 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.”⁵⁹

- 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.”⁶⁰

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.

⁵⁸ Paragraph 217 House of Lords Select Committee on Communications “The Ownership of the News” (2008).

⁵⁹ Page 468 Adam Sisman “Hugh Trevor-Roper: The Biography” (2010).

⁶⁰ Page 516 Adam Sisman “Hugh Trevor-Roper: The Biography” (2010).

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- 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.⁶¹ 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.”⁶²

- 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.

⁶¹ Paragraph 5.54 CC report into *BSkyB/ITV*.

⁶² James Murdoch – MacTaggart Lecture (2009).

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- 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 2009.⁶³ 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."*⁶⁴
- 8.6 Newspaper advertising revenue has fallen by at least 20% in recent years – from £5.1bn in 2004 to £4.1bn in 2008.⁶⁵ Cover price revenues are also thought to have fallen by at least 10% from 2004 to 2009.⁶⁶
- 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.

⁶³ Enders Analysis.

⁶⁴ In contrast, BSkyB's subscription revenues continue to increase.

⁶⁵ 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.

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

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- 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.⁶⁷
- 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.”*⁶⁸
- 8.14 Of particular relevance is the financial health of ITN (BSkyB’s only commercial competitor for broadcast news).⁶⁹ 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.

⁶⁷ 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.

⁶⁸ Stream Conference 2009.

⁶⁹ See also paragraph 6.27.

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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 subscribers⁷⁰ 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.

⁷⁰ http://corporate.sky.com/about_sky/key_facts_and_figures.htm

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- 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.⁷¹

The Legislation Specifically Provides for Intervention in these Circumstances

- 9.2 The media plurality provisions in the Enterprise Act⁷² 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)⁷³ are part of a "merger situation" and thereby "cease to be distinct " (which includes a move from 39% to 100%),⁷⁴ 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".⁷⁵

⁷¹ 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.

⁷² Specifically, Section 58A(4).

⁷³ 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".

⁷⁴ By virtue of Section 26(4)(a) Enterprise Act 2002.

⁷⁵ 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".

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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 Appeal⁷⁶ 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 case⁷⁷ went on to clarify:⁷⁸

"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.⁷⁹

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.

⁷⁶ Paragraph 53 *B Sky B v Competition Commission*.

⁷⁷ Paragraph 121 *B Sky B v Competition Commission*.

⁷⁸ Applying Section 58A(5).

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

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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.⁸⁰ 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."*⁸¹
- "[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."*⁸²
- 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.⁸³ However, in circumstances where BSKyB was 100% owned by News Corporation, News Corporation could unilaterally appoint and dismiss all of the BSKyB management.

⁸⁰ Section 172 Companies Act 2006.

⁸¹ Page 33 BSKyB Annual Report 2010.

⁸² Page 40 BSKyB Annual Report 2010.

⁸³ Page 38 BSKyB Annual Review 2010.

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- 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,⁸⁴ 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.*"⁸⁵ 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...*".⁸⁶ 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.*"⁸⁷
- 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".*⁸⁸

⁸⁴ Article 3(1) European Union Merger Regulation.

⁸⁵ Paragraph 5.29 CC report on *BSkyB/ITV*.

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

⁸⁷ Paragraph 5.57 CC report into *BSkyB/ITV*.

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

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- 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 2009.⁸⁹
- 9.17 Therefore, it is clear that BSKyB'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 BSKyB.
- 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 BSKyB 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

⁸⁹ 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.

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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.”⁹⁰

- 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.”⁹¹

- 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.

⁹⁰ Andrew Neil's evidence to House of Lords Select Committee on Communications – paragraph 219 “The Ownership of the News” (2008).

⁹¹ James Murdoch – MacTaggart Lecture (2009).

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- 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

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