E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], [redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc:	Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Prisk MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=MPRISK]
Sent:	15/06/2010 at 19:01
Received:	15/06/2010 at 19:01
Subject:	RE: PA monitoring: NEWSCORP'S SKY BID SNUBBED

[redacted] - you may have heard already from [redacted] but I understand he is in the process of preparing lines for press office.

[redacted] - incidentally, John Redwood has just bumped into the SoS in the House and asked why the Government isn't jumping up and down over the Sky issue. SoS is worried he will continue to be questioned on it, both informally like this, but also formally through PQs. I have informed him that there will be a note for tonight's box on the next steps in this case. As I mentioned to you on the phone, he will be keen to understand a bit of background to the very brief chat he had with James Murdoch earlier. Please could you check your note answers the following questions...

What has Sky done so far? What does this mean in practice?
What will happen next? What is the timeline of events?
Should the Government do/say something specific about it?
If not, why not, and what line can we use in the interim?

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted] | Mob: [redacted]

From: SPAD MPST
Sent: 15 June 2010 17:26
To: Cable MPST; [redacted] (Communications); [redacted] (Communications)
Cc: Davey MPST; Chambers Sarah (CCP)
Subject: RE: PA monitoring: NEWSCORP'S SKY BID SNUBBED

[redacted]

Were lines on NewsCorp's bid for Sky ever drafted and provided? Perhaps [redacted] know?

Katie Waring is being asked by journalists and would like to know what the BIS line is regarding the competition implications of the bid, should she require it.

Thanks.
[redacted]

[redacted] | Private Secretary to the Special Advisers | Department for Business, Innovation & Skills | [redacted]bis.gsi.gov.uk | 0207 215 [redacted] | www.bis.gov.uk

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From: [redacted] (MPST MIN) On Behalf Of Cable MPST
Sent: 15 June 2010 09:17
To: [redacted] (CCP); [redacted] (CCP)
Cc: Davey MPST; SPAD MPST; Chambers Sarah (CCP)
Subject: FW: PA monitoring: NEWSCORP'S SKY BID SNUBBED

[redacted]

As discussed. James Murdoch urgently wants to brief the SoS about an "urgent confidential commercial matter".

They would like to have the call as soon as possible this morning- ideally before Cabinet at 9.45.

As the SoS is new to this area it would be helpful to have background for him on the competition rules in this area and past contact with Murdoch, alongside any lines you think it would be helpful for him to have on the below issue that the call may be about.

Can you send something by 10.30, please, and we'll arrange the call for after Cabinet.

Happy to discuss,
[redacted]

....

[redacted]
Private Secretary to Vince Cable | 0207 215 [redacted]

Department for Business, Innovation & Skills - Investing in our future

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From: [redacted] (Communications)
Sent: 15 June 2010 08:00
To: COMMS - Press Office Monitoring; COMMS - Press Office Operational
Subject: PA monitoring: NEWSCORP'S SKY BID SNUBBED

BSkyB said today that it had rebuffed an initial attempt by Rupert Murdoch's News Corporation to take full control of the UK satellite broadcaster.
The 700p-a-share approach for the 61% of BSkyB that NewsCorp does not currently own values the FTSE 100 Index company at around £12 billion.
BSkyB said the proposal significantly undervalued the business and called for an offer in excess of 800p a share, in part to compensate shareholders for the wait they would face while regulatory clearance was sought.
NewsCorp's interests include The Times and The Sun newspapers in the UK and the Wall Street Journal in America.

[redacted] Press Office,
Department for Business, Innovation and Skills (BIS), London SW1H 0ET
P: 020 7215 [redacted]

SoS Call with James Murdoch
Tuesday 15 June

JM notified the SoS that Newscorp was proposing to acquire the remaining balance of shares which they do not currently own in BSkyB. He said that once there was an agreed deal they planned to file with the European Commission for regulatory approval. Currently this negotiation was still ongoing as Newscorp's first offer had been rejected.

VC thanked JM for the call.

E-mail Message

From: [redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]

To: Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]

Cc: SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Prisk MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=MPRISK], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted] [redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], [redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]

Sent: 15/06/2010 at 19:42

Received: 15/06/2010 at 19:42

Subject: News International and BSkyB

Cable MPST

1. We spoke. You have asked for a very brief and quick summary, including lines to take for the SofS in preparation for his attendance at a News International event, which also rounded up his telecon with James Murdoch this morning.

Lines to Take:

* Ownership of a company is primarily a matter for the company itself and its shareholders

* It is for the Competition authorities to investigate whether the transaction raises any competition issues

* It would be premature for the Government to comment on any potential use of its intervention powers under the Enterprise Act until we have more facts surrounding the acquisition

Press Office is using the following general line for media enquiries:

A Department for Business Spokesperson said:

"In the first instance it is always for the independent competition authorities. However, the Secretary of State does also have the power to intervene in mergers if he feels that there is a public interest issue at stake. It is premature to speculate about this case as the parties have not even agreed to the acquisition."

What do you mean by independent?
"In this case it would be the European Commission, due to the large size of the acquisition."

P52

Background

The SofS took a phone call from James Murdoch this morning who gave an update to the media stories. News International have offered to acquire the remaining shares in BSkyB that it does not already own - it currently has 39.1% of the shareholding. James Murdoch told the SofS that the offer was rejected on the grounds that the Board felt it did not represent the true value of the company. However, the two companies had agreed to enter into further talks. He added that the Takeover Panel had been informed that the two companies had entered into further negotiations and that any further announcements would be in in accordance with the rules of the Takeover Code. James Murdoch then said that should the two Boards come to an agreement, a filing to the European Commission would be made for regulatory clearance. He gave no specific timetable as to when any further announcements would be made and they are not as yet under any regulatory commitment to conclude any negotiations - the Takeover Panel can issue "put up or shut up" notices which includes a specific timetable however these are usually related to hostile takeover bids.

If a deal is reached, the acquisition will need regulatory clearance by the relevant competition authority. Due to the size of the companies involved, jurisdiction will fall to the European Commission for it to investigate the merger under the European Community Merger Regulations which will consider the acquisitions impact on competition. The EC requires mergers to be pre notified and it will make its preliminary decision within 30 days of a filing.

The SofS does have powers under the Enterprise Act 2002, to intervene in mergers that raise a specified public interest consideration - in this case the plurality of media ownership. The power can also be used where the EC has jurisdiction over the case. However, much more information would be required on the detail of the acquisition. Lawyers representing BSkyB called CCP officials shortly after the SofS telecon this morning and offered to submit greater detail in due course. Should the SofS believe that this case did raise concerns warranting an intervention, that could only be done so once the merger had been notified to the EC, and his ability to intervene would cease once the EC had announced its final decision. An intervention would trigger an instruction to Ofcom for it to provide the SofS a report on the media plurality aspects raised by the merger - based on that and any other information, the SofS would make a decision (to clear the merger, clear subject to conditions or refer the merger to the CC for further investigation of the public interest issue). Ofcom's investigation would run in parallel to the EC's competition investigation.

The power to intervene in media mergers has only been used once - in the case of BSkyB's acquisition of a 17.9% shareholding in ITV plc in 2006 which after a CC report and two appeals, Sky have now divested more than half of that acquisition.

[redacted]

Competition Law and Mergers |Department for Business, Innovation and Skills |
[redacted]@bis.gsi.gov.uk | T: 0207 215 [redacted]

BSkyB Shares Acquisition

Lines to Take (if asked):

- **Ownership of a company is primarily a matter for the company itself and its shareholders**
- **It is for the Competition authorities to investigate whether the transaction raises any competition issues**
- **It would be premature for the Government to comment on any potential use of its intervention powers under the Enterprise Act until we have more facts surrounding the acquisition**

Background

Current Situation

- James Murdoch explained to you that News International has offered to acquire the remaining shares in BSkyB that it does not already own - it currently has 39.1% of the shareholding.
- He reported that the offer has been rejected on the grounds that the Board felt it did not represent the true value of the company, but the two companies have entered into further talks.
- The Takeover Panel had been informed that the two companies have entered into further negotiations. Any further announcements would be in accordance with the rules of the Takeover Code.

What Next?

- Should the two Boards come to an agreement, a filing to the European Commission would be made for regulatory clearance. Due to the size of the companies involved, jurisdiction will fall to the European Commission for it to investigate the merger under the European Community Merger Regulations which will consider the acquisition's impact on competition. The EC requires mergers to be pre notified and it will make its preliminary decision within 30 days of a filing.
- He gave no specific timetable as to when any further announcements would be made and they are not as yet under any regulatory commitment to conclude any negotiations (The Takeover Panel can issue "put up or shut up" notices which includes a specific timetable however these are usually related to hostile takeover bids).

Should you intervene?

- You have powers under the Enterprise Act 2002 to intervene in mergers that raise a specified public interest consideration - in this case the plurality of media ownership.
- The power can be used even where the EC has jurisdiction over the case. However, much more information would be required on the detail of the acquisition before a decision to intervene could be made, and you are only able to intervene *after* the merger had been notified to the EC (which won't be until the two Boards have come to an agreement).
- **Therefore, recommendation is <u>not</u> to intervene at this stage, or at least until more is known and until the merger has been notified to the EC.**

(Incidentally, the power to intervene in media mergers has only been used once - in the case of BSkyB's acquisition of a 17.9% shareholding in ITV plc in 2006 which after a Competition Commission report and two appeals, Sky have now divested more than half of that acquisition.)

E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE]
Cc:	Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Hendon David (IE) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=DHENDON], Clark Rachel (IE) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=RECLARK], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=OCAMPBEL]
Sent:	21/06/2010 at 16:17
Received:	21/06/2010 at 16:17
Subject:	RE: James Murdoch Meeting

Thanks [redacted] I will let you know when we set this up.

Rachel - I've been told by James Murdoch's assistant that he will exclusively want to talk about the broader issues such as broadband policy, not the shares acquisition specifically, so I assume we'll need your help, and your colleagues, for a meeting briefing. Once a time is organised I will get a clearer view on the agenda for the meeting from his assistant. I'll keep you posted.

Thanks
[redacted]

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (CCP)
Sent: 17 June 2010 14:31
To: Cable MPST; Chambers Sarah (CCP)
Cc: Davey MPST; SPAD MPST; Hendon David (IE); Clark Rachel (IE); Rees Andrew (CCP); [redacted] (CCP); [redacted] (LEGAL B); [redacted] (COMMS)
Subject: RE: James Murdoch Meeting

[redacted]

1. It seems reasonable to assume that since the phone call earlier this week, the two companies are closer to reaching a deal and that James Murdoch wants to update the SofS and, in the light of their experience in the ITV share acquisition case, would want an indication from the SofS as to whether he would use his powers of intervention.

2. It therefore would perhaps seem unreasonable to refuse their request. The SofS should however, be in listening mode and I would suggest that he should follow the lines to take (background would remain the same) as provided in my e mail of

late Tuesday evening. It might help if a CCP official could also sit in.

[redacted]

Competition Law and Mergers |Department for Business, Innovation and Skills |
[redacted]bis.gsi.gov.uk | T: 0207 215 [redacted]

The Department for Business, Innovation and Skills (BIS) is building a dynamic and competitive UK economy by creating the conditions for business success; promoting enterprise and science; and giving everyone the skills and opportunities to succeed. To achieve this we will foster world class universities and promote an open and global economy.

BIS - Investing in our future

From: Cable MPST
Sent: 17 June 2010 12:52
To: Chambers Sarah (CCP); [redacted] (CCP)
Cc: Davey MPST; SPAD MPST; Hendon David (IE); Clark Rachel (IE)
Subject: James Murdoch Meeting

Sarah, [redacted]

James Murdoch's office has called.

At the end of the call this week James suggested he and the SoS meet up at some point, SoS vaguely agreed. They now want a slot in the diary.

Do you see any issue with this in terms of the acquisition?

[redacted]

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

Dr Vince Cable MP
Secretary of State for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

date: 23 June 2010
contact: [redacted]
direct line:
email:

Dear Vince

News Corporation bid for BSkyB

I wrote to you on 16 June setting out our general views on Mergers and takeovers and now a very specific case has arisen about which the TUC has grave concerns.

This is the News Corporation's bid for BSkyB. Were this bid to go ahead, competition in the media sector in the UK would be very substantially reduced and media plurality, a cornerstone of a flourishing democracy, seriously damaged.

Unlike with the Kraft/Cadbury bid, the Government does have the power to intervene in the News Corporation bid for BSkyB. I would strongly urge you to ask that scrutiny of the bid is repatriated from Europe and examined by UK institutions, as is your right given the major impact that the bid would have on the media sector in the UK, to ensure that the public interest, and in particular the impact on media plurality and concentration of media ownership in the UK, are fully taken into account in assessing the bid.

I would welcome the opportunity for myself and colleagues representing workers in the media industry to meet with you to discuss this urgent matter further. Perhaps your office could contact [redacted] o make the appropriate arrangements?

Yours sincerely

[redacted]

Brendan Barber
General Secretary

E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD]
Sent:	28/06/2010 at 13:50
Received:	28/06/2010 at 13:50
Subject:	RE: BSkyB Note for SoS

[redacted]

The Sos was grateful for your note which he read over the weekend. He has said that he would appreciate updates as the case progresses and would like to know if there are any representations for him to intervene. Please could you keep us informed?

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (CCP)
Sent: 25 June 2010 16:44
To: Cable MPST
Cc: Chambers Sarah (CCP); Rees Andrew (CCP); Davey MPST; SPAD MPST
Subject: RE: BSkyB Note for SoS

[redacted]

I attach a note summarising the scope for the Newscorp / BSkyB merger to give rise to concerns relevant to the public interest consideration relating to the sufficiency of plurality of persons with control of media enterprises. This includes information on the process and timetable as well as substantive advice on whether an intervention might be appropriate in this case. Also attached is a decision tree that sets out the process in diagram form.

[redacted]

<< File: BSkyB & Newscorp.doc >> << File: ECMR case merger process decision tree.doc >>

From: Cable MPST
Sent: 25 June 2010 14:29
To: [redacted] (CCP)
Cc: Chambers Sarah (CCP); Rees Andrew (CCP); Davey MPST; SPAD MPST
Subject: BSkyB Note for SoS

P58

[redacted]

You have very helpfully agreed to adapt the submission you have prepared on the BSkyB shares acquisition to answer the following questions from the SoS this afternoon:

1. What are the specific stages the merger will go through (a little bit of detail on what happens at each stage, what is assessed and which authorities are involved at each point)?
2. At what point can he intervene, how would he do this/how does this work?
3. In theory, what competition issues could arise from this merger? i.e. to what extent might media plurality be compromised by this merger and why? (I guess for this one you might have to go into News International's control of the market before and after the merger - assuming it would go ahead)

Happy to chat again if you have questions.

Grateful for something by 4.30pm please.

Thanks very much

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (CCP)
Sent: 18 June 2010 16:20
To: Cable MPST
Cc: Davey MPST; Willetts MPST; Prisk MPST; Fraser MPST; Kelly Bernadette (MPST DG); Chambers Sarah (CCP); Rees Andrew (CCP); Pryce Vicky (EPA); [redacted] (CCP); [redacted] (CCP); [redacted] (LEGAL B); [redacted] (LEGAL B); [redacted] (Better Regulation Executive); [redacted] (Communications); [redacted] (COMMS); SPAD MPST
Subject: Competition cases - Guidelines for Ministers

<< File: Guidelines draft submission.doc >> << File: Guidelines - letter to Cabinet Colleagues.doc >> << File: Guidelines on commenting on competition cases.doc >>

PS/Secretary of State

I attach a submission advising the SofS to write to Cabinet Colleagues drawing their attention to guidelines governing the way Ministers comment on live competition cases. A draft letter is attached along with a copy of the guidelines which are unchanged from those circulated by Ministers in recent previous years. I understand the letter should go to members of the Economic Affairs Committee but happy to be advised on this by Private Office. The need for Ministers to avoid statements that might undermine the independence of the competition authorities continues to apply irrespective of any possible action relating to the Coalition commitment on strengthening the scope to take public interest issues into account when considering takeovers.

CCP2
Ext

NEWSCORP ACQUISITION OF REMAINING SHARES IN BSKYB: SCOPE TO INTERVENE ON PUBLIC INTEREST GROUNDS

Jurisdiction/process issues

1. The parties plan to notify the transaction to the EU Commission (DG Competition) for consideration under the EC Merger Regulation (ECMR). In theory, the UK's competition authority (the OFT) could ask DG Competition to refer the merger to it to deal with instead. However, there seems no reason why the OFT would make such a request and it is not clear DG Competition would agree to it even if they did. Once the transaction has been formally notified to it, DG Competition has an initial 25 working days to decide whether to clear the merger or initiate a more in depth second phase investigation.

2. The Secretary of State could issue a European Intervention Notice (EIN) under Section 67 of the Enterprise Act at any time if he considered the merger gave rise to issues relevant to a public interest consideration specified in Section 58 of that Act. The legislation does not define precisely by when such an intervention must be made in an ECMR case. In view of this, as a matter of practice, our approach has been to adopt a timetable for intervening equivalent to that which applies in domestic cases. Accordingly, if an intervention was to be made in this case, we would want it to issue quickly and at least before DG Competition reaches its decision on whether or not to go to a Phase Two competition investigation.

3. This transaction involves an enterprise involved in broadcasting and an enterprise involved in newspapers. Any argument for a public interest intervention is likely to relate to a potential impact on the cross media public interest consideration concerned with the need to ensure there is a sufficient plurality of persons with control of media enterprises.

4. If the Secretary of State were to issue an EIN, this would mean Ofcom would produce a report considering the merger's impact on plurality. On receipt of the report from Ofcom, the Secretary of State must decide whether to refer the merger to the Competition Commission for a more detailed investigation of the impact on media plurality. If such a reference was made, the Competition Commission would report to the Secretary of State within 24 weeks. He would then need to take final decisions on what action to take (if any) within 30 days.

5. Meanwhile DG Competition would take its own separate decision on whether to undertake a Phase Two competition investigation. The outcome of this does not affect the outcome of any public interest investigation the UK might undertake. It is possible for DG Competition to clear the merger at Phase I on competition grounds and for the Secretary of State nevertheless to refer it to the Competition Commission on public interest grounds and subsequently take decisions to impose conditions on the merger or block it altogether if appropriate.

Does the proposed transaction give rise to public interest concerns?

6. The reason the sufficiency of plurality of persons with control of media enterprises is a matter of public interest relates to the need to ensure people have access to a wide range of viewpoints and opinions and that no one person has unacceptable degree of control over what information people receive. In

considering whether this transaction may significantly affect this interest, it may be noted that Newscorp already has a large shareholding in BskyB (39.1%), has directors on its board and a close relationship with the company. While it clearly is the case that the transaction would increase Newscorp's current scope to exert influence over BskyB's output, the cautious view would be that Newscorp already has the scope to exert influence over BskyB's output.

7. The nature of Newscorp's relationship with BskyB has already been considered in the context of this question of the sufficiency of plurality of persons with control of media enterprises. A public interest intervention was made in January 2007 in respect of BSkyB's acquisition of a 17.9% shareholding in ITV plc. During that investigation, the argument was made and largely accepted that the scope for Newscorp to exert influence over the content of BSkyB's output (particularly the presentation of news) meant that the two enterprises should be deemed to be under common control for the purposes of assessing media plurality – meaning that Newscorp's various newspaper enterprises were taken into account in considering whether BskyB's ownership of a large stake in ITV might reduce such plurality.

8. In view of this, for the purposes of assessing whether an intervention may be appropriate in respect of Newscorp's acquiring 100% of the shares in BskyB, it is necessary to consider whether any increased degree of control Newscorp might acquire over BSkyB's editorial policy and output would make any substantive difference to the state of the sufficiency of plurality.

9. Our initial view is that there is no reason to make a public interest intervention in this proposed transaction since it appears to involve no change in practice to the extent to which people have access to a wide range of views and opinions. Nevertheless, interested parties may put forward a case for intervention and we will need to consider carefully any arguments that may be put forward on the matter. Accordingly, in any public statements BIS makes on the matter, it is important to reserve the Secretary of State's position and not appear to have already reached a conclusive decision.

10. We have spoken about the transaction with colleagues at Ofcom, DCMS and the OFT. Ofcom indicate that while the transaction may give Newscorp increased influence over BskyB's output, they already treat Newscorp and BskyB as one entity for the purposes of the media ownership rules provided under the Communications Act 2003. DCMS officials had no points to make relevant to the decision on whether or not an intervention might be appropriate – a decision that falls to be taken solely by the BIS Secretary of State. The OFT indicated they did not consider the transaction likely to raise substantive competition concerns.

PUBLIC INTEREST INTERVENTION ON MEDIA PUBLIC INTEREST GROUNDS

PROCESS

Merger meets ECMR thresholds for investigation by DG Competition – Parties have combined annual worldwide turnover of Euro 5 billion and Euro 250 million EU wide turnover

Yes
SofS considers whether merger appears to raise public interests concerns

No
DG Competition considers case on competition grounds only

Yes
SofS intervenes in merger under Section 67 of Enterprise Act. Instructs Ofcom to investigate and prepare report on media public interest issues

SofS receives report from Ofcom and makes a decision on whether to clear the merger, clear it subject to accepting undertakings, or refer it on public interest grounds to Competition Commission

(1) Makes no finding on public interest – intervention ends and case is considered only on competition grounds by DG Competition. (2) Or SofS accepts undertakings in lieu of reference to deal with public interest concerns and then clears the merger

SofS refers the merger on public interest grounds to the Competition Commission (CC) for an in-depth investigation

CC has 24 weeks to investigate and submit its report to SofS. SofS must accept CC's findings on competition however, he has discretion on its public interest findings

SofS takes final decision in the case once he has received the CC's final report. He can clear the merger, clear subject to undertakings or ultimately block the merger altogether. He must have due regard to the CC's report and any other submissions received.

30

E-mail Message

From:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	[redacted] [SMTP:[redacted]@hoganlovells.com]
Cc:	[redacted] [SMTP:[redacted]@hoganlovells.com], [redacted] [SMTP:[redacted]@newsint.co.uk], [redacted] [SMTP:[redacted]@hoganlovells.com]
Sent:	20/07/2010 at 13:35
Received:	20/07/2010 at 13:35
Subject:	RE: News Corporation/ BSkyB

[redacted]

Many thanks for the briefing note which will help us provide advice to the Secretary of State on the question of possible use of his public interest intervention powers under the Enterprise Act. Is there any further information you could provide on the likely timing of a notification to the EU Commission?

[redacted]
Consumer & Competition Policy Directorate BIS
020 7215 [redacted]

From: [redacted] [mailto:[redacted]@hoganlovells.com]
Sent: 20 July 2010 11:16
To: [redacted] (CCP)
Cc: [redacted]
Subject: News Corporation/ BSkyB

Confidential

Dear [redacted]

Further to our conversation on 15 June, I attach a short briefing paper providing background information on News' announcement of a possible offer to acquire up to the entire issued and to be issued share capital of Sky that it does not already own.

Should you or your colleagues have any questions, please do not hesitate to get in touch with me (on the direct line below) or [redacted]

All the best

[redacted]

[redacted]
Counsel

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Confidential Contains Business Secrets

POSSIBLE ACQUISITION BY NEWS CORPORATION OF BRITISH SKY BROADCASTING GROUP PLC

Preliminary Briefing by News Corporation to the Department of Business, Innovation and Skills and the Office of Communications

1. INTRODUCTION

1.1 This briefing paper relates to the possible offer by News Corporation ("News") to acquire the entire issued and to be issued share capital of British Sky Broadcasting Group plc ("Sky") that News does not already own (the "Transaction").

1.2 The Transaction is a concentration with a Union dimension and is therefore subject to mandatory notification to, and approval by, the European Commission (the "Commission") under the EU Merger Regulation ("EUMR"). Pre-notification contacts are underway with the Commission.

1.3 The Transaction would be subject to the UK City Code on Takeovers and Mergers. It is therefore important for transaction planning and financeability purposes that News can ensure, as far as possible, an efficient and speedy review of the Transaction under relevant merger control rules. Recognising that the Transaction could be in the interests of Sky's shareholders in the future, and that obtaining any necessary merger clearances would facilitate such an offer, Sky has agreed to co-operate with News in seeking those clearances. In this context, Sky has reviewed this preliminary briefing paper.

1.4 The purpose of this preliminary briefing paper is to provide the Department of Business, Innovation and Skills and Ofcom with background information on the Transaction and its UK context. This paper is a summary note of the key points of relevance to the Department's appraisal of the Transaction. The parties would be happy to provide further detail if helpful.

1.5 For the reasons set out below, the parties do not consider that the Transaction raises grounds for the Secretary of State for Business, Innovation and Skills ("SoS") to intervene in the Transaction pursuant to Part 3, Chapter 2 of the Enterprise Act 2002 ("EA02"), and in compliance with Article 21 EUMR, in order to protect the plurality of the media, as defined in section 58(2C) EA02.

1.6 As you will appreciate, the matters disclosed in this briefing paper are highly sensitive. Therefore, the information provided should not be disclosed to third parties beyond the relevant case teams at the Department and Ofcom who are dealing with this matter without the parties' prior written consent.

2. OVERVIEW OF THE TRANSACTION

The Parties

2.1 **News:** News is a diversified global media company with operations in eight industry segments: filmed entertainment; television; cable network programming; direct broadcast satellite television; integrated marketing services; newspapers and information services; book publishing; and other. News has a market capitalisation of approximately US$35 billion, had total assets as of 31 March 2010 of approximately US$55 billion and total annual revenues of approximately US$30 billion for the fiscal year ended 30 June 2009.

2.2 The activities of News are conducted principally in the United States, Continental Europe, the United Kingdom, Australia, Asia and Latin America.

2.3 News is a Delaware corporation whose shares are listed on the New York and Australian Stock Exchanges. News has a secondary listing on the London Stock Exchange.

2.4 News owns 39.1% of the shares in Sky, which entitle it to exercise 37.19% of the voting rights in Sky. News considers that, at present, it enjoys an ability materially to influence the policy of Sky.

2.5 Sky is active in a number of economic sectors in the UK and Ireland. In particular, Sky produces and acquires TV content which it uses to create linear TV channels, including the Sky News HD 24 hour rolling news service, and provides wholesale news programming to the commercial public service broadcaster ("PSB") channel, five, as well as providing news content to a number of commercial radio stations; wholesales its TV channels to third party cable and IPTV operators for them to retail to their subscribers; retails its own and third party pay TV channels to its direct-to-home satellite subscribers (including both private and commercial customers), over the internet via *Sky Player* and through mobile technologies, as well as retailing certain of its channels to IP-TV subscribers.

2.6 Sky also broadcasts a number of its channels free to air via DTH satellite and via DTT. Sky distributes its own and third party audiovisual programming via the services known as Sky Player and Sky Anytime on an on-demand basis; produces and distributes to its DTH satellite subscribers a number of listings magazines (SkyMag, Sky Sports Magazine and Sky Movies Magazine) featuring editorial about current and future programming on the DTH satellite platform; via its subsidiary Amstrad, manufactures and sells set-top-boxes; provides retail broadband services and telephony services (only in the UK), and certain internet-related services to consumers; through Easynet Global Services Sky provides managed network and hosting services to businesses; through its advertising sales house, 'Sky Media', sells advertising and sponsorship on its own and third party channels, around content available on Sky Anytime and Sky Player, as well as selling advertising space and sponsorship online; provides interactive services on Sky's DTH platform; and provides fixed odds betting services.

2.7 Sky is a UK public company whose shares are listed on the London Stock Exchange.

Rationale of the Transaction

2.8 Sky has achieved significant success over the years and News believes that the business would continue to have a successful future under News' outright ownership.

2.9 News believes that increasing its shareholding in Sky is a sensible step for News at the present time and a good use of News' available cash resources. The Transaction would improve the quality of News' earnings by expanding the geographic diversification of News' earnings base, reducing the concentration on cyclical advertising revenues and increasing News' access to direct consumer subscription revenues.

The Transaction structure

2.10 The Transaction contemplates the acquisition by News of up to 100% of Sky's shares. After the implementation of the Transaction, News would exercise sole control over Sky.

2.11 The Transaction would be subject to the City Code on Takeovers and Mergers and would be implemented by way of a public offer or court approved scheme of arrangement.

Timetable and regulatory review

2.12 On 15 June 2010, News made an announcement pursuant to Rule 2.4 of the City Code on Takeovers and Mergers of a possible offer to acquire the entire issued and to be issued share capital of Sky that News does not already own.

2.13 Pursuant to a Cooperation Agreement entered into by News and Sky on 15 June 2010, Sky has agreed to co-operate with News in seeking any necessary merger clearances in relation to the Transaction from the relevant merger control authorities.

2.14 For further details, please refer to the News press release dated 15 June 2010 at Annex I.

3. JURISDICTION

3.1 The Transaction would be a concentration with a Union dimension which would be subject to mandatory notification to the Commission.

(a) News does not currently exercise decisive influence over Sky for the purposes of the EUMR. Based on the attendance at Sky's last three general shareholder meetings, News' current 37.19% of the voting rights would not allow News to exercise the majority of the voting rights at the next meeting.

(b) The jurisdictional thresholds under the EUMR are satisfied as:

(i) the combined worldwide turnover of News and Sky exceeded Euro 5 billion in the most recent financial year;

(ii) each of News and Sky generated turnover in the European Union exceeding Euro 250 million in the most recent financial year;

(iii) News and Sky did not generate more than two thirds of their Union-wide turnover in one and the same Member State in the most recent financial year.

3.2 News considers that the Commission is the most appropriate authority to review the Transaction in its entirety by reference to its possible effects on competition and that the conditions to request a referral back to the UK under Article 9 of the EUMR are not met in this case because the Transaction does not threaten to affect significantly competition in a distinct market within the UK, nor will it affect competition in any distinct market within the UK that does not constitute a substantial part of the common market. News is engaging with the OFT in order to apprise the OFT of the Transaction and to discuss any concerns which the OFT might identify as to the potential impact of the Transaction on competition in the UK.

4. PUBLIC INTEREST CONSIDERATIONS

Legal framework for plurality assessment

4.1 The Transaction does not raise grounds to justify the SoS intervening on public interest grounds pursuant to Part 3, Chapter 2 EA02 to protect the plurality of the media.

4.2 It is submitted that the Transaction will not give rise to any public interest concerns such as to justify an intervention because:

(a) the Transaction does not fall under any scenarios contemplated by the SoS' policy on intervention in media public interest cases;

(b) there will be no material effect on the range or quality of plurality of news media available to any relevant audience;

(c) even if the SoS were to consider that there would be a reduction in plurality as a result of the acquisition of *de jure* control following the Transaction, there will be a sufficient number and diversity of sources of news to protect plurality; and

(d) the regulatory framework contains further safeguards of plurality.

Absence of plurality concerns

Submission 1: The Transaction does not fall under any scenarios contemplated by the SoS' policy in media public interest cases

4.3 The SoS has published guidance[1] on the circumstances in which he would expect to intervene in a media merger on public interest grounds. The guidance makes clear that he would generally expect to intervene only in cases where the transaction would otherwise have been governed by media ownership rules which have been removed by the Communications Act 2003. The cases that come within this category relate to mergers involving:

(a) owners of national newspapers with a market share in excess of 20% and Channel 5;

(b) owners of national newspapers with a market share in excess of 20% and national radio;

(c) Channel 3 and national radio;

(d) Channel 5 and national radio;

(e) two national radio stations; and

(f) a takeover of a Channel 3 licensee.

4.4 None of the above scenarios would arise as a result of the Transaction.

4.5 The SoS's guidance also contemplates intervention in other "exceptional circumstances".[2] The only such cases cited are ones where:

(a) a large number of news or educational channels would be coming under single control; or

(b) a single person were to take over all the music channels.

4.6 The Transaction would not give rise to either of these exceptional outcomes.

4.7 Nor is there any other reason to consider the Transaction to be "exceptional" and otherwise warranting intervention. In particular:

(a) there is no or no material overlap in the parties' activities in UK newspapers or television news; and

(b) neither of the parties uses any scarce spectrum resources or otherwise benefits from any special privileges (such as, for example, public funding). They do not, therefore, enjoy advantages which cannot be replicated by others.

4.7 Moreover, the legal threshold for an adverse public interest finding is high, and there is no prospect that the Transaction would give rise to concerns which might meet such a threshold. The guidance of the SoS makes clear that an adverse public interest finding would be justified only where a transaction gave rise to "***unacceptable levels*** of media and cross-media ***dominance***" (emphasis added)[3] and/ or a "***significant*** reduction in plurality in relation to any relevant audience" (emphasis added).[4] As explained further

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1 Enterprise Act 2002: Public Interest Intervention in Media Mergers, Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004 ("DTI Guidance").

2 DTI Guidance, para. 8.8.

3 DTI Guidance, para. 7.7.

4 DTI Guidance, para. 7.11.

below, post-Transaction there would remain a sufficient number and diversity of sources of news to protect plurality.

Submission 2: There would be no material effect on the range or quality of plurality

4.8 News is already entitled to exercise 37.19% of the voting rights in Sky, and News considers that it would already be deemed to enjoy an ability materially to influence the policy of Sky (as the Competition Commission ("CC") assumed in *Sky/ITV*[5]). Under the UK thresholds laid out in the UK merger legislation and the plurality test set out by the Court of Appeal in *Sky/ITV*[6], Sky and News are together already deemed to constitute a single controller of media enterprises. Section 58A(5) EA02 essentially provides that, where there is any degree of control over one enterprise by another (i.e., under any of the three measures of control in EA02, being at minimum "material influence"), both of them have to be treated as under the control of only one person.

4.9 However, in *Sky/ITV*[7], the Court of Appeal also made clear that, in assessing whether a further merger (e.g. News' acquisition of *de jure* control of Sky) has an adverse effect on plurality, it is necessary not just to count the number of independent controllers of media enterprises who are active in the market, but also to evaluate whether the new merger adversely affects the quality of plurality.

4.10 News submits that the Transaction cannot be expected to have any adverse effect on the range or quality of plurality of relevant media.

4.11 By virtue of its existing interest in Sky, News submits that it is already deemed to exercise some degree of influence over Sky. Support for this contention can be found in the detailed and lengthy review of the Sky/ITV transaction by the OFT, the CC, Ofcom and the Competition Appeal Tribunal ("CAT"), where the UK authorities have assumed that News exercises material influence over Sky within the UK merger control framework:

(a) The OFT stated that "[BSkyB's] largest shareholder is News Corporation (News Corp) with a 39.02 per cent stake, along with several directorships, which is sufficient to confer control over BSkyB."[8]

(b) The CC assumed that, for the purposes of its analysis of the impact of the ITV acquisition on plurality of news, "News Corporation had material influence over BSkyB."[9]

(c) Ofcom took into account the links between News and Sky in its plurality assessment.[10]

(d) The CAT's judgment recites that Ofcom, in its initial report to the SoS, "assumed that Sky is or may be controlled by News Corporation (39.1% shareholding held through a number of News Corporation subsidiaries)".[11]

4.12 Thus, on this basis, as sources of news (via newspapers and TV news coverage), News and Sky may be considered to be not wholly independent from one another even before

5 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, para. 5.64.

6 *BSkyB v Competition Commission* [2010] EWCA Civ 2 – Case Nos C12008/3053 and 3066.

7 *BSkyB v Competition Commission* [2010] EWCA Civ 2 – Case Nos C12008/3053 and 3066.

8 Acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc, OFT Report to the Secretary of State for Trade and Industry, 27 April 2007, para. 25.

9 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, para. 5.64.

10 Ofcom Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting plc's acquisition of a 17.9% shareholding in ITV plc, 27 April 2007, paras. 4.4-4.7.

11 *British Sky Broadcasting v Competition Commission and Secretary of State and Virgin Media Inc v Competition Commission and Secretary of State, ([2008] CAT 25)*, judgment of 29 September 2008, para. 247.

the Transaction. Accordingly, due to the existing links between News and Sky, the Transaction will not result in a material change in the range or quality of plurality.

Submission 3: There will remain a sufficient number and diversity of sources of news to protect plurality

4.13 Even if the SoS were to conclude that there might be a reduction in plurality as a result of the Transaction, any reduction in the range and diversity of the sources of news provided to audiences served by News and Sky cannot be expected to be qualitatively significant such as to justify intervention.

4.14 Post-Transaction there will remain a sufficient number and diversity of sources of news to protect plurality. In particular:

(a) there is no overlap between the parties in the supply of newspapers;

(b) there is no material overlap between the parties in the supply of UK television news[12];

(c) Sky News has a very small share of overall viewing[13] and accounts for a relatively small share of television news viewing. In considering any potential reduction in the number of controllers of media enterprises serving relevant audiences for news, account should be taken that:

(i) Sky News itself accounts for only 4.9% of television news viewing[14];

(ii) Ofcom recognised that Sky News' share of UK television news remained "small in comparison to PSB news broadcasters."[15] This remains the case today. Audiences for all rolling news channels are, at any one time, a small fraction of those attracted to news on PSB channels;

(d) neither Sky nor News will in the future determine the editorial policy of any other major broadcaster. Although Sky provides raw news data and content to five, Channel 5 Broadcasting Limited owns and controls the editorial policy of its channels, including any news programming, and is the regulated broadcasting service provider under the Communications Act 2003;

(e) there is a strong culture of editorial independence within UK television news production, which will continue to be effective in preventing any prejudice to independence and diversity of views. In assessing the Sky/ ITV transaction, the CC noted in relation to that transaction that the "evidence ... received suggested to [the Competition Commission] that there was a strong commitment to editorial independence across television news broadcasting which would lead to editors resisting any direct board intervention or intervention from shareholders to set the news agenda"[16];

(f) in any event, when analysing plurality in relation to any relevant audiences, the parties would draw attention to several facts which suggest that, even after completion of the Transaction, there would remain a sufficient degree of plurality

12 The *Fox News* channel is available on Sky's DSat platform; however, this channel is a re-transmission of the US channel and does not produce or comprise any UK specific news programming. See para 3.80 of New News, Future News. The challenges for digital news after Digital Switch-over, 26 June 2007 (Ofcom).

13 For each of April to June 2010, Sky News' share of monthly multi-channel viewing was 0.7%, 0.9% and 0.6% respectively (source: BARB http://www.barb.co.uk/report/monthlyViewing?_s=4).

14 October 2006. Source: BARB/TNS Infosys, Magentum analysis, all hours. Cited in New News, Future News, The challenges for digital news after Digital Switch-over, 26 June 2007 (Ofcom), Figure 3.2.

15 New News, Future News, The challenges for digital news after Digital Switch-over, 26 June 2007 (Ofcom), para. 3.36.

16 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, para. 5.68.

in the provision of news to any relevant audience to obviate the need for any public interest intervention:

(i) in an increasingly diverse all-media market place, there is and will remain post-Transaction a variety of sources of news and viewpoints, including traditional print media, the internet, radio and TV (both free-to-air and pay TV);

(ii) even where TV is the main source of news for some audiences, it is not the only source. The great majority of TV viewers of news rely on multiple sources for their news including traditional print media, the internet, radio and TV[17];

(iii) even within each specific medium, individuals tend to draw on multiple sources. For example, the average person who uses the internet for news will visit several different news websites each week, whilst a third of viewers actively watch television news from more than one source[18];

(iv) many other significant players (including the BBC and ITV) will remain as significant providers of news to the relevant audiences. As explained above, Sky's share of audience viewing is small by comparison with that of other providers;

(v) with further innovations in the distribution of news and other media including specialist/ dedicated news channels and news programming provided as part of general entertainment services owned and controlled by a number of media enterprises, it cannot be said that, post-Transaction, there would be an insufficient number of media enterprises serving relevant audiences.

Submission 4: The regulatory framework safeguards plurality

4.15 Television news provision is subject to separate regulatory mechanisms that impose specific standards relating to the quality of news provision.

4.16 In television news, regulatory mechanisms, including 'quality controls' and obligations to present news with 'due impartiality' contained in Ofcom's Broadcasting Code and in relevant broadcasting licences[19], reduce the scope for influence over editorial content by owners of television channels which broadcast news.

4.17 The parties submit that the Transaction should be viewed against this regulatory environment. In this context, the range of information and views available to relevant audiences would not be adversely affected following the Transaction. Such safeguards will continue to operate in addition to the strong culture of editorial independence within news production which is well accepted (see, further, Submission 3).

5. CONCLUSION

5.1 The parties submit that the Transaction has no adverse effect on the range of information and views available to the relevant audiences on the basis that:

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17 For example, see Figure 5 of Appendix I to the CC's Report in SkyB/ITV (Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007).

18 See Figure 6 of Appendix I to the CC's Report in SkyB/ITV (Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007).

19 For example, Channel five is obliged by its DTPS licence to include "Not less than 408 hours in each calendar year ... of news programmes ... between 6 am and midnight .... Such news programmes shall be of high quality and deal with both national and international matters."

(a) the Transaction does not fall under any scenarios contemplated by the SoS' policy on intervention in media public interest cases;

(b) there will be no material effect on the range or quality of plurality of news media available to any relevant audience;

(c) even if the SoS were to consider that there would be a reduction in plurality as a result of the acquisition of *de jure* control following the Transaction, there will be a sufficient number and diversity of sources of news to protect plurality; and

(d) the regulatory framework contains further safeguards of plurality.

5.2 Therefore, the Transaction does not give rise to any potential concerns which would justify the SoS intervening in the Transaction on public interest grounds.

5.3 The parties would be happy to provide further information in relation to any of the points raised above and to meet with staff, if helpful.

5.4 Should you have any questions, please do not hesitate to contact [redacted] (on direct line ++ 44 (0)20 [redacted] or email at [redacted]@hoganlovells.com) or [redacted] (on direct line ++ 44 (0)20 [redacted] or email at [redacted]@hoganlovells.com) or [redacted] at News (on direct line +44 (0)20 [redacted] or email at [redacted]@newsint.co.uk).

20 July 2010

Annex I

News Press release dated 15 June 2010

News Corporation Proposes To The Board Of British Sky Broadcasting Group Plc A Cash Offer Of 700 Pence Per Share For The British Sky Broadcasting Group Plc Shares It Does Not Already Own

News Corporation

NEWS RELEASE

NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION (IN WHOLE OR IN PART) IN, INTO OR FROM ANY JURISDICTION WHERE TO DO SO WOULD CONSTITUTE A VIOLATION OF THE RELEVANT LAWS OF SUCH JURISDICTION

This announcement does not constitute an announcement of a firm intention to make an offer under Rule 2.5 of the Takeover Code. There can be no certainty that any offer will ultimately be made.

FOR IMMEDIATE RELEASE

News Corporation Proposes To The Board Of British Sky Broadcasting Group Plc A Cash Offer Of 700 Pence Per Share For The British Sky Broadcasting Group Plc Shares It Does Not Already Own

NEW YORK, NY, June 15, 2010 – News Corporation ("News Corp") announces that it approached the Board of British Sky Broadcasting Group plc ("BSkyB") on Thursday, 10 June 2010, and proposed making an offer to acquire the entire issued and to be issued share capital of BSkyB not already owned by it for 675 pence in cash per share subject to the conditions described in this announcement.

After News Corp made the proposal, the Independent Directors of BSkyB requested that News Corp enter into discussions with the objective of achieving an agreed proposal for the mutual benefit of all shareholders. Following these discussions, News Corp increased the proposal to 700 pence in cash per share (the "Proposal").

News Corp and the BSkyB Independent Directors have been unable to reach a mutually agreeable price at the current time. However, both parties have agreed to work together to proceed with the regulatory process in order to facilitate a proposed transaction and, accordingly, we have agreed to enter into a Cooperation Agreement, details of which are set out below.

News Corp has been a major shareholder in BSkyB for over twenty years and has had Board representation throughout that period. News Corp currently owns 686,021,700 BSkyB shares, representing 39.1% of BSkyB's issued share capital.

Highlights of the Proposal

- News Corp proposes to the Independent Directors of BSkyB an offer of 700 pence in cash per share for the shares in BSkyB that it does not already own.
- The Proposal is at an attractive price and represents:
  - a premium of approximately 22.0% to BSkyB's share price of 574 pence at the close of business on 9 June 2010, being the day prior to News Corp's approach to the BSkyB Board;
  - a premium of approximately 27.5% to the average closing price of approximately 549 pence for the twelve month period to 9 June 2010, being the day prior to News Corp's approach to the BSkyB Board; and
  - a multiple of approximately 11.8 times BSkyB's earnings before interest, tax, depreciation and amortisation of £1,139 million (US$1,686 million) for the pro-forma twelve month period ended 31 March 2010.
- The Proposal values the fully diluted share capital of BSkyB, excluding the shares already owned by News Corp, at approximately £7.8 billion (US$11.5 billion).

News Corporation

NEWS RELEASE

Chase Carey, Deputy Chairman, President and Chief Operating Officer, News Corp, commented:

"We are proud of the success BSkyB has achieved over the years and of the many innovations it has brought to consumers in the UK and Ireland. That success is reflected in its strong public market valuation. Our increased proposal represents both an attractive valuation at approximately 11.8 times EBITDA for the twelve months to 31 March 2010 and a premium of 27.5% over BSkyB's average share price for the last twelve months prior to our approach.

"We believe that this is the right time for BSkyB to become a wholly-owned part of News Corporation with its greater scale and broader geographic reach. For News Corporation, our Proposal presents an opportunity to consolidate a core business with which we have been closely associated for over two decades. News Corporation will also benefit from increasing the geographic diversification of our earnings base, reducing our exposure to cyclical advertising revenues and increasing our direct consumer subscription revenues.

"However, we are taking a disciplined approach to this transaction, recognising both the market valuation of BSkyB and our substantial existing ownership.

"It goes without saying that we are a committed shareholder and are fully supportive of the talented management team and exceptional people at the company."

News Corp plans to finance its proposed offer by using a significant portion of the available cash on its balance sheet plus borrowed funds.

FURTHER INFORMATION ON NEWS CORP

News Corp is a diversified global media company with operations in eight industry segments: filmed entertainment; television; cable network programming; direct broadcast satellite television; integrated marketing services; newspapers and information services; book publishing; and other. News Corp has a market capitalisation of approximately US$35 billion, had total assets as of 31 March 2010 of approximately US$55 billion and total annual revenues of approximately US$30 billion for the fiscal year ended 30 June 2009. The activities of News Corp are conducted principally in the United States, Continental Europe, the United Kingdom, Australia, Asia and Latin America.

IMPORTANT NOTICE

News Corp's Proposal is subject, inter alia, to the following pre-conditions:

- clearance of the proposed transaction by the EC and any other relevant competition or regulatory authority; and
- News Corp obtaining satisfactory financing.

News Corp's preliminary assessment suggests that the thresholds for notification under the EC Merger Regulation are met and, as a result, merger filings will be required. Relevant documentation is expected to be filed with anti-trust and other regulatory bodies as soon as possible.

Pursuant to the Cooperation Agreement, News Corp and the Independent Directors of BSkyB have agreed:

- to cooperate in obtaining all relevant competition and other regulatory approvals. News Corp is not required to agree to any undertaking, commitment or assurance in relation to any such approval.
- a standstill under which News Corp will not (except with the agreement of the Independent Directors of BSkyB or in other specified circumstances):
  - until the earlier of two months after grant of the merger clearances, payment of the Break Fee described below, and 31 December 2011, acquire or offer to acquire an interest in BSkyB shares or make an offer for all or any part of the share capital of BSkyB or take

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action that would require it to make any takeover or similar transaction involving the securities of BSkyB.

- o until the earlier of five months after grant of the merger clearances, payment of the Break Fee described below, and 31 December 2011 (the "Standstill Period"), make an offer for all or any part of the share capital of BSkyB (other than an offer that is conditional upon News Corp and its associates acquiring shares carrying 70% or more of the voting rights of BSkyB) or take action that would require it to make any takeover or similar transaction involving the securities of BSkyB.

- that, until the earlier of the payment of the Break Fee and expiry of the Standstill Period, BSkyB will not request that the Panel on Takeovers and Mergers (the "Panel") imposes a time limit for News Corp to clarify its intentions with regard to BSkyB pursuant to Rule 2.4(b) of the City Code on Takeovers and Mergers (the "Takeover Code").

- News Corp will pay to BSkyB a break fee (the "Break Fee") equal to 0.5% of the value of an offer were one to have been made at the Proposal price (approximately £38.5 million, or US$57.0 million) if:

  - o certain merger control and competition clearances are unconditionally granted or granted subject to agreement to a non-material remedy prior to 31 December 2011; and

  - o News Corp does not announce an offer pursuant to Rule 2.5 of the Takeover Code at the Proposal price or such higher price that is permitted by the Panel or such lower price that is agreed with the Independent Directors of BSkyB (a "Firm Offer Price") within five months following such clearance; or

  - o News Corp announces, prior to the conclusion of the processes required to achieve all merger control and competition clearances, that it does not intend to announce a firm offer at the Firm Offer Price or the Takeover Code applies in such a way as to restrict News Corp from doing so in any such case prior to 31 December 2011.

- the Break Fee may be distributed to BSkyB shareholders other than News Corp and its affiliates if so determined by the Independent Directors of BSkyB, and News Corp has agreed to vote in favour of any resolution to give that effect.

- the Break Fee is not payable in the event that (i) BSkyB has committed a wilful or intentional breach of its warranties or representations or obligations under the Cooperation Agreement, or (ii) a transaction is publicly disclosed (including a possible offer from a third party) prior to 31 December 2011 which would be an alternative to, inconsistent with or reasonably likely to preclude News Corp from implementing an acquisition of the whole of BSkyB and subsequently becomes wholly unconditional (the "Non-Pay Events"). The standstill described above will cease to apply in the event BSkyB commits a wilful breach of the Cooperation Agreement that is not remedied.

- News Corp will reimburse BSkyB in respect of expenses reasonably incurred up to a maximum of £20 million (US$29.6 million) in the event that the merger clearances are not granted, unless one of the Non-Pay Events has occurred.

News Corp reserves the right to:

(i) make an offer at any time at a value below 700 pence per BSkyB share: (a) with the agreement and recommendation of the Independent Directors of BSkyB; or (b) to the extent that BSkyB declares, makes or pays any dividend in excess of 19.50 pence per share in respect of the financial year ending 30 June 2010 or to the extent that BSkyB declares, makes or pays a dividend in excess of the daily pro-rata portion of an annual equivalent of 21.45 pence per share in respect of any part of the financial year ending 30 June 2011; and/or

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(ii) vary the form and/or mix of consideration as set out above and/or introduce other forms of consideration such as securities in substitution for all or part of the cash consideration; and/or

(iii) waive in whole or in part any of the pre-conditions to the making of an offer referred to above.

The proposed offer would be made by News Corp or a wholly-owned subsidiary of News Corp. It is News Corp's current intention to effect the transaction by means of a scheme of arrangement under Part 26 of the Companies Act 2006. However, News Corp reserves the right to proceed by way of a takeover offer subject to the Takeover Code. Any offer will be made solely by certain offer documentation, which will set out the full terms and conditions of any offer.

This announcement does not amount to a firm intention to make an offer under Rule 2.5 of the Takeover Code. There can be no certainty that any offer will ultimately be made even if the above pre-conditions are satisfied or waived.

A copy of this announcement will be available on News Corp's website at www.newscorp.com.

Deutsche Bank and J.P. Morgan Cazenove are acting as financial advisers to News Corp.

News Corp will hold an analyst and investor call with respect to the proposed offer for BSkyB at 8.30 EDT / 13.30 BST today, 15 June 2010. A live and recorded webcast will be available from www.newscorp.com.

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US and toll free: (800) 230 1096
Password: NEWS

An audio replay of the analyst and investor call will be available from 11.00 EDT today until 23.59 EDT on 28 June 2010 from the following dial in numbers:

UK and International: +1 (320) 365 3844
US and toll free: (800) 475 6701
Access code: 162124

Enquiries:

News Corporation Alice Macandrew Telephone: +44 (0)20 7782 6013 Teri Everett Telephone: +1 (212) 852 7070	**Investors and analysts** Reed Nolte Telephone: +1 (212) 852 7092 Tony Santabarbara Telephone: +1 (212) 852 7840
Deutsche Bank Gavin Deane James Agnew Telephone: +44 (0)20 7545 8000	**J.P. Morgan Cazenove** Charles Harman Dwayne Lysaght Telephone: +44 (0)20 7588 2828

Nothing in this announcement is intended to be a profit forecast and the statements in this announcement should not be interpreted to mean that the earnings per News Corp share for the current or future financial periods will necessarily be greater than those for the relevant preceding financial period.

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Further information

Deutsche Bank AG is authorised under German Banking Law (competent authority: BaFin – Federal Financial Supervisory Authority) and authorised and subject to limited regulation by the FSA. Details about the extent of Deutsche Bank AG's authorisation and regulation by the FSA are available on request. Deutsche Bank AG, London Branch is acting as financial adviser to News Corp and no one else in connection with the contents of this announcement and the Proposal and will not be responsible to any person other than News Corp for providing the protections afforded to clients of Deutsche Bank AG, London Branch, nor for providing advice in relation to the Proposal or any matters referred to herein.

J.P. Morgan plc, which conducts its UK investment banking business as J.P. Morgan Cazenove and is authorised and regulated in the United Kingdom by the Financial Services Authority, is acting for News Corp and for no one else in connection with the matters set out in this announcement and the Proposal and will not be responsible to anyone other than News Corp for providing the protections afforded to clients of J.P. Morgan plc nor for providing advice in relation to the Proposal or any matters set out in this announcement.

This announcement is not intended to, and does not, constitute or form part of any offer, invitation or the solicitation of an offer to purchase, otherwise acquire, subscribe for, sell or otherwise dispose of, any securities, or the solicitation of any vote or approval in any jurisdiction, pursuant to this announcement or otherwise. Any offer will be made solely by certain offer documentation which will contain the full terms and conditions of any offer, including details of how it may be accepted.

This announcement has been prepared in accordance with English law and the Takeover Code and information disclosed may not be the same as that which would have been prepared in accordance with the laws of jurisdictions outside England.

The distribution of this announcement in jurisdictions other than the United Kingdom and the availability of any offer to shareholders of BSkyB who are not resident in the United Kingdom may be affected by the laws of relevant jurisdictions. Therefore any persons who are subject to the laws of any jurisdiction other than the United Kingdom or shareholders of BSkyB who are not resident in the United Kingdom will need to inform themselves about, and observe, any applicable requirements.

Forward-looking statements

Certain statements made in this announcement that are not based on current or historical facts are forward-looking in nature including, without limitation, statements preceded, followed by or containing the words "believes," "anticipates," "plans," "projects," "intends," "expects," "estimates," "predicts," and words of similar import or the negative thereof. All statements other than statements of historical facts including, without limitation, those regarding News Corp's or BSkyB's financial position or News Corp's business strategy, plans and objectives of management for future operations (including development plans and objectives) or News Corp's Proposal to acquire the shares it does not currently own in BSkyB and the potential consummation thereof are forward-looking statements. Such forward-looking statements involve known and unknown risks, uncertainties and other important factors that could cause the actual results to be materially different from future events, results, performance or achievements expressed or implied by such forward-looking statements. Such forward-looking statements are based on numerous assumptions regarding News Corp's and BSkyB's present and future business strategies and the environment in which News Corp and BSkyB will operate in the future. These forward-looking statements speak only as at the date of this announcement. News Corp expressly disclaims any obligation or undertaking (other than under applicable law, rule or regulation) to disseminate any updates or revisions to any forward-looking statements contained herein to reflect any changes in the News Corp's expectations with regard thereto or any change in events, conditions or circumstances on which any such statement is based. For additional information on these and other factors that could affect News Corp's forward-looking statements, see News Corp's filings with the U.S. Securities and Exchange Commission (the "SEC"), including News Corp's most recently filed Annual Report on Form 10-K and subsequent reports on Forms 10-Q and 8-K.

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Additional information

This announcement is provided for informational purposes only, and it is not a solicitation of a proxy or an offer to purchase, or a solicitation of an offer to sell, shares of BSkyB or News Corp. Subject to future developments, News Corp may file documents with the SEC in connection with the proposed combination, including, but not limited to, a proxy statement on Schedule 14A, a registration statement and/or a tender offer statement on Schedule TO. If any such filings are made, shareholders of News Corp are urged to read such filings, and any other filings made by News Corp with the SEC in connection with the potential combination (if and when they become available), because such filings will contain important information about News Corp, BSkyB and the potential combination. Those documents, if and when they become available, as well as News Corp's other public filings with the SEC, may be obtained without charge at the SEC's website at www.sec.gov and at News Corp's website at www.newscorp.com or by directing the request to News Corp, 1211 Avenue of the Americas, New York, New York 10036, Attention: Reed Nolte, by telephone at +1 212 852 7092 or by email at investor@newscorp.com.

Dealing disclosure requirements

Under Rule 8.3(a) of the Takeover Code, any person who is interested in 1% or more of any class of relevant securities of an offeree company or of any paper offeror (being any offeror other than an offeror in respect of which it has been announced that its offer is, or is likely to be, solely in cash) must make an Opening Position Disclosure following the commencement of the offer period and, if later, following the announcement in which any paper offeror is first identified. An Opening Position Disclosure must contain details of the person's interests and short positions in, and rights to subscribe for, any relevant securities of each of (i) the offeree company and (ii) any paper offeror(s). An Opening Position Disclosure by a person to whom Rule 8.3(a) applies must be made by no later than 3.30 pm (London time) on the 10th business day following the commencement of the offer period and, if appropriate, by no later than 3.30 pm (London time) on the 10th business day following the announcement in which any paper offeror is first identified. Relevant persons who deal in the relevant securities of the offeree company or of a paper offeror prior to the deadline for making an Opening Position Disclosure must instead make a Dealing Disclosure.

Under Rule 8.3(b) of the Takeover Code, any person who is, or becomes, interested in 1% or more of any class of relevant securities of the offeree company or of any paper offeror must make a Dealing Disclosure if the person deals in any relevant securities of the offeree company or of any paper offeror. A Dealing Disclosure must contain details of the dealing concerned and of the person's interests and short positions in, and rights to subscribe for, any relevant securities of each of (i) the offeree company and (ii) any paper offeror, save to the extent that these details have previously been disclosed under Rule 8. A Dealing Disclosure by a person to whom Rule 8.3(b) applies must be made by no later than 3.30 pm (London time) on the business day following the date of the relevant dealing.

If two or more persons act together pursuant to an agreement or understanding, whether formal or informal, to acquire or control an interest in relevant securities of an offeree company or a paper offeror, they will be deemed to be a single person for the purpose of Rule 8.3.

Opening Position Disclosures must also be made by the offeree company and by any offeror and Dealing Disclosures must also be made by the offeree company, by any offeror and by any persons acting in concert with any of them (see Rules 8.1, 8.2 and 8.4).

Details of the offeree and offeror companies in respect of whose relevant securities Opening Position Disclosures and Dealing Disclosures must be made can be found in the Disclosure Table on the Takeover Panel's website at www.thetakeoverpanel.org.uk, including details of the number of relevant securities in issue, when the offer period commenced and when any offeror was first identified. If you are in any doubt as to whether you are required to make an Opening Position Disclosure or a Dealing Disclosure, you should contact the Panel's Market Surveillance Unit on +44 (0)20 7638 0129.

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APPENDIX I
BASES AND SOURCES OF INFORMATION

- Closing share prices are sourced from Datastream, and refer to prices at close on 9 June 2010, the day prior to News Corp's approach to the Board of BSkyB, unless otherwise stated.
- US$/£ exchange rate of 1.48.
- News Corp's current shareholding in BSkyB of 686,021,700 shares as at 29 July 2009, sourced from BSkyB's Annual Report for the 2009 financial year. Under the terms of the 2005 Voting Agreement signed by BSkyB, News Corp and certain of their affiliates, the voting interest of News Corp (including its affiliates and any parties acting in concert with it) in BSkyB is limited to 37.19%. The provisions of the Voting Agreement cease to apply on a change of control of BSkyB and in certain other circumstances.
- Twelve month arithmetic average closing price of approximately 549 pence sourced from Datastream over the period from 10 June 2009 until 9 June 2010 inclusive. Average only includes trading days.
- The acquisition multiple of approximately 11.8 times BSkyB's Adjusted EBITDA for pro-forma twelve month period ended 31 March 2010 calculated as ratio of Enterprise Value (as defined below) to Adjusted EBITDA for the pro-forma twelve month period ended 31 March 2010 (as defined below).
- BSkyB's Adjusted EBITDA for the pro-forma twelve month period ended 31 March 2010 of £1,139 million (US$1,686 million) is calculated as:
  - "Adjusted EBITDA" as reported by BSkyB for the financial year to 30 June 2009 of £1,071 million (US$1,585 million) (sourced from BSkyB's financial year 2009 earnings release)
  - Less: "Adjusted EBITDA" as reported by BSkyB for the 9 months to 31 March 2009 of £800 million (US$1,184 million) (sourced from BSkyB's earnings release for the 9 months ended 31 March 2010)
  - Add: "Adjusted EBITDA" as reported by BSkyB for the 9 months to 31 March 2010 of £868 million (US$1,285 million) (sourced from BSkyB's earnings release for the 9 months ended 31 March 2010)
- BSkyB's Enterprise Value is calculated as:
  - (a) the equity value based on the Proposal price of 700 pence per share and fully diluted share capital of 1,800,004,829, comprising:
    - 1,752,842,599 ordinary shares in issue as reported on BSkyB's Form 20-F as filed with the US Securities and Exchange Commission on 31 July 2009; and
    - 47,162,230 options which have exercise prices at or below 700 pence, assuming that options are exercisable at the mid-point of their respective exercise price ranges, with all figures as reported by BSkyB in its Annual Report for the 2009 financial year
  - (b) add: net debt of £1,394 million (US$2,063 million) as at 31 March 2010, as reported by BSkyB in its earnings release for the 9 months ended 31 March 2010 (such figure excludes £233 million (US$345 million) of litigation proceeds from EDS)
  - (c) less: net cash proceeds from the EDS settlement of £281 million (US$416 million), being the £233 million (US$345 million) previously not recognised by BSkyB as cash plus £48 million (US$71 million) additional settlement proceeds (being the difference between the £318 million (US$471 million) final settlement announced by BSkyB on 7 June 2010 and the £270 million (US$400 million) interim payment as reported by BSkyB in its earnings release for the 9 months ended 31 March 2010)

News Corporation

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- (d) less: £90 million (US$134 million) of cash proceeds from the exercise of in-the-money share options referred to in part (a) above, calculated based on BSkyB's Annual Report for the 2009 financial year

- (e) less: value of stake in ITV plc, calculated as the product of the 291,684,730 shares attributable to BSkyB at 3 March 2010 (as reported by ITV plc in its 2009 Annual Report) and the 52.75 pence per share closing price for ITV plc.

- The Proposal values BSkyB's fully diluted share capital, excluding the shares already owned by News Corp, at £7.8 billion (US$11.5 billion), based on a Proposal price of 700 pence per share and 1,113,983,129 fully diluted shares, comprising:

  - 1,066,820,899 BSkyB shares in issue and not already held by News Corp, being the difference between 1,752,842,599 BSkyB shares in issue (sourced as above) and the 686,021,700 shares already owned by News Corp (sourced as above); and

  - 47,162,230 options which have exercise prices at or below 700 pence (sourced as above).

- The break fee of approximately £38.5 million (US$57.0 million) is calculated as 0.5% of the value of an offer were one to have been made at 700 pence per share, calculated as the sum of:

  - the value of the issued and outstanding BSkyB shares not already held by News Corp, calculated based on a Proposal price of 700 pence per share and 1,066,820,899 shares issued and outstanding and not already held by News Corp (being the difference between the 1,752,842,599 BSkyB shares in issue and the 686,021,700 shares already held by News Corp, with both figures sourced as above); and

  - see-through value of £239,879,749 (US$355,022,029) for the options which have exercise prices at or below 700 pence, assuming that options are exercisable at the mid-point of their respective exercise price ranges, as reported by BSkyB in its Annual Report for the 2009 financial year.

- News Corp's market capitalisation of approximately US$35 billion is calculated based on closing prices of $12.72 for News Corp's Class A Common Stock and $14.82 for News Corp's Class B Common Stock. News Corp's shares outstanding (1,822,182,953 Class A Common shares and 798,520,953 Class B Common shares outstanding) are as at 30 April 2010 and are sourced from News Corp's quarterly report filed on Form 10-Q with the US Securities and Exchange Commission on 5 May 2010.

- News Corp's total assets of $55 billion are as at 31 March 2010 and are sourced from News Corp's quarterly report filed on Form 10-Q with the US Securities and Exchange Commission on 5 May 2010.

- News Corp's revenues of $30 billion for the year ended 30 June 2009 are sourced from News Corp's annual report filed on Form 10-K with the US Securities and Exchange Commission on 12 August 2009.

END

E-mail Message

From:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	21/07/2010 at 10:46
Received:	21/07/2010 at 10:46
Subject:	URGENT: BSkyB Newscorp - TUC letter
Attachments:	BSkyB Newscorp - TUC letter.doc

[redacted]

I think you mentioned yesterday to one of my staff that the letter to the TUC about NewsCorp/Sky has not yet gone. Could I ask you to substitute the attached which includes some minor changes to make it consistent with other correspondence. Thanks.

<>

P83

The Rt Hon Vince Cable MP
Secretary of State for Business,
Innovation and Skills

Our ref: 210461
Your ref:

Brendan Barber
Trades Union Congress
Congress House
Great Russell Street
London
WC1B 3JS

July 2010

Thank you for your letter of 16 June. I look forward to discussing your views on reforming the way mergers and takeovers are considered when we meet on 19 July.

In your subsequent letter of 23 June, you refer to the proposal from News Corporation to acquire 100% of the shares in British Sky Broadcasting. You suggest that this proposed transaction would give rise to significant competition impacts. You also suggest the deal should be considered by the Office of Fair Trading (OFT) rather than by the European Commission. My officials have forwarded your letter to the OFT to note your views on this matter. It is for the OFT to decide whether to ask the European Commission to refer the transaction to them. If the OFT were to make such a request, it would be for the European Commission to decide whether or not to agree to it.

You also call on me to use the powers I have under the Enterprise Act 2002 to intervene in the proposed transaction on public interest grounds. Guidance on the circumstances in which the Secretary of State might use his discretion to intervene in media mergers is available on the BIS website at: http://www.bis.gov.uk/files/file14331.pdf. Taking this published guidance into account, perhaps you could let me know if you have substantive reasons for believing the transaction could result in effects detrimental to the public interest such as might justify an intervention; please do submit detailed arguments on the matter for consideration.

VINCE CABLE

P84

E-mail Message

From:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=PBANNIST], [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] [redacted] MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD]
Sent:	23/07/2010 at 11:59
Received:	23/07/2010 at 11:59
Subject:	BSkyB Newscorp - TUC letter - revised draft
Attachments:	BSkyB Newscorp - TUC letter - revised draft.doc BIS Briefing Paper.pdf

<> <>

Covering Restricted

[redacted]

As requested, I attach a revised draft letter to Brendan Barber at the TUC. The revised text aims to provide the fuller, more helpful explanation the Secretary of State asked for of the applicable rules and scope for him to take action. If the Secretary of State is content with this, we will adopt similar text for use in replies to other letters that call for the Secretary of State to intervene in respect of Newscorp's plan to acquire 100% of BSkyB.

Also attached is a briefing not provided by News Corporation's legal advisers Hogan Lovells setting out their arguments on why the transaction should not be deemed to raise relevant to the media public interest considerations and why an intervention would not be appropriate. We have acknowledged receipt. Please note the information in this note is provided to BIS in confidence.

The Hogan Lovells analysis accords with our own assessment of the position - which is:
(i) that the transaction appears to make no substantive difference to the state of plurality of persons with control of media enterprises since News Corporation is already deemed to have the power to influence the output of BSkyB and
(ii) that our published guidance on use of the power to intervene in media mergers suggests this is not a case in which we would expect to use the power to intervene save in exceptional circumstances. We remain open to argument on the matter but there would need to be substantive information on which to base different conclusions about the case for a public interest intervention.

My email of 25 June covered a more detailed briefing note on this matter.

We understand (again in confidence) that News Corporation currently expects to submit a formal merger notification to the European Commission in early September. It may be noted that the OFT does not expect the merger to give rise to competition concerns.

[redacted]
CCP2
[redacted]

The Rt Hon Vince Cable MP
Secretary of State for Business,
Innovation and Skills

Our ref: 210461
Your ref:

Trades Union Congress
Congress House
Great Russell Street
London
WC1B 3JS

July 2010

Thank you for your letter of 16 June. I look forward to discussing your views on reforming the way mergers and takeovers are considered when we next meet.

In your subsequent letter of 23 June, you refer to the proposal from News Corporation to acquire 100% of the shares in British Sky Broadcasting (BSkyB). You suggest that this proposed transaction would give rise to significant competition impacts. You also call on me to request that such a deal be considered by the UK competition authorities rather than by the European Commission on the basis that it raises issues relevant to the public interest as it relates to media plurality and concentration of media ownership in the UK.

The EC Merger Regulation (ECMR) does provide (at Article 9) that the relevant competent authority of any member state may ask the EU Commission to refer a merger to them if the market affected by the merger is limited to that member state. In the UK, the relevant competent authority that would take decisions on whether to make such a request is the Office of Fair Trading (OFT). The OFT's approach to possible use of this scope is set out in its jurisdictional & procedural guidance which may be found on the OFT website at: http://oft.gov.uk/shared_oft/mergers_ea02/oft527.pdf. The relevant section is between paragraphs 11.24 and 11.29 on pages 111 and 112.

My officials have forwarded your letter to the OFT to note your views on the matter and consider whether it would be appropriate in this case to make such a request to the EU Commission. It may be noted that, even if the OFT were to decide there was reason to make such a request, the final decision on whether to accept the request would rest with the European Commission.

It should be understood that, for the purposes of using my powers to intervene in mergers on public interest grounds, it makes no substantive difference whether a merger is considered by the EU Commission or the UK competition authorities. I can intervene in both domestic and European mergers, though the precise procedures that apply in each case are slightly different.

There is published guidance which sets out the circumstances in which the Secretary of State might use his discretion to intervene in media mergers. This is available on the BIS website at: http://www.bis.gov.uk/files/file14331.pdf. I must take this guidance into account in reaching decisions on whether to intervene in a media merger.

The guidance includes a statement of policy on intervention in broadcasting and cross-media mergers – which is what a News Corporation acquisition of BSkyB would be. The guidance states 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". It goes on to set out the rules that were removed by that Act. It further explains that "save in exceptional circumstances" intervention would not be made in relation to mergers where there had never been any media ownership rules.

I hope that is helpful in explaining the scope to intervene on public interest grounds in the proposed News Corporation / BSkyB transaction. Taking the published guidance into account, if you have substantive reasons for believing the transaction could result in effects detrimental to the public interest such as might justify an intervention, please do submit arguments on the matter for my consideration.

VINCE CABLE

E-mail Message

From:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] [redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] [redacted] (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD]
Sent:	29/07/2010 at 15:06
Received:	29/07/2010 at 15:06
Subject:	RE: BSkyB Newscorp - TUC letter - revised draft
Attachments:	BSkyB Newscorp - TUC letter - revised draft SoS.doc

<>

[redacted]

I have amended the relevant paragraph as the SofS requested (in track changes) to explain how the published Guidance relates to the case for intervention in a Newscorp acquisition of BSkyB. This provides a more helpful and comprehensive response to Mr Barber since it suggests what conclusion may be drawn from the guidance about whether or not a Newscorp acquisition of BSkyB is a case in which the SofS would generally consider intervention. The guidance clearly indicates that it is not.

The other proposed conversational tone type changes seem fine.

[redacted]

From: [redacted] MPST MIN) On Behalf Of Cable MPST
Sent: 29 July 2010 12:22
To: [redacted] (CCP); Cable MPST
Cc: Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); [redacted] (Communications); [redacted] MPST MIN); Davey MPST; Kelly Bernadette (MPST DG); SPAD MPST
Subject: RE: BSkyB Newscorp - TUC letter - revised draft

[redacted]

Thanks for this. The SoS asked for some further amendments to this letter to make it more conversational. He has also asked for some more info for a new penultimate paragraph.

Can you provide this, this afternoon please?
<< File: BSkyB Newscorp - TUC letter - revised draft SoS.doc >>

Happy to discuss,

[redacted]

[redacted] in India)

P88

....

[redacted]
Private Secretary to Vince Cable | 0207 215 [redacted]

Department for Business, Innovation & Skills - Investing in our future

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From: [redacted] (CCP)
Sent: 23 July 2010 10:59
To: Cable MPST
Cc: Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); [redacted] (Communications); [redacted] (MPST MIN); Davey MPST; Kelly Bernadette (MPST DG); SPAD MPST
Subject: BSkyB Newscorp - TUC letter - revised draft

<< File: BSkyB Newscorp - TUC letter - revised draft.doc >> << File: BIS Briefing Paper.pdf >>

Covering Restricted

[redacted]

As requested, I attach a revised draft letter to Brendan Barber at the TUC. The revised text aims to provide the fuller, more helpful explanation the Secretary of State asked for of the applicable rules and scope for him to take action. If the Secretary of State is content with this, we will adopt similar text for use in replies to other letters that call for the Secretary of State to intervene in respect of Newscorp's plan to acquire 100% of BSkyB.

Also attached is a briefing not provided by News Corporation's legal advisers Hogan Lovells setting out their arguments on why the transaction should not be deemed to raise relevant to the media public interest considerations and why an intervention would not be appropriate. We have acknowledged receipt. Please note the information in this note is provided to BIS in confidence.

The Hogan Lovells analysis accords with our own assessment of the position - which is:
(i) that the transaction appears to make no substantive difference to the state of plurality of persons with control of media enterprises since News Corporation is already deemed to have the power to influence the output of BSkyB and
(ii) that our published guidance on use of the power to intervene in media mergers suggests this is not a case in which we would expect to use the power to intervene save in exceptional circumstances. We remain open to argument on the matter but there would need to be substantive information on which to base different conclusions about the case for a public interest intervention.

My email of 25 June covered a more detailed briefing note on this matter.

We understand (again in confidence) that News Corporation currently expects to submit a formal merger notification to the European Commission in early September. It may be noted that the OFT does not expect the merger to give rise to competition concerns.

[redacted]
CCP2
[redacted]

The Rt Hon Vince Cable MP
Secretary of State for Business,
Innovation and Skills

Our ref: 210461
Your ref:

Brendan Barber
Trades Union Congress
Congress House
Great Russell Street
London
WC1B 3JS

July 2010

P90

Thank you for your letter of 16 June. I look forward to discussing your views on reforming the way mergers and takeovers are considered when we next meet.

In your subsequent letter of 23 June, you refer to the proposal from News Corporation to acquire 100% of the shares in British Sky Broadcasting (BSkyB). You suggested that I request that this be considered by the UK competition authorities rather than by the European Commission on the basis that it raises issues relevant to the public interest due to the impact on concentration of media ownership in the UK.

I thought it would be helpful to set out some more information on the scope for intervention and involvement in this area. As you say there is a way for the UK authority to rule on this. Specifically, the EC Merger Regulation (ECMR) states that the relevant competent authority of any member state may ask the EU Commission to refer a merger to them if the market affected by the merger is limited to that member state. In the UK, the relevant competent authority that would take decisions on whether to make such a request is the Office of Fair Trading (OFT). The OFT's approach to possible use of this scope is set out in its jurisdictional & procedural guidance which may be found on the OFT website at: http://oft.gov.uk/shared_oft/mergers_ea02/oft527.pdf. The relevant section is between paragraphs 11.24 and 11.29 on pages 111 and 112.

My officials have forwarded your letter to the OFT to note your views on the matter and consider whether it would be appropriate in this case to make such a request to the EU Commission. You'll appreciate of course, that even if the OFT were to make such a request, the final decision on whether or not to accept this rests with the European Commission.

I should make clear, however, that for the purposes of using my powers to intervene in mergers on public interest grounds, it makes no substantive difference whether a merger is considered by the EU Commission or the UK competition authorities. I can intervene in both domestic and European mergers, though the precise procedures that apply in each case are slightly different.

Of course there is guidance on what circumstances the Secretary of State can use their discretion to intervene in media mergers. This is available on the BIS website at: http://www.bis.gov.uk/files/file14331.pdf. I must take this guidance into account in reaching decisions on whether to intervene in a media merger.

The guidance includes a statement of policy on intervention in broadcasting and cross-media mergers – which is what a News Corporation acquisition of BSkyB would be. Paragraph 8.2 of the guidance states 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". It goes on to set out what those cases are that would previously have been subject to media ownership rules – all mergers involving the holders of Channel 3 and Channel 5 television licences or national radio services. None of the cases listed concerns a merger involving BSkyB. The Guidance further explains that "save in exceptional circumstances" intervention would not be made in relation to mergers where there had never been any media ownership rules. In this case, it is not clear that any exceptional circumstances exist that would justify deviating from the generally applicable principles governing decisions on this matter.

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Deleted: rules that were removed by that Act

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[what does this mean in this case? This does not say whether this case would be an 'exceptional circumstance, or whether this is a case 'w[illegible] media ownership rules [illegible] been removed by CA 20[illegible] or 'where there had never been any media ownership rules'. Can you clarify]

I hope that is helpful in explaining the scope to intervene on public interest grounds in the proposed News Corporation / BSkyB transaction. Taking the published guidance into account, if you have substantive reasons for believing the transaction could result in effects detrimental to the public interest such as might justify an intervention, please do submit arguments on the matter for my consideration.

VINCE CABLE

Guardian Media Group
gmg
Kings Place, 90 York Way,
London N1 9GU
Telephone 020 3353 2000
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PLEASE TREAT THIS AS CONFIDENTIAL

30th July 2010

The Rt Hon Dr Vincent Cable MP
Secretary of State for Business, Innovation & Skills &
President of the Board of Trade
Department for Business, Innovation & Skills
1 Victoria Street
London SW1H 0ET

Dear Dr Cable,

I am writing in relation to the potential acquisition by News Corporation of the 61% of BSkyB currently in the hands of other shareholders, and Richard Desmond's acquisition of Five.

In recent years, via both the inquiry by the Lords Select Committee on Communications into "Media Ownership and the News" and Ofcom's more recent consultation on media ownership rules, Guardian Media Group has argued that current regulatory frameworks do not necessarily provide sufficient protection in terms of maintaining diversity of news provision.

These frameworks were designed to cater for an old model of media, in which media such as TV, radio and print were clearly distinct from one another. Technology and changing consumer behaviour have driven integration across these platforms, meaning that cross-platform concentration of share and voice is the critical issue for plurality - not just the old debate about who owns terrestrial channels.

This area of weakness, alongside structural changes within the industry – specifically the increasing concentration of power among a small group of super-dominant platforms (such as the BBC, Google, News Corporation), while the majority of media companies face considerable economic challenges – means there is a risk that a small number of organisations could develop an unhealthy share of media distribution and editorial voice in the UK.

Cont'd ...

Guardian Media Group
gmg

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We do not have sufficient information at present to judge whether the proposed acquisition of BSkyB by News Corporation would fall foul of competition law. However, we believe that given the level of media control and ownership already enjoyed by News Corporation in the UK (which under legislation in other countries such as the US it would never have been able to achieve), a further increase in that control and therefore share of total voice would be undesirable. We also note with interest that the OFT is considering the proposed acquisition by BSkyB of certain television channels and the entire share capital of Virgin Media Television Limited and Virgin Media Television Rights Limited, from Virgin Media Group.

We trust you will therefore consider the News Corporation/BSkyB deal an appropriate matter for intervention, given that it raises important public interest considerations as to the sufficiency of plurality of persons with control of media enterprises serving audiences in the UK.

Both the proposed BSkyB deal and the acquisition of Five are significant steps along the road towards greater consolidation and, consequently, further erosion of media plurality. On the basis that we cannot assume the current regulatory framework is sufficiently broad or robust to deal adequately with such cases, and that current market conditions, far from guaranteeing plurality, create an inherent bias towards a greater concentration of voice, we believe there to be grounds for the Secretary of State to intervene into both deals on the basis that the media public interest consideration (plurality of media ownership) is relevant to each.

Yours sincerely,

Andrew Miller

Chief Executive, Guardian Media Group

CC(.

ENDERS|ANALYSIS

30 July 2010

Rt Hon Dr Vince Cable MP
Secretary of State for Business, Innovation and Skills
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

Dear Dr Cable

The proposed purchase by News Corporation of the remaining 60.9% of BSkyB that it does not already own raises a number of concerns with respect to the resulting operation of the UK media sector that are the responsibility of the competition authorities in the UK and at the European Commission. In addition, I consider that this transaction's potential effects on media 'plurality' in our society deserve an intervention on your part under the "media public interest considerations" of The Enterprise Act 2002, as amended by the Communications Act 2003.

Enders Analysis is a leading UK independent research company serving research and analysis to investors, companies, regulators and government departments interested in the media, telecommunications and technology sectors. I am the CEO and owner of Enders Analysis.

The enclosed report provides an analysis of the development of the activities of BSkyB and News Corp in the television and newspapers in the UK, and their likely development over the period to 2014. I demonstrate that BSkyB's leading position in the commercial television market, combined with News Corp's leading position in the newspaper market, will give the resulting enterprise an unprecedented degree of control over the television and newspaper industries of the UK. This will reduce the plurality of media ownership, in my view, to below the level considered sufficient to support our democracy and a vibrant economy in the creative industries, warranting a public interest intervention. For similar reasons, the acquisition by Northern and Shell of Five also merits intervention. The Act refers to 'the *need* [my italics], in relation to every different audience in the UK, or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of media enterprises serving that audience'. As a result, I strongly urge you to intervene under the public interest regime of The Enterprise Act 2002, as amended by the Communications Act 2003.

I would be more than happy to discuss the contents of my report as the basis of my conclusions with yourself or with members of your staff.

Yours faithfully

Claire Enders

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News Corporation's proposed takeover of BSkyB:

A submission to the Secretary of State by Claire Enders, CEO, Enders Analysis Ltd

Overview

News Corporation, listed in the United States, controls a large range of media assets in the UK and in other countries. In the UK, the principal assets of News Corp are:

- 100% ownership of News International, which publishes *The Times*, *The Sunday Times*, *The Sun* and *News of the World*
- A 39.1% stake in BSkyB, the leading supplier of pay-TV services in the UK and also a supplier of telecommunication services
- 100% ownership of HarperCollins, one of the top four book publishers in the UK

Other notable News Corp assets include:

- In the United States, *The Wall Street Journal* (the leading global business newspaper), Dow Jones, *The New York Post*, and Fox Television, one of the big four US networks
- In Australia, a portfolio of newspapers including *The Australian*, *The Daily Telegraph* and *Herald Sun* and a 25% stake in pay-TV satellite television service FOXTEL
- 100% ownership of Sky Italia, the leading supplier of pay-TV services in Italy and a 45.4% stake in Sky Deutschland, the leading supplier of pay-TV services in Germany

News Corp has proposed to purchase the remaining 60.9% of BSkyB that it does not already own. This transaction constitutes a 'relevant merger situation' under the Enterprise Act 2002, engaging the responsibilities of the competition authorities. This Act permits Ministers to intervene in merger cases which raise public interest considerations specified in the Act. National security was the only consideration initially specified in the Act, but 'media public interest considerations' were added upon amendment of the Act by the Communications Act 2003. Baroness Blackstone, introducing what became the 2003 Communications Act into the Lords, said that one of the main purposes of the legislation was 'to ensure the existence of a range of media voices, safeguarding the vibrancy of democratic debate'.

As the Department of Trade and Industry (now BIS) specified in its Guidance Document of May 2004, such 'media public interest considerations' may apply to mergers involving newspapers or broadcast media enterprises or to cross-media mergers of newspaper and broadcast media enterprises. Clearly, News Corp's proposed transaction involves both a broadcast media enterprise (BSkyB) and a newspaper enterprise (News International) and therefore constitutes a cross-media merger.

This submission examines the proposed transaction's potential effects on 'plurality' in the UK in the context of the UK TV and newspaper markets. It has three sections:

- Section I provides a factual summary of the UK TV market to 2009, our projections for the development of the market by 2014, and a detailed discussion of the strategy of BSkyB
- Section II provides a factual summary of the UK newspaper market to 2009, our projections for the development of the market by 2014, and a detailed discussion of the strategy of News International
- Section III discusses the implications of the proposed cross-media merger for media plurality in the UK

We conclude that the potentially adverse effects of the proposed transaction on media plurality in the UK constitute 'media public interest considerations' that deserve the issuance of an intervention notice on the part of the Secretary of State. The resulting investigation by independent regulator Ofcom should provide a thorough exploration of the plurality implications of the proposed transaction, increasing the transparency and therefore public debate on this matter, which is vital for the future of the UK's democracy. At the very least, Ofcom's advice and recommendations will be valuable in the Secretary of State's decision as to whether plurality is relevant to the merger's consideration by the Competition Commission.

This report is produced by Enders Analysis Limited, a leading UK independent research company serving the media and telecommunications sectors. A full list of our subscribers (companies, investors, regulators and government departments) is provided in the Appendix. Information on our services is available at www.endersanalysis.com.

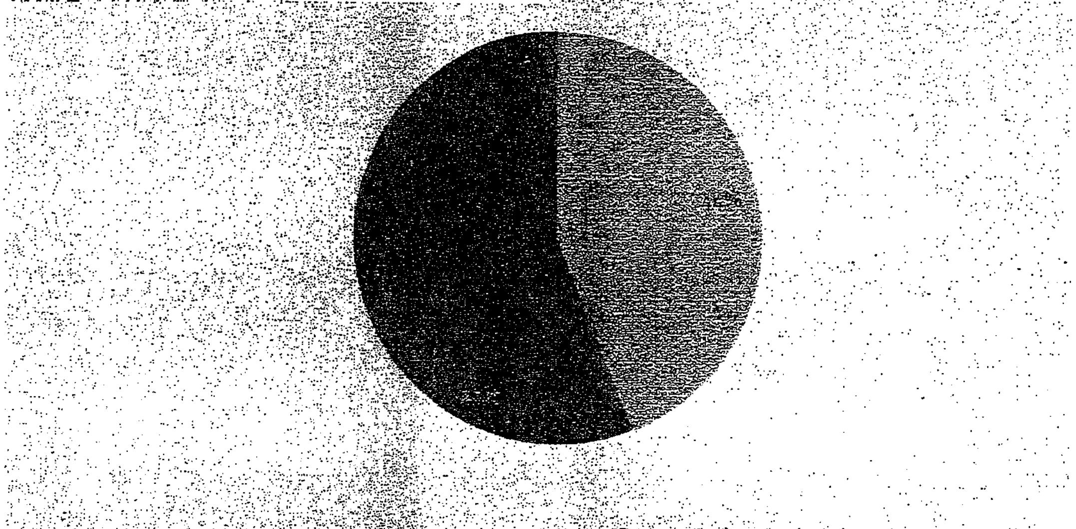
Section I – UK TV market through to 2014

UK TV market

The UK TV market totalled approximately £11.4 billion in 2009, and comprised three significant sources of revenue (Chart 1): the licence fee (23%), advertising (26%) and pay subscription revenues (44%). The remaining 7% came from a variety of other sources, including global programme sales. These revenue streams are defined as follows:

- Pay – Subscription and pay-per-view revenues generated from the provision of television services, excluding any payments for telecoms services, or wholesale revenues from third-party channel provision[1]
- Advertising – Revenue generated by television groups from the sale of spot advertising. Excludes any revenue received from programme production divisions
- Licence – Revenue allocated to BBC television activities (excludes radio and other activities)
- Other – Includes estimates of net TV shopping as well as sponsorship, product placement, interactive revenue (e.g. premium rate telephony), programme sales and S4C grants from the DCMS and non-UK subscription revenue from BSkyB

Chart 1: UK TV revenue distribution, 2009



[Source: Enders Analysis based on industry data]

Industry structure

BSkyB achieved total revenue of £5.9 billion in its last financial year (ending June 2010) and adjusted operating profits of £855 million.[2] BSkyB is the UK's leading supplier of residential and business pay-TV services, and also supplies residential telecommunication services. We estimate that BSkyB currently accounts for 67% of UK residential subscribers to subscription pay-TV services and about 80% of subscription pay-TV revenues. Virgin Media is the other leading retail provider of pay-TV subscription services, while BT Retail is a recent entrant.

BSkyB also competes with the major UK TV public service broadcasters (PSBs). The BBC is the largest of the PSBs, with total funding of £3.6 billion (including radio and websites) in the year ending March 2010, principally from the license fee. The other PSBs rely mainly on advertising for their funding. ITV's total revenue in 2009 was £1.9 billion, only £52 million larger than BSkyB's programming spend in the same period. Part of

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[1] BSkyB pay revenues include residential and non-residential subscriptions, both in the UK and other countries (e.g. Ireland).

[2] BSkyB's total revenues are generated from subscription payments and fees for entertainment products, advertising sales, residential and business telecommunications services, and fees from the wholesaling of Sky channels to other TV operators.

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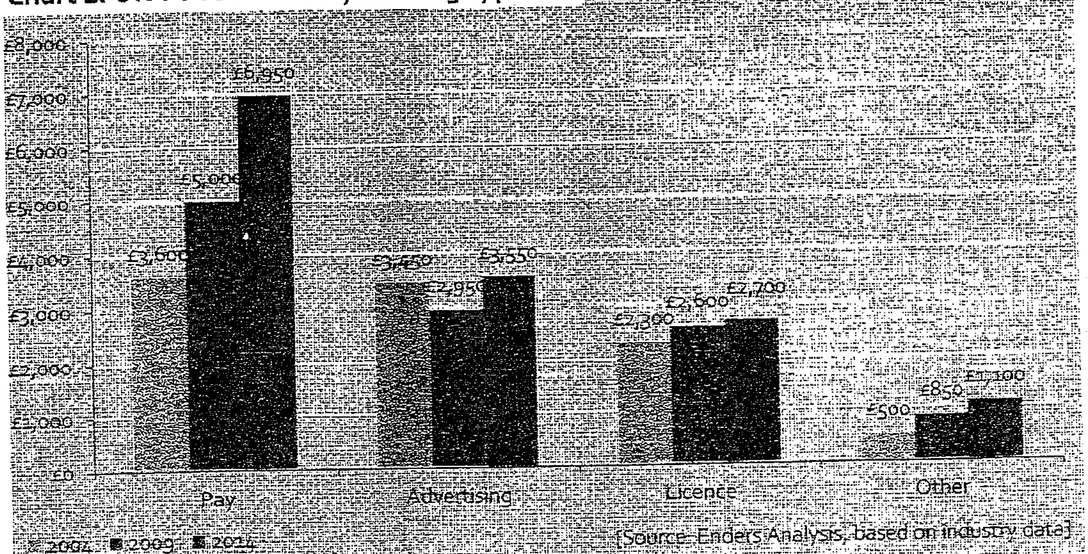
ITV's revenues came from the sale of programming via ITV Studios; this contributed 17.8% of ITV's total revenue. Channel 4 generated revenue of £830 million, while Five is considerably smaller at £269 million.

Development to 2014

BSkyB has acquired growing economic significance in the UK TV market due to the surge in pay revenue in recent years (see next section), in contrast to the revenues from TV advertising that fund the commercial PSB operators and, to a lesser extent, the BBC's license fee. Between 2004 and 2009, the total revenue to pay-TV operators – of which BSkyB accounted for some 80% in 2009 - rose by approximately 39% in nominal terms, to account for 44% of the total TV market, while advertising revenues fell by 14.5% due to structural change and cyclical effects in 2008-09. As a result, the contribution of advertising to total TV revenue fell to 26% in 2009 from 35% in 2004. The licence fee settlement in force until March 2013 has increased the BBC's revenues, albeit at a much lower rate than pay revenues, resulting in licence fee revenues contributing an increasingly smaller portion of income to the total TV market (22.8% in 2009 down from 23.4% in 2004).

During the next five years to 2014, pay-TV revenue is expected to grow at the same relative rate, taking total revenues to £6.95 billion, 48.6% of the total UK TV market in 2014, according to our calculations (Chart 2). 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. The government is closely examining the current funding of BBC TV channels and its other activities. After the current licence fee settlement expires in 2013, there could be a significant cut in the BBC's income, adversely affecting the position of the BBC relative to BSkyB in particular.[3]

Chart 2: UK TV revenues by funding type (m)



[Source: Enders Analysis, based on industry data]

[3] In an interview with *The Daily Telegraph*, Jeremy Hunt was questioned about the licence fee. Responding to a question over whether he could envisage people paying less for the BBC, he said: "Absolutely. I think that's the discussion that we need to have...The BBC should not interpret the fact that we haven't said anything about the way licence fee payer funds are used as an indication that we are happy about it."
http://www.telegraph.co.uk/culture/tvandradio/bbc/7895750/Licence-fee-for-wasteful-BBC-will-be-cut.html

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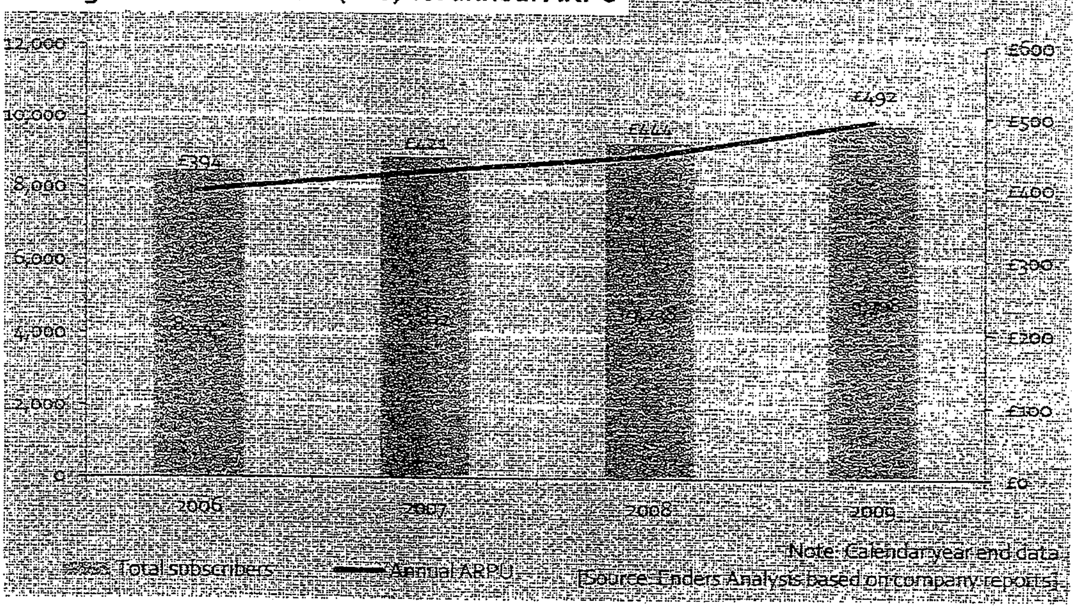
BSkyB's strategy for revenue growth

The surge in BSkyB's pay revenues is mainly due to a two-pronged strategy of expanding the number of subscribers and selling more products and services to each subscriber, thus lifting annual revenue per user (ARPU). Between 2006 and 2009, total BSkyB subscribers (in the UK, Ireland and other countries) rose by 15% to reach 9.7 million and ARPU rose by 25% to reach £492(Chart 3).

Chart 3: Total subscribers (000) vs. annual ARPU



BSkyB pay-TV subscriber growth has been assisted by levels of promotional spend. According to Nielsen data, BSkyB was the fourth largest advertiser by spend in the UK in 2008, spending £127 million, double the level recorded for 2004 (Table 1). In contrast, neither BT nor Virgin Media (adjusting for the merger between NTL and Telewest that established the group) spend as much as BSkyB or have increased spend to the same degree.

Table 1: BSkyB and competitors advertising spend, 2003-2008

	2003	2004	2005	2006	2007	2008
BSkyB advertising spend (m)	£41.7	£65.5	£111.2	£117.2	£155.1	£127.0
Ranking of total advertising spend	21	10	4	4	3	4
BT advertising spend (m)	£96.4	£81.9	£80.4	£91.9	£92.1	£87.6
Ranking of total advertising spend	3	5	9	6	6	8
Virgin Media advertising spend (m)	-	-	£32.4*	£37.6*	£68.8	£60.5
Ranking of total advertising spend	-	-	45	36	13	16

*NTL spend

[Source: The Nielsen Company, The Advertising Association Year Book]

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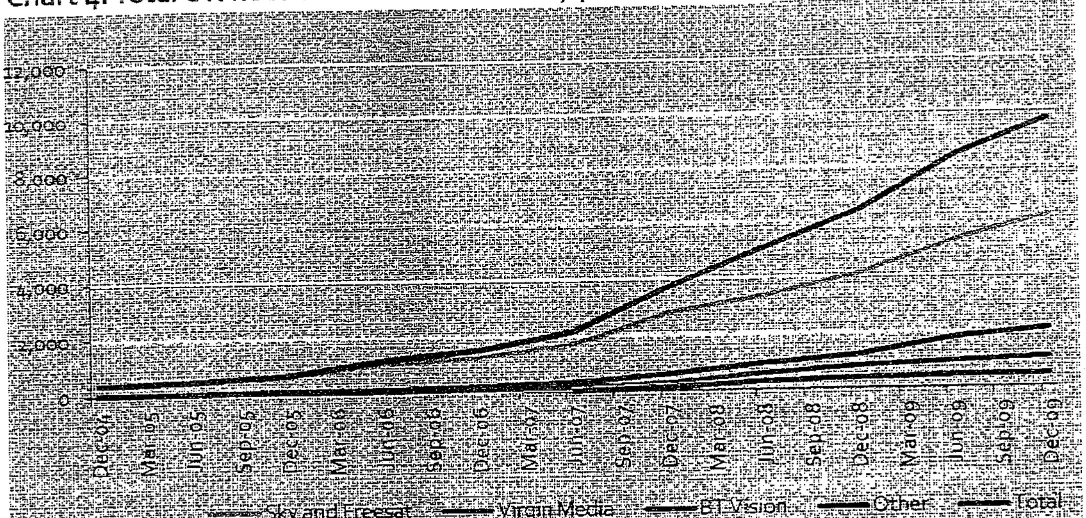
In addition, upfront costs to the BSkyB customer, chiefly installation and the Sky+ box, have been reduced and are nil for certain packages (if Sky TV plus either sports, films or broadband are taken). BSkyB's costs of sourcing the set-top boxes were lowered by the purchase of supplier Amstrad in September 2007. Between 2006 and 2009, the penetration of personal video recorders (PVRs) among the BSkyB subscriber base rose from 23.3% to 66.5%. BSkyB does not charge a monthly fee for the PVR service and the box itself is provided at modest cost or free for certain packages, requiring BSkyB to subsidise in relation to its 'normal' cost. However, the device adds substantial value to the service, mainly by facilitating catch-up TV viewing, thus improving customer retention. Virgin Media instead charges customers a monthly fee of £5 for a PVR unless they opt for their top tier content package. By the end of 2009, Virgin Media had 862,000 customers taking a PVR, just 23.6% of their TV base. BT Vision is also an important supplier of set-top boxes due to its BT Vision service. Out of the approximately 9.5 million PVRs in the UK, we estimate that less than 20% were bought on a standalone basis, mainly either for use with Freesat or Freeview (Chart 4).

Chart 4: Total UK housedholds with PVRs by platform (000)



[Source: BARB/InfoSysTV, Enders Analysis]

To spur product adoption, BSkyB announced in January 2010 that it would provide HD capable boxes as standard equipment to new subscribers to enable an upgrade to HD without having to replace their set-top box. For BSkyB, this eliminates the incremental set-top box subsidy when a customer decides to upgrade.[4] While the customer benefits from the subsidisation of set-top boxes, it is also true that BSkyB's competitors for the pay-TV customer are also forced to subsidise their customer premises equipment to maintain a level playing field in relation to new customers. This makes it more difficult for new entrants relying on the sale of set-top boxes to engage the customer in paying for the service (e.g. Canvas). In order for new services to generate reasonable levels of adoption, they will likely have to follow one of two paths: incorporation into TV sets; or to be given away as part of a package. Operators that decide to give away or subsidise hardware as part of their package face higher upfront customer acquisition costs, a heavy burden on new entrants.

The second prong of BSkyB's strategy has been to expand the number of charged for products taken by customers (Chart 5). In entertainment, BSkyB offers multiroom and HD, on top of pay-TV subscriptions. At the end of 2009, 2.1 million customers took either multiroom or HD respectively, each charged at a monthly fee of £10 (including VAT)).

Finally, BSkyB has been cross-selling telecoms services to pay-TV subscribers since July 2006, when Sky broadband launched. By the end of 2009, 24.8% of BSkyB customers took broadband while 21.8% took telephony and 13.4% purchased line rental. Residential telecoms contributed £514 million to BSkyB's revenue

[4] There will be a cost incurred when upgrading a customer. However it is likely to be small, covering any administration costs and the cost of a new viewing card to enable the HD channels. In contrast, the current cost of upgrading a customer to HD who does not have an HD box is stated as £200.

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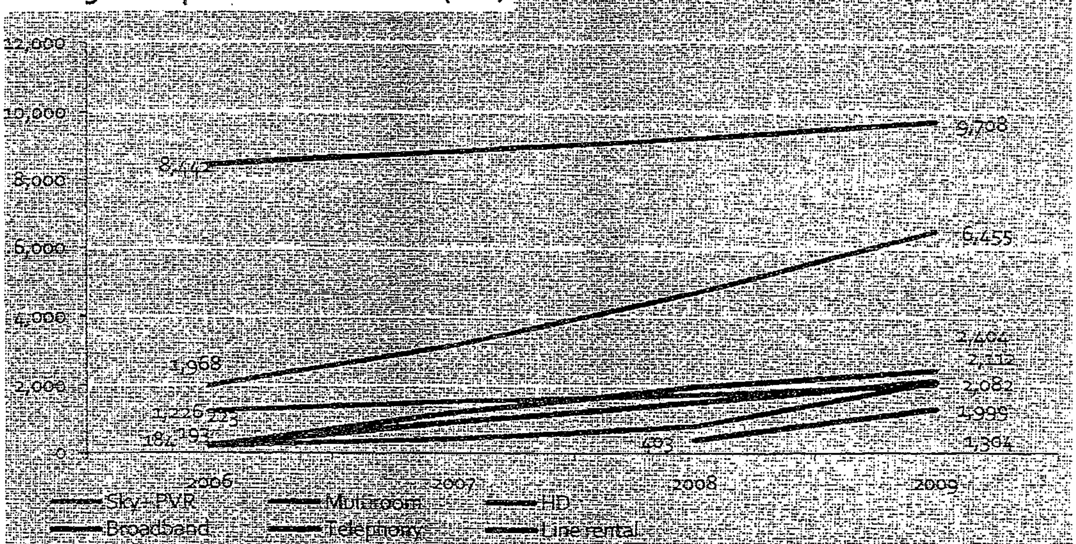
in calendar year 2009.[5] BSkyB has been willing to invest in these additional products, despite residential telecoms recording total operating losses of £503 million to March 2010.

Chart 5: Multiproduct subscribers (000)



Note: Years refer to calendar year ends
[Source: Enders Analysis based on company data]

BSkyB's broader TV activities

BSkyB's activities and its ability to influence other players in the market extend well beyond its core pay-TV operations into other areas, where it has a prominent role both as content aggregator and channel supplier and purchaser of third party channel content. Its other activities of particular interest in the present context may be listed under the following headings.

- News provision
- Freeview presence
- Advertising sales
- Third party channel provision
- Premium sports and films

News provision: Sky News is one of three substantial providers of UK TV news, supplying its own channels and also Five. The other two UK TV news providers are the BBC and ITN. ITN is 40% owned by ITV and provides TV news to ITV and to Channel 4. Sky News and the BBC are the only two suppliers of news for UK national radio. In March 2009, Sky News increased the number of commercial radio stations it supplied with news content to over 300 (essentially the vast majority of all commercial radio stations) following an agreement with Independent Radio News).

Freeview presence: BSkyB's three channels on Freeview are Sky News, Sky 3 (general entertainment) and Sky Sports News (which BSkyB has announced will become a pay only channel and replaced by Sky 3+1 on Freeview). The number of fully owned BSkyB channels on Freeview will increase to four (out of a total of 47, excluding four HD channels) following an agreement to purchase the VMtv channels from Virgin Media on the 13th July 2010. The OFT is examining this transaction with a decision expected by the 14th September 2010.

Advertising sales: In 2010, we estimate that BSkyB will account for approximately 14% of UK TV advertising sales, the third largest group (Chart 6). Assuming the acquisition of VMtv is approved by the OFT, BSkyB's share of advertising sales will rise to circa 16% in 2011 as the current agreement with IDS for handling advertising sales ends.[6] Within the non-PSB commercial TV sector, its share of TV advertising will be over 50%.

[5] BSkyB owned Easynet, a provider of business telecoms products. On the 21st July 2010, BSkyB announced that it had sold Easynet to Lloyds Development Capital. During calendar year 2009, Easynet contributed £204 million revenue to BSkyB.
[6] IDS sells advertising for the VMtv channels and UKTV. UKTV will become the advertising sales company for Channel 4 from January 2011.

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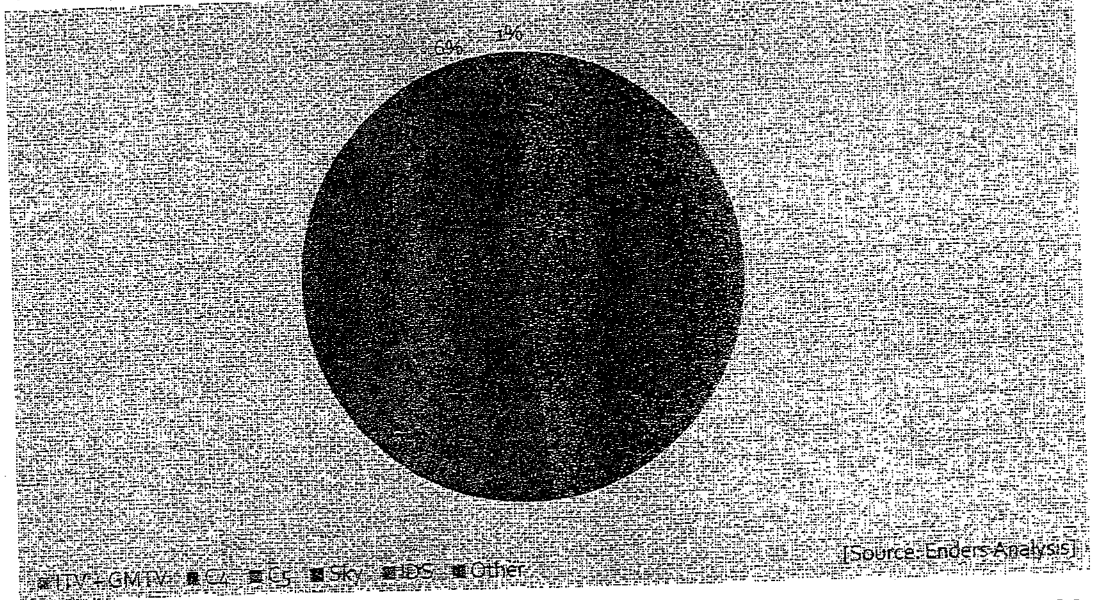
Chart 6: Share of TV new advertising revenue, 2010



Third party channel provision: Outside the public service broadcasting circle that comprises the BBC, ITV, Channel 4 and Five groups, the vast majority of channels rely on a mixed advertising/subscription model. Virgin Media previously had a range of TV channels comprised of VMtv, sit-up (three home shopping channels) and a 50% stake in UKTV, but has been slowly exiting full channel ownership. In April 2009 Virgin Media sold sit-up to AURELIUS of Germany while VMtv was sold to BSkyB in July 2010. Virgin Media retains a 50% stake in the UKTV joint venture with BBC Worldwide but this stake could also be sold.[7]

Virgin Media's withdrawal from content ownership puts BSkyB in a commanding position over the market for pay channels, including third party basic channel carriage fees. As gatekeeper of the satellite platform, BSkyB is able to dictate terms that allow its third party channels to be viable, while it extracts most of the profits. At the same time, BSkyB is in the position to offer, if it chooses, other non-PSB channels incentives to stay exclusively on the pay-TV platform. Even the most powerful third party suppliers, such as Disney/ESPN, may be viewed as vassals of BSkyB, constrained by its commercial policies.

Premium sports and films: BSkyB occupies an uncontested position of dominance in the provision of televised sports in the UK, reflected in its budget of over £1 billion for this programming segment (out of an expected £1.9 billion total) in fiscal 2010, almost matching the total programme budget of BBC1. Sports is a major source of news and media attention, and no sport more than football, where there no longer exists any serious rival to BSkyB in terms of bidding for live televised Premier League (PL) matches. Moreover, BSkyB's position is further strengthened by the poor financial state of many of the PL clubs, which make them increasingly dependent on its willingness to back them.

Ofcom's pay-TV investigation was launched in March 2007 following the receipt of a preliminary submission from BT, Setanta, Top Up TV and Virgin Media in January 2007 requesting a market investigation reference to the Competition Commission under the Enterprise Act 2002. The investigation, which ran for three years, focused on the market power of Sky in the wholesale and retail markets for premium sports and movies in the pay-TV subscription window. Ultimately, the core issue was Sky's market power in the wholesale of certain channels containing premium sports and movies content; in particular sports, and Sky's control of the live broadcast rights for many of the most important sports. Ofcom concluded that Sky was exploiting its market power by limiting the wholesale distribution of its premium channels, with the effect of restricting competition from retailers on other platforms. To counter this, Ofcom has imposed a wholesale must offer (WMO) remedy intended to make Sky Sports 1 and 2 available in SD, HD and interactive versions on other platforms; Sky is appealing the WMO remedy to the Competition Appeals Tribunal.

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[7] "It is not a strategic investment [and] as with any investment we look at it from time to time... There are ways and means we could realise [value]. We could realise it through holding [the UKTV stake] as investment and if there are ways and means of realising it through divestment we would [look at it]." http://www.guardian.co.uk/media/2010/jul/28/neil-berkett-virgin-media-uktv

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While the appeals by Sky and other parties are being heard, the WMO remedy is restricted to Virgin Media on the cable platform and to BT Vision and Top Up TV on the digital terrestrial platform. Even assuming the WMO remedy is here to stay, Sky retains some flexibility to game the remedy through shifting certain content on to Sky Sports 3 and 4 and the use of cross-promotions. In addition, Sky has chosen to withdraw Sky Sports News - hitherto available as a free-to-air channel on the digital terrestrial platform - behind its paywall. Like Sky Sports 3 and 4, Sky Sports News is now to be offered as a bonus channel in SD and HD versions to existing Sky DTH premium dual sports (i.e. Sky Sports 1 and Sky Sports 2) subscribers.

Twenty years ago, when BSkyB (then Sky Television) launched, films were the major attraction and outlay of programme spend. That has changed considerably over the years. Although Sky prices its film channels almost as high as its sports channels, its current budgetary outlay on film content (£278 million in fiscal year 2009) is only about a quarter of its outlay on sports and has fallen substantially at current prices in recent years (e.g. it was £343 million in fiscal year 2005). Since the very beginning, Sky has held exclusive contracts with the six US studio majors for films within the subscription pay-TV window, and has contracts with other leading suppliers. It also enjoys a position of market power since the film contracts are staggered. This, along with its position of retail market power, has placed Sky in an unassailable position as wholesale purchaser, able over time to negotiate successively lower fees as the film contracts become due for renewal. For the film suppliers, there is no alternative place to go. Their position is made still more problematic by the bundling of subscription video on demand (SVOD) with broadcast rights. Until now, Sky has made barely any use of its exclusive SVOD film rights, opening itself to the charge of warehousing those rights, which might otherwise be better exploited on the interactive cable and broadband platforms. Indeed, following on from the pay-TV investigation, Ofcom has just consulted on whether to make a referral to the Competition Commission (CC) and is to announce its decision shortly. Whilst the film suppliers might welcome the prospect of becoming available on other platforms, their position is weak (hence a notable lack of expressed appetite for a CC investigation, with Time Warner coming out against it in its consultation response to Ofcom) and Sky is the party able to determine consumer choice. Most recently, BSkyB has announced an exclusive multi-year output deal with Time Warner Inc.'s HBO, giving it access to all new HBO-commissioned programmes and series, and the HBO library, which includes many outstanding hits, such as *The Wire* and *The Sopranos*.

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Section II - UK newspaper market to 2014

UK newspaper market

The UK national press market was worth £4.1 billion in 2009 according to the Advertising Association (Chart 7), and comprised two significant sources of revenue: consumer purchases of newspapers (62%), and advertising (38%). It is well-known that structural change in the advertising market combined with cyclical pressures from a weak economic environment in 2008-09 to reduce newspaper industry revenues from advertising, forcing greater reliance on consumer purchases (Chart 8). A number of publishers have resorted to cover price increases to sustain revenues from consumer purchases in the face of circulation decline, a strategy that would likely be counter-productive if pursued further.

Chart 7: UK national press revenues (m)

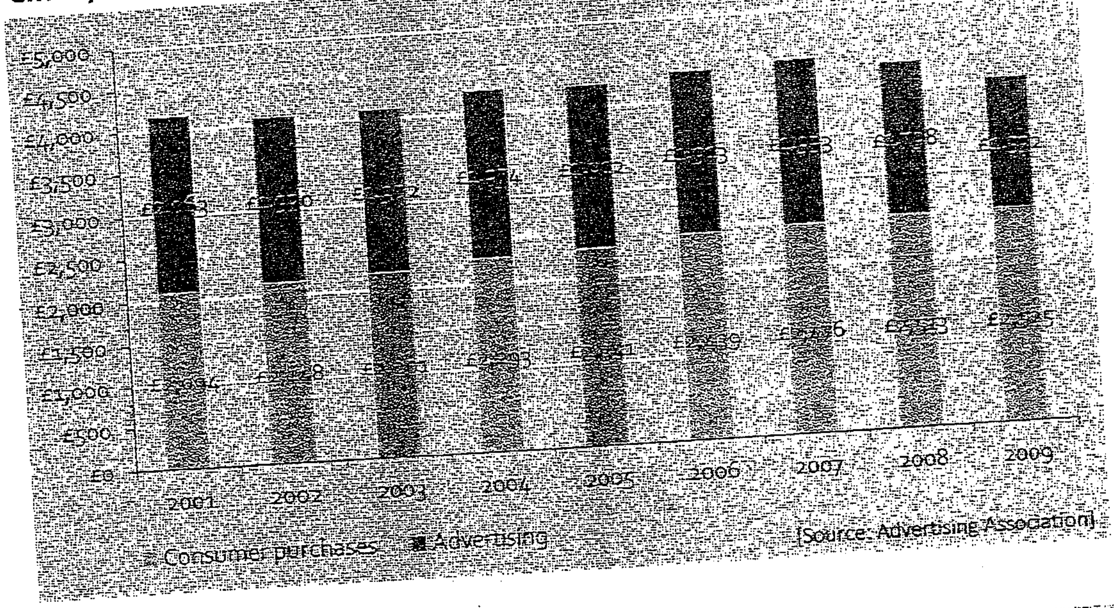


Chart 8a: Revenue breakdown, 2001

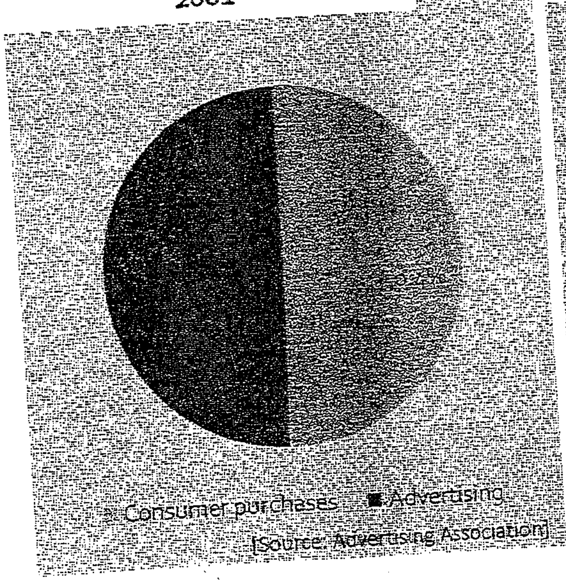
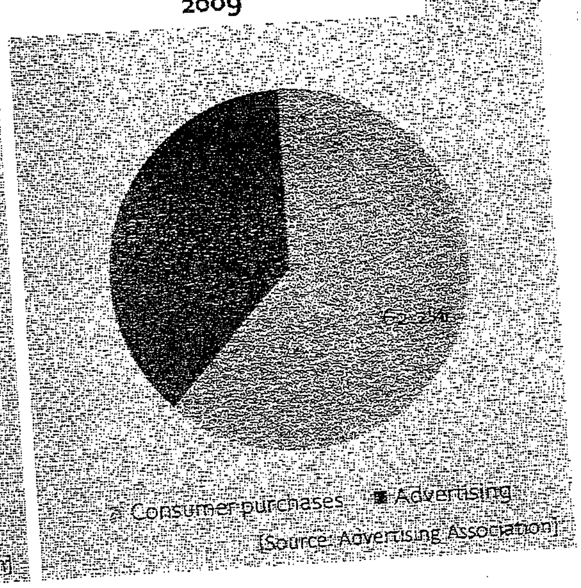


Chart 8b: Revenue breakdown, 2009



Industry structure

News Corp publishes four national papers in the UK: *The Times, The Sunday Times, The Sun* and the *News of the World*. The latest ABC data for June 2010 indicates that *The Sun* has the highest average daily circulation amongst UK papers at 2.98 million copies, while *The Times* has circulation of 504,000. In terms of the Sunday titles, the *News of the World* has circulation of 2.83 million, also the highest figure for any Sunday title, while *The Sunday Times* has circulation of 1.09 million, second behind the *Mail on Sunday* (1.91 million) in terms of quality titles.

In 2009, News Corp's papers accounted for over 37% of national newspaper circulation in the UK, the same share as the two next competitors, Trinity Mirror and Daily Mail and General Trust (DMGT), combined. News Corp has been slowly gaining share in the UK national newspaper market as a result of: good consumer, advertiser and socio-political positioning; sustaining content quality; discounting; and product improvements, frequently adding pagination. Scale and efficiencies in printing and distribution have also helped.

In terms of quality titles (Table 2), *The Times* and *The Daily Telegraph* have similar levels of readership (a broader measure of reach than circulation) amongst adults at 3.6% and 3.7% respectively. When the Sunday titles are compared, *The Sunday Times* is read by 6.5% of adults and 9.9% of ABC1's, while *The Sunday Telegraph* is read by 3.4% of adults and 5.2% of ABC1 adults.

Table 2: Selected UK newspaper readership

	Paper	Total share of readership	ABC1	C2DE
Quality daily	The Times	3.6%	5.5%	1.1%
	The Daily Telegraph	3.7%	5.8%	1.1%
Quality Sunday	The Sunday Times	6.5%	9.9%	2.2%
	The Sunday Telegraph	3.4%	5.2%	1.0%
Tabloid daily	The Sun	15.6%	10.5%	22.0%
	The Daily Mirror	8.6%	6.0%	11.9%
Tabloid Sunday	News of the World	15.4%	11.1%	20.8%
	Sunday Mirror	7.7%	5.8%	10.0%

[Source: NRS readership estimates, April 2009-March 2010]

When the individual News Corp titles are analysed against some of their competition it can be seen that they command the majority of readership in certain demographics. *The Sun* is the most widely read newspaper in the UK, reaching 15.6% of UK adults. Although the *Daily Mail* (9.8%) is the second most read daily, *The Mirror* is closer in nature and reaches 8.6% of adults. When analysed by socio-economic segment, 22% of C2DE adults read *The Sun* while 11.9% read *The Mirror*. The situation is very similar with the Sunday edition, with 15.4% of adults reading *News of the World*, rising to 20.8% of C2DE's reading the title.

Development to 2014

In common with other newspaper publishers, News International experienced a decline in advertising revenues from the onset of recession in H2 2008, until about Q3 2009. These declines were severe: in the region of 13% year-on-year in 2009. Our view is that, despite some strong growth in advertising in recent months, notably from retail advertisers, the long-term pattern for the newspaper industry in aggregate will continue to be a decline in advertising in real terms due to structural factors, exacerbated by over-supply. This over-supply in the newspaper market takes two forms: the large number of national titles, and the scale of the inventory on offer within each title. The latter category exploded in the late 1990s, with pagination increases related to supplements and pull-outs. Weekend editions in particular became unrecognisable from their equivalent editions 10 years earlier. In 2010, we believe aggregated advertising revenue will be roughly £1.3 billion, about 50% of the peak level and roughly in line with revenues achieved in 1995.

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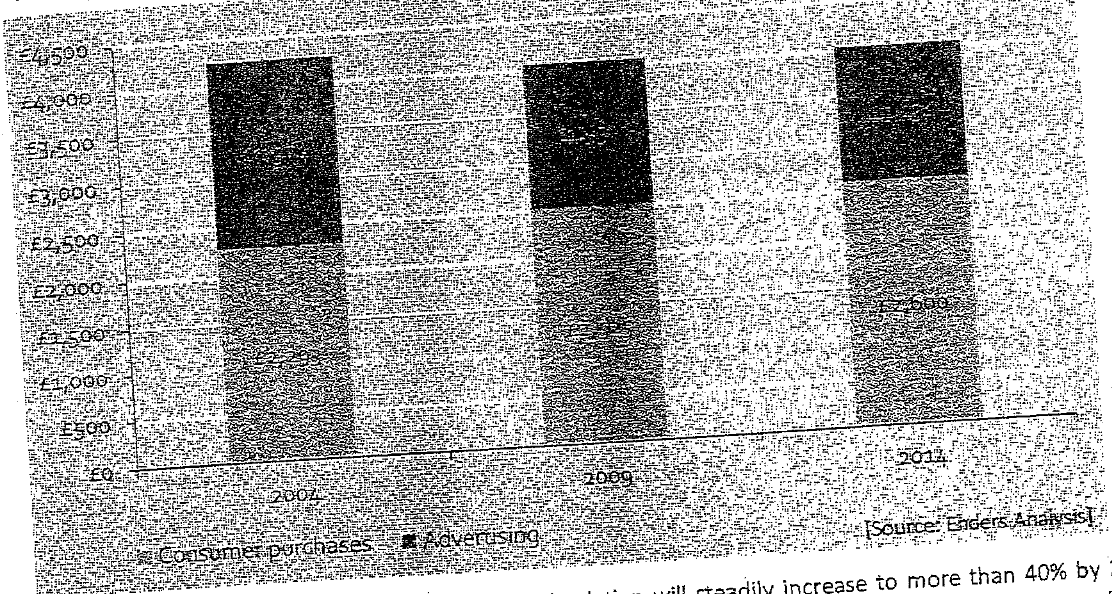
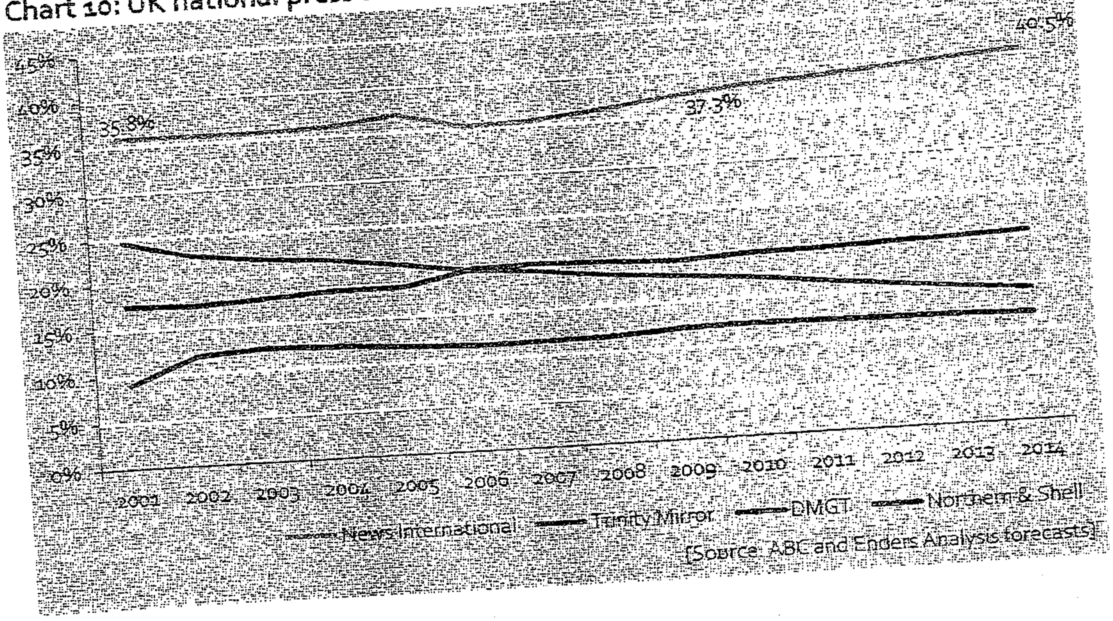
Looking further out, we project national newspaper industry revenues from advertising to compress by about 6% between 2009 and 2014 due to ongoing substitution of advertisers for new media, whilst circulation revenues could hold roughly steady in nominal terms (Chart 9).

Chart 9: National press revenue forecasts (m)



We predict News Corp's share of national press circulation will steadily increase to more than 40% by 2014 (Chart 10), assuming there are no material supply changes to the market. 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 margin. In other words, the strongest companies will become stronger still, as has been the trend since 2005. However, if the industry starts to shed titles, the outcome could be more severe still. We return to this point in Section III when considering some of the strategic options that News Corp might conceivably initiate in the medium term.

Chart 10: UK national press share of circulation by publisher



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News International strategy

News International has a history of resorting to discounting cover prices to grow market share and reduce circulation decline. *The Sun* is currently discounted to 20p (full price is 35p) in London, Birmingham and Oxford to ensure national daily circulation hovers around the 3 million mark, which the publisher seems to recognise as a critical indicator of scale for advertisers against competitors. Competitor *The Daily Star*, published by Northern & Shell, is currently discounted to 10p. *The Daily Mirror*, which Trinity Mirror declines to discount, is facing severe circulation decline (-7.0% in June 2010). In the past, *The Times* has likewise attempted to take quality press share (in particular from *The Daily Telegraph*) by discounting at the newsstand.

In theory, purchasing the outstanding BSkyB shares it does not already own provides News Corp with the financial resources to sustain its newspapers for the very long term. News Corp would also be able to experiment with media discounting and bundling in a much broader manner, for example offering print and digital editions of *The Sun* or *The Times* to Sky subscribers (see below, under Section III). Depending on its choice of strategy, this could severely upset the competitive landscape to the detriment of competitors.

Furthermore, the possibility of further 'free' print newspapers has not entirely vanished. News International stopped publishing its free London evening title, *The London Paper*, in 2009 at the same time as Rupert Murdoch announced his intention to switch the digital Times to a subscription strategy. *The London Paper*, which was distributing 400,000 free copies across the capital, was losing £1-2 million per month. We assume both these changes were part of a strategic initiative to underline the 'value' of news provision to consumers, and to promote audience quality to advertising partners over audience scale. However, a discounted *The Sun*, and free access to Sky News and *The Sun* online, remain anomalies in this strategic framework, implying tactical variations will always be mobilised to develop competitive advantage over weaker participants. This is not to suggest a free *The Sun* will hit the streets anytime soon; but that free editions and press and digital bundles for households could become critical developments for News Corp's UK operations as a whole in the future.

There is also the question of newspaper distribution. The wholesaler Dawsons exited the newspaper industry in August 2009 after losing a series of contracts valued at more than £500 million, leaving just two distributors, Smiths News and John Menzies. The long-term decline in sales through news agents in favour of general and supermarket retailers is further reducing the funnel to consumers for newspaper publishers. Buying newspapers is becoming more difficult for consumers (and particularly older consumers who are so important to the sector) at exactly the wrong time for the industry. While these issues affect all newspapers to some degree, those publishers best able to absorb steep cost increases and overcome distribution challenges will clearly be better positioned to survive. For example, providing household deliveries is an onerously expensive enterprise outside high density areas such as London. Printing is becoming more concentrated too, with News International (which prints the Telegraph), Trinity Mirror and DMGT holding many crucial print contracts between them.[8]

As in the case of BSkyB, a core feature of News International's strategy is to market its titles aggressively through advertising. Table 3 below outlines the level of spend by News International Newspapers between 2003 and 2008. None of the other major newspaper groups were among the top 50 advertisers by spend.

Table 3: News International Newspaper advertising spend (m)

	2003	2004	2005	2006	2007	2008
News International Newspapers	£39.4	£33.6	£37.0	£37.2	£36.7	£45.7
Ranking of total advertising spend	23	32	39	34	37	30

[Source: The Nielsen Company, April 2009, The Advertising Association Yearbook]

[8] News International's printing subsidiary, Newsprinters, started printing *The Daily Telegraph* in August 2008. http://www.printweek.com/news/836881/First-editions-Telegraph-printed-Knowsley/

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Table 4 below presents the revenue and operating profits of *The Times* newspapers and of *The Sun/News of the World*. The data shows that the two paper groups have made operating losses in the last two financial years. In 2009, the total revenue from all three papers was £1.0 billion, with an operating loss of £87.4 million.

Table 4: The Times, The Sun and News of the World accounts

	The Times		The Sun/News of the World		Total	
Year end June	2008	2009	2008	2009	2008	2009
Revenue (m)	£444.9	£385.5	£626.3	£617.9	£1,071.2	£1,003.4
Gross profit (m)	£83.4	£79.5	£148.8	£153.5	£232.2	£233.0
Operating profit before exceptional items (m)	-£42.8	-£71.9	-£18.5	-£15.5	-£61.3	-£87.4

[Source: Company House filings for Times Newspapers and News Group Newspapers]

For classic display categories such as retail, newspapers continue to provide advertisers with a very beneficial media environment, both in terms of physical layout and the tactical advantages to brands and agencies gained from the format's daily frequency, as well as consumer volumes and greater consumer engagement with print than digital media. Unlike classified advertising categories, the main challenges to display advertising categories are not digital media substitution (though that certainly exists, too), but rather over-supply of titles and inventory. In this environment, the strongest titles (including *The Sun*, *The Daily Mail* and *The Times*) will gain further market share, as some lesser titles fall off the roster for an increasing volume of campaigns. However, a still greater threat for publishers of non-leading titles would be a longer-term option for News Corp's UK operations, assuming it owned BSkyB outright, to offer advertisers print, online and digital TV bundles. Such packages would be impossible for other newspaper publishers to emulate, risking a more rapid decline in the breadth of newspaper usage by consumers, and therefore agencies and marketers, than would otherwise be envisaged due to market dynamics alone.

Online news subscriptions, or 'paywalls', may play an important role in determining the pace and scale of business model development. The online Times shifted to a subscriber model in July 2010, making it the first UK general newspaper brand to do so. The *Financial Times* already operates a subscriber model for its digital services, as does *The Wall Street Journal*. Both these titles provide business and financial news into professional communities. Therefore, despite their print editions being categorised as newspapers, their online subscriptions are effectively in the business-to-business space rather than the business-to-consumer space. The key general news titles to have set up digital subscription services are *The New York Times*, which abandoned its Times Select model in 2007, generating approximately $10 million per year (a new iteration of the subscription is to be launched in Q1 2011), and *Le Monde*, which we estimate generates €5.5 million from its online subscriptions. *The New York Times* abandoned Times Select both because the revenue generated was too small (advertising revenues are to a large degree correlated to traffic), but also because general news journalists considered themselves 'cut off' from the digital network, which is increasingly the environment that makes the news brand relevant for a large audience. News aggregation and key communication and social services (Google News, Facebook, Twitter, YouTube, blogs and so on) provide word-of-mouth distribution networks for news provision, comment and analysis, and are increasingly perceived to be critical elements of the news ecosystem by editors, writers and publishers.

However, early indications as to the scale of the traffic using the Times Online subscription are not good. Prior to implementing the paywall, Times Online was achieving traffic in the region of 6 million unique visitors per month, and in the early weeks of the subscription, estimates of paid-for consumer access have been as low as 15,000. Even if all these subscribers signed up for an entire year they would generate £1.5 million per year for the Times, a tiny fraction of the more than £200 million generated by consumer sales of the print editions.

Furthermore, prior to the Paywall, we estimate Times Online was generating £25-30 million in advertising revenue. Even assuming that advertising volumes and revenues decline by substantially less than the traffic has (because the audience is self-selecting, highly targetable and very attractive to key product and service brands), it is difficult to see how the aggregated revenues of the subscription model will be in line with the free online model. This leads us to believe that *The Times* will inevitably consider further strategic developments as necessary and indeed an imperative in the near future.

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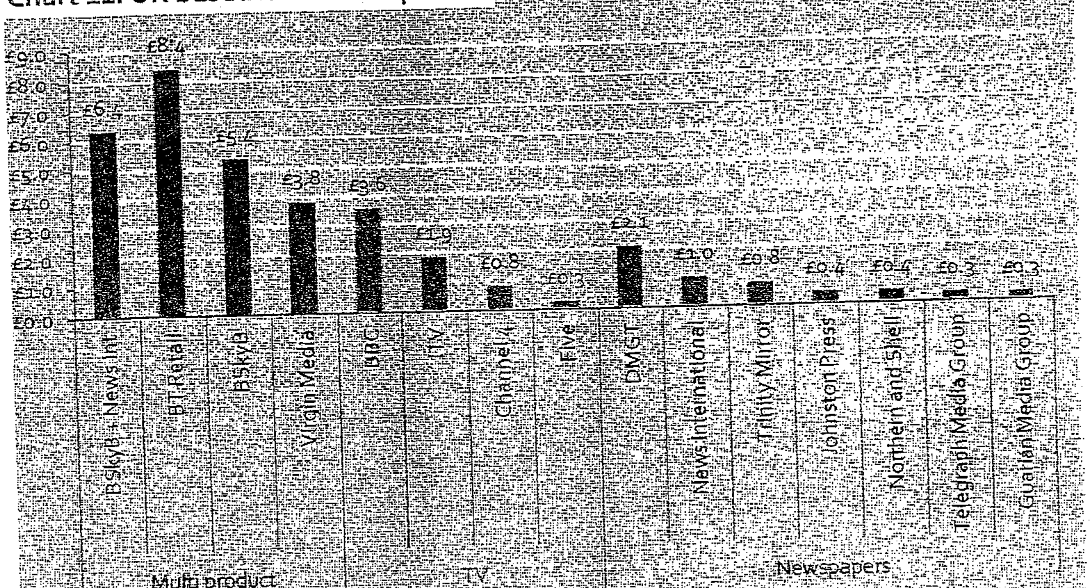
One option available to *The Times* would be to switch back to a free model, and focus on developing a scale model as competitors such as the Mail Online are doing. However, we consider this an unlikely outcome, and believe News International and ultimately News Corp are much more likely to trial a variety of different approaches to subscription, particularly in ways where they can evidence competitive advantage over other press and media groups. Switching the nature of content provision by aggregating services sourced from a variety of different assets and media, and so offering bundles such as the Times/Sky, Sun/Sky, Times/WSJ, (branded) News Corp sport, (branded) News Corp business, (branded) News Corp celebrity, and so on, would not only have natural appeal for consumers, but would create screen-based content channels for advertisers that are a great deal more optimal than a destination news site. In such a scenario, the question of monetising Times online as a stand-alone destination service would no longer be an issue because consumers would be purchasing bundles. Furthermore, the concern that journalistic influence collapses as a result of the online subscription also vanishes, or at least diminishes, as the scale of access could be increased dramatically. Indeed, just as consumers could be accessing content through a variety of bundles, so journalists could be deployed more proactively across a variety of outlets. Such a strategy is not so different from that of the BBC, where Nick Robinson is the political editor, and provides expert comments on the BBC News at Ten, BBC News 24, Radio 4's Today programme, the BBC news site, his own BBC blog and so on.

The scale of UK media and telecoms companies

Chart 11 below outlines the relative size of major competitors to BSkyB and News International and separates the companies into three groups: multi-product, TV and newspapers. Each company's total revenues are stated with the exception of BT where BT Retail revenue only is stated.

Chart 11: UK based media companies



[Source: Enders Analysis based on company data]

Notes:
BT Retail is for the calendar year 2009. BT group revenue was £21 billion in this period.
BSkyB is total reported revenue for financial year ending June 2009.
Virgin Media revenue is for the year ending December 2009.
BBC is the total spend as stated in their 2009/10 annual report. Period runs from April 2009 to March 2010.
ITV revenue is for the year end December 2009.
Channel 4 revenue is for the year ending December 2009.
Five revenue is for the year end is December 2009.
DMGT year end September 2009 and includes revenue from non-consumer media. DMGT newspaper revenue totalled £876 million during the period.
News International includes the revenue from the UK newspapers for the year ending June 2009.
Trinity Mirror revenue is for the year end 3rd January 2010.
Johnston Press revenue is for the year end 2nd January 2010.
Northern and Shell revenue is for the year end December 2008.
Telegraph Media Group revenue is for the year end December 2009.
GMG revenue is for the year end March 2010.

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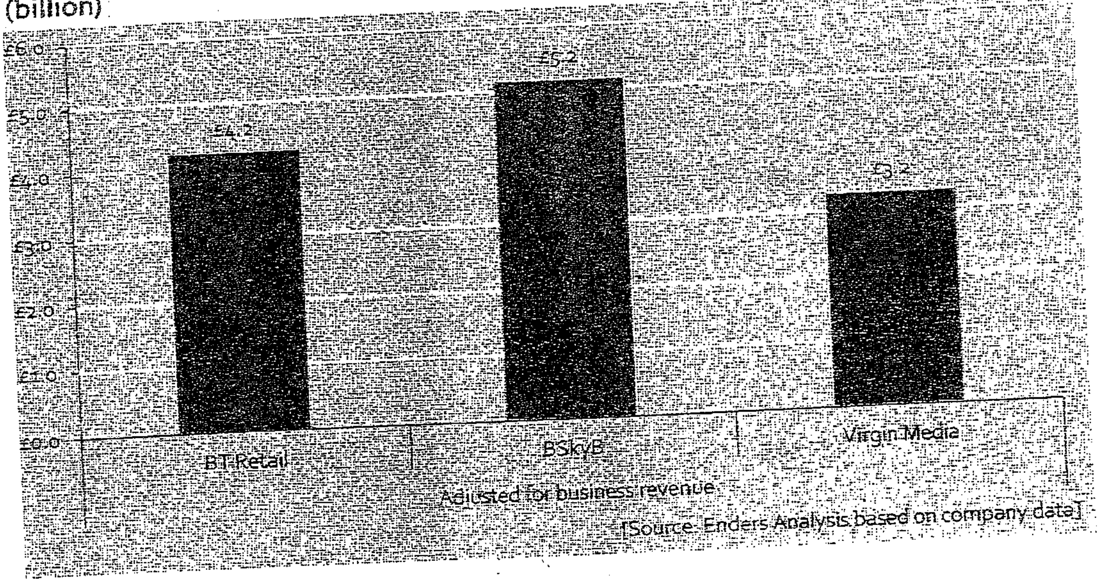
News International faces competition from a range of independent newspaper companies, who, with the exception of DMGT, focus solely on publishing newspapers and related websites. DMGT group revenue was £2.1 billion in 2009. Of this, £876 million, or 41.4%, was generated through newspaper activities. This places News International as the largest newspaper publisher by revenue. Of the companies shown, News International, Northern & Shell, Telegraph Media Group and Guardian Media Group publish national titles (Northern & Shell also publishes OK! and New! magazines). DMGT and Trinity Mirror publish national and local newspapers while Johnston Press only publishes local newspapers.

In Chart 11 above, multi-product companies' revenues include those from business products. Stripped out (Chart 12), BSkyB has the largest adjusted consumer revenue at £5.2 billion, while BT Retail revenue is £4.2 billion and Virgin Media revenue is £3.2 billion. In short, BSkyB and News International are already the largest companies in their respective sectors and following the merger, the combined group will have annual revenues in the region of £7 billion.

Chart 12: BT Retail, BSkyB and Virgin Media consumer revenue (billion)



Notes:
BT Retail adjusted revenue is taken from BT Retail business unit revenue reporting – 'Consumer'.
BSkyB adjusted revenue is total group revenue minus Easynet, but includes channel wholesale revenue and revenue from pubs and clubs.
Virgin Media revenue is total group revenue (including content) minus total business revenues.

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Section III – The potential impact on plurality

The goal of plurality

By moving from a position of material influence to one of complete control over BSkyB, News Corp will trigger the legal procedures for control of mergers under UK law. Over the last few decades, government has largely withdrawn from intervening in corporate takeovers, handing authority over to the Office of Fair Trading (OFT) and other regulators. However, partly as a result of the efforts of Lord Puttnam, the 2003 Communications Act gave back some authority to the Secretary of State over the buying and selling of TV, radio and newspaper companies. Lord Puttnam and others convinced the government of the day that the application of competition law did not provide adequate protection for plurality. Media was made a special case.

UK governments and regulators have consistently maintained that a healthy and informed democratic society requires media 'plurality'. Baroness Blackstone, introducing what became the 2003 Communications Act into the Lords, said that one of the main purposes of the legislation was 'to ensure the existence of a range of media voices, safeguarding the vibrancy of democratic debate'. Ofcom cited Parliament's concern that 'the underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda'.[9] Plurality requires a significant number of broadcasters (radio and TV) and newspapers designed to appeal to 'a wide variety of tastes and interests', as the legislation puts it. The Guidance Document of the Department of Trade and Industry (now BIS) from May 2004 provides some useful examples of proposed transactions that were denied consent by the Secretary of State or were granted his consent subject to remedies on plurality grounds.[10]

In merger situations involving newspapers, broadcast media or cross-media mergers, the Secretary of State has the authority to issue an intervention notice. Such a notice triggers an initial investigation by Ofcom into whether such public interest issues are relevant to a consideration of the transaction, which reports to the Secretary of State, providing advice and recommendations. The Secretary of State may then decide to refer the merger's plurality concerns, along with those regarding the conditions of competition, to the Competition Commission.

This authority was last used on 26 February 2007 when the Secretary of State for Trade and Industry issued an intervention notice with respect to the acquisition by BSkyB of a 17.9% shareholding in ITV. Ofcom's initial investigation, reported to the Secretary of State on 27 April 2007, advised that 'there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audiences for national news and the UK TV audience for national news'.[11] The issue of plurality was then taken up by the Competition Commission in its examination of the transaction. However, they concluded that 'there is insufficient evidence to suggest that the acquisition of a stake of this nature would give BSkyB or its parent companies the ability or incentive to exert editorial influence over ITV's news output'.[12]

It should be noted that impartiality is distinct from plurality. Section 5 of Ofcom's Broadcasting Code establishes a requirement of due impartiality in stories of a political or industrial nature by broadcast media (noting that no such requirement applies to newspapers, which are permitted to adopt editorial positions). In its Report to the Secretary of State on BSkyB's acquisition of ITV shares, Ofcom stated: 'These regulatory provisions, while they 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'.[13]

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[9] Ofcom, 'Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting plc's acquisition of 17.9% of shareholding in ITV plc, 27 April 2007, page 4. A redacted copy is available at: http://www.bis.gov.uk/files/file39607.pdf
[10] DTI, 'Enterprise Act 2002: Public Interest Intervention in Media Mergers', Guidance Document, May 2004. A copy is available at: www.bis.gov.uk/files/file14331.pdf
[11] Ofcom, 'Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting plc's acquisition of 17.9% of shareholding in ITV plc, 27 April 2007, page 3. A redacted copy is available at: http://www.bis.gov.uk/files/file39607.pdf
[12] Competition Commission, 'Acquisition by BSkyB of 17.9% of the shares in ITV', 14 December 2007, page 80. Available at: http://www.competition-commission.org.uk/rep_pub/reports/2007/535itv.htm
[13] Ofcom, 'Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting plc's acquisition of 17.9% of shareholding in ITV plc, 27 April 2007, page 19. A redacted copy is available at: http://www.bis.gov.uk/files/file39607.pdf

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Implications on media plurality of the proposed News Corp transaction

Why does News Corp's purchase of the remaining 60.9% of BSkyB make the situation arguably 'worse' than it already is today? News Corp already owns more media in the UK than it is permitted to own in the US and Australia, the other two main markets for News Corp products, and the UK media market is often characterised as highly concentrated as a result. By moving from a minority shareholder interest to full ownership, News Corp will gain important financial advantages – the pooling of financial resources and tax obligations across the new entity – which will improve its ability to compete, notably in the newspaper market where we have noted the weak position of most newspaper publishing groups. In addition, the group will acquire several important new strategic opportunities.

First, products currently separately offered by BSkyB and News Corp titles may be combined in bundles, discounted or provided without charge. For instance, BSkyB could bundle News International titles with monthly entertainment to its millions of customers in the UK. If this happens, long-held reader loyalty to titles such as *The Mirror, The Daily Telegraph* and even *The Daily Mail* could be severely tested. In other words, reader loyalty would be measured by a new and entirely different yardstick than previous competitor options, such as temporary price discounts or a new supplement. Strategic initiatives of this nature could lead to a much more rapid decline in competitor newspaper circulations than we have assumed, boosting News Corp's newspaper market share above 40% by 2014. Magazine publishers already know something about this: Sky distributes 7.4 million copies every month of its magazine to subscribers of its TV services, making Sky the largest circulation magazine in the UK based on ABC data.

Second, the widespread availability of fast broadband is encouraging the rapid convergence of press and television. Today's newspaper websites contain increasing numbers of video clips and extended interviews. Once the News Corp purchase has been completed, stories from Sky News (especially video) will presumably be carried more and more frequently on News Corp websites. Links to newspaper stories could appear at the bottom of the Sky News screen. Progressively, News International papers and BSkyB channels, particularly Sky News, may merge into one stream of fact and opinion. If this occurred, plurality would decline, even if the combined organisation continued to maintain newsrooms that are nominally separate.

Third, the loss of the independent BSkyB shareholders will allow News Corp greater opportunity to influence, tacitly or otherwise, the editorial coverage of Sky News and other BSkyB channels. The 2006 investigation by the regulators of the BSkyB purchase of ITV shares found no evidence of proprietor intervention in Sky News under its current shareholding structure, but this could change under full ownership. Today, the presence of strong independent directors of the company, many of whom have substantial external reputations, helps protect the independence and diversity of what appears on screen, particularly on news programmes.

This concern is heightened by Mr Rupert Murdoch's position as a 'traditional proprietor' of certain media properties, exercising editorial control on key policy debates or political events. In particular, Mr Murdoch plays an active role in editorial policy at *The Sun*, as noted by the Competition Commission: 'in relation to *The Sun*, whilst the editor's decisions on news content and stance are generally independently taken, the editor also has regular discussions with other parties, including with Mr (Rupert) Murdoch and News International Executive Chairman, Les Hinton, on a range of editorial matters,' and also concluded that 'News International (the UK newspaper holding company) and News Corporation are heavily involved in decisions affecting the circulation and profitability of their newspaper titles'.[14]

One could be tempted to conclude that the widespread availability of other news outlets, especially online sites, protects the UK public and its political leaders against the excessive influence of media proprietors. This is not a strong argument. The press and TV are able to hold enterprises, government and politicians to account in a manner that bloggers cannot, lacking the resources, financial or otherwise, to engage in investigative reporting. Newspapers and TV news programmes still provide the bulk of news gathering operations in the UK.

The link between endorsement and voting intentions is subject to some controversy. While some studies have shown that newspaper endorsements have very limited influence, others suggest that they can increase the votes given to a party in general elections. This is not necessarily important. Newspapers and TV affect citizen perceptions of political and economic life by deciding which stories are most important and how information, analysis and personalities are portrayed to their readers and viewers.[15] Peter Kelner, the president of the

[14] Appendix I of the Competition Commission's 2007 report on BSkyB's acquisition of ITV shares, p. 16.
[15] Shanto Iyengar and Donald Kinder, *News That Matters: Television and American Opinion*, University of Chicago Press, 1989.

international polling company YouGov, commented that 'the news of newspapers matters much more than endorsements'.[16]

Similar issues apply to coverage by Sky News and/or News Corp's titles of product launches and pricing innovations from competitors. BSkyB controls all UK pay-TV rights for major sports events and for Hollywood movies, as well as recently adding exclusive access to HBO programming to its content on offer. An attempt by a competitor to launch an alternative offering, or to compete directly against its channels, could be impeded by the failure of the News Corps titles to publicise the availability or pricing of competing services; or any systematic slant against its competitors and in favour of entities in News Corp or entities that are known to be supportive of News Corp.

In this context, regulatory control of strong and increasingly powerful companies such as BSkyB is central to maintaining the conditions of competition on the relevant markets. However, the experience of the recent three-year Ofcom pay-TV investigation suggests that the process is challenging, expensive and time-consuming for BSkyB, its competitors and the regulator. Ofcom's conclusions in its pay-TV consultation are being litigated by BSkyB, which reacts with hostility to all regulation affecting its operations, to which it is in principle opposed. It has consequently proved almost impossible to introduce effective regulation to maintain a fair and level TV marketplace for BSkyB's competitors. The proposed BSkyB transaction is likely to make it more difficult for even highly skilled regulators such as Ofcom to achieve this goal. Should Ofcom's powers be materially reduced in a new Communications Act, this concern would be exacerbated.

BSkyB has a position of strength in the UK TV market, which we expect to increase (see Section I). News Corp's transaction is intended to further strengthen this position by reducing the company's exposure to cyclical advertising revenues.[17] Jeremy Darroch, the CEO of BSkyB, noted in last year's Annual Report 'By delivering on our plans and remaining focused on customers, we have the potential to build a larger, *more durable* [our italics] business and create significant value for shareholders'.[18]

One illustration of how BSkyB could increase its dominance yet further was provided by Sky Television's 2001 bid to provide ITV's national news services.[19] The incumbent provider, ITN, battled successfully to retain the contract and still holds it today. But if Sky had won, ITN would have had to dramatically reduce its costs and reduce its news gathering operations around the world. Eventually its other main customer, Channel 4 News, would probably have been forced to obtain its material from elsewhere by using either Sky News or the BBC.[20] Five switched to Sky News as its news provider in 2005, meaning that the BBC and Sky News would have been the only two significant national news providers in the UK. When the contract comes up for renewal in future years, ITV could decide to switch to a consortium led by BSkyB at any time. Although ITV owns 40% of ITN, ITN's most recent accounts were heavily qualified, in part due to its pension deficit.[21] A duopoly of TV news providers in the UK is therefore a realistic future scenario. A duopoly of radio news provision already exists (the BBC and BSkyB, see earlier section on news provision).

Although it is theoretically possible that Internet-enabled television options will be to the detriment of traditional TV, there has been little evidence to date that such options are material. While about 72% of UK households are now on broadband, online video consumption accounted for 2% of all minutes viewed per day in December 2009 (Chart 13). We continue to anticipate no material challenge to BSkyB from the Internet space in the next five years.

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16 Peter Kelner quoted in *The Times* of 30th September 2009

17 Press announcement by News Corp on the proposal to buy the remainder of BSKyB's shares, 15 June 2010.

18 Jeremy Darroch's letter to investors in the BSkyB Annual Report for the financial year 2008-2009.

19 BSkyB was a partner in the Channel 3 consortium that bid for the ITV news contract. The other partners were Chrysalis, Ulster Television, Bloomberg and CBS.

20 Channel 4 confirmed this in a submission to the House of Lords Communications Committee in 2008.

21 The other shareholders are Daily Mail and General Trust (20%), Thomson Reuters (20%) and United Business Media (20%). ITN provides video content for the website of the Daily Mail.

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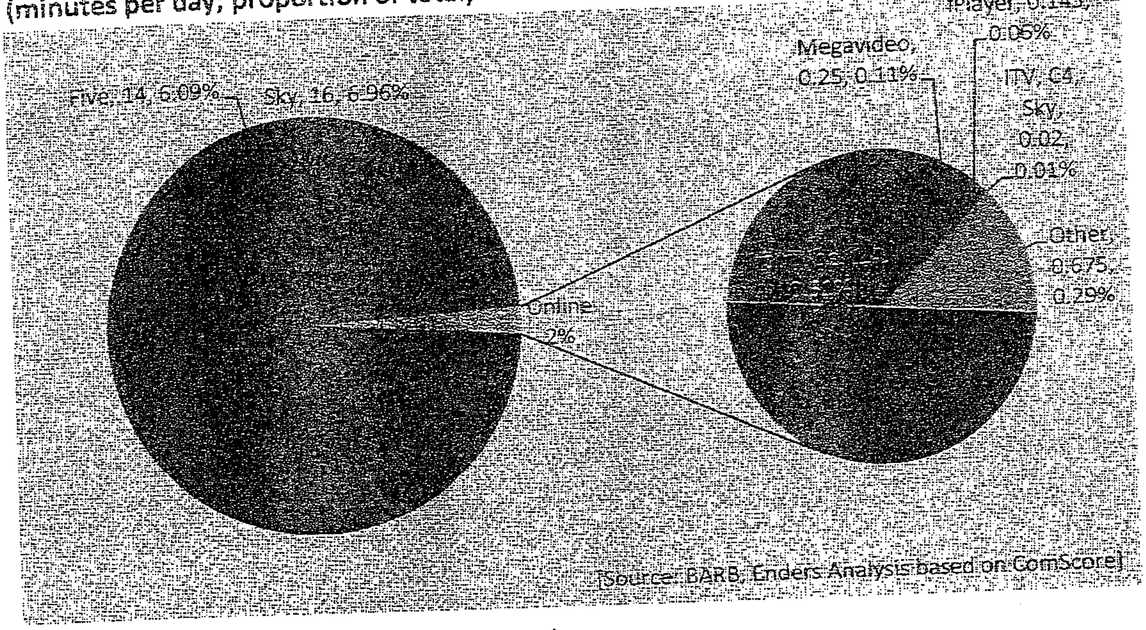
Chart 13: UK broadcast and online video consumption, December 2009 (minutes per day; proportion of total)



[Source: BARB; Enders Analysis based on ComScore]

Conclusions

When News Corp announced the proposal to buy the remainder of BSkyB on June 15th, Chase Carey, News Corp Chief Operating Officer, commented that the company did not 'think that this deal warrants a plurality review'.[22] We believe instead that there is a risk of a reduction in media plurality to an unacceptably low level. We therefore consider it appropriate for the Secretary of State to issue an intervention notice under the 'media public interest considerations' of The Enterprise Act 2002, as amended by the Communications Act 2003. Furthermore, we also consider that this intervention is particularly timely as the leading positions of BSkyB on the UK TV market and of News Corp on the UK newspaper market will strengthen in the period to 2014. We therefore encourage the Secretary of State to give urgent attention to the matter in the available window of opportunity.

Finally, this report has provided an exhaustive treatment of the BSkyB/News Corp proposed merger, but it should be clear that a similar reasoning in favour of intervention by the Secretary of State also applies to the transaction involving Northern Shell and Five.

[22] Speaking on the conference call with analysts following the announcement of the bid proposal.

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Appendix

Enders Analysis research subscribers

Advertising/Marketing
Publicis
WCRS
WPP

Film/Television/Music
Arqiva
BBC Audio & Music
BBC New Media & Technology
BBC Policy & Strategy
BBC Worldwide
BSkyB
Canal +
Channel 4
Digital UK
EMI
Five
Freesat
Freeview
ITV
LOVEFiLM.com
Ludorum
MTV Networks
NBC Universal International
PRS for Music
Red Bee Media
Sony Pictures Entertainment
stv Group
Turner Broadcasting
UKTV
Universal Music Group
Virgin Media
Vivendi
Walt Disney Company
Warner Bros Entertainment UK

Internet
AOL Europe
Google Europe
Microsoft
Sling Media
Yahoo! Europe

Investment Banks
Allen & Co
BNP Paribas
Citigroup
J P Morgan Cazenove
Jefferies International
N.M. Rothschild

Press/Radio
Archant
Bauer Media
D C Thomson
DMGT
Guardian Media Group
Hachette Filipacchi (UK) Ltd
Iliffe News & Media
Johnston Press
National Magazine Company
Newbury News
Pearson
RadioCentre
Telegraph Media Group
Trinity Mirror
Yell Group

Private Equity/Venture Capital
Apax Partners
Bain Capital
Cinven
Doughty Hanson
Exponent Private Equity
KKR
Permira Advisors
Providence Equity
Usaha Tegas
Warburg Pincus

Professional Services
Accenture
AlixPartners
Capgemini
Deloitte Consulting
Detica
KPMG
McKinsey & Co
OC&C Strategy Consultants
PricewaterhouseCoopers
Steria

Public Sector
BBC Trust
BIS (Department for Business, Innovation and Skills)
DCMS (Department for Culture, Media and Sport)
European Commission
Invest Northern Ireland
Ofcom

Retail
Carphone Warehouse
Comet Group
HMV
Post Office

Telecoms Equipment
Alcatel-Lucent
Cisco
Huawei
Nokia
Qualcomm

Telecoms Operators
BT
Emtel
FT-Orange
H3G UK
Iliad
O2
Orange
SFR
T-Mobile
TalkTalk Group
Tesco Telecoms
Virgin Mobile
Vodafone
Vonage UK

Funds
Aberdeen Asset Managers
Alliance Trust
Baillie Gifford
Capital Group
Cedar Rock Capital
F&C Asset Management
Fidelity
Loch Capital Management
Martin Currie Investment Management
Morgan Stanley Investment Management
Odey Asset Management
Standard Life
Tiger Europe
USS

E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY]
Sent:	02/08/2010 at 13:29
Received:	02/08/2010 at 13:29
Subject:	FW: FAO: [redacted]
Attachments:	[redacted]

[redacted]

The SoS has proposed the attached tracked changes to the Brendan Barber letter which is intended to make it clear that he has not prejudged this case and has an open mind until he sees representations and evidence. Pl shout if alarm bells start ringing

The SoS is of the view that News Corporation's lawyers can hardly be considered an independent source of advice. The SoS has read strongly argued views to the contrary. He is somewhat concerned to read that "OFT does not expect the merger to give rise to competition concerns". Does this not suggest that they have prejudged the issue? Or have they already carried out an evaluation?

The SoS has also queried what other representations have been received, Have other media groups written letters? The BBC? Are we expecting representations from these and others?

The SoS would like to review the position when he returns from leave in the last week of August. On this basis, I would be grateful if you could provide answers to the above questions during the course of this week and an update sub for his consideration on 20th August.

Thanks

[redacted]

Thanks

From: MPST Central Admin
Sent: 02 August 2010 10:09
To: Cable MPST
Subject: FAO: [redacted]

<>

[redacted]

The Rt Hon Vince Cable MP
Secretary of State for Business
Innovation & Skills

[redacted]
Trades Union Congress
Congress House
Great Russell Street
London
WC1B 3JS

July 2010

Thank you for your letter of 16 June. I look forward to discussing your views on reforming the way mergers and takeovers are considered when we next meet.

In your subsequent letter of 23 June, you refer to the proposal from News Corporation to acquire 100% of the shares in British Sky Broadcasting (BSkyB). You suggested that I request that this be considered by the UK competition authorities rather than by the European Commission on the basis that it raises issues relevant to the public interest due to the impact on concentration of media ownership in the UK.

I thought it would be helpful to set out some more information on the scope for intervention and involvement in this area. As you say there is a way for the UK authority to rule on this. Specifically, the EC Merger Regulation (ECMR) states that the relevant competent authority of any member state may ask the EU Commission to refer a merger to them if the market affected by the merger is limited to that member state. In the UK, the relevant competent authority that would take decisions on whether to make such a request is the Office of Fair Trading (OFT). The OFT's approach to possible use of this scope is set out in its jurisdictional & procedural guidance which may be found on the OFT website at: http://oft.gov.uk/shared_oft/mergers_ea02/oft527.pdf. The relevant section is between paragraphs 11.24 and 11.29 on pages 111 and 112.

My officials have forwarded your letter to the OFT to note your views on the matter and consider whether it would be appropriate in this case to make such a request to the EU Commission. You'll appreciate of course, that even if the OFT were to make such a request, the final decision on whether or not to accept this rests with the European Commission.

I should make clear, however, that for the purposes of using my powers to intervene in mergers on public interest grounds, it makes no substantive difference whether a merger is considered by the EU Commission or the UK competition authorities. I can intervene in both domestic and European mergers, though the precise procedures that apply in each case are slightly different.

Of course there is guidance on what circumstances the Secretary of State can use their discretion to intervene in media mergers. This is available on the BIS website at: http://www.bis.gov.uk/files/file14331.pdf. I must take this guidance into account in reaching decisions on whether to intervene in a media merger.

The guidance includes a statement of policy on intervention in broadcasting and cross-media mergers – which is what a News Corporation acquisition of BSkyB would be. Paragraph 8.2 of the guidance states 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". It goes on to set out what those cases are that would previously have been subject to media ownership rules – all mergers involving the holders of Channel 3 and Channel 5 television licences or national radio services. None of the cases listed concerns a merger involving BSkyB. The Guidance further explains that "save in exceptional circumstances" intervention would not be made in relation to mergers where there had never been any media ownership rules. I have yet to see the representations and evidence relating to this case and have an open mind as to whether there would be grounds for intervention, should the proposed acquisition proceed.

Deleted: In this case, it is not clear that any exceptional circumstances exist that would justify deviating from the generally applicable principles governing decisions on this matter.

I hope that is helpful in explaining the scope to intervene on public interest grounds in the proposed News Corporation / BSkyB transaction. Taking the published guidance into account, if you have substantive reasons for believing the transaction could result in effects detrimental to the public interest such as might justify an intervention, please do submit arguments on the matter for my consideration.

VINCE CABLE

BIS | Department for Business Innovation & Skills

The Rt Hon Vince Cable MP
Secretary of State for Business
Innovation & Skills

Brendan Barber
Trades Union Congress
Congress House
Great Russell Street
London
WC1B 3JS

2 August 2010

Brendan

Thank you for your letter of 16 June. I look forward to discussing your views on reforming the way mergers and takeovers are considered when we next meet.

In your subsequent letter of 23 June, you refer to the proposal from News Corporation to acquire 100% of the shares in British Sky Broadcasting (BSkyB). You suggested that I request that this be considered by the UK competition authorities rather than by the European Commission on the basis that it raises issues relevant to the public interest due to the impact on concentration of media ownership in the UK.

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I hope that is helpful in explaining the scope to intervene on public interest grounds in the proposed News Corporation / BSkyB transaction. Taking the published guidance into account, if you have substantive reasons for believing the transaction could result in effects detrimental to the public interest such as might justify an intervention, please do submit arguments on the matter for my consideration.

VINCE CABLE

P120

E-mail Message

From:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY]
Sent:	03/08/2010 at 11:38
Received:	03/08/2010 at 11:38
Subject:	Newscorp/BSkyB - response to SofS's queries

[redacted]

As requested, here is some further advice responding to the points raised by the Secretary of State.

1. It is right to say the submission from Newscorp's lawyers Hogan Lovells does not represent independent advice. It is the formal position of Newscorp. All such representations must be properly considered and taken into account by the Secretary of State in examining the issue and reaching conclusions about the merits of intervention. But he is not bound to agree with any particular submission.

2. The BIS correspondence unit has received no submissions on this matter from other media organisations. There are, however, numerous letters from MPs (on behalf of constituents) and members of the public. In the main these express broad concerns and reflect a belief that the Secretary of State has the authority to prevent Newscorp from acquiring 100% of the BSkyB. We propose now to respond to these letters drawing on the lines adopted in the reply to the TUC (which issued yesterday) and which echo the line used in Mr Davey's recent reply to the PQ from Chinyelu Onwurah.

3. While expressing strongly held views, these letters generally do not provide reasoned arguments pertinent to the specific question the Secretary of State has to consider - which is whether or not the proposed transaction could result in a loss of sufficient plurality of persons with control of media enterprises and whether it is a case in which a public interest intervention might be appropriate. Our own analysis of these questions leads to the conclusion that intervention appears unlikely to be appropriate in this case - as briefly set out in my original briefing note submitted on 25 June. The Hogan Lovells submission on behalf of Newscorp draws much the same conclusions for the same reasons. This is not surprising. We all have direct experience of using the powers to intervene in media mergers having done so in respect of BSkyB's acquisition of a 17.9% stake in ITV plc and this heavily contested case examined very thoroughly before the courts the limits of the Secretary of State's powers.

4. The scope to intervene is constrained in law. There is also published guidance that provides a clear statement of policy on when intervention might and might not be considered. This guidance is very important in giving a degree of certainty to the market about when non-competition factors might be expected to be taken into account in the regulation of media mergers. It does not over-ride the law as provided by the Enterprise Act 2002 but it does create a legitimate expectation about the way the Government may be expected to consider this matter. Failure to operate in accordance with the guidance would increase the risk of successful challenge to any decision the Secretary of State may take.

5. We did receive yesterday our first substantive submission arguing that an alternative outcome may be appropriate. A market research company called Enders

Analysis has written arguing that the Secretary of State should intervene on public interest grounds in both Newscorp's acquisition of all of BSkyB and also in Northern and Shell's acquisition of Channel 5. We will explore the merits of the Enders Analysis submission in consultation with colleagues at the OFT, DCMS and Ofcom as appropriate and will provide advice in due course on how best to reply. On an initial reading, however, it appears unlikely to raise points that could lead us to reach different conclusions about the merits of an intervention by the SofS in either of these cases.

6. Informal advice from the OFT is that the European Commission is unlikely to identify significant competition concerns that might need to be remedied in this merger. This informal OFT assessment does not prejudice any outcomes. The substantive analysis is a matter solely for the EU Commission and not one on which HMG is required to comment publicly.

[redacted]
CCP2
[redacted]

From: Cable MPST
Sent: 02 August 2010 12:30
To: [redacted] (CCP)
Cc: Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); [redacted] (Communications); Kelly Bernadette (MPST DG)
Subject: FW: FAO: [redacted]

[redacted]

The SoS has proposed the attached tracked changes to the [redacted] letter which is intended to make it clear that he has not prejudged this case and has an open mind until he sees representations and evidence. Pl shout if alarm bells start ringing

The SoS is of the view that News Corporation's lawyers can hardly be considered an independent source of advice. The SoS has read strongly argued views to the contrary. He is somewhat concerned to read that "OFT does not expect the merger to give rise to competition concerns". Does this not suggest that they have prejudged the issue? Or have they already carried out an evaluation?

The SoS has also queried what other representations have been received, Have other media groups written letters? The BBC? Are we expecting representations from these and others?

The SoS would like to review the position when he returns from leave in the last week of August. On this basis, I would be grateful if you could provide answers to the above questions during the course of this week and an update sub for his consideration on 20th August.

Thanks

[redacted]

Thanks

From: MPST Central Admin
Sent: 02 August 2010 10:09
To: Cable MPST
Subject: FAO: [redacted]

E-mail Message

From:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], [redacted] (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Vaizey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=PSVAIZEY], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]
Sent:	06/08/2010 at 16:30
Received:	06/08/2010 at 16:30
Subject:	Newscorp/BSkyB - calls for intervention
Attachments:	GMG to Vince Cable re BSkyB 30 July 2010.pdf BSkyB & Channel 5 - Guardian letter draft reply.doc

PS/Secretary of State

I attach a draft reply for the Secretary of State to use in responding to the attached letter from Guardian Media Group calling on him to intervene in respect of the proposed Newscorp acquisition of 100% of BSkyB and also in Northern & Shell's recent acquisition of Channel 5 from RTL. This adopts the same line used in the reply to the TUC which issued on Monday.

GMG places its call for intervention in these mergers in the context of concerns about more general increased concentration in the media market across different media platforms. The letter raises questions about whether the applicable regulatory framework remains appropriate in view of recent market developments. The draft reply makes clear that responsibility for the regulatory framework applicable to media ownership rests with DCMS and states that the GMG letter has been forwarded to the SofS DCMS to note GMG's concerns. I have alerted relevant DCMS officials and have sent the GMG letter to them so they can consider it and take action as appropriate.

Please note we also need to reply to a submission from Enders Analysis that similarly calls for intervention in these two mergers. Subject to the SofS being content with this proposed reply to GMG, we expect to adopt a similar line in responding to Enders Analysis though we may need to comment on some more specific matters they raise.

[redacted]
CCP2
020 7215 [redacted]

<> <>

From: Cable MPST
Sent: 04 August 2010 10:17

To: [redacted] (CCP)
Cc: Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); [redacted] (Communications); Kelly Bernadette (MPST DG)
Subject: RE: Newscorp/BSkyB - response to SofS's queries

[redacted]

Many thanks for this which the SofS found helpful.

[redacted]

From: [redacted] (CCP)
Sent: 03 August 2010 10:38
To: Cable MPST
Cc: Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); [redacted] (Communications); Kelly Bernadette (MPST DG)
Subject: Newscorp/BSkyB - response to SofS's queries

[redacted]

As requested, here is some further advice responding to the points raised by the Secretary of State.

1. It is right to say the submission from Newscorp's lawyers Hogan Lovells does not represent independent advice. It is the formal position of Newscorp. All such representations must be properly considered and taken into account by the Secretary of State in examining the issue and reaching conclusions about the merits of intervention. But he is not bound to agree with any particular submission.

2. The BIS correspondence unit has received no submissions on this matter from other media organisations. There are, however, numerous letters from MPs (on behalf of constituents) and members of the public. In the main these express broad concerns and reflect a belief that the Secretary of State has the authority to prevent Newscorp from acquiring 100% of the BSkyB. We propose now to respond to these letters drawing on the lines adopted in the reply to the TUC (which issued yesterday) and which echo the line used in Mr Davey's recent reply to the PQ from Chinyelu Onwurah.

3. While expressing strongly held views, these letters generally do not provide reasoned arguments pertinent to the specific question the Secretary of State has to consider - which is whether or not the proposed transaction could result in a loss of sufficient plurality of persons with control of media enterprises and whether it is a case in which a public interest intervention might be appropriate. Our own analysis of these questions leads to the conclusion that intervention appears unlikely to be appropriate in this case - as briefly set out in my original briefing note submitted on 25 June. The Hogan Lovells submission on behalf of Newscorp draws much the same conclusions for the same reasons. This is not surprising. We all have direct experience of using the powers to intervene in media mergers having done so in respect of BSkyB's acquisition of a 17.9% stake in ITV plc and this heavily contested case examined very thoroughly before the courts the limits of the Secretary of State's powers.

4. The scope to intervene is constrained in law. There is also published guidance that provides a clear statement of policy on when intervention might and might not be considered. This guidance is very important in giving a degree of certainty to the market about when non-competition factors might be expected to be taken into account in the regulation of media mergers. It does not over-ride the law as provided by the Enterprise Act 2002 but it does create a legitimate expectation about the way the Government may be expected to consider this matter. Failure to operate in accordance with the guidance would increase the risk of successful challenge to any decision the Secretary of State may take.

Draft reply to Guardian Media Group

1. Thank you for your letter of 30 July. You express concern that increased consolidation across different media platforms might result in releatively few enterprises controlling a large proportion of the news and editorial content available to people in the UK and suggest the regulatory framework governing the media may require amendment. The rules governing media ownership are a matter for the Secretary of State for Culture, Media and Sport. I have forwarded your letter to him to note your views about the continued appropriateness of the regulatory framework in today's market.

2. You go on to raise the recent announcement by News Corporation that it plans to acquire 100% of the shares in British Sky Broadcasting (BSkyB) and also the acquisition of Channel 5 by Northern & Shell. You suggest I might use my powers under the Enterprise Act 2002 to intervene in respect of both these transactions.

3. As you know, the main purpose in regulating mergers is to prevent substantial lessening of competition in relevant markets. The scope to intervene in mergers on public interest grounds is rightly constrained by the law. In addition, in respect of media mergers, there is published guidance that sets out the circumstances in which the Secretary of State might use his discretion to intervene. This guidance was produced to provide a degree of certainty to the market about whether or not intervention may be likely in a particular case. This guidance, which is available on the BIS website at: http://www.bis.gov.uk/files/file14331.pdf, must be taken into account in reaching decisions on whether to intervene in a media merger.

4. The guidance includes a statement of policy on intervention in broadcasting and cross-media mergers – which is what both the transactions you raise would be. The guidance states 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". It goes on to set out those rules that were removed by that Act. It further explains that "save in exceptional circumstances" intervention would not be made in relation to mergers where there had never been any media ownership rules.

5. I hope that is helpful in explaining the scope to intervene on public interest grounds in the proposed News Corporation / BSkyB transaction and the recent transfer of ownership of Channel 5. Taking the published guidance into account, if you have substantive reasons for believing these transactions could result in effects detrimental to the public interest such as might justify an intervention, please do submit arguments on the matter for my consideration.

SofS

Background note

1. In its letter, the Guardian Media Group expresses concerns about the continued appropriateness of the overall regulatory framework governing media ownership and the scope for broader market developments to result in inappropriate levels of concentration. This is a matter governed by a specific regulatory framework for which DCMS is responsible. It makes sense to refer questions on that regime to DCMS to consider whether and how to respond.

2. The question of whether or not it is appropriate to use powers available under the Enterprise Act 2002 to intervene in a particular merger situation is a distinct matter. The media public interest considerations were added to the Enterprise Act as a result of amendments successfully proposed during passage through the House of Lords of the Communications Act 2003. Their addition reflected the desire to provide continued scope for the Government to take action in respect of changes of ownership that would have been subject to specific statutory media ownership rules had those rules not been removed by the Communications Act 2003.

3. As set out in earlier advice on this matter, the Secretary of State must have proper regard to the published guidance on intervention in media mergers when considering whether or not it may be appropriate to intervene in a particular merger. Two central questions to consider are (i) whether these two transactions fall within the scope of the type of transactions in which the guidance suggests intervention may be considered and if not (ii) whether there are exceptional circumstances that suggest intervention would nevertheless be appropriate.

4. None of the media ownership rules removed by the Communications Act 2003 applied to ownership of BskyB - ownership of BskyB has never been subject to statutory controls. The question of whether BskyB is already controlled by Newscorp for the purposes of determining the sufficiency of plurality of persons with control of media enterprises has been considered previously with the conclusion that Newscorp's current 39.1% shareholding in BskyB affords it the capacity to materially influence BskyB's editorial output such that the two enterprises should be deemed to be under common control for the purposes of a plurality assessment.

5. The guidance would also suggest that Northern & Shell's acquisition of Channel 5 is not a transaction in respect of which intervention would generally be considered because it would not previously have been prevented by one of the media ownership rules removed by the Communications Act 2003. Northern & Shell has a maximum 14% share of the newspaper market – that share would have needed to have been greater than 20% before any such rule would have applied. There appears no strong reason to consider that the public interest is negatively affected in any material way by Northern & Shell owning Channel 5 rather than RTL.

The Rt Hon Dr Vince Cable MP
Secretary of State for Business, Innovation & Skills,
and President of the Board of Trade
Department for Business, Innovation & Skills
1 Victoria Street
London SW1H 0ET

CONFIDENTIAL

By email and mail

13 August 2010

Dear Secretary of State

News Corporation's proposed takeover of BSkyB

We are writing in relation to the announced acquisition by News Corporation ("News Corp") of the remaining 60.1% shares in British Sky Broadcasting Group plc ("BSkyB"). Attached is a note setting out BT's analysis of the detrimental market effects of the proposed transaction.

Accordingly, we would respectfully suggest that that it would be appropriate for you to issue a European Intervention Notice under s67 of the Enterprise Act 2002 on the basis of public interest considerations relating to plurality of the media resulting from News Corp's significantly increased control (both in the quality and amount) over BSkyB.

We remain at your disposal should you require further information ([redacted] in my team is my lead on this issue – she can be reached at [redacted]@bt.com).

Yours faithfully

[redacted]

IAN LIVINGSTON

cc: [redacted] Head of Strategic Projects and M&A – Competition & Regulatory Law
[redacted] BT Retail - Managing Director, Strategy, Portfolio, Legal & Regulatory Services
[redacted] BT Retail - General Counsel

Ian Livingston
Chief Executive Officer
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81 Newgate Street, London EC1A 7AJ
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News Corporation's ("News Corp") proposed takeover of British Sky Broadcasting Group ("BSkyB"): A Confidential Submission to the Secretary of State by British Telecommunications plc

1. Overview

News Corp, listed in the United States, controls a large range of media assets in the UK and in other countries.

News Corp's principal operations in the UK include:

- 100% ownership of News International, which publishes *The Times*, *The Sunday Times*, *The Sun* and *News of the World* – where *The Sun* has the highest average daily circulation amongst UK papers at 2.98 million copies, while *The Times* has circulation of 504,000, while in terms of the Sunday titles, the *News of the World* has circulation of 2.83 million (the highest figure for any Sunday title) with *The Sunday Times* with a circulation of 1.09 million, second behind the *Mail on Sunday* (1.91 million) in terms of quality titles. News Corp's papers accounted for over 37% of national newspaper circulation in the UK in 2009, the same share as the two next competitors.

- A 39.1% stake in BSkyB, the leading supplier of Pay TV services in the UK and also a supplier of telecommunication services (see below)

- 100% ownership of HarperCollins, one of the top four book publishers in the UK

Other notable News Corp assets include:

- 100% ownership of Sky Italia, the leading supplier of Pay TV services in Italy

- A 45.4% stake in Sky Deutschland, the leading supplier of Pay TV services in Germany

- In the United States, *The Wall Street Journal* (the leading global business newspaper), Dow Jones, *The New York Post*, Fox Television (one of the big four US networks) and 20th Century Fox (one of the big film producers)

- In Australia, a portfolio of newspapers including *The Australian*, *The Daily Telegraph* and *Herald Sun* and a 25% stake in pay-TV satellite television service FOXTEL

News Corp has proposed to purchase the remaining 60.9% of BSkyB that it does not already own.

BSkyB is the UK's leading supplier of residential and business Pay TV services, and also supplies residential telecommunication services. We estimate that BSkyB currently accounts for close to 70% of UK residential subscribers to subscription Pay TV services and about 80% of subscription Pay TV revenues. In the wholesale basic Pay TV market, BSkyB has a market share of approx. 36% of viewers after its acquisition of Virgin Media's TV business. BSkyB's dominance in sports has led Ofcom to imposing "wholesale must offer" remedies in its 31 March 2010 Pay TV Statement, and its dominance in premium movies led to the referral to the Competition Commission of the premium movie markets on 4 August 2010.

Expressed succinctly, the proposed transaction will bring together under common control and ownership the largest UK broadcaster and Pay TV company (BSkyB) and the largest UK newspaper group (News Corp), and this concentration raises concerns as to whether there will be sufficient plurality of the media going forward.

2. Applicability of EU Merger Control Rules

We believe that the proposed transaction requires mandatory notification under the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EC Merger Regulation" or "ECMR"), as the relevant turnover- based thresholds of Article 1(2) ECMR will be met.

News Corp's total worldwide revenues for the year ending 30 June 2009 were US$30,423 million. Using the relevant ECB monthly exchange rate, News Corp's turnover was Euro 22,186 million worldwide, Euro 6,804 million on a European level and Euro 2,114 million on a UK level. BSkyB's total revenues to the year ending 30 June 2009 were £ 5,359 million. At the relevant ECB monthly exchange rate, BSkyB's turnover was Euro 6,261 million, predominantly on a UK level.

Both companies have in the past days issued statements to the markets with revenues for the year ended 30 June 2010; although EU and UK revenues are not available yet, we do not expect the 2009-10 figures to change the ECMR threshold analysis.

News Corp alone meets the relevant Euro 5 billion worldwide turnover test under Article 1(2) ECMR, while News Corp and BSkyB each have Community-wide turnover in excess of Euro 250 million. BSkyB achieves more than two-thirds of its aggregate Community-wide turnover in one and the same member state (the UK); however, News Corp does not meet this threshold. As a result, the proposed transaction is a concentration with a Community dimension within the meaning of Article 1 ECMR and, accordingly, a mandatory ECMR filing will be required.

Our assessment is consistent with News Corp's own press release of 15 June 2010, which indicated that "News Corp's Proposal is subject, inter alia, to the following pre-conditions: clearance of the proposed transaction by the EC and any other relevant competition or regulatory authority (...). News Corp's preliminary assessment suggests that the thresholds for notification under the EC Merger Regulation are met and, as a result, merger filings will be required. Relevant documentation is expected to be filed with anti-trust and other regulatory bodies as soon as possible." (see http://www.newscorp.com/news/news_454.html)

3. Intervention Notices under the Enterprise Act 2002 in relation to relevant merger situations and particularly European mergers

Under Article 21(4) ECMR, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the ECMR and compatible with the general principles and other provisions of Community law with respect to concentrations with a Community dimension. Plurality of the media is specifically identified as a legitimate interest within the meaning of Article 21(4), first subparagraph.

The mechanism under which the UK authorities can take such measures is the issuance of an Intervention Notice. In merger situations involving newspapers, broadcast media or cross-media mergers, the Secretary of State has the authority to issue an intervention notice (or European Intervention Notice). Such a notice triggers an initial investigation by the Office of Fair Trading ("OFT") and Ofcom into whether such public interest issues are relevant to a consideration of the transaction, which reports to the Secretary of State, providing advice and recommendations. The Secretary of State may then decide to refer the merger's plurality concerns, along with those regarding the conditions of competition, to the Competition Commission.

Under Section 67 of the Enterprise Act 2002, the Secretary of State may issue a European Intervention Notice in respect of a concentration falling under the ECMR, where consideration is being given whether to take appropriate measures to protect legitimate interests as permitted by Article 21(4) ECMR. In such a case, the Secretary of State may give a notice to the OFT and Ofcom if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned (with the OFT reporting on jurisdiction and Ofcom on the relevant media public interest consideration).

4. Plurality of the Media

The Communications Act 2003 amended the Enterprise Act 2002 by adding public interest considerations relating to mergers involving media and newspaper enterprises. These additional public interest considerations (referred to collectively in the legislation as the "media public interest considerations") are set out in section 58(2A) to (2C) of the Enterprise Act 2002, where sections 58(2A) and (2B) may apply in the context of mergers involving newspapers, while section 58(2C) may apply in the context of mergers involving broadcast media enterprises or cross-media mergers involving both broadcast media enterprises and newspaper enterprises.

The Department of Trade and Industry (now BIS) specified in its May 2004 *"Guidance on the operation of the public interest merger provisions relating to newspapers and other media mergers"* ("2004 Guidance Document") that "media public interest considerations" may apply to mergers involving newspapers or broadcast media enterprises or to cross-media mergers of newspaper and broadcast media enterprises. News Corp's proposed transaction involves both a broadcast media enterprise (BSkyB) and a newspaper enterprise (News International) and therefore constitutes a cross-media merger.

Under sections 58(2A) to (2C) of the Enterprise Act 2002, plurality of the media is intended to address several fundamental aims in an informed and democratic society:

> *"(2A) The need for—*
> *(a) accurate presentation of news; and*
> *(b) free expression of opinion; in newspapers is specified in this section.*
>
> *(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.*
>
> *(2C) The following are specified in this section—*
> *(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;*

(b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
(c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003."

The media and cross-media public interest regime under the Enterprise Act 2002 provides a safeguard to prevent media mergers bringing about undue concentrations of ownership, which may operate against the public interest. It enables the Secretary of State to intervene in certain mergers involving media enterprises so as to ensure a sufficient plurality of media ownership, to protect the availability of a wide range of high quality broadcasting and to ensure that those with control of media enterprises have a genuine commitment to the broadcasting standards objectives set out in the Communications Act 2003.

The first of the broadcasting and cross-media public interest considerations set out in section 58(2C) refers to the need for a sufficient plurality of persons with control of media enterprises serving the same audience in any given area of the UK. As set out in paragraph 7.7 of the 2004 Guidance Document, this public interest consideration is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons, as it would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This broadcasting and cross-media public interest consideration, therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality.

This authority was last used on 26 February 2007 when the Secretary of State issued an intervention notice with respect to the acquisition by BSkyB of a 17.9% shareholding in ITV. Ofcom's initial investigation, reported to the Secretary of State on 27 April 2007, advised that *"there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audiences for national news and the UK TV audience for national news".*

5. Change in the quality and extent of control

The quality and extent of control that News Corp will have as a result of its acquisition of the remaining 60.9% of BSkyB will be fundamentally different to the influence it currently exercises. It is that change in the quality and extent of control which is decisive in the present circumstances both to the existence of a concentration (under the ECMR – or a relevant merger situation under the Enterprise Act 2002 where the transaction not to be caught by the ECMR) and to the existence of a public interest regarding plurality of the media.

From a corporate point of view, an increase in Sky's shareholding from 39.1% to 100% would see Sky move from an 'equity affiliate' status (as it is described in News Corp's Annual Report) to a fully owned subsidiary of News Corporation. Under the terms of a 2005 Voting Agreement signed by BSkyB, News Corp and certain of their affiliates, the voting interest of News Corp (including its affiliates and any parties acting in concert with it) in BSkyB has been limited to 37.19%. However, if News Corp is allowed to increase its shareholding in BSkyB from 39.1% to 100%, it will then be able to do anything it likes with BSkyB from a corporate law perspective. In particular, it will have the power to appoint and remove the Board, which can be done by an ordinary resolution of shareholders, which requires only a simple majority under the Companies Act 2006. News Corp would also, among others, be able to pass special resolutions (which must be passed by at least 75% of the members present in person or by proxy and entitled to vote at a general meeting) under the Companies Act 2006 (for example, special resolutions would be required to alter BSkyB's Articles of Association, change its name, ratify acts beyond the directors' powers, reduce BSkyB's share capital, give authority for the allotment of equity securities by the directors without restriction or subject to modified restrictions, and/or decide on the voluntary winding-up of BSkyB).

In the present case, because News Corp already has a 39.1% interest in BSkyB, the two companies are not completely unaffiliated and independent and, therefore, arguably, BSkyB may have already ceased to be entirely distinct as a result of News Corp's acquisition of its original shareholding in BSkyB. This means that already today, BSkyB and News Corp are not analysed in isolation of each other when considering plurality of the media and the risk of any substantial lessening of competition and, therefore, the number of enterprises serving the relevant media audiences may be considered to be unchanged.

However, paragraph 7.13 of the 2004 Guidance Document clearly sets out that when assessing plurality, merger situations including those involving an ***increase in levels of control*** of such media enterprises may be examined for the purposes of subsection 58(2C), which 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 enterprises serving the relevant audience ***even though the number of enterprises serving that audience may be unchanged.***

It is important to note that the question of the importance of the nature of control – and of any change in that control – was considered by the Competition Commission, by the Competition Appeal Tribunal and ultimately by the Court of Appeal.

In its judgment [2010] EWCA Civ 2 in relation to BSkyB's November 2006 acquisition of 17.9% of the issued share capital of ITV plc, the Court of Appeal considered the correct interpretation of the phrase "*sufficient plurality of persons with control of ... media enterprises*" in section 58(2C)(a).

The Court of Appeal indicated (emphasis added):

> "80. 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, not defined in the Act, "sufficient plurality of persons with control of ... media enterprises" in section 58(2C)(a). ***The Commission held that what was required was not just an exercise of counting heads, and that it was proper and necessary to have regard to the actual degree of control exercised by one enterprise over another.***
>
> [..].
>
> 121. On that basis, it seems to us that the Commission was correct to hold that, whereas in reckoning the number of controllers of media enterprises for the purposes of section 58(2C)(a) only one controller is to be counted in respect of both or all of the relevant enterprises (here Sky and ITV), nevertheless, when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, ***the Commission may, and should, take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another***, whether it is a case of deemed control resulting from

material influence under section 26 or rather one of actual common ownership or control. [...]"

As a result, it is clear that in the present circumstances, News Corp's proposed acquisition of the remaining shares in BSkyB would increase its influence over BSkyB to the level of outright ownership and control. That change in the *quality* of control satisfies the test under section 58(2C) as to whether there is insufficient plurality of persons with control of media enterprises to warrant the issuance of an intervention notice.

6. How could News Corp use its control of BSkyB

Although we consider that the relevant legal test for an intervention notice is clearly met, and that accordingly the proposed transaction should be reviewed against the public interest of plurality of the media, and without seeking to pre-empt that review, we thought it may be useful to identify some of the potential risks resulting from the proposed transaction.

From a plurality of the media perspective, News Corp would be able to make fundamental changes to how its UK media operations function as a result of its proposed acquisition of full control of BSkyB. By moving from a minority shareholder interest to full ownership of BSkyB, News Corp will gain important financial advantages and strategic opportunities which will improve its ability to compete against its rivals both in newspapers and broadcasting.

First, products currently separately offered by BSkyB and News Corp titles may be combined in bundles, discounted or provided without charge. For instance, BSkyB could bundle News International titles with monthly entertainment to its millions of customers in the UK. BSkyB currently distributes more than 7 million copies every month of its magazine to subscribers of its Pay TV services, making BSkyB the largest circulation magazine in the UK based on ABC data. This could therefore have a material anti-competitive impact on other UK newspapers.

Second, the widespread availability of fast broadband is encouraging the rapid convergence of press and television. It is easy to foresee a convergence of the content from News Corp newspapers being carried on Sky News and Sky's website, and the content from BSkyB channels being reflected in News Corp newspapers and websites. This convergence means that plurality would decline even if the combined organisation continued to maintain newsrooms that are nominally separate, as their content would increasingly become "mixed".

This blurring of content and news may also result in driving the news agenda on Sky News being influenced by commercial considerations, with news items being given prominence on Sky News to promote related "exclusives" in News Corp's newspapers. A disturbing recent example of this has been the high profile reporting of the Roal Moat case as a news item, with subsequent "exclusive interviews" being given by his family and ex-girlfriend in various newspapers.

Third, the loss of the independent BSkyB shareholders will allow News Corp greater opportunity to influence, tacitly or otherwise, the editorial coverage of Sky News and other BSkyB channels. The 2006 investigation by the regulators of the BSkyB purchase of ITV shares found no evidence of proprietor intervention in Sky News under its current shareholding structure, but this could change under full ownership. Today, the presence of strong independent directors of BSkyB, many of whom have substantial external reputations, helps protect the independence and diversity of what appears on screen, particularly on news programmes.
However, it is well known that Mr Rupert Murdoch plays an active role in editorial policy at *The Sun*, as noted by the Competition Commission: 'in relation to *The Sun*, whilst the editor's

decisions on news content and stance are generally independently taken, the editor also has regular discussions with other parties, including with Mr (Rupert) Murdoch and News International Executive Chairman, Les Hinton, on a range of editorial matters,' and also concluded that 'News International (the UK newspaper holding company) and News Corporation are heavily involved in decisions affecting the circulation and profitability of their newspaper titles'.

It is therefore entirely reasonable to believe that Mr Murdoch may seek to play a more active role in the editorial policy of BSkyB, for example by seeking to streamline newsrooms across News Corp's various UK media operations, both newspaper and broadcasting.

It is notable that, in the context of BSkyB's acquisition of a 17.5% share in ITV, the issue of plurality was taken up by the Competition Commission in its examination of the transaction, which concluded that *'there is insufficient evidence to suggest that the acquisition of a stake of this nature would give BSkyB or its parent companies the ability or incentive to exert editorial influence over ITV's news output'.* This is clearly not the case here, as News Corp would acquire complete control over BSkyB and would therefore clearly have the ability to exert editorial influence of BSkyB's news output and, as noted above with respect to Mr Murdoch, would likely also have the incentive to do so too.

Fourth, the plurality issues should also be considered in the context of BSkyB's dominant and increasingly aggressive competitive position in UK TV markets, which will in itself have implications for plurality. The merging of News Corp and BSkyB can be expected further to lessen competition in UK Pay TV markets. BSkyB currently carries content from News Corp (e.g. from Fox Television and 20th Century). As a result of BSkyB becoming a wholly-owned subsidiary of News Corp, the incentives of News Corp and other News Corp businesses in terms of their interactions with BSkyB would change; specifically, it is reasonable to expect that the carriage fees that News Corp would charge a wholly-owned subsidiary – BSkyB – for channels and content produced or distributed by other News Corp entities would be lower than it would charge third party companies competing with BSkyB. This would result in the cost of entry for rivals increasing, and further reinforce BSkyB's dominant position in Pay TV.

As you are aware, BSkyB already has a dominant position in UK premium Pay TV sports and movies markets, at the wholesale and retail level, as defined by Ofcom in its Pay TV market review statement on 31 March 2010. It has a 100% share of the wholesale premium Pay TV movies channels market and an 80% share of the wholesale premium Pay TV sports channels market. It controls the vast majority of UK Pay TV content rights for major sports events and for Hollywood movies, as well as recently adding exclusive access to HBO programming to its content on offer. In its Pay TV Market Statement Ofcom imposed a "wholesale must offer" obligation on BSkyB in respect of its two main sports channels Sky Sports 1 and Sky Sports 2.

This was followed on 4 August 2010 by Ofcom's decision to make a reference to the Competition Commission under the Enterprise Act 2002 for an investigation into the supply and acquisition of Subscription Pay TV Movie Rights and into the wholesale supply and acquisition of packages including Core Premium Movies channels. BSkyB therefore is under close scrutiny for its dominant position and conduct in a number of key Pay TV markets, and its dominant position is likely to be reinforced as a result of the proposed transaction.

These market dynamics have profound issues for the plurality of media in the UK, because the market position and the number of retailers and wholesalers of alternative views and opinions are under threat from the growing dominance of BSkyB.

It is also worth highlighting the possible impact of the proposed acquisition in relation to advertising. BSkyB already currently refuses to carry advertising for rival propositions such as BT Vision, and also has a track record interrupting supplies of wholesale basic Pay TV channels (as it did with Virgin Media between March 2007 and November 2008). At the moment, News Corp newspapers carry a significant amount of advertising for rival propositions which compete with BSkyB. However, News Corp having full control of BSkyB could change News Corp's incentives with respect to carrying advertising and promoting alternative propositions that compete with BSkyB and could result in News Corp newspapers favouring BSkyB to the detriment of other rival propositions, thereby raising advertising and customer acquisition costs for rivals such as BT Vision, Virgin Media or TalkTalk.

Fifth, the sector is currently undergoing significant transformation. News Corp has announced its proposed acquisition of BSkyB, while BSkyB has just recently acquired various television channels from Virgin Media Inc namely the Virgin 1, Living, Bravo and Challenge channels and their related channels, thereby further reinforcing BSkyB's dominant position in UK Pay TV. In parallel, news reports suggest that Richard Desmond, the owner of Express Newspapers, the Star, OK magazine as well as adult channels, will shortly conclude negotiations to buy Five. This suggests that there is an increased need to look closely at plurality of the media issues at this time of significant change in the UK media industry.

7. Conclusion

The proposed acquisition by News Corp of the remaining 60.9% shares in BSkyB will bring about a material change in the quality and extent of control over BSkyB and, as a result, there will be insufficient plurality of persons with control of media enterprises. As a result, we consider that it would be appropriate for the Secretary of State to issue a European Intervention Notice on the plurality of the media public interest grounds, and that to do so would be to apply the law as intended and in line with prior precedents.

12 August 2010

E-mail Message

From: [redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To: Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Cablem]
Cc: Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Arees], [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=J[redacted] Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Bmkelly], [redacted] (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Edavey], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Spad], [redacted] [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Vaizey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Psvaizey], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Amos Stephen (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Samos], [redacted] MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent: 15/08/2010 at 13:24
Received: 15/08/2010 at 13:24
Subject: Newscorp/BSkyB - calls for intervention

Attachments: Enders.pdf
News Corp BSkyB - Enders Analysis draft response.doc

PS Secretary of State

1. The e mail below from [redacted] gave a draft response for the SofS to send in response to the Guardian Media Group and their call for him to use his powers in the Enterprise Act to intervene in News Corps proposed acquisition of the remaining shares in BSkyB that it does not already own. We have received another submission from Enders Analysis (attached) which also calls for the SofS to intervene in this potential acquisition, and Northern and Shell's acquisition of Channel 5. Enders Analysis is a firm that provides media analysis and reports to its subscribers - it's research is often quoted in media reporting. The draft response is similar to that provided for the response to GMG.

2. Much of Enders Analysis is in the context of concerns about increased concentration in the media markets of Pay TV and national newspapers - the ability of News Corp to use the revenues and access to millions of subscribers created by a full ownership of BSkyB to cross subsidy growth strategies for is News International owned newspaper titles. Enders also submits a number of points to suggest that the public interest consideration of media plurality would be considerably "worse off than it is today". These concerns centre on the ability of News Corp to cross refer its news stories between its various news paper titles, Sky News broadcast and its on line operations that would effectively merge into one stream of fact and opinion even if separate and independent news gathering and Editors and maintained. It also submits that the loss of an independent BSkyB Board of Directors would give News Corps the ability to greater influence what appears on screen - particularly Sky News.

3. To note that we have just received a further submission from BT (which operates BT Vision) for which Andrew Rees will provide a draft response next week. On an initial reading, BT's submission makes similar points to those made by Enders Analysis.

Regards

[redacted]

Competition Law and Mergers |Department for Business, Innovation and Skills |
[redacted]@bis.gsi.gov.uk | T: 0207 215 [redacted]

<> <>

From: [redacted] (CCP)
Sent: 06 August 2010 15:30
To: Cable MPST
Cc: Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); [redacted] (Communications); Kelly Bernadette (MPST DG); [redacted] (MPST MIN); Davey MPST; SPAD MPST; [redacted] (CCP); [redacted] (CCP); Vaizey MPST; [redacted] [redacted] (CCP)
Subject: Newscorp/BSkyB - calls for intervention

PS/Secretary of State

I attach a draft reply for the Secretary of State to use in responding to the attached letter from Guardian Media Group calling on him to intervene in respect of the proposed Newscorp acquisition of 100% of BSkyB and also in Northern & Shell's recent acquisition of Channel 5 from RTL. This adopts the same line used in the reply to the TUC which issued on Monday.

GMG places its call for intervention in these mergers in the context of concerns about more general increased concentration in the media market across different media platforms. The letter raises questions about whether the applicable regulatory framework remains appropriate in view of recent market developments. The draft reply makes clear that responsibility for the regulatory framework applicable to media ownership rests with DCMS and states that the GMG letter has been forwarded to the SofS DCMS to note GMG's concerns. I have alerted relevant DCMS officials and have sent the GMG letter to them so they can consider it and take action as appropriate.

Please note we also need to reply to a submission from Enders Analysis that similarly calls for intervention in these two mergers. Subject to the SofS being content with this proposed reply to GMG, we expect to adopt a similar line in responding to Enders Analysis though we may need to comment on some more specific matters they raise.

[redacted]
CCP2
020 7215 [redacted]

<< File: GMG to Vince Cable re BSkyB 30 July 2010.pdf >> << File: BSkyB & Channel 5 - Guardian letter draft reply.doc >>

From: Cable MPST
Sent: 04 August 2010 10:17
To: [redacted] (CCP)
Cc: Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); [redacted] (Communications); Kelly Bernadette (MPST DG)
Subject: RE: Newscorp/BSkyB - response to SofS's queries

[redacted]

Many thanks for this which the SofS found helpful.

Bryan

Draft reply to Enders Analysis

1. Thank you for your letter dated 30 July. You include a submission about the recent announcement that News Corp plans to acquire the remaining shares in BSkyB. Your submission gives Enders Analysis view of the likely development of the television and newspaper market in the UK. I note your concerns about the effects of the proposed transaction on plurality of media ownership, and that of Northern and Shell's acquisition of Channel 5. You urge me to use my powers under the Enterprise Act 2002 to intervene in both these transactions.

2. As you know, the main purpose in regulating mergers is to prevent substantial lessening of competition in relevant markets. Much of your analysis relates to competition aspects arising from these mergers, and I would therefore suggest that you submit these arguments to the relevant competition authority at the appropriate time.

3. On the question of the public interest, you will be aware that the scope to intervene is rightly constrained by the law. In addition, in respect of media mergers, there is published guidance that sets out the circumstances in which the Secretary of State might use his discretion to intervene. This guidance was produced to provide a degree of certainty to the market about whether or not intervention may be likely in a particular case. The guidance, available on the BIS website at: http://www.bis.gov.uk/files/file14331.pdf, must be taken into account in reaching decisions on whether to intervene in a media merger.

4. This guidance includes a statement of policy on intervention in broadcasting and cross-media mergers – which is what both the transactions you raise would be. It states 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". It goes on to set out those rules that were removed by the Act. If further explains that "save in exceptional circumstances" intervention would not be made in relation to mergers where there had never been any media ownership rules.

5. I hope that is helpful in explaining the scope to intervene on public interest grounds in the proposed News Corp/BSkyB transaction and the recent transfer of ownership of Channel 5. I am grateful for your submission which I will take into account in considering these cases.

Background Note

1. Much of the detail set out in the background note to the draft response to the Guardian Media Group's on the same subject also applies to this draft reply (Jonathan Cook's e mail dated 6 Aug timed 16:30).

2. Enders Analysis is a research and analysis company that specialises in the media, telecommunications and technology sectors providing its services to its subscribers. Its reports and analysis are regularly quoted in media reporting. It was founded in 1997 by Claire Enders who is the CEO and the signatory to the letter to the SofS.

3. Enders Analysis expresses concerns about News Corp adding a fully owned BSkyB to its portfolio. It notes that BSkyB's "commanding" position in the Pay TV market particularly with its premium content such as sports and film releases, is enabling it to cross into telecommunications services such as broadband and residential landlines by offering packages to subscribers. Combining that with News International's share of the UK national newspaper market, which currently stands at about 37%, means that News Corp could, in theory, cross subsidy newspaper selling discounts from the revenue generated by full ownership of BSkyB, or bundling its newspaper titles with BSkyB subscriber TV packages. It expresses similar concerns for the advertising market where it suggests that News Corp could offer advertisers print, on line and digital TV packages in a way that no other provider could; set against its competitors in the newspaper industry that are not particularly strong enough to react. These are essentially <u>competition</u> concerns which the European Commission would consider under its jurisdiction once the transaction is notified and Enders Analysis, along with any other interested party can submit their views direct.

4. Enders Analysis submits that the transaction would have implications for <u>media plurality</u> that would make the situation "worse than it is today". Its first argument is that News Corp's ability to bundle its UK newspaper titles with BSkyB's Monthly Entertainment magazine (which it distributes 7 million copies every month to its subscribers making it the largest magazine in circulation in the UK) could "severely test" long held reader loyalty to titles such as The Mirror or the Daily Mail by changing the way in which consumers measure their value. Its second argument is that News Corp will be able to cross refer news stories between its various newspaper titles, Sky News and it's on line operations which would effectively merge into one stream of fact and opinion – even if the combined organisation maintained separate and independent newsrooms and editors. Lastly, the loss of independent BSkyB shareholders could allow News Corp greater opportunity to influence editorial coverage of Sky News and other BSkyB channels. Enders Analysis argues that the presence of strong independent directors of BSkyB, many of whom have substantial external reputations helps to protect the independence and diversity of what appears on screen, particularly Sky News.

5. Enders Analysis also urges the SofS to intervene in Northern and Shell's acquisition of Channel 5, though it does not give specific arguments.

Trinity Mirror plc

16th August 2010

The Right Honourable Vince Cable MP
Secretary of State for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

Dear Secretary of State

Re: News Corporation – BSkyB

You will, of course, be aware of the announced intention of News Corporation to acquire the 60.9% of shares in BSkyB that it does not already own.

I am writing on behalf of Trinity Mirror Plc - the parent company of the group which publishes five national newspapers, including the Daily Mirror and 160 local and regional newspapers - to express our very grave concern at the likely threat to plurality of media ownership and news provision in the UK should this acquisition be allowed to proceed.

We are concerned that there is already a growing assumption that, as News Corporation holds a 39.1% of the shares in BSkyB and has three nominated directors on its Board, it already effectively controls BSkyB and thus there would be no material change should it move to outright ownership.

We believe this school of thought simply ignores the influence on the management and running of BSkyB of the presence of independent non-executive directors who among other things ensure that BSkyB is run in the commercial interests of all its shareholders and that long-term commercial decisions are not taken solely in the interests of News Corporation. Such constraints would, of course, disappear if BSkyB were to become merely a subsidiary of News Corporation.

You will be aware of many of the titles that we publish. The Daily ~~Mirror and Sunday~~ Mirror were the only national newspapers that took a pro-labour standpoint at the last general election.

You will also be aware that local and regional newspapers adopt a neutral stance in party politics but are often the only media outlets that report on the work of individual members of parliament and allow them to speak directly to their constituents (indeed, we are very pleased that you are a regular contributor to one of our titles, The Richmond Informer).

The purpose of this letter is to urge you, at the appropriate time, to issue on public interest grounds either an Intervention Notice or a European Intervention Notice so as to ensure that proper consideration is given to plurality of media ownership in the UK.

Sly Bailey
Chief Executive
Trinity Mirror plc
One Canada Square, Canary Wharf, London E14 5AP

www.trinitymirror.com

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Although News International, the UK subsidiary of News Corporation, has always denied either occupying or abusing a dominant market position, there is no doubt that it is aggressively protective of its market share. Starting with the so called newspaper price wars of the early 1990's through to the present day, News International have shown that it is prepared to sustain either very heavy losses or long-term reductions in profit through cover price discounting to increase or maintain market share for The Times and The Sun.

Our concern is that, without the restraining impact of the need to look to the interests of non-News Corporation shareholders in BSkyB, decisions that make no commercial sense in the short term could be taken in the perceived greater long-term good of News Corporation.

Possible steps could include:

1. The removal of any advertising or promotional spend in Trinity Mirror titles – The Daily Mirror being viewed as the principal competitor to the News International title The Sun. BSkyB currently spends in the regional of £3 million per annum on promotion and advertising in Trinity Mirror titles. It is clear that such a step would deny BSkyB itself access to Mirror readers and would not make commercial sense from BSkyB's point of view but would be very damaging to the health of Trinity Mirror's titles and therefore advantageous to News International.

2. Products currently sold separately could be bundled together into subscription packages. . It is easy to see bundles that would combine the Sky TV chanels with home delivered copies of The Times or The Sun. This concept is even more likely if News Corporation further develops its paywall plans for the internet based versions of their newspapers. A Sky TV premium bundle, including iPad friendly access to a paywall protected Times is entirely feasible. Such a proposition would be entirely unmatchable by stand-alone newspaper publishers.

3. A fully integrated News Corporation/BSkyB would see each limb having access to the almost unmatchable promotional capabilities of the other. Whether this is done through straight "house ads" or through cross fertilisation of star columnists, presenters and flattering TV reviews and features is immaterial.

4. As you will know, conditional selling – the refusal to take advertising in one title (normally the stronger) unless space is also bought in a weaker product – is prohibited. We are concerned that whilst there may be no illegality, the ability to create "packages" for advertisers unmatchable by other media outlets would give a combined News Corporation and BSkyB an unfair advantage.

5. You will also be aware of the practice by which media organisations encourage advertisers to enter into "solus" arrangements under which all their advertising is based with a single outlet. If a solus deal cannot be achieved then share deals are negotiated under which an agreement is made for a percentage of all advertising to be placed with one organisation. Again, the share size of a combined News Corporation/BSkyB and its reach within the UK would give it a significant advantage in negotiating solus or share deals.

6. The sheer financial scale of the combined entity would enable the continued cross subsidy of deep cover price discounting on News International titles to the long-term detriment of their competitors.

It is the ability within an integrated News Corporation/BSkyB to use a combination of all or some of the above to protect its position to the detriment of others which concerns us.

We are concerned that the long-term impact of a combination of all or some of the above will have a detrimental impact on the commercial viability of our existing portfolio of products.

As mentioned above, the Mirror titles are the only national newspapers to adopt a consistent left of centre political position and are a vital part of the democratic system in the United Kingdom. Similarly, our numerous regional titles play a very significant role in local communities and are the only outlets that report the workings of the lower courts and council meetings. Their future viability will be placed in further jeopardy should the finances of Trinity Mirror as a whole be weakened by a combined News Corporation/BSkyB.

We believe that given the potential impact of a combined News Corporation/BSkyB a proper airing of all concerns should be allowed and urge you to issue an Intervention Notice.

Yours sincerely,

[redacted]

Sly B[redacted]

NEWSCORP ACQUISITION OF 100% OF BSKYB

KEY MESSAGES:

- Recognise your concerns about the proposed Newscorp acquisition of the remaining shares in BSkyB.
- The European Commission will consider whether this transaction results in an unacceptable reduction of competition in the market. This competition assessment should address any negative effects arising from the transaction.
- You suggested it might be appropriate for me separately to intervene in this merger on public interest grounds.
- My letter of 2nd August sought to explain the issues I must take into account in considering this matter. If you have any further arguments, I would be happy to receive them for consideration.

BACKGROUND

1. The TUC is one of several parties that have called on you to intervene on public interest grounds in Newscorp's planned acquisition of the remaining shares in BSkyB. If you were going to make a public interest intervention, you would want to do this shortly after the transaction is notified formally to the European Commission for a competition assessment. We expect the parties to notify the proposed merger in early September.
2. The power you have to intervene in media was introduced to ensure Ministers retained a reserve power to examine public interest issues arising from media mergers in addition to the existence of statutory rules governing media ownership. In creating that power, the Government issued formal guidance (in 2004) setting out when it might be used. This guidance may not be disregarded since it creates a legitimate expectation about how the Secretary of State will act, providing clarity to business and avoiding a situation where intervention would need to be considered in all manner of media mergers claimed to raise issues affecting wider public interests.
3. Our assessment is that this is not a merger in respect of which intervention would generally be considered. Such an intervention would only be appropriate if we believed exceptional circumstances applied that would justify acting in contradiction of the published guidance. We remain open to

submissions on this matter but there seems no strong reason to believe intervention would be appropriate or that the transaction could have any significant negative impact on the sufficiency of plurality of persons with control of media enterprises. It may be noted that, for the purposes of considering the state of media plurality that exists currently, Newscorp should already be deemed capable of exercising control over BSkyB.

SoS Meeting with TUC
Wednesday 25th August, 2.15 – 3.00pm

Attendees:
[redacted]
Matthew Hilton (MH)
Giles Wilkes (GW)

[redacted]

[redacted]

BSkyB
BB said that the reported Newscorp acquisition of BSkyB was a serious issue for media unions. BB said that there were practical, industrial issues on the media plurality issue which the unions were concerned about. SoS said that there was a careful process to be followed, and that he had no pre-conceived judgements, but he said he would be willing to hear any genuine representation and consider the evidence.

P146

E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Amos Stephen (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SAMOS], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc:	
Sent:	25/08/2010 at 18:33
Received:	25/08/2010 at 18:33
Subject:	RE: Newscorp acquisition of BSkyB

[redacted]

Thanks for this update. Presumably we should expect a new round of media interest once the filing actually happens? We need to have a think about what the SoS should say (and shouldn't say) if questioned about it. Can/should we say anything different once the acquisition is formal?

Incidentally, Brendan Barber questioned him about this today in a meeting and he did very well at sticking to the lines so I think he's more comfortable with the process now. There is one thing I not entirely clear about though. One of the things we said to Brendan Barber in the response to his letter was that if he was really concerned about the threat of the acquisition to media plurality then he should submit evidence for the SoS to consider. But what sort of 'evidence' would we expect concerned parties like him to produce? How formal must the evidence be and also, on what basis will the SoS judge it? Is there a set of criteria? Would you provide him with advice on the basis of such evidence? (I have just been thinking about how (hypothetically) the SoS would get himself into a position where he is confident that an intervention is required.)

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (CCP)
Sent: 25 August 2010 10:38
To: Cable MPST; Davey MPST; Kelly Bernadette (MPST DG); Chambers Sarah (CCP); Amos Stephen (LEGAL B); Rees Andrew (CCP); [redacted] (LEGAL B)
Subject: Newscorp acquisition of BSkyB

Dear all

Just to note that I received a phone call this morning from Hogan Lovells, the lawyers working for Newscorp on the BSkyB acquisition. Just an update confirming all is happening much as expected. The draft merger notification form has been discussed with the EU Commission and is pretty much finalised and ready to be filed formally. They think filing will happen very early in September so probably next week or the week after. They have provided the OFT with a briefing note on the acquisition and had a brief discussion with them. The OFT is not currently seeking anything further from Hogan Lovells. I confirmed we also had all the information we needed from them.

When asked about the timetable for any action that may be taken by the Secretary of State, I indicated that as a matter of practice, our aim would be to operate to the same public interest intervention timetable that applies in respect of UK merger cases. This is a matter of practice rather than law because the Enterprise Act is unfortunately non-specific about what statutory timetable applies when intervening in European merger cases. [In view of the Enterprise Act being vague on this matter, in due course I wonder whether it may be worth publishing a policy statement on the relevant page of the BIS website to provide clarity about what timetable will be applied to public interest interventions in European merger cases.]

CCP2 BIS

E-mail Message

From:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE]
Cc:	[redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Wilkes Giles (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=GWILKES], Amos Stephen (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SAMOS], [redacted] (COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN [redacted]
Sent:	26/08/2010 at 16:28
Received:	26/08/2010 at 16:28
Subject:	RE: BSkyB
Attachments:	BSkyB Newscorp - case for intervention analysis.doc ECMR case merger process decision tree.doc

[redacted]

Me, Sarah and Stephen Amos will attend the meeting this afternoon and we will seek to address all questions about process and media handling. In advance, I thought it might be helpful to provide a supplementary discussion note. The attached seeks to explain how the power to intervene fits in with the broader regulatory regime and summarise again our analysis of the case for intervention in this merger. This may help address the first of the questions you list below. Also attached is that process flow chart you requested from an earlier submission.

[redacted]

From: Cable MPST
Sent: 26 August 2010 10:43
To: Chambers Sarah (CCP); [redacted] (CCP)
Cc: [redacted] (Communications); SPAD MPST; Wilkes Giles (MPST MIN)
Subject: BSkyB

Hi [redacted]

As discussed with Sarah just now, the SoS would like a short chat today about BSkyB. [redacted] has sent you an invitation.

He is anxious to really understand the Sky situation. He is definitely getting more familiar with the official proces, but there are some gaps in his (and my) knowledge. We have had some really helpful submissions from you and your team, but given the technicalities of the process, and the sensitivities of this case, I think a face to face briefing would be really valuable, not least because a filing to the EC is imminent and this may lead to renewed media interest.

What he is likely to ask you is:
- What representations has the Department received so far? What do they say, and why have they not been 'valid'? What would a representation which does provide valid grounds for him to intervene look like?
- What timeframe does he have to intervene and practically how would he do this? (probably good to bring out what the implications/consequences of this might be too)
- If there are no grounds to intervene, then what else can be done? Can we seek reassurances about the independence of editorial control? Should we meet Sky at some point to register our concerns?
- From a media point of view and in terms of correspondence and PQs, we need to work up a set of lines which shows he is engaged in this process but which also accurately reflects the legal limitations of his role. We need to make it really clear to anyone who asks what he has been doing so far (i.e. that he has been assessing representations but that none so far contain a sufficiently compelling case for him to intervene under specific criteria by which he is constrained) and what he will be doing (i.e. that he will continue to assess representations he receives and will keep an open mind). Whilst there is a process to be followed in such cases, we need to make SoS' references to this process as 'human' and helpful as we can.

Hope this helps to set the context for this afternoon's meeting.

It might be helpful to dig out that timeline you created in one of your submissions which shows what happens when in the process. Could be helpful to have that to refer to.

Thanks for your help

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

CASE FOR INTERVENTION IN NEWSCORP / BSKYB SUPPLEMENTARY ANALYSIS

The power to intervene in the broader regulatory context

1. The Secretary of State's powers to intervene in media mergers must be considered in the context of the broader applicable regulatory regime that separately governs who may own and control media enterprises and also the rules that apply to the conduct of all broadcasters irrespective of ownership.

2. Mergers are regulated to protect the public interest by ensuring they do not result in a substantial lessening of competition in markets. In the case of media enterprises, there is also a distinct statutory scheme that governs ownership to "prevent individuals from accumulating too great a share of the national media voice by having significant interests across television and newspapers". It may be noted there have never been media ownership rules that govern the ownership of BSkyB. Other regulatory mechanisms govern the presentation of news by broadcasters to ensure high standards and impartiality.

3. Given that such clear statutory provisions exist to control ownership of media enterprises, the existence of a separate discretionary power to regulate media mergers on other "public interest" grounds is clearly capable of creating unacceptable regulatory uncertainty. In view of this, the Government published detailed guidance setting out when that power to intervene in media mergers might be exercised. This guidance is important in constraining the scope to intervene in media mergers and minimising uncertainty. It provides the key set of criteria against which the Secretary of State should consider the merits of any call for intervention.

Why were the media public interest considerations introduced?

4. The media public interest considerations were added to the Enterprise Act 2002 as the result of an amendment introduced during the passage of the Communications Act 2003. That Act included provision to remove certain rules applicable to media ownership. Parliamentarians decided they would only accept removal of those rules if Ministers were given a reserve power to take action in mergers that would previously have been prohibited by the statutory rules. The guidance makes clear that intervention would generally not be considered in cases where media ownership rules had never existed.

What is the threshold for issuing an intervention?

5. The Secretary of State may intervene in a merger if he believes a specific public interest consideration that either has been or should be specified in Section 58 of the Enterprise Act 2002 is relevant to a consideration of it. The requirement to have only a "belief" that a consideration is "relevant" provides for a fair amount of discretion and ensures intervention is legally possible even if there is as yet no strong evidence to demonstrate that a merger would actually operate against a specified public interest. Nevertheless, legal advice indicates that the requirement to have a "belief" implies more than speculation.

6. While the relatively low threshold means it may technically be feasible to issue an intervention notice in a relatively wide number of cases, there would be no point

in doing so in a case where there appeared no realistic prospect of identifying credible justification for some further, more substantive action.

The representations received on Newscorp / Sky

7. Many of the representations calling on the Secretary of State to intervene in this case are expressed in quite general terms reflecting concern about the implications of increased commercial power of Newscorp and knowledge that the Secretary of State has certain scope to take action in this area. Responses to these are referring concerned parties to the published guidance and applicable law and inviting them to submit more detailed arguments as to why intervention might be appropriate.

8. More reasoned arguments as to why intervention might be deemed appropriate have so far been received from Trinity Mirror, Guardian Media Group, Enders Analysis and BT. And we have a substantive submission from Newscorp's lawyers, Hogan Lovells setting out arguments as to why such an intervention is not appropriate.

Competition concerns versus media plurality concerns

9. The purpose of intervention by the Secretary of State must be to address issues that are pertinent to the public interest but would not be addressed in a competition assessment. Questions as to whether or not a merger might result in a party gaining increased market power and loss of effective competition within the market will be addressed by the competition authority and are not matters on which the Secretary of State has the power to make judgments. One problem with the media public interest consideration of ensuring sufficiency of media plurality is its similarity with the interest of ensuring effective competition resulting in concerns presented as relating to the sufficiency of media plurality are actually substantively the same as concerns about consumers continuing to have access to a sufficient range of choices.

10. It may be seen that in the only case in which the power to intervene in a media merger has so far been used (BSkyB's acquisition of a 17.9% stake in ITV plc), although the Secretary of State referred the merger to the Competition Commission on both public interest and competition grounds, the outcome was that no action was taken on public interest grounds. On competition grounds, BSkyB was forced to reduce its shareholding in ITV to less than 7.5%. In reaching a decision, it was made clear that this competition remedy would have adequately addressed any media plurality concerns that might conceivably have arisen in the case such that even if it was successfully argued that the decision not to make a negative public interest finding on media plurality grounds was mistaken, no different remedy would be required. This may be contrasted with a case where intervention is made on the basis of the national security public interest consideration. It seems unlikely that remedies that might successfully address concerns about national security arising from a merger would be the same as a remedy that might be imposed to address competition concerns.

The substantive case for intervention in this merger

11. The submissions that argue for intervention do so by reference to a broadly similar set of concerns. In particular, they make points about the increased scope for Newscorp to influence BSkyB's output and for there to be cross promotion

between Newscorp newspapers and BSkyB. This could result in a greater number of people that read Neswcorp owned newspapers and also watch Sky News than would otherwise have been the case.

12. From the point of view of sufficiency of media plurality, the key consideration appears to be the extent to which Newscorp owning 100% of BSkyB might result in people receiving news and information from one source. In broadcasting, the existence of the BBC and of numerous commercial television and radio channels provides the main assurance of plurality. The cross media ownership rules also exist "to prevent individuals from accumulating too great a share of the national media voice by having significant interests across television and newspapers". There have never been media ownership rules that govern the ownership of BSkyB. And other regulatory mechanisms govern the presentation of news by broadcasters to ensure high standards and impartiality.

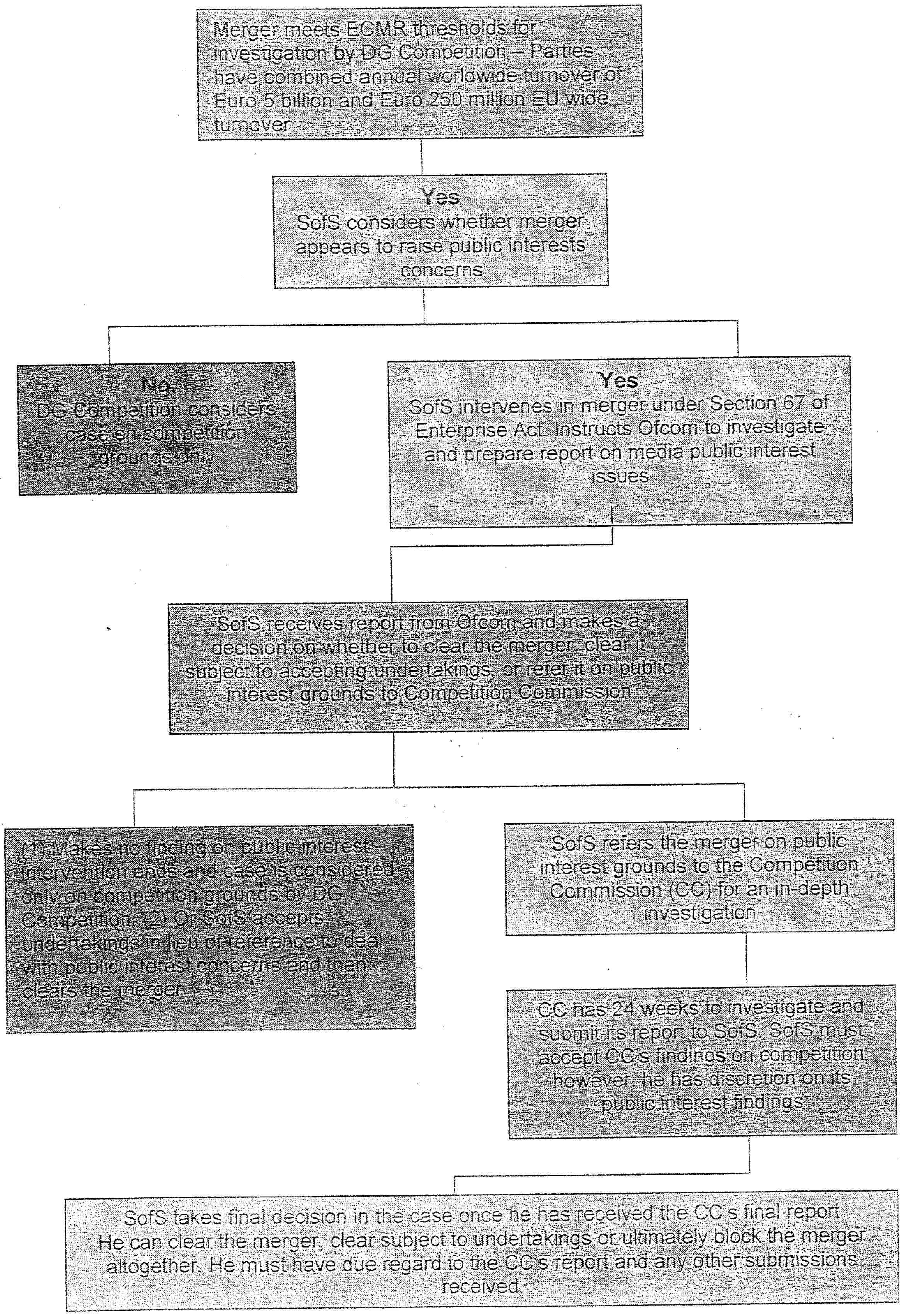
13. In addition to the above, it may be noted that since no media ownership rules have ever applied to the ownership of BSkyB, a cross media merger that affects its ownership is not one in respect of which the published guidance indicates intervention would generally be considered save in exceptional circumstances.

14. The nature of Newscorp's relationship with BskyB has already been considered in the context of the question of the sufficiency of plurality of persons with control of media enterprises. In the Sky / ITV case, the matter was examined in depth and it was accepted pretty much universally that Newscorp and BSkyB should be treated as already being under common control for the purposes of a plurality assessment. This is in view of the scope Newscorp currently has to exert influence over the content of BSkyB's output (particularly the presentation of news). It follows that an increase to 100% ownership may reasonably be considered to have no substantive effect on the state of plurality.

15. [Media ownership rules would not appear to preclude an enterprise that owns national newspapers from launching additional new television channels – such as may be considered to have happened with the creation of BSkyB.]

PUBLIC INTEREST INTERVENTION ON MEDIA PUBLIC INTEREST GROUNDS

PROCESS



BIS | Department for Business Innovation & Skills

The Rt Hon Vince Cable MP
Secretary of State for Business, Innovation and Skills

Andrew Miller
Chief Executive
Guardian Media Group
Kings Place
90 York Way
London
N1 9GU

Our ref: 217162

August 2010

Thank you for your letter of 30 July. You express concern that increased consolidation across different media platforms might result in relatively few enterprises controlling a large proportion of the news and editorial content available to people in the UK and suggest the regulatory framework governing the media may require amendment. The rules governing media ownership are a matter for the Secretary of State for Culture, Media and Sport. I have forwarded your letter to him to note your views about the continued appropriateness of the regulatory framework in today's market.

You go on to raise the recent announcement by News Corporation that it plans to acquire 100% of the shares in British Sky Broadcasting (BSkyB) and also the acquisition of Channel 5 by Northern & Shell. You suggest I might use my powers under the Enterprise Act 2002 to intervene in respect of both these transactions.

As you know, the main purpose in regulating mergers is to prevent substantial lessening of competition in relevant markets. The scope to intervene in mergers on public interest grounds is rightly constrained by the law. In addition, in respect of media mergers, there is published guidance that sets out the circumstances in which the Secretary of State might use his discretion to intervene. This guidance was produced to provide a degree of certainty to the market about whether or not intervention may be likely in a particular case. This guidance, which is available on the BIS website at: http://www.bis.gov.uk/files/file14331.pdf, must be taken into account in reaching decisions on whether to intervene in a media merger.

The guidance includes a statement of policy on intervention in broadcasting and cross-media mergers – which is what both the transactions you raise would be. The guidance states 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". It goes on to set out those rules that were removed by that Act. It further explains that "save in exceptional circumstances" intervention would not be made in relation to mergers where there had never been any media ownership rules.

I hope that is helpful in explaining the scope to intervene on public interest grounds in the proposed News Corporation / BSkyB transaction and the recent transfer of ownership of Channel 5. Taking the published guidance into account, if you have substantive reasons for believing these transactions could result in effects detrimental to the public interest such as might justify an intervention, please do submit arguments on the matter for my consideration.

VINCE CABLE

BIS | Department for Business Innovation & Skills

The Rt Hon Vince Cable MP
Secretary of State for Business, Innovation and Skills

Our ref: 217161

Claire Enders
46A Great Marlborough Street
London
W1F 7JW

31 August 2010

Dear Ms Enders

Thank you for your letter dated 30 July. You include a submission about the recent announcement that News Corp plans to acquire the remaining shares in BSkyB. I am grateful for your submission, which I will take into account when considering whether to intervene in this case.

You suggest I might use the powers I have under the Enterprise Act 2002 to intervene in the proposed transaction on public interest grounds. The scope that exists for me to intervene in mergers on public interest grounds – including in media mergers – is, of course, tightly constrained by the law. It is not a general power to take decisions about ownership of particular enterprises. The guidance you refer to sets out the circumstances in which I might use my discretion to intervene in media mergers. This guidance was produced to provide a degree of certainty to the market about whether or not such intervention may be likely in a particular case.

I understand the parties plan to notify this proposed transaction to the EU Commission (DG Competition) under the EC Merger Regulation (ECMR). Once the transaction has been formally notified to it, DG Competition will have an initial 25 working days to decide whether to clear the merger or initiate a more in depth second phase investigation of its impact on competition in the market. This competition assessment should serve to prevent the transaction from resulting in a substantial lessening of competition in relevant markets. Many of the points you raise appear to relate to potential competition impacts.

I recommend that you submit arguments on these matters to DG Competition at the appropriate time.

VINCE CABLE

BIS | Department for Business Innovation & Skills

The Rt Hon Vince Cable MP
Secretary of State for Business, Innovation and Skills

Ian Livingston
Chief Executive
BT Group
BT Centre
81 Newgate Street
London
EC1A 7AJ

Our ref: 217053

31 August 2010

Dear Mr Livingston

Thank you for your letter of 13 August, about the recent announcement by News Corporation that it plans to acquire 100% of the shares in British Sky Broadcasting (BSkyB). I am grateful for your submission, which I will take into account when considering whether to intervene in this case.

You suggest I might use the powers I have under the Enterprise Act 2002 to intervene in the proposed transaction on public interest grounds. The scope that exists for me to intervene in mergers on public interest grounds – including in media mergers – is, of course, tightly constrained by the law. It is not a general power to take decisions about ownership of particular enterprises. The guidance you refer to sets out the circumstances in which I might use my discretion to intervene in media mergers. This guidance was produced to provide a degree of certainty to the market about whether or not such intervention may be likely in a particular case.

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I recommend that you submit arguments on these matters to DG Competition at the appropriate time.

VINCE CABLE

BIS | Department for Business Innovation & Skills

The Rt.Hon Vince Cable MP
Secretary of State for Business, Innovation and Skills

Sly Bailey
Chief Executive
Trinity Mirror plc
One Canada Square
Canary Warf
London
E14 5AP

Our ref: AOK/217344

31 August 2010

Dear Ms Bailey

Thank you for your letter of 16 August, about the recent announcement by News Corporation that it plans to acquire 100% of the shares in British Sky Broadcasting (BSkyB). I am grateful for your submission, which I will take into account when considering whether to intervene in this case.

You suggest I might use the powers I have under the Enterprise Act 2002 to intervene in the proposed transaction on public interest grounds. The scope that exists for me to intervene in mergers on public interest grounds – including in media mergers – is, of course, tightly constrained by the law. It is not a general power to take decisions about ownership of particular enterprises. The guidance you refer to sets out the circumstances in which I might use my discretion to intervene in media mergers. This guidance was produced to provide a degree of certainty to the market about whether or not such intervention may be likely in a particular case.

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I recommend that you submit arguments on these matters to DG Competition at the appropriate time.

VINCE CABLE

E-mail Message

From:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Perm Sec BIS [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=FRASER], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], Hendon David (IE) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=DHENDON], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Amos Stephen (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SAMOS], [redacted] LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted] Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENT[redacted]
Sent:	03/09/2010 at 17:08
Received:	03/09/2010 at 17:08
Subject:	BSkyB / Newscorp intervention advice submission

Attachments:	BSkyB Newscorp intervention advice submission.doc BSkyB Newscorp - case for intervention analysis.doc BSkyB Newscorp - analysis of submissions from third parties.doc BSkyB Newscorp draft EIN and IN.doc

<> <> <> <>

[redacted]

I attach a submission with advice to the SofS on the case for intervening on public interest grounds in the anticipated acquisition by Newscorp of 100% of the shares in BSkyB. Also attached is:

(i) an analysis of the issues that need to be taken into account in reaching a decision;
(ii) an analysis of the substantive points raised in the 4 submissions you received from interested third parties arguing in favour of intervention; and
(iii) draft intervention notices.

I have not attached again all the submissions from third parties and the one from Hogan Lovells on behalf of Newscorp. These have been circulated previously and the SofS has them with him.

[redacted]

To	Secretary of State
From	
Date	3 September 2010

Subject: Case for intervening in Newscorp/BSkyB

Issue

- Whether to use your powers under the Enterprise Act to require an investigation into how this merger might affect the public interest as it relates to the sufficiency of plurality of persons with control of media enterprises.

Timing

- Routine, though a meeting to discuss further in the next week or so would be useful (see below).

Recommendation

- The arguments are complex and we recommend a further discussion before you make a decision.

Coalition Considerations

- The Coalition Agreement mentions the need to "promote greater competition across the economy" and to "review the range of factors that can be considered by regulators when takeovers are proposed". More recently you have spoken on a number of occasions about your desire to take a more pro-active approach to competition. However, the power to intervene in mergers on public interest grounds is a discrete power that must be exercised by the BIS Secretary of State acting alone in accordance with the provisions of the Enterprise Act 2002.

Argument / Analysis

- In summary, we believe that the substantive arguments as to why this merger might be deemed to result in insufficient plurality of persons with control of media enterprises are not strong. Nevertheless, the legislation provides a deliberately low legal threshold for taking a decision to issue an intervention notice. You need only believe it is or may be the case that the specified public interest consideration is relevant to a consideration of the merger. The prospect of legal challenge arising at this initial intervention stage appears low since the process involved is relatively short and would not involve significant burdens on the parties to the merger. However, issuing an intervention notice initiates a formal statutory process and places you in the position of taking formal decisions in accordance with the requirements of the Enterprise Act 2002. The next stage in that process would be for you to decide whether or not to refer the merger on public interest grounds to the Competition Commission. At this second stage, the evidential threshold is higher and the prospects of legal challenge much greater. The evidence you would have on which to base that decision may well be substantively the same as the evidence you have already received in submissions from the parties to the merger and from interested third parties.

- You have received representations calling on you to intervene in Newscorp's acquisition of 100% of BSkyB. The most substantive submissions are those received from Enders Analysis, BT, Trinity Mirror and the Guardian Media Group. The submissions from BT and Enders Analysis make effectively the same points. Trinity Mirror makes a number of the same points but adds one further concern about whether BSkyB might cease placing advertisements in newspapers other than those owned by Newscorp. The Guardian Media Group puts forward no substantive arguments as to why intervention would be appropriate. The fact that submissions have been made on this matter is not in itself a justification for issuing an intervention notice. You must apply your own judgement and undertake a qualitative assessment of the case for using those powers in this instance. The note attached at **Annex A** provides a detailed examination of the issues you need to take into account in deciding whether or not to intervene in this case.

- The note attached at **Annex B** analyses the substantive points raised in the representations arguing for intervention. For practical reasons, the note addresses primarily the points raised in the submission from BT simply because this submission covers most, if not quite all, the substantive points raised by the other parties. You have also received a detailed briefing note from Hogan Lovells, the lawyers representing the merging parties, arguing that intervention in this case is not appropriate or necessary. We have not provided separate detailed analysis of the Hogan Lovells note, which is self explanatory. Their note identifies the key questions you have to address in considering the case for intervention and presents arguments on the matter which must be set against those set out in other representations you have received on this matter.

- The parties plan to notify the transaction to the EU Commission (DG Competition) for consideration under the EC Merger Regulation (ECMR) very soon. In theory, the UK's competition authority, the Office of Fair Trading (OFT), could ask DG Competition to refer the merger to it to deal with instead. They would have 15 days in which to make such a request. We do not expect the OFT to make such a request since they have indicated to us privately that they have no significant concerns about the transaction's impact on competition in the market. Once the transaction has been formally notified to it, DG Competition has an initial 25 working days to decide whether to clear the merger or initiate a more in depth second phase investigation. The legislation unfortunately does not specify a precise timetable for intervention in ECMR cases though it does for intervention in UK mergers. Our published guidance indicates that in UK merger cases we would aim to take a decision on whether to intervene within 10 working days of a merger coming to our attention. In reality we would always aim to intervene as soon as possible in order to give the OFT (or Ofcom in media mergers) as much time as possible to produce a report and enable a decision on reference to the Competition Commission to be taken no later than a decision by the competition authority on whether or not to go to a full second stage competition investigation. This avoids undue delay in the regulatory process. A draft text of a suitable intervention notice is attached at **Annex C**. We would expect this to be a European Intervention Notice since we do not expect the case to be referred back to the OFT to handle the competition assessment, but a UK Intervention Notice is also included in case it should be required.

Resource / Financial / Value for Money (VFM) implications

- Taking no action in this case would involve no resource implications. A decision to intervene would mean Ofcom provides you with a report for which Ofcom would submit a bill to BIS to cover their costs (as happened in the previous media merger case in which the SofS intervened – Sky/ITV). In addition, intervention would mean you would subsequently have to take and publish a formal reasoned decision on whether to refer the merger to the Competition Commission. That decision would be open to legal challenge. If such a challenge arose, there would be costs involved in handling the associated legal proceedings. The scale of these costs would depend on how the proceedings went and whether they led to further appeals, but they may be expected at least initially to be in the region of tens of thousands.

Legal

- BIS legal advisers have been fully involved in analysing the case for intervention in this merger and our advice on the merits of the matter reflects consultation with them. We are in the process of engaging external Counsel to provide a further assessment of the relative legal risks associated with a decision either way, the scope for legal challenge and the prospects for defending any decisions against such challenges. This will ensure you have available to you the most comprehensive advice possible to help you reach decisions.

Press and Stakeholder Handling

- There is understandable interest in this merger amongst other media enterprises – particularly those that are rivals to Newscorp and BSkyB. Such enterprises may have particular interest in encouraging you to use your powers to intervene – particularly as most articles consider the merger is unlikely to raise any competition concerns that might need to be remedied by DG Competition. Trinity Mirror and Guardian Media Group are among those that have submitted representations calling on you to intervene. It may be that numerous media parties would be critical of a decision not to intervene, presenting this as a failure to take a tough stance against Newscorp which could be seen as a threat to the quality of news provision in the UK. More specialist financial/business media are more likely to be critical of a decision to intervene, presenting this as a politically motivated gesture rather than a considered use of a reserve power. Robust media handling material will be necessary whichever decision you reach.

Special Advisers' (SpAds) advice

- SpAds have been included on all exchanges to date on this matter.

Background

- None.

Cleared by: Sarah Chambers

Advice received from: None.

CC list:

ci

Cable MPST
Davey MPST
SPAD MPST
Permanent Secretary
Bernadette Kelly FM
David Hendon IE
Sarah Chambers CCP

[redacted] Comms
Stephen Amos Legal
Andrew Rees CCP3
[redacted]egal
[redacted] Comms
[redacted] CCP2

P166

Annex A

CASE FOR INTERVENTION IN NEWSCORP / BSKYB

The power to intervene in the broader regulatory context

1. The Secretary of State's powers to intervene in media mergers must be considered in the context of the broader applicable regulatory regime that separately governs who may own and control media enterprises and also the rules that apply to the conduct of all broadcasters irrespective of ownership.

2. Mergers are regulated to protect the public interest by ensuring they do not result in a substantial lessening of competition in markets. In the case of media enterprises, there is also a distinct statutory scheme that governs ownership to "prevent individuals from accumulating too great a share of the national media voice by having significant interests across television and newspapers". It may be noted there have never been media ownership rules that govern the ownership of BSkyB. Other regulatory mechanisms govern the presentation of news by broadcasters to ensure high standards and impartiality.

3. Given that such clear statutory provisions exist to control ownership of media enterprises, the existence of a separate discretionary power to regulate media mergers on other "public interest" grounds is clearly capable of creating unacceptable regulatory uncertainty. In view of this, the Government published detailed guidance setting out when that power to intervene in media mergers might be exercised. This guidance is important in constraining the scope to intervene in media mergers and minimising uncertainty. It provides the key set of criteria against which the Secretary of State should consider the merits of any call for intervention.

Why were the media public interest considerations introduced?

4. The media public interest considerations were added to the Enterprise Act 2002 as the result of an amendment introduced during the passage of the Communications Act 2003. That Act included provision to remove certain rules applicable to media ownership. Parliamentarians decided they would only accept removal of those rules if Ministers were given a reserve power to take action in mergers that would previously have been prohibited by the statutory rules. The guidance makes clear that intervention would generally not be considered in cases where media ownership rules had never existed.

What is the threshold for issuing an intervention?

5. The Secretary of State may intervene in a merger if he believes it is or may be the case that a public interest consideration that either has been or should be specified in Section 58 of the Enterprise Act 2002 is relevant to a consideration of it. The requirement to have only a "belief" that it is or may be the case that a consideration is "relevant" provides for a fair amount of discretion and ensures intervention is legally possible even if there is as yet no strong evidence to demonstrate that a merger would actually operate against a specified public interest. Nevertheless, legal advice indicates that the requirement to have a "belief" implies more than speculation and the Secretary of State is bound always to act in a proportionate and reasonable way.

Risk of legal challenge

6. While the relatively low threshold applicable means it may technically be feasible to issue an intervention notice in a relatively wide number of cases, there would be no point in doing so in a case where there appeared no realistic prospect of identifying credible justification for some further, more substantive action. In addition, issuing an intervention notice initiates a statutory process that requires the Secretary of State to take decisions which may well be subject to judicial review challenge. While his original decision to intervene may not itself be challenged, there is much greater likelihood of challenge to the decision he must subsequently take on whether or not to refer the merger to the Competition Commission on public interest grounds. Parties with an interest in seeing further regulatory delay and barriers imposed on the deal would have good reason to challenge a decision not to refer the merger to the Competition Commission while the parties to the merger would clearly have reason to challenge a positive decision to make such a reference. The decision becomes especially significant if the merger is cleared by the competition authority at Phase I because a public interest reference by the Secretary of State would be the only remaining regulatory obstacle to the transaction proceeding.

Competition concerns versus media plurality concerns

7. The purpose of intervention by the Secretary of State must be to address issues that are pertinent to the public interest but would not be addressed in a competition assessment. Questions as to whether or not a merger might result in a party gaining increased market power and loss of effective competition within the market will be addressed by the competition authority and are not matters on which the Secretary of State has the power to make judgements. One problem with the media public interest consideration concerned with ensuring a sufficiency of plurality of persons with control of media enterprises is its similarity with the straight competition interest of ensuring there is effective competition and choice within markets. This can result in a lack of clarity about the boundaries between the two matters.

8. In the only previous media merger case in which an intervention has been made (BSkyB's acquisition of a 17.9% stake in ITV plc), the Secretary of State referred the merger to the Competition Commission on both public interest and competition grounds. The outcome was that no action was taken on public interest grounds but on competition grounds, BSkyB was forced to reduce its shareholding in ITV to less than 7.5%. In reaching that decision, it was made clear that this competition remedy would also adequately address any media plurality concerns that might conceivably arise in the case had the alternative decision been reached about the impact on media plurality. No separate remedy would have been required. This may be contrasted with a case where intervention is made on the basis of the national security public interest consideration. It seems unlikely that remedies that might successfully address concerns about national security would be the same remedy that addressed competition concerns.

The regulatory framework governing media ownership

9. In considering the merits of using the Enterprise Act powers to intervene in this case it is important to note that the sufficiency of media plurality in the UK does not depend exclusively on the BIS Secretary of State applying these powers. Media mergers are subject to competition based merger control in the same way

as are other mergers. Concerns about mergers resulting in dominance in markets will generally be addressed in the context of the competition assessment. Separately, there are statutory cross media ownership rules provided for under the Broadcasting Acts of 1990 and 1996, and enforced by Ofcom, which exist "to prevent individuals from accumulating too great a share of the national media voice by having significant interests across television and newspapers" (quote taken from the Ofcom website). The media ownership rules were last reviewed by the relevant regulator, Ofcom, in 2009. Ofcom's report and findings may be found on its website at http://stakeholders.ofcom.org.uk/consultations/morr/. And there are other regulatory mechanisms that govern the presentation of news by broadcasters to ensure they apply high standards of accuracy and impartiality. In broadcasting, the existence of the BBC and of numerous commercial television and radio channels is what provides the main assurance that there will exist a sufficient plurality of voices and viewpoints expressed in the media. The emergence of cable and satelite television channels has provided additional alternative sources.

Does this merger raise concerns affecting the sufficiency of media plurality

10. The central points we believe are relevant to the issue of whether the sufficiency of media plurality might be damaged by this merger relate to (i) an increased scope for Newscorp to influence BSkyB's output and (ii) greater cross promotion and commercial support between Newscorp newspapers and BSkyB which could result in both enterprises gaining increased market share and a greater number of people than would otherwise have been the case that read Neswcorp owned newspapers and also watch Sky News.

11. On the first point, there is clearly a strong argument that any increase in the extent to which Newscorp is able to influence BSkyB's editorial policy actually makes no difference to the present state of plurality of persons with control of media enterprises. The situation as regards such plurality has already been considered in the context of the investigation into the public interest issues raised by BSkyB's acquisition of a 17.9% stake in ITV. In that investigation and the resultant legal proceedings, there was broad acceptance that for the purposes of undertaking an assessment of the state of plurality, Newscorp should be deemed currently to have sufficient capability to influence the policy of BSkyB that the two enterprises should be considered as being under common control. It would appear difficult to argue subsequently that an increase in Newscorp's capability to influence BSkyB editorial policy makes a substantive difference to the state of media plurality.

12. On the second question, concerned with the merged entity gaining an unacceptable degree of market power, it may be considered that these are actually matters to be addressed by the cpompetition authority in the context of their assessment of the merger's impact on competition. But it may equally be considered relevant at the same time to the question of the sufficiency of plurality.

The 2004 DTI Guidance on use of the power to intervene in media mergers

13. The 2004 DTI Guidance on use of the power to intervene in media mergers indicates that the purpose of the cross media public interest consideration (Newscorp/BSkyB is a cross media merger) is to "prevent unacceptable levels of media and cross media dominance and ensure a minimum level of plurality". The

guidance also refers to assessing "whether there is likely to be a significant reduction in plurality". This suggests the question of sufficiency of plurality of persons with control of media enterprises demands a qualitative assessment as to whether or not people continue to have access to a sufficiently wide range of sources of news and opinion and of whether any one person is able to exert an unacceptable degree of influence on public opinion. Judgement must be exercised as to whether the transaction might actually result in some degree of dominance and a significant reduction in plurality.

14. As indicated in paragraph 3 above, the guidance was produced to provide a degree of certainty to the market about whether or not such intervention may be likely in a particular case. It is not hard law but it does create a legitimate expectation as to how the power will be used and must be taken into account in reaching decisions on whether to intervene in a media merger. The guidance includes a statement of policy on intervention in broadcasting and cross-media mergers in Section 8. This states 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". It goes on to set out those rules that were removed by that Act. It further explains that "save in exceptional circumstances" intervention would not be made in relation to mergers where there had never been any media ownership rules. The Guidance goes on to consider what might constitute such exceptional circumstances. At paragraph 8.8, it says "during Parliamentary debate of these provisions, Ministers suggested that these might include circumstances where a large number of news or educational channels might be coming under single control, or if someone were to take over all the music channels".

15. There have never been any media ownership rules that impose restrictions on who may own BSkyB. Accordingly, a cross media merger that affects its ownership is not one in respect of which the published guidance indicates intervention would generally be considered by the Secretary of State save in exceptional circumstances. It appears likely, therefore, that any intervention in this case would need to be made on the basis that there exceptional circumstances applied. We plan to explore this point further with external Counsel as well as what exceptional circumstances might be judged to apply.

CCP2 BIS
3 September 2010

Annex B

NEWSCORP ACQUISITION OF 100% OF BSKYB: POSSIBLE INTERVENTION BY THE SECRETARY OF STATE

Analysis of arguments in favour of intervention put forward by BT / Enders Analysis / Trinity Mirror / Guardian Media Group

1. The Secretary of State has received representations calling on him to intervene in the Newscorp acquisition of BSkyB. The most substantive submissions are those received from Enders Analysis, BT, Trinity Mirror and the Guardian Media Group. He has also received a submission from the lawyers representing the parties to the merger explaining why they believe intervention would not be appropriate. This note analyses the substantive points raised in the four representations that argue in favour of intervention. It refers to the submission from BT because this covers most of the substantive arguments contained in all the other submissions but references to BT might equally be taken as references to Enders Analysis and Trinity Mirror who raise similar points.

2. The first substantive argument BT puts forward appears under Section 5 of its note. This argues that paragraph 7.13 of the 2004 DTI Guidance on use of the power to intervene in media mergers indicates that intervention might be made in this case. It is not clear that Paragraph 7.13 of the 2004 Guidance is particularly significant to a decision in this case. That paragraph simply serves to make clear that the law allows intervention to be made irrespective of whether or not there is an outright merger between two previously distinct enterprises or whether a party is acquiring an increased level of control over another. This is necessary because while it may be acceptable for one media enterprise to have a relatively small shareholding in another, if that shareholding were to increase substantially this might have an impact on the sufficiency of plurality such that intervention was appropriate.

3. More relevant to an assessment of what the Guidance says about whether or not intervention may be anticipated in this case is Section 8 which sets out the Government's policy on intervention in broadcasting and cross media merger cases. As explained more fully elsewhere, this Section states 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" and further explains that "save in exceptional circumstances" intervention would not be made in relation to mergers where there had never been any media ownership rules. The Guidance goes on to consider what might constitute such exceptional circumstances saying that "during Parliamentary debate of these provisions, Ministers suggested that these might include circumstances where a large number of news or educational channels might be coming under single control, or if someone were to take over all the music channels". The BT and other submissions make no comment about the applicability of this section of the Guidance to this case. Our own assessment is that the current merger is not one in respect of which the Guidance suggests intervention would generally be considered and that we would, therefore, need to identify exceptional circumstances as a basis for such an intervention.

Annex B

4. BT further develops its argument on this matter by reference to a judgement by the Court of Appeal from earlier this year which overturned an earlier Competition Appeals Tribunal decision on the correct interpretation of Sections 58A(4) and 58A(5) of the Enterprise Act – an aspect of the law that was disputed in the context of decisions made in the BSkyB / ITV merger case which was referred to the Competition Commission on both competition and public interest grounds. Again, it is not clear that this matter is particularly relevant to the case for intervention in this merger. The question at issue for the Court of Appeal related to whether or not the Competition Commission had been correct in deciding that the relevant provisions of the Act did not prevent it from taking into account the actual degree of control BSkyB was able to exercise over ITV by virtue of its 17.9% stake in the company when examining the issue of sufficient plurality. But that highly technical legal point only arose because in that case, BSkyB had been judged to have acquired material influence over ITV for the purposes of the competition assessment. In the present case, Newscorp is acquiring 100% of the shares in BSkyB. This is a situation of full control rather than of material influence. Accordingly, questions as to the correct interpretation of the deeming provisions in Sections 58A(4) and 58A(5) of the Act do not appear to arise. Newscorp and BSkyB plainly would be treated as one entity for the purposes of undertaking any plurality assessment in this case. It follows that we must consider whether there is sufficient plurality by reference to the other parties operating in the market to provide alternative sources of news and information.

5. BT's submission goes on to list five areas of concern that it asserts relate to the public interest consideration of ensuring the sufficiency of plurality of persons with control of media enterprises.

6. The first point concerns whether the merger increases the prospect of Newscorp products being provided at a discount or free of charge to Sky subscribers as part of a bundled package of products. The second point concerns the scope for convergence between the news content carried by Newscorp titles, Sky News and the Sky website and also for there to be cross promotion between the enterprises. The third point is that the merger will result in loss of editorial independence at BSkyB with Newscorp able to influence policy and content. The fourth point is that the merger might increase the incentive on Newscorp titles to decline to provide advertising space to enterprises that are competitors of BSkyB. Trinity Mirror also argues that BSkyB might decide to stop placing advertisements with non-Newscorp titles such as Trinity Mirror in order to damage the commercial health of those enterprises to the advantage of Newscorp. The fifth point is that there are certain changes happening in the market generally that suggest an assessment of media plurality at this time would be beneficial.

7. The first, second and fourth points (on bundling of products, cross promotion, denying access to advertising space and choosing not to place advertisements in certain titles) appear to be commercial questions the EU Commission may need to consider in its assessment of whether the merger results in a substantial lessening of competition in the market. These concerns may be deemed relevant to the media plurality public interest consideration in view of the potential outcome that an increasingly large audience will receive its news from only one source.

Annex B

8. In considering this matter, it is important to bear in mind that media ownership is regulated by statutory rules. Subject to those rules, and the applicable regulatory schemes that govern broadcasting and the sale of advertising space, businesses are free to pursue whatever commercial strategy they choose. The merger might or might not produce results that are beneficial to Newscorp and Sky ands might, therefore result in an increase in the number of people that read Newscorp owned newspapers and also watch Sky News or use the Sky News website. But the power to intervene in media mergers would not appear to have been provided so that the Secretary of State can regulate the relative popularity and success of any particular media enterprise. While it may well be that some people rely on Newscorp and Sky for their news, it may equally be the case that many more people rely exclusively on the BBC for their news and also that others will rely entirely on the Guardian newspaper and its website or the Telegraph and its website. The concern of the Secretary of State in using the power to intervene in media mergers on the basis of the media plurality public interest consideration appears to be concerned with ensuring, as far as is practicable, that a sufficient number of such alternative sources of news remains available to people.

9. The third of the points made relates to the potential increased scope for Newscorp to influence BSkyB's editorial policy. However, as the BT submission acknowledges, Newscorp's existing 39.1% shareholding in BSkyB already appears to enable it to exercise control over the editorial policy of BSkyB. The question of Newscorp's capacity to influence BSkyB editorial policy has already been considered in the context of the state of media plurality in the UK. In the Sky/ITV case and resultant legal proceedings, there was universal acceptance that for the purposes of undertaking such an assessment of the state of plurality, the Competition Commission was right to treat Newscorp and BSkyB as being under common control in view of Newscorp's capability to influence the policy of BSkyB. It appears difficult to argue subsequently that this merger, which no doubt does increase Newscorp's capability to influence BSkyB editorial policy, nevertheless makes any substantive difference to the state of media plurality in the UK. The logical conclusion appears to be that it results in no change to the present position.

10. The fifth point amounts to a general concern about developments in the media sector involving consolidation across different platforms. This appears to be a concern about the adequacy of the regulatory framework that governs media ownership generally. This is not a matter that might be addressed by application of the public interest intervention provisions provided within merger control legislation. Broader policy objectives are not legitimate factors that may be taken into account in considering whether or not there is a justification to intervene in a merger on public interest grounds. And a merger remedy is unlikely to be able to achieve some separate policy objective.

[redacted]
CCP2/3
020 7215 [redacted]
3 September 2010

24

E-mail Message

From:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM], Waring Katie (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=KWARING]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], [redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], Amos Stephen (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SAMOS]
Sent:	06/09/2010 at 19:06
Received:	06/09/2010 at 19:06
Subject:	News Corp/BSkyB - submission from Hogan Lovells
Attachments:	BIS Briefing Paper.pdf

[redacted]

As requested, I attach a further copy of the note from Newscorp's lawyers, Hogan Lovells. This identifies in clear terms what appear to be the central questions the SofS has to address in considering whether to intervene in this case. Any decision on this matter will need to have proper regard to the points made in this paper.

On the question of possible legal challenge, we have explained that since the threshold for intervention is set deliberately low, there might not be a challenge to an initial decision to intervene. However, the parties could nevertheless have reason to make announcements to the effect that the SofS had made an error in law and that they reserved the right subsequently to challenge that decision at a later stage. Their basis for challenge would probably be that intervention conflicted directly with the policy set out in Section 8 of the 2004 DTI Guidance. As previously advised, this Guidance does create a legitimate expectation about how the SofS will act.

The Guidance states that, "save in exceptional circumstances", intervention would only be considered where a merger would previously have been prevented by a media ownership rule that was removed by the Communications Act 2003. This means the question of whether the Guidance supports an intervention hinges substantively on the question of whether or not there are "exceptional circumstances" in this case that nevertheless make it appropriate to intervene in this case to protect the sufficiency of media plurality in the UK.

The Guidance does not provide an exhaustive definition of the meaning of "exceptional circumstances" but does suggest two possible cases that might meet the test. Neither of these appear to apply to this current case. In challenging a decision that this was, nevertheless, an exceptional circumstance, Newscorp might argue that its acquisition of the remaining shares in Sky was a situation that could have been readily foreseen at the time we wrote the Guidance and that, had we considered this to be a situation that should fall within the meaning of an exceptional circumstance, we would have stated that position expressly.

[redacted]

<>

P174

E-mail Message

From:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Cablem]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe]
Sent:	06/09/2010 at 19:13
Received:	06/09/2010 at 19:13
Subject:	Sky - Would we announce decision in Parliament

[redacted]

As discussed at the meeting earlier, while most public interest interventions in mergers are announced in a low profile manner, the SofS correctly remembered that the decision to intervene in the Sky/ITV case was announced in Parliament via a written statement (26 February 2007 Hansard Ref 77/8WS). A press release was also issued at approximately the same time as the statement was made available to Parliament. The subsequent decision to refer that merger to the Competition Commission on public interest and competition grounds was also announced in Parliament (24 May 2007 - Hansard ref 90/1WS) as was the final decision (29 January 2008 Hansard ref 5/7WS).

In the Lloyds TSB / HBOS merger case, the original decision to intervene was announced by a press release only (18 September 2008). The subsequent decision to clear the merger was also announced initially by press release (on Friday 31 October 2008) but that was followed by written statements to both the Lords and Commons on 3 November 2008 (Hansard refs 705 cl / 2WS and 482 cl / 2WS respectively).

Hope that's helpful.

[redacted]

E-mail Message

From:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	[redacted]@monck.cism.net [SMTP:[redacted]@monck.cism.net]
Cc:	
Sent:	09/09/2010 at 17:02
Received:	09/09/2010 at 17:02
Subject:	News Corporation BSkyB Merger Instructions to Counsel

Attachments:
News Corporation BSkyB Merger Instructions to Counsel 09.09.10.doc
file14331.pdf
BIS Briefing Paper.pdf
BSkyB Newscorp - analysis of submissions from third parties.doc
Enders.pdf
GMG to Vince Cable re BSkyB 30 July 2010.pdf
img-8130847-0001_1281697867515[1].pdf
Trinity Mirror to Vince Cable re BSkyB 16 Aug 2010.pdf
BSkyB Newscorp draft EIN and IN.doc
[redacted]

To: Elisa Holmes

Further to my telephone conversation with your clerks yesterday, please find enclosed instructions in relation to the above case, for which a conference has been arranged next Tuesday at 2:00.
<>
Please also find the accompanying documents referred to in paragraph 5 of the instructions

(a) Guidance
<>
(b) Preliminary Briefing
<>
(c) BIS Internal Note
<>

(d) Enders submission
<>
(e) Guardian Letter
<>
(f) BT Submission
<>
(g) Trinity Mirror Submission
<>
(h) Draft Intervention Notices
<>
(i) Note of Consultation
<>
If there are any questions, please do not hesitate to contact me.

[redacted]

Legal Adviser (Competition and Public Bodies) | Legal Services B4 (Competition, State Aids and Procurement) | Department for Business, Innovation & Skills | peter.evans@bis.gsi.gov.uk | 020 7215 3409| www.bis.gov.uk |

PROPOSED ACQUISITION BY NEWS CORPORATION OF THE REMAINING 60.9% OF SHARES IN BSKYB

INSTRUCTIONS TO COUNSEL

Introduction:

1. On 15 June 2010 News Corporation, which currently owns 39.1% of the shares in British Sky Broadcasting Group plc ("BSkyB") announced its intention to purchase all the remaining shares. Under the Enterprise Act 2002 ("the 2002 Act") the Secretary of State may intervene in certain media mergers if media public interest considerations arise. There is guidance on such public interest interventions, issued by the (then) Department of Trade and Industry in May 2004.

2. These instructions seek Counsel's advice on the legal issues which relate to a European Intervention Notice decision by the Secretary of State under section 67 of the 2002 Act, including advice on the strength of possible grounds for challenge in the event that the Secretary of State should decide either to intervene or not to intervene under that section.

3. We think that the two main issues are as follows:

    a. Whether a decision to issue an intervention notice could be challenged as exceeding the Secretary of State's powers and/or as irrational having regard to the prospects of the proposed acquisition giving rise to media plurality public interest considerations.

    b. Whether a decision by the Secretary of State would breach any legitimate expectation that may have been created by statements in the guidance that was issued in May 2004.

4. A challenge on either of these grounds could be brought before the Competition Appeal Tribunal ("CAT") under section 120 of the 2002 Act. That section enables any person aggrieved by a decision of the Secretary of State in connection with a merger reference (or possible merger reference) to apply to the CAT for a review of that decision. It also requires the CAT to apply the same principles as would be applied by a court on an application for judicial review.

Accompanying papers:

5. The following documents are enclosed with these instructions:

    a. DTI Guidance on the operation of the public interest merger provisions relating to newspapers and other media mergers, issued in

May 2004;

b. Preliminary Briefing by News Corporation to BIS and OFCOM on the possible acquisition of BSkyB, dated 20 July 2010;

c. BIS internal note analysing arguments in favour of intervention put forward by BT, Enders Analysis, Trinity Mirror and Guardian Media Group

d. Submission by Enders Analysis Limited on the proposed takeover, dated 30 July 2010;

e. Letter from Guardian Media Group to the Secretary of State concerning the proposed takeover, dated 30 July 2010;

f. Submission by BT, dated 13 August 2010;

g. Submission by Trinity Mirror plc dated 16 August 2010;

h. Draft intervention notices to be given (should the Secretary of State so decide) by the Secretary of State under sections 42[1] and 67 of the 2002 Act.

Factual Background:

6. News Corporation, which is listed in the United States, owns shares in various media enterprises both in the U.K. and overseas. These interests include a 39.1% stake in BSkyB. On 15 June 2010 News Corporation announced its proposal to purchase the remaining 60.9% of BSkyB.

7. The proposed acquisition is a concentration with a Community dimension for the purposes of the Merger Regulation[2] because:

    a. the combined worldwide turnover of News Corporation and BSkyB exceeded 5 billion euros in the most recent financial year;

[1] Intervention under section 42 would only be considered if the European Commission referred the case back to the Office of Fair Trading in accordance with Article 9 of the Merger Regulation.

[2] Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings. Although the Regulation and 2002 Act refer to "concentrations with a Community dimension" the European Community has been succeeded and replaced by the European Union as a result of the Treaty of Lisbon .

b. News Corporation and BSkyB each generated turnover within the EU in excess of 250 million euros in the most recent financial year; and

c. News Corporation and BSkyB did not generate more than two thirds of their EU-wide turnover within the same Member State in the most recent financial year.

8. We understand from News Corporation's legal advisers that they will shortly be notifying the European Commission of the proposed acquisition in accordance with Article 4 of the Merger Regulation. As the proposed acquisition falls within the scope of the Merger Regulation, it will be subject to review by the European Commission.

9. However, Article 21(4) of that Regulation preserves the Member States' ability to protect legitimate interests (provided these are compatible with the general principles and other provisions of EU law) and legitimate interests expressly include plurality of the media. Section 67 of the 2002 Act allows the Secretary of State to issue an intervention notice in cases falling within the Merger Regulation which may give rise to specified public interest considerations. The Secretary of State is considering whether to issue such an intervention notice and has received the submissions listed in paragraph 5 above.

Legal Framework: Enterprise Act 2002

10. Section 67 of the 2002 Act allows the Secretary of State to issue a European intervention notice if all the following tests are satisfied:

a. It is or may be the case that a **relevant merger situation** has been created (or will result from arrangements in progress or in contemplation).

b. A **concentration with a Community dimension** (as defined in the Merger Regulation) has arisen or will arise.

c. **Community law prevents a reference** from being made under section 22 or 33 of the 2002 Act.

d. The Secretary of State is **considering whether to take appropriate measures to protect legitimate interests** as permitted by Article 21(4) of the Merger Regulation.

e. It is or may be the case that one or more **public interest considerations** is relevant to considering the merger situation concerned.

11. There does not seem to be any doubt that News Corporation's purchase of the remaining BSkyB shares would create a relevant merger situation, as defined by section 23 of the 2002 Act. News Corporation also appears to accept that the transaction would be a concentration with a European Union dimension and, as noted in paragraph 7 above, the turnover meets the required levels in the Merger Regulation. Community law (in particular the requirements of the Merger Regulation) would therefore prevent a merger reference being made under the 2002 Act. This leaves the legitimate interests and public interest considerations referred to in Article 21(4) of the Regulation and set out in the 2002 Act.

12. Article 21(4) of the Regulation makes it clear that plurality of the media shall be regarded as a legitimate interest capable of being protected by Member States' appropriate measures.

13. In the 2002 Act the relevant media public interest considerations are set out in section 58(2C):

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

    b. the need for the availability throughout the U.K. of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and

    c. the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

14. The most relevant public interest consideration in this instance is (a) above: media plurality. The Secretary of State's intervention powers can be viewed as broad insofar as he does not need to believe that it <u>*is the case*</u> that media plurality (or some other public interest consideration) is relevant: a belief that this *may be the case* is sufficient.

15. News Corporation argue[4] that the legal threshold for an adverse public interest finding is high and imply that the Secretary of State ought not to issue an intervention notice if there is no prospect that the transaction would give rise to concerns which might meet such a high threshold. They point to

[4] News Corporation Preliminary Briefing 20.07.10, paragraph 4.7.

the fact that News Corporation already exercises 39.1% voting rights in BSkyB (and so can already materially influence the latter's policies) and therefore argue that acquiring the remaining shares would have no material effect on media plurality. In this regard, Counsel may recall that, in assessing BSkyB's acquisition of ITV shares in 2006/7, the Competition Commission deemed News Corporation and BSkyB to be under common control. News Corporation also argue that there could be no significant effect on media plurality, having regard to the range and diversity of news sources and also to safeguards in the regulatory framework.

16. Enders Analysis and BT argue that there would nonetheless be increased opportunities for News Corporation as a result of purchasing the remaining BSkyB shares. They argue that the pooling of financial resources and tax obligations across the new entity would improve its ability to compete, particularly in the newspaper market. They point to the following strategic opportunities for the new entity[5]:

    a. The ability to bundle or discount products e.g. Sky subscriptions including discounts on News International titles

    b. In an age of fast broadband access and increasing use of video streams on newspaper websites, the ability to link News International titles' reports to Sky News footage, leading to a "single stream of fact and opinion".

    c. The loss of independent BSkyB shareholders would increase News Corporation's ability to influence editorial coverage in Sky News and other BSkyB channels.

17. Trinity Mirror raises an additional argument that BSkyB might use its market position to weaken newspapers not owned by News Corporation, for example by ceasing to place BSkyB product advertisements in such newspapers[6].

18. Bearing these submissions in mind, we would appreciate Counsel's advice on whether it is open to the Secretary of State to conclude that it is or may be the case that media plurality would be a relevant consideration. In particular, how pertinent is the argument (advanced by News Corporation) that acquiring the remaining BSkyB shareholding would not materially affect plurality, as News Corporation already owns a controlling stake in BSkyB?

Statutory guidance: "exceptional circumstances"

19. The 2002 Act needs to be read alongside the guidance which the then DTI issued in May 2004 on the operation of the public interest merger provisions in relation to media mergers. This guidance has a statutory basis, having been

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[5] See in particular page 17 of the Enders submission.

[6] See in particular page 2 of the Trinity Mirror submission

issued under section 106A[7] of the 2002 Act. Counsel has previously advised that this 2004 guidance is capable of creating a legitimate expectation as to how the Secretary of State will exercise his powers under the 2002 Act.[8]

20. Section 8 of the guidance (which starts at p.37) sets out the policy on intervention in broadcasting and cross-media public interest cases. Paragraph 8.2 states, "The Secretary of State's policy is that, save in exceptional circumstances, she will consider intervention only in cases where media ownership rules have been removed by the Communications Act 2003." There follows a list of all the cases where media ownership rules have been so removed. News Corporation argues that the proposed acquisition of BSkyB would not appear to be caught by anything on this list. We did explore whether the rule referred to in the final bullet point of paragraph 8.2 might have been applicable since it related to "mergers involving owners from outside the European Economic Area (except where prior to the Communications Act 2003 there were no restrictions on non-European Economic Area ownership)" and we note that News Corporation is registered in the United States. However, the relevant rule, which appears in Part 2 of Schedule 2 to the Broadcasting Act 1990, did not prevent persons from outside the EEA from holding licences for cable and satellite services or multiplexes.

21. In circumstances where none of the previously applicable media ownership rules would have prevented this transaction, the Secretary of State's stated policy is that he will intervene in such a merger in exceptional circumstances. The guidance could be considered therefore to create a legitimate expectation that the Secretary of State will only issue an intervention notice in this case on the basis of exceptional circumstances. If Counsel agrees with this analysis, the key issue is whether any such "exceptional circumstances" apply to the present proposed merger.

22. Paragraph 8.8 provides some examples of what might amount to "exceptional circumstances":

"In exceptional circumstances, the Secretary of State may consider it necessary to intervene in mergers in areas where there continue to be media ownership rules or where there have never been such rules. The Secretary of State will only consider intervening in such a merger where she believes that it may give rise to serious public interest concerns in relation to any of the three considerations. During Parliamentary debate of these provisions, Ministers suggested that these might include circumstances where a large number of news or educational channels would be coming under single control, or if someone were to take over all the music channels. The Secretary of State may consider intervention if a prospective new entrant to

[7] Section 106A empowers the Secretary of State to publish advice and information about the considerations specified in section 58(2A) to (2C) (i.e. the media public interest considerations).
[8] See Conference Note 05.02.07, paragraphs 1 and 15.

local radio ownership has not shown a genuine commitment to broadcasting standards in other media or countries. The Secretary of State is not currently aware of any other types of cases in which exceptional circumstances might arise. She has also taken the view that an adverse public interest finding by a previous regulatory authority into a proposed merger is not necessarily in itself an exceptional circumstance meriting intervention; such cases should be considered in light of the reasons for the adverse finding and if the law has been changed to allows the sort of concentration resulting from the merger."

23. News Corporation argues[9] that this transaction would not give rise to either of the specific circumstances mentioned above. It may be noted, though, that BSkyB provides news gathering services to Channel Five and a number of national and regional commercial radio stations. This might provide a basis for considering that a large number of news channels would be coming under single control in this case. On the other hand, we understand that Channel Five and the radio stations are essentially provided with 'raw' news information and exercise editorial discretion as to whether and how this information is used. We would appreciate Counsel's views on this issue. We do not regard paragraph 8.8 as providing an exhaustive list of the circumstances which could be exceptional (and we assume Counsel agrees with this interpretation). News Corporation asserts that there is no other reason to consider the transaction to be exceptional. In particular, they argue there is no material overlap in the parties' activities in UK newspapers on television news and neither party enjoys special advantages (such as public funding or scarce spectrum resources) which cannot be replicated by competitors.

24. Having regard to the submission made by Enders Analysis, BT, Trinity Mirror and others, it seems that the circumstances which might make this proposed acquisition "exceptional" are:

    a. the scope for cross-media bundling and discounting of BSkyB and News Corporation products and possible distortion of the media market;

    b. convergence of news content and cross promotion as between News Corporation titles, Sky News and the Sky website;

    c. loss of editorial independence at BSkyB and increased ability of News Corporation to influence editorial policy and content;

    d. impact on other newspaper titles if BSkyB only advertises in News Corporation titles;

[9] News Corporation Preliminary Briefing 20.07.10, paragraphs 4.5 and 4.6

e. changes in the market which suggest that an assessment of media plurality at this time would be beneficial.

25. We are unsure as to whether any of these circumstances could be justified as "exceptional". Points a, b and d would appear to be questions of market distortion which would fall to be assessed by the European Commission. However, there would be an impact on media plurality if a significantly larger audience was to receive its news effectively from just one source. Point c might constitute an exceptional circumstance, but as News Corporation already can by virtue of its 39.1% shareholding exercise control over BSkyB, it may be difficult to argue that a substantive difference to media plurality would in fact result or that any increased control would be "exceptional" in its implications for media plurality. News Corporation might argue that the current situation is one that could have been foreseen at the time we wrote the 2004 Guidance and that, had we considered it appropriate to do so, could have stated expressly that it should be considered to represent an exceptional circumstance. As for point e, general concerns about the regulatory framework for media ownership would not in themselves appear to amount to an exceptional circumstance such as would justify intervening in this case.

26. We would welcome Counsel's advice on whether the points raised in the submissions of Enders, Trinity Mirror and others provide a reason to consider exceptional circumstances to apply in this case, such as to justify the issue of an intervention notice in accordance with the Department's stated policy as set out in the 2004 Guidance.

Prospects of challenge by News Corporation

27. Having regard to the points discussed above concerning the legal threshold for issuing a European intervention notice and the 2004 guidance on the Department's policy for intervening, we would welcome Counsel's advice on the likelihood of a successful challenge from News Corporation, should the Secretary of State decide to issue an intervention notice.

Prospects of challenge by other parties

28. These instructions have focussed on the possibility of a challenge from News Corporation. However, we would also welcome Counsel's advice on whether, having regard to the arguments outlined above, there is any prospect of a successful challenge from BT, Enders Analysis, Trinity Mirror or Guardian Media Group, should the Secretary of State decide not to issue an intervention notice.

29. Clearly, if Counsel advises that the legal threshold for intervening is not satisfied in this case or that News Corporation's legitimate expectation would be defeated on the basis that the circumstances were not exceptional as

contemplated in the 2004 Guidance, it should follow that a challenge from BT, Enders or others could not succeed.

30. However, if Counsel advises that the Secretary of State could intervene at this stage, the question arises as to whether it would be reasonable in administrative law terms not to intervene. The following points might be raised in this respect:

    a. The Secretary of State would need to take account of relevant considerations (and disregard irrelevant ones) such as might be raised in the submissions from interested parties.

    b. The Secretary of State's decision should not go beyond the range of responses open to a reasonable decision-maker.

    c. A decision not to intervene could in effect provide a final determination of the media plurality issue, without taking the opportunity to obtain further information (in the form of a report from OFCOM).

    d. On the other hand, there can be no expectation that the Secretary of State will always intervene and the guidance makes clear that interventions in cases of this kind would be exceptional.

31. We would welcome Counsel's advice on the likelihood of a successful challenge being brought in relation to any decision by the Secretary of State not to issue an intervention notice.

Conclusion:

32. Counsel's advice is sought on the legal risks related to a European Intervention Notice decision by the Secretary of State and in particular:

    a. whether it is open to the Secretary of State to conclude that media plurality is or may be a relevant consideration, notwithstanding the News Corporation argument that there would be no material affect as News Corporation already owns a controlling interest in BSkyB;

    b. whether the points raised in the submissions of Enders Analysis, Trinity Mirror and others provide exceptional circumstances such as to justify an intervention notice in accordance with the policy stated in the Department's 2000 Guidance;

    c. on the prospects of a successful challenge by News Corporation, should the Secretary of State decided to issue a European Intervention Notice; and

d. the prospects of a successful challenge by another party (e.g. Enders Analysis, BT or Trinity Mirror) should the Secretary of State decide not to issue a European Intervention Notice.

33. A conference has been arranged for Tuesday 14th September at 2:00 pm. If Counsel has any queries ahead of the conference, please contact [redacted] in BIS Legal Services (tel: 020 7215 [redacted]

E-mail Message

From:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Cablem]
Cc:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Arees], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe], [redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	15/09/2010 at 13:23
Received:	15/09/2010 at 13:23
Subject:	RE: Sky case statement

[redacted]

As discussed, the substance of any public statement the SofS might make about a decision on whether or not intervene in the Sky/Newscorp case will depend entirely on the substance of that decision and the reasons for it. As you know, we plan to submit further advice on this matter as soon as we can following our conference with Counsel tomorrow morning on the legal risks associated with a decision either way. The written statement made in 2008 on the intervene in Sky / ITV case indicates the sort of thing that might be said if a positive decision to intervene was made. But before we obtain that further legal advice and obtain a decision, we will not be in a position to draft a statement that would be relevant to this case. But I can confirm we would be able to prepare something suitable quickly as and when required.

[redacted]

From: Cable MPST
Sent: 14 September 2010 12:03
To: [redacted] (CCP)
Subject: Sky & Don Foster

Hi [redacted]

You kindly agreed to send me the original letter from Don Foster on ITV/CCR and the reply you drafted; and also you agreed to amend the attached Written Ministerial Statement so it could be used for a Newscorp intervention by tomorrow at midday.

Many thanks for your help

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

22

E-mail Message

From:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Perm Sec BIS [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=FRASER], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], Hendon David (IE) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=DHENDON], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Amos Stephen (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SAMOS][redacted] LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES],[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	16/09/2010 at 18:48
Received:	16/09/2010 at 18:48
Subject:	RE: BSkyB / Newscorp intervention advice submission
Attachments:	BSkyB Newscorp final legal advice.doc

As discussed, I attach a note summarising advice from external Counsel on the legal case for intervention in the Sky/Newscorp case.

[redacted]
CCP2/3
[redacted]

<>

From: [redacted] (CCP)
Sent: 03 September 2010 16:09
To: Cable MPST
Cc: Davey MPST; SPAD MPST; Perm Sec BIS; Kelly Bernadette (MPST DG); Hendon David (IE); Chambers Sarah (CCP); [redacted] (Communications); Amos Stephen (LEGAL B); [redacted] (LEGAL B); Rees Andrew (CCP); [redacted] (Communications); [redacted] (CCP)
Subject: BSkyB / Newscorp intervention advice submission

<< File: BSkyB Newscorp intervention advice submission.doc >> << File: BSkyB Newscorp - case for intervention analysis.doc >> << File: BSkyB Newscorp - analysis of submissions from third parties.doc >> << File: BSkyB Newscorp draft EIN and IN.doc >>
Jo

I attach a submission with advice to the SofS on the case for intervening on public interest grounds in the anticipated acquisition by Newscorp of 100% of the shares in BSkyB. Also attached is:

(i) an analysis of the issues that need to be taken into account in reaching a decision;
(ii) an analysis of the substantive points raised in the 4 submissions you received from interested third parties arguing in favour of intervention; and
(iii) draft intervention notices.

I have not attached again all the submissions from third parties and the one from Hogan Lovells on behalf of Newscorp. These have been circulated previously and the SofS has them with him.

To	Secretary of State
From	
Date	16 September 2010

Subject: Legal advice on case for intervening in Newscorp/BSkyB

Issue

- Further to my submission of 3 September and subsequent discussion with the Secretary of State, we have now sought advice from external Counsel on the scope for intervention in this case. This note summarises Counsel's conclusions. A formal record of our conference with Counsel will follow in due course.

Timing

- Routine. We expect the parties to formally notify the deal to the EU Commission next week. If an intervention were to be made, there is merit in making it as soon as possible after that formal notification in order to give Ofcom as much time as possible to prepare its report to you. The Guidance suggests you would aim to take such a decision within working days.

Counsel's Advice

- Counsel confirms that there would be no strong grounds to challenge a positive decision to issue an intervention notice in this case. This is in view of the low threshold for intervention which requires the Secretary of State only to have a reasonable basis for having a "belief" that a specified public interest consideration "is or may be relevant" to this merger. The Secretary of State clearly has scope to exercise a good degree of discretion in deciding whether or not to intervene.

- In reaching the above view, Counsel noted in particular that the merger could be considered to fall within the scope of one of the "exceptional circumstances" expressly identified in the 2004 Guidance on use of the power and that the Guidance could not reasonably be considered to create a legitimate expectation that no intervention would be made in this case.

Detail

- The legal threshold for intervening in mergers on public interest grounds is deliberately low so as to provide suitable discretion to take action in all cases where this appears justified. Where such discretion exists and the decision results only in an initial investigation rather than a final determination of the matter, the prospect of legal challenge to an intervention appears low provided there is at least a reasonable case for having a belief that a public interest consideration is or may be relevant to the merger. In this case, substantive submissions have been received arguing that the merger does indeed impact on a specified public interest consideration. In the light of such submissions, it would be difficult to argue that a decision to intervene represented a clear misapplication of the relevant law. Indeed, given the low nature of the threshold, Counsel felt it was more difficult to make the case for a decision not to intervene because this decision was determinative and precluded further investigation.

- There is formal Guidance published by the then DTI in 2004 which explains how the power to intervene in media mergers will be used. While the Guidance is not law, it nevertheless must be taken properly into account in reaching decisions since it creates a legitimate expectation about how the Secretary of State will act. No media ownership rule has ever previously existed that would have prevented this present merger from taking place. The Guidance states that "save in exceptional circumstances", intervention would generally not be considered where such rules never existed. This requires us to consider whether exceptional circumstances might be deemed to apply in this case. Counsel is satisfied that they can.

- Exceptional circumstances are, by their nature, undefined. Nevertheless, paragraph 8.8 of the Guidance seeks to indicate the type of situation that might be considered to represent exceptional circumstances while making clear this does not represent an exhaustive list. Paragraph 8.8 refers specifically to a situation where a large number of news channels are coming under common control. Counsel believes this reference may be considered to apply to this case because one enterprise is obtaining total control of both News International (The Times, The Sun, The Sunday Times and the News of the World newspapers) and BSkyB (Sky News which provides news also to Channel 5, two national radio stations and numerous regional radio stations). While the guidance may mention specifically "a large number of news channels", the reference clearly demonstrates that, in drafting this provision, there was a particular concern about the variety of sources of news to which people had access. This case appears to raise matters directly relevant to that concern.

- The threshold test for taking a subsequent decision to refer the merger to the Competition Commission would be considerably more challenging. We would need to asses that case for taking this step on its merits following receipt of a report from Ofcom.

Special Advisers' (SpAds) advice

- SpAds have been included on all exchanges to date on this matter.

Background
- None.

Cleared by: Sarah Chambers

Advice received from: Monckton Chambers.

CC list:

ci	Cable MPST	[redacted] Comms
	Davey MPST	Stephen Amos Legal
	SPAD MPST	Andrew Rees CCP3
	Permanent Secretary	[redacted]gal
	Bernadette Kelly FM	[redacted] Comms
	David Hendon IE	[redacted] CCP2
	Sarah Chambers CCP	

BT

CONFIDENTIAL – via e-mail and mail

The Rt Hon Vince Cable MP
Secretary of State for Business, Innovation & Skills,
And President of the Board of Trade
Department for Business, Innovation & Skills
1 Victoria Street
London SW1H 0ET

16 September 2010

Dear Secretary of State

News Corporation's proposed takeover of BSkyB

I am writing further to my letter of 13 August 2010 and your response of 31 August 2010 regarding the announced acquisition by News Corporation ("News Corp") of the remaining 60.1% shares in British Sky Broadcasting Group plc ("BSkyB"). We spoke briefly about this when we met recently and I thought it would be helpful if we clarified a few points again as you may still be considering the matter.

We believe you do have the legal power to intervene in this merger, and that to exercise your power would be the ordinary thing to do, because the completion of this transaction will result in an excessive concentration of media ownership in the United Kingdom which is against the public interest in terms of the plurality of the media.

Just to summarise the main points in our detailed letter:

- We think there is a **serious issue** to be considered in News Corp's acquisition of BSkyB. We are not alone in thinking this.
- We consider that this is an issue of **media plurality** not competition: the issue of concern is one of cross-media ownership, given News Corp's concentration in national press and TV news particularly. In other words, the question is "is this an appropriate level of concentration of media in the United Kingdom?" We do not believe that such a level of concentration would be allowed in the United States, for example.
- Our assessment is that as Secretary of State you have the **power to intervene** in the proposed merger on plurality grounds: it is the same basis as the intervention that was made when BSkyB's acquired their stake in ITV. We set this out in detail in our note of 13 August 2010 (see sections 3 and 4).

Ian Livingston
Chief Executive Officer
BT Group

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United Kingdom

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e-mail ian.livingston@bt.com

- Our reading of the legal framework is that this power **extends to EU mergers** considered by the European Commission (see section 3 of our note of 13 August 2010): there are plenty of precedents for EU interventions particularly on national security grounds.

- We consider that intervening would be the **ordinary use** of your powers. Indeed, there will be no second chance, as the EU review will *only* cover competition law considerations, and will not look at the issues of media plurality in an informed and democratic society. Without a UK review these issues will not be considered by anyone.

This is an issue of national interest to UK society and to UK plc. It's important there should be appropriate plurality in the media sector. This is not a narrow commercial issue of interest only to BT.

I would like to point out that concern is growing in the media about News International's growing control over the British media – see for example Will Hutton's article in the Observer this weekend. While I may not agree with all of Will Hutton's language, I do share his concerns and his conclusion that it is critical that a proper assessment of the proposed takeover of BSkyB by News Corp be carried out under media plurality rules. The article indicates "*The [merged] company would then represent the single largest concentration of media power in any large democracy, a practice outlawed in Australia and the US, with huge implications not just for British politics and culture, but also for the structure of the media and the information industry*", and concludes "*the most urgent action is a plurality review. As matters stand, to delegate the decision to Brussels' competition authorities, which are notoriously reluctant to act, is far too dangerous. All politicians should understand the danger of the kind of media dominance [News International] is now developing in Britain.*"

In summary, we simply want News Corp's proposed acquisition of BSkyB to be referred to the Competition Commission so that the issues can be properly considered. So, I would respectfully reiterate the suggestion that it would be appropriate for you to issue a European Intervention Notice under s67 of the Enterprise Act 2002 on the basis of public interest considerations relating to plurality of the media resulting from News Corp's significantly increased control (both in the quality and amount) over BSkyB.

I'd be happy to help you with any further information you might need.

Yours faithfully

IAN LIVINGSTON

British Broadcasting Corporation Room 5127 White City 201 Wood Lane London W12 7TS
Telephone 020 8008 1801 Fax 020 8222 6969 Email carolinethomsonandpa@bbc.co.uk

BBC

Caroline Thomson
Chief Operating Officer

The Rt Hon Dr Vince Cable MP
Secretary of State for Business, Innovation and Skills
Department for Business, Innovation & Skills
1 Victoria Street
London
SW1H 0ET

20th September 2010

Dear Secretary of State,

I am writing in connection with the debate about the importance of maintaining media plurality in the UK, in particular the extent of News Corporation's media holdings were it to acquire the balancing interest in BSkyB.

The BBC's Director General raised the issue of the strength of BSkyB in his recent MacTaggart lecture. He said: 'Sky is well on its way to being the most dominant force in broadcast media in this country. Moreover, if News Corp's proposal to acquire all of the remaining shares in Sky goes through, Sky will not just be Britain's biggest broadcaster, but a full part of a company which is also dominant in national newspapers as well as one of Britain's biggest publishers.'

I am sure that you will agree that a plurality of media ownership is vital for the successful functioning of the democratic process, as recognised in the Communication Act (2003). Plurality helps to protect a diversity of viewpoints and to ensure that citizens have access to a variety of sources of news, information and opinion. The BBC plays an important role in the provision of high quality, impartial news but it is imperative that a variety of other viable news providers also exist. It would clearly therefore be of concern if any one organisation was to control too much of the media, because of its ability to influence and control the agenda.

Clearly the media industry is undergoing a period of rapid change. While consumption through traditional platforms remains important, structural changes are underway in the newspaper, television and radio industries. We are likely to see further consolidation in the sector in order to reduce costs and grow revenues. This process could raise issues for plurality that require careful consideration by your department.

I note there is a framework in place for handling media consolidation that is designed to strike a balance between safeguarding plurality, on the one hand, and providing freedom for companies to expand, invest and innovate on the other. In addition to the UK's existing cross-media ownership rules, the 'media public interest' and 'legitimate interest' tests allow the Secretary of State to intervene in newspaper, broadcasting and cross-media mergers if he believes they raise public interest considerations. These include the need to ensure the accurate presentation of news, free expression of opinion and plurality. The ability to invoke these tests is important given the likely trends in the UK media landscape.

I believe the possibility of News Corporation acquiring full control of BSkyB, taken together with its other holdings, might raise public interest considerations that require close examination and the possibility only of proceeding with protections in place. In the UK, in addition to its 39.1% stake in BSkyB, News Corporation's principal assets include News International which publishes newspapers comprising around 35% of national newspaper circulation, and HarperCollins, one of the top four book publishers in the UK. BSkyB is the leading supplier of pay-TV wholesale and retail services in the UK, with an annual turnover of £5.9 billion. It also operates a successful 24 hour news channel and supplies news content to other television and radio broadcasters.

Both News Corporation and BSkyB play, and have for many years played, an important and dynamic role in the UK's media sector, stimulating levels of innovation and investment that benefit consumers and the wider UK public. However, the proposal by News Corporation to acquire the balancing interest in BSkyB, when taken together with its other holdings particularly in news, in my view warrants an assessment of its impact on plurality in the UK media sector with a view to establishing what protections, if any, are necessary to protect the public interest.

Yours sincerely

Caroline Thomson
Chief Operating Officer, BBC

E-mail Message

From:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	[redacted] [SMTP:[redacted]@hoganlovells.com]
Cc:	[redacted] [SMTP[redacted]@hoganlovells.com], [redacted] [SMTP:[redacted]@hoganlovells.com], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Arees], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	24/09/2010 at 14:21
Received:	24/09/2010 at 14:21
Subject:	News Corporation/ BSkyB

Dear [redacted] and [redacted]

When we spoke the other day, you suggested you might wish to submit a further note on the case for a public interest intervention in relation to the proposed acquisition of 100% of BSkyB by News Corporation. You wished to present arguments responding to points that have been made on this matter by Enders Analysis arguing that the Secretary of State should intervene. Please note that I am on leave for a couple of days. So if you do submit a note on this matter before Tuesday, could I ask you to copy it also to my colleagues Andrew Rees and [redacted] who are copied in to this email.

Many thanks

[redacted]
CCP BIS
020 7215 [redacted]

E-mail Message

From:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Perm Sec BIS [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=FRASER], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], Hendon David (IE) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=DHENDON], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], [redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Amos Stephen (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SAMOS], [redacted] LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] [redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	24/09/2010 at 18:37
Received:	24/09/2010 at 18:37
Subject:	RE: Update on BSkyB / Newscorp merger
Attachments:	NewsCorps BSkyB - Note of Conference with Counsel - September 2010.doc

[redacted] We now have a formal note of our discussion with Counsel about the NewsCorp/BSkyB merger which I attach for information (agreed with Counsel). Also, a quick update on timing: Hogan Lovells, NewsCorps legal advisers, were due to submit further representations relating to Claire Enders analysis earlier this week but have been delayed in doing so. We spoke to Hogan Lovells yesterday who confirmed they could well file to the European Commission next week, but there may be a further slight delay due to the need to complete some preparatory correspondence with the Commission.

Andrew

<>

From: [redacted] (CCP)
Sent: 22 September 2010 10:58
To: Cable MPST
Cc: Davey MPST; SPAD MPST; Perm Sec BIS; Kelly Bernadette (MPST DG); Hendon David (IE); Chambers Sarah (CCP); [redacted] (Communications); Amos Stephen (LEGAL B); [redacted] (LEGAL B); Rees Andrew (CCP); [redacted] (Communications); [redacted] (CCP)
Subject: Update on BSkyB / Newscorp merger

PS/SofS

Please note that:
(i) the parties now expect to file the transaction formally with the EU Commission early next week. The Commission has asked further questions and the parties are responding to those this week; and
(ii) having seen the Enders Analysis submission to the SofS published in the media, Newscorp's legal advisers Hogan Lovells intend this week to submit further representations to the SofS responding to some of the points made by Enders Analysis.

We will submit further advice on the substance of this further submission from Hogan Lovells as soon as we can following its receipt.

[redacted]

CCP2/3
Ext [redacted]

From: [redacted] (CCP)
Sent: 16 September 2010 17:48
To: Cable MPST
Cc: Davey MPST; SPAD MPST; Perm Sec BIS; Kelly Bernadette (MPST DG); Hendon David (IE); Chambers Sarah (CCP); [redacted] (Communications); Amos Stephen (LEGAL B); [redacted] (LEGAL B); Rees Andrew (CCP); [redacted] (Communications); [redacted] (CCP)
Subject: RE: BSkyB / Newscorp intervention advice submission

As discussed, I attach a note summarising advice from external Counsel on the legal case for intervention in the Sky/Newscorp case.

[redacted]
CCP2/3
[redacted]

PROPOSED ACQUISITION BY NEWS CORPORATION OF THE REMAINING 60.9% OF SHARES IN BSKYB

NOTE OF CONFERENCE WITH ELISA HOLMES, MONCKTON CHAMBERS, ON THURSDAY 16TH SEPTEMBER

1. The conference was attended by Andrew Rees, [redacted] [redacted] and [redacted] from BIS and by [redacted] and [redacted] from DCMS.

2. The instructions raise two key issues:

   a. whether the public interest consideration of media plurality is or may be relevant to consideration of the proposed acquisition;

   b. whether intervention could be said to frustrate a legitimate expectation in view of the May 2004 Departmental guidance on media mergers that intervention would only occur in exceptional circumstances.

3. There is no doubt that the proposed acquisition is a relevant merger situation or that the other conditions for intervention under section 67 of the Enterprise Act 2002 are satisfied. It does not appear that any other public interest considerations could be relevant to this case.

Media plurality:

4. In order to intervene, the Secretary of State needs to believe that it is or may be the case that media plurality is relevant to consideration of the proposed acquisition. This is a relatively low threshold.

5. The crucial question is whether the move from a 39.1% stake to a 100% stake makes any appreciable difference, particularly as regards control of news content. The submissions on behalf of News Corporation, although expressed forcefully, do not say much on this question. Those submissions make the point that the regulatory framework for television news already safeguards media plurality, but this is not, at least on its own, a particularly persuasive argument as the key issue is the ability, through editorial control, to set the agenda, and this is not something with which the relevant regulatory controls are particularly concerned.

6. The submissions from other parties raised a concern about the merged entity's ability to bundle and discount newspaper titles and TV subscriptions. Ostensibly this is a plausible concern but may depend on whether the increase in News Corporation's stake in BSkyB makes any difference to the level of control which New Corporation can exercise over BSkyB's commercial strategy. The effect on audience share, particularly in the provision of news, is relevant and should be considered. The Enders report states that News

Corporation newspaper titles account for 37% of the UK newspaper market. It is argued this share will be increased by cross-promotion and service bundling.

7. There are three main news providers: Sky, ITN and BBC. Sky News is broadcast not only on Sky channels, but also provided to Channel 5 and the majority of commercial radio stations (both local and national). Channel 5 and these radio stations commission news programmes from Sky: they do not receive "raw" news material over which they might exercise editorial control. A potentially very wide range and large percentage of people receive news from News Corporation titles and/or outlets for Sky news. This percentage could increase if the concerns raised by the Enders Report (and repeated in other submissions) are well-founded and if the acquisition by News Corporation of the remaining shares in BSkyB results in an increase in control by News Corporation over news editorial decisions, so, for example, the news provided by News Corporation publications and BSkyB comes from a single source. These are the sorts of matters which Ofcom would consider if the Secretary of State intervened.

8. In all the circumstances, it seems entirely open to the Secretary of State to conclude that it is or may be the case that media plurality is or may be relevant to the proposed acquisition. Moreover, it is difficult to argue, in the face of the submissions from Enders Analysis and others, that media plurality could not be a consideration.

9. It might be said that there is little to distinguish media plurality concerns from competition concerns. However, the fact that the European Commission would investigate any potential market distortion would not be a good enough reason for not intervening, if it appears there may be concerns about media plurality. It is clear from the statutory scheme that concerns with media plurality should be considered separately from competition law issues.

10. It is not completely clear what impact News Corporation's increased shareholding in BSkyB would have on editorial control. News Corporation submit there would be no change, but the concerns expressed by Enders and others may have a foundation. There is a difference between influence (which News Corporation already exercise) and control over editorial and commercial policy. With a 100% shareholding it seems at least possible, given that there would be no other shareholders whose interests should be taken into account, that News Corporation's control over BSkyB would be significantly increased. There would effectively be only one commercial interest, and editorial, strategic and commercial decisions could be taken in the interests of the group as a whole.

11. Deciding not to intervene would be a conclusive determination of the question of media plurality. Therefore, such a decision carries a greater risk of successful challenge (e.g. from competitors) than a decision to intervene.

On the basis of information presently available, it is difficult to say that there is no prospect of media plurality being a relevant consideration. The Secretary of State has a discretion to intervene, but would need to have good reasons for not exercising that discretion in circumstances in which he concluded that it was or may be the case that plurality is relevant to a consideration of the merger.. A decision to intervene is not a conclusive determination of any substantive rights or obligations. It simply means that the impact of the acquisition on media plurality will be considered in greater depth.

Departmental guidance/legitimate expectation:

12. The guidance should not operate to fetter the Secretary of State's discretion under section 67 of the 2002 Act, and is not a substitute for the provisions of the Act. However the guidance is capable of creating a legitimate expectation as to how the Secretary of State will approach intervention decisions.

13. Paragraph 1.7 of the Guidance states that the Guidance is intended to provide an indication of the approach the Secretary of State is likely to adopt in considering cases, but makes clear that each transaction will be considered on a case by case basis and on its own merits.

14. The Secretary of State is not bound as such by the Guidance, but he would need good reasons to depart from it. In practice, such reasons are likely to be the same as those which might amount to "exceptional circumstances" as described in section 8 of the Guidance.

15. This transaction does not fall within any of the cases listed in paragraph 8.2 of the guidance. Therefore, the question is whether there are exceptional circumstances. Paragraph 8.8 provides some illustrative examples of what exceptional circumstances might be. These include circumstances where a large number of news or educational channels would be coming under single control. This transaction affects a large number of news outlets: national newspapers, Sky news, news provided to Channel 5 and local radio. News Corporation would acquire full control over those outlets. It is therefore analogous to the example given in paragraph 8.8. Although it might be argued that this particular case could have been foreseen when the guidance was written (as News Corporation already owned shares in BSkyB in 2004), the examples must be viewed as illustrative, not exhaustive, particularly bearing in mind the changing face of media markets and news production.

16. In summary, this merger may be regarded a exceptional since it involves a large number of news outlets coming under complete common control. In support of this qualifying as an "exceptional circumstance" is the fact that it seems analogous to one of the circumstances explicitly identified as exceptional in the guidance. There are good reasons for treating these

circumstances as exceptional and therefore taking the position that intervention would accord with the policy set out in the guidance.

Prospects of challenge:

17. The possibility of News Corporation successfully challenging a decision to intervene at this stage cannot be ruled out, but it is more likely that they will not challenge a decision by the Secretary of State to intervene. An intervention is not determinative of any of its substantive rights or liabilities and it is open to the Secretary of State to find, on the basis of information so far provided, that media plurality is or may be a relevant consideration and hence intervene to obtain further information. The test for intervention imposes a relatively low threshold.

18. Arguing that the guidance creates a legitimate expectation that the Secretary of State will not intervene might be regarded as tantamount to arguing that there is immunity from investigation and regulatory control – an unattractive argument. The legitimate expectation of News Corporation could only be that the guidance would generally be applied in intervention decisions. However, the guidance does not have legislative force and, if the Secretary of State considers that it may be the case that plurality is relevant to a consideration of New Corporation's acquisition, then he should not consider himself bound by the guidance as though it were a statutory provision. In any event the guidance explicitly contemplates other situations in which intervention might be appropriate but which are not set out in the guidance. Further, it expressly preserves the possibility of an intervention in exceptional circumstances and clearly contemplates the possibility of intervention when a large number of news outlets come under single control (as appears to be the case here).

19. Finally, any challenge to the decision to intervene would be more likely than not to be unsuccessful, although of course the existence of a challenge and its potential success cannot be ruled out.

20. On the other hand, there is a real possibility of BT (who have made submissions to the Secretary of State) or some other party challenging a decision not to intervene, particularly as such a decision would finally determine the question of media plurality in so far as it is relevant to this acquisition. Given the content of the submissions supporting intervention, it would be difficult to show that media plurality could not possibly be considered a relevant consideration (which in turn is at least in part dependent upon whether the increase in News Corporation's shareholding has a relevant impact upon its control of BSkyB's editorial, strategic and commercial policies). The argument against intervention would rest on the wide discretion the Secretary of State has and a belief the acquisition is unlikely to affect plurality, given the significant shareholding News Corporation already have. The chances of a decision not to intervene being

successfully challenged are higher than the chances of the opposite decision being successfully challenged.

E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY]
Sent:	27/09/2010 at 13:35
Received:	27/09/2010 at 13:35
Subject:	Legal Advice on case for intervening in Newscorp/BSkyB

Hi [redacted]

Thank you for your note to the Secretary of State on the legal advice on the Newscorp case. (Sorry I can't find the electronic version of your note in the inbox).

The SoS was very grateful for the note which he commented was very helpful and reassuring.

Thanks for your help in getting all this information up to the SoS and special advisors. I realise we have been depending on you quite a bit at the moment!

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

E-mail Message

From: Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To: Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
Cc: Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Perm Sec BIS [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=FRASER], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], Hendon David (IE) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=DHENDON], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Amos Stephen (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SAMOS], [redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent: 27/09/2010 at 14:27
Received: 27/09/2010 at 14:27
Subject: RE: Update on BSkyB / Newscorp merger

Thanks Andrew. Please continue to keep us updated, this is really helpful.

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Rees Andrew (CCP)
Sent: 24 September 2010 17:38
To: Cable MPST
Cc: Davey MPST; SPAD MPST; Perm Sec BIS; Kelly Bernadette (MPST DG); Hendon David (IE); Chambers Sarah (CCP); [redacted] (Communications); Amos Stephen (LEGAL B); [redacted] (LEGAL B); [redacted] (Communications); [redacted] (CCP); [redacted] (CCP)
Subject: RE: Update on BSkyB / Newscorp merger

[redacted] We now have a formal note of our discussion with Counsel about the NewsCorp/BSkyB merger which I attach for information (agreed with Counsel). Also, a quick update on timing: Hogan Lovells, NewsCorps legal advisers, were due to submit further representations relating to Claire Enders analysis earlier this week but have been delayed in doing so. We spoke to Hogan Lovells yesterday who confirmed they could well file to the European Commission next week, but there may be a further slight delay due to the need to complete some preparatory correspondence with the Commission.

Andrew

<< File: NewsCorps BSkyB - Note of Conference with Counsel - September 2010.doc >>

From: [redacted] (CCP)
Sent: 22 September 2010 10:58

To: Cable MPST
Cc: Davey MPST; SPAD MPST; Perm Sec BIS; Kelly Bernadette (MPST DG); Hendon David (IE); Chambers Sarah (CCP); [redacted] (Communications); Amos Stephen (LEGAL B); [redacted] (LEGAL B); Rees Andrew (CCP); [redacted] (Communications); [redacted] (CCP)
Subject: Update on BSkyB / Newscorp merger

PS/SofS

Please note that:
(i) the parties now expect to file the transaction formally with the EU Commission early next week. The Commission has asked further questions and the parties are responding to those this week; and
(ii) having seen the Enders Analysis submission to the SofS published in the media, Newscorp's legal advisers Hogan Lovells intend this week to submit further representations to the SofS responding to some of the points made by Enders Analysis.

We will submit further advice on the substance of this further submission from Hogan Lovells as soon as we can following its receipt.

[redacted]
CCP2/3
Ext [redacted]

From: [redacted] (CCP)
Sent: 16 September 2010 17:48
To: Cable MPST
Cc: Davey MPST; SPAD MPST; Perm Sec BIS; Kelly Bernadette (MPST DG); Hendon David (IE); Chambers Sarah (CCP); [redacted] (Communications); Amos Stephen (LEGAL B); [redacted] (LEGAL B); Rees Andrew (CCP); [redacted] (Communications); [redacted] (CCP)
Subject: RE: BSkyB / Newscorp intervention advice submission

As discussed, I attach a note summarising advice from external Counsel on the legal case for intervention in the Sky/Newscorp case.

[redacted]
CCP2/3
[redacted]

21

E-mail Message

From:	Waring Katie (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=KWARING]
To:	Cook Jonathan (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM], MPST Correspondence [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=MPSTCO], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE]
Cc:	[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	28/09/2010 at 12:59
Received:	28/09/2010 at 12:59
Subject:	RE: 38 Degrees - Delivering a petition to the Minister

Agreed.

Katie Waring | Special Adviser | Department for Business, Innovation & Skills | 020 7215 [redacted]

From: [redacted] (CCP)
Sent: 28 September 2010 11:41
To: Cable MPST; MPST Correspondence; Chambers Sarah (CCP)
Cc: [redacted] (Communications); Waring Katie (MPST MIN); Rees Andrew (CCP); [redacted] (CCP)
Subject: RE: 38 Degrees - Delivering a petition to the Minister

That sounds fine.

[redacted]

From: Cable MPST
Sent: 28 September 2010 11:28
To: [redacted] (CCP); MPST Correspondence; Chambers Sarah (CCP)
Cc: [redacted] (Communications); Waring Katie (MPST MIN); Rees Andrew (CCP); [redacted] (CCP)
Subject: RE: 38 Degrees - Delivering a petition to the Minister

Thanks [redacted]

I understand the usual practice is to send a member of private office down to collect the petition. Do you see any issues with us doing this?

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (CCP)
Sent: 28 September 2010 11:18
To: Cable MPST; MPST Correspondence; Chambers Sarah (CCP)
Cc: [redacted] (Communications); Waring Katie (MPST MIN); Rees Andrew (CCP); [redacted] (CCP)
Subject: RE: 38 Degrees - Delivering a petition to the Minister

[redacted]

The SofS should reject any proposed meeting to receive this petition. If 38 Degrees wish to make written representations on this matter, they are free to do so and the SofS will give these due consideration in reaching the decisions he must take on the merits of making a public interest intervention in respect of this merger. If officials felt there was some practical value in meeting with 38 Degrees to explore matters relevant to the decisions the SofS must take, we would invite them in. There appears no need for any such meeting. And even if there was, it would not need to involve the SofS. The SofS needs to preserve his impartiality in considering the merits of the case.

[redacted]

From: Cable MPST
Sent: 27 September 2010 10:44
To: MPST Correspondence; [redacted] (CCP); Chambers Sarah (CCP)
Cc: [redacted] (Communications); Waring Katie (MPST MIN)
Subject: FW: 38 Degrees - Delivering a petition to the Minister

[redacted] Sarah

Please could you we have a quick bit of advice on how to handle this request?

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] [mailto:[redacted]38degrees.org.uk]
Sent: 23 September 2010 16:25
To: Cable MPST
Subject: 38 Degrees - Delivering a petition to the Minister

Dear Sir or Madam,

I'm a campaigns assistant at the organization 38 Degrees and am contacting you regarding the possibiliy of delivering a petition to the Minister next week. We are currently running a campaign calling on the Minister (Vince Cable) to call in Rupert Murdoch's proposed buyout of BSkyB for a proper investigation once the proposed deal has been filed with the European Commission. In a recent action (which is the one we would like to deliver), around 20,000 people signed up to support the Minister calling it in, and sent messages to him with that in mind. It's those messages that we're now keen to deliver.

Therefore I am enquiring as to whether we could arranage a date next week or the week after where the Minster would be free to accept them from 38 Degrees staff and members.

Is there a time when we could deliver the messages? My own contact details are below, or you'd be very welcome to get in touch with my colleague, [redacted] (Campaigns Director).

We look forward to hearing from you.

Yours faithfully

[redacted]

Telephone - 020 [redacted]
E-mail - [redacted]38degrees.org.uk

[redacted]

Telephone - [redacted]
E-mail - [redacted]38degrees.org.uk

E-mail Message

From:	[redacted] COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=NEVANS]
To:	[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Arees]
Cc:	
Sent:	29/09/2010 at 12:45
Received:	29/09/2010 at 12:45
Subject:	FW: Lines to Take for Newscorp case

All

The SoS has come back on the lines and would like to change his quote. Would you be happy with the attached?

The changes in blue are mine, but grateful if you could comment on it as a whole.

Happy to discuss

[redacted]

From: Cable MPST
Sent: 29 September 2010 11:38
To: [redacted] COMMS)
Cc: Waring Katie (MPST MIN); SPAD MPST; Davey MPST
Subject: Lines to Take for Newscorp case

Hi [redacted]

As discussed, the SoS has amended the lines to take on Newscorp. It now reads:

I have received various representations on this issue from a variety of [media] groups. It is my statutory responsibility to ensure that issues of media plurality are carefully considered in takeovers. Given the [serious] concerns [about plurality] raised with me in this case, I have asked the independent experts at Ofcom to investigate the matter and report back to me. [I will not comment any further on this case until I hear back from Ofcom] .

Could you feed this into the media briefing please?

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

20

E-mail Message

From:	[redacted](CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	[redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc:	
Sent:	12/01/2011 at 10:56
Received:	12/01/2011 at 10:56
Subject:	FW: News Corporation/BSkyB
Attachments:	2584504 v1 - Further Submission to the Secretary of State - Public Interest News CorpBSkyB.PDF 2584506 v1 - Annexes.PDF

From: [redacted] [mailto:[redacted]@hoganlovells.com] On Behalf Of [redacted]
Sent: 29 September 2010 16:52
To: [redacted] (CCP); Rees Andrew (CCP); [redacted] (CCP)
Cc: [redacted]
Subject: News Corporation/BSkyB

Gentlemen,

Please see attached.

On timing for the submission of the Form CO to the European Commission, the response to the Commission's request for information of 16 September has now been submitted and hopefully, with the Commission's agreement, the Form CO itself will be submitted shortly, probably early next week. I will keep you posted.

Best regards,

[redacted]

Partner

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29 September 2010

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Department of Business Innovation and Skills
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Partner
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Our ref PHEASJ/2577271.1
Matter ref A0020/78918

Dear [redacted]

Further Submission to the Secretary of State - Public Interest:
News Corporation - British Sky Broadcasting

I am writing further to our briefing paper submitted on 20 July and our conversation on 20 September.

We have noted recent media and public commentary and speculation on the proposed acquisition by News Corporation ("News") of the remaining shares in British Sky Broadcasting Group plc ("Sky") that News does not already own (the "proposed transaction").

News understands that the Secretary of State for Business, Innovation and Skills ("SoS") has been provided with a submission by Enders Analysis Ltd ("Enders") which urges the SoS to intervene in the proposed transaction on media public interest grounds (the "Enders Submission"), which News has had the opportunity to review.[1]

This letter and the supporting Annexes respond to your invitation to News to set out its position on the propositions put forward in the Enders Submission. News believes it is necessary to correct the inaccurate statements and misleading views set out in the Enders Submission and to provide the SoS with further information and arguments on the lack of any justification for an intervention on public interest grounds.

As you will appreciate, the matters disclosed in this letter and Annexes are highly sensitive. Therefore, the information provided should not be disclosed to third parties without the parties' prior written consent.

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1 Public copy available at: http://www.beehivecity.com/television/why-murdochs-bid-for-sky-should-be-blocked-memo-in-full/

Executive Summary

News submits that the Enders Submission:

- misunderstands and presents a flawed and misleading view of the relevant legal and regulatory framework for the assessment of media public interest considerations (**Annex I**);
- relies on unsupported and speculative assertions concerning the effects of the proposed transaction (**Annex II**); and
- is founded on selective and, in certain instances, misleading market data (which, in any event, are not relevant to a correct assessment of media public interest considerations in relation to the proposed transaction).[2]

As explained in News' briefing to BIS of 20 July, News submits that the proposed transaction does not give rise to potential concerns which would justify an intervention on public interest grounds for the reasons that:

- The proposed transaction does not fall under any of the scenarios contemplated by the UK policy on intervention in media public interest cases. In particular, the UK policy, save in exceptional circumstances, is not to intervene in respect of mergers in areas where there are no media ownership restrictions and none were removed by the Communications Act 2003 (e.g., mergers involving satellite and cable TV and radio services which are cited in the DTI Guidance).[3]
- In any event, the threshold for intervention on public interest grounds is high. This threshold would be met only if the transaction gave rise to a "***significant reduction in plurality*** in relation to any relevant audience" (our emphasis)[4].
- There will be no material effect on the range or quality of plurality of news media available to any relevant audience since Sky and News are already deemed to constitute a single controller of media enterprises under the Enterprise Act 2002 (as specified in the detailed and lengthy review of the *Sky - ITV* transaction).[5]
- Even if the SoS were to consider that there would be a reduction in plurality as a result of the change in the degree of control exercised by News over Sky following the transaction, there will not be a "significant reduction in plurality" for the purposes of a qualitative assessment "of persons with control of the media enterprises serving" any "audience in the United Kingdom".[6] The SoS will be aware that News already exercises material

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2 In particular, it appears that at least some of the figures quoted in the Enders Submission (e.g. ARPU figures) are based on an analysis of Sky's activities going beyond its news-related activities, and include revenues derived from other pay TV services and other non-TV services too (e.g. telephony and broadband).

3 Enterprise Act 2002: Public Interest Intervention in Media Mergers, Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004 ("DTI Guidance"), paragraph 8.4.

4 DTI Guidance, paragraph 7.11.

5 Preliminary briefing of 20 July 2010, paragraph 4.11.

6 In *BSkyB v. Competition Commission* [2010] EWCA Civ 2, the Court of Appeal noted that, in its judgment which was the subject of Sky's appeal, the CAT had noted that *"[a] qualitative assessment of the sufficiency of the plurality of persons in control of media enterprises is still required but it must be carried out within a framework which treats the merged companies (and any other media enterprises to which subsection 58A(5) applies) as subject to a single controller. Although that framework does in our view preclude account being taken of 'internal plurality',* ***it still leaves room for a detailed and wide-ranging qualitative assessment on the basis of which the Commission will judge whether the 'external plurality' of the remaining controllers is 'sufficient'"*** (our emphasis) (paragraph 113 of the judgment of the Court of Appeal citing the judgment of the CAT at paragraph 265 (*British Sky Broadcasting v Competition Commission and Secretary of State and Virgin Media Inc v Competition Commission and Secretary of State, ([2008] CAT 25),* judgment of 29 September 2008)). Furthermore, the Court of Appeal later recognised at paragraph 121 that the statutory framework did not exclude "*a consideration of the limited extent (if it be the case) of* ***any control actually exercised or exercisable by a controlling enterprise over another enterprise, in the course of the qualitative assessment*** *which is required on an investigation by the Commission in relation to the particular public interest consideration identified in section 58(2C)(a)"* (our emphasis).

influence over Sky.[7] Post-transaction, all of the existing newspaper titles and all of the television and radio news channels other than those today controlled by News and Sky will remain and continue to represent together a "sufficient plurality of persons" within the meaning of the legal test.[8]

- The regulatory framework contains further safeguards of plurality.[9]

1. **The Enders Submission misunderstands and presents a flawed and misleading view of the relevant legal and regulatory framework for the assessment of media public interest considerations**

The Enders Submission distorts the proper framework for assessment of media public interest considerations as applicable to the proposed transaction:

- It assumes or alleges that the proposed transaction is a natural case for intervention on media public interest grounds, in particular by citing regulatory guidance and examples of past transactions that were denied consent.[10] On the contrary, the references to the DTI Guidance are misplaced. Far from supporting the case for intervention in the proposed transaction on media public interest grounds, the DTI Guidance actually supports the contrary proposition, i.e., that the case is not appropriate for intervention on plurality grounds, on the basis that it does not fall under any of the categories listed in the DTI Guidance and, in any event, is not exceptional.

- It erroneously states that English law provides for a lower level of protection of plurality by allegedly allowing News to own more media interests in the UK than it is permitted to own in the US and Australia.[11] On the contrary, there are no cross-ownership restrictions in the US and Australia that would prohibit the proposed transaction.

- It confuses the correct test for plurality with an assessment on competition grounds and thereby assumes that any impact on competition, however remote or tangential to the implementation of the proposed transaction, raises plurality issues of sufficient importance and immediacy to justify intervention by the SoS.[12] The proposed transaction would have no material effect on competition, including in the news sector in the UK. But, in any event, the effect (if any) of the transaction on competition will be fully considered by the European Commission under the EU Merger Regulation, and the proposed transaction will proceed only if it secures merger control clearance. It would therefore be a serious error to seek to justify an intervention on media plurality grounds based on the alleged (but wholly unsupported) adverse effects of the proposed transaction on competition. Moreover, the putative adverse effect on which the Enders Submission speculates would not result directly and immediately from the proposed transaction but from the cumulative consequences of ever more remote and therefore speculative developments in the market pushing out at least four years.[13] Concerns about such remote and speculative developments would not provide the legal basis for an intervention in respect of the proposed transaction on public interest grounds: the adverse effects for plurality of the media would need to be the direct and immediate result of the proposed transaction and no such effects are foreseeable.

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7 Indeed, in recognition of News' existing interest in Sky, it is noted that News is itself bound by the undertakings that Sky gave to the SoS in the context of the *Sky/ ITV* transaction. See, further, paragraph 5.1 of the undertakings given by Sky to the SoS pursuant to section 55 of the Enterprise Act 2002.

8 Preliminary briefing of 20 July 2010, paragraph 4.13.

9 Preliminary briefing of 20 July 2010, paragraph 4.15.

10 Enders Submission, page 16.

11 Enders Submission, page 17.

12 Enders Submission, pages 17 to 19.

13 Enders Submission, page 17.

- It dismisses the role of impartiality regulations in the plurality assessment.[14] On the contrary, the requirement to maintain impartiality in the presentation of news provides a safeguard against undue editorial influence of a shareholder over news output.

Each of these points are discussed in further detail in Annex I.

2. The Enders Submission relies on unsupported and speculative assertions concerning the effects of the proposed transaction

The legal and analytical errors in the Enders Submission are based on speculative assertions regarding the incentives of the merged group and possible mid to long-term effects of the proposed transaction, which lack factual or evidential support. It links these unsupported premises through a series of suppositions as to what "may", "could" or "presumably" might occur to conclude that, "if" such hypothetical circumstances were to occur, harm would be caused to the public interest.

Such an approach is no substitute for an analysis of the legal and evidential basis for intervention on media plurality grounds based on what qualitative change (if any) would clearly occur as a direct and immediate result of the proposed transaction.

More specifically:

- The Enders Submission assumes that certain changes in the current business model would naturally occur. For example, it speculates without evidential foundation that *"products currently separately offered by [Sky] and [News] titles may be combined in bundles, discounted or provided without charge"*[15]; that *"[p]rogressively, [News] papers and [Sky] channels, particularly Sky News, may merge into one stream of fact and opinion"*[16]; and that competitors would be harmed by the *"failure of the [News] titles to publicise the availability or pricing of competing services"*[17]. However, none of these statements is supported by facts and evidence that they may actually or likely occur.

- The Enders Submission then assumes that the alleged adverse outcomes it predicts would necessarily lead to the demise of other media enterprises in the TV news or newspaper sectors. For example, it is conjectured that *"ITV could decide to switch to a consortium led by [Sky] at any time"*[18], or that the *"long-held reader loyalty to titles...could be severely tested"*[19] so that News' newspaper market share would be boosted above 40% by 2014. Such outcomes are totally speculative, are not transaction-specific and, in any event, fail to take into account the remaining sufficiency of plurality of media controllers, including the BBC, other terrestrial broadcasters and other newspaper groups, serving all relevant audiences.

- The Enders Submission predicts without foundation that *"the loss of the independent [Sky] shareholders will allow [News] greater opportunity to influence, tacitly or otherwise, the editorial coverage of Sky News and other [Sky] channels."*[20] This speculation is unsupported. Sky News is highly regarded for its editorial independence and News would not risk damaging that reputation.

Annex II sets out examples of speculative assertions from the Enders Submission, which are unsupported by evidence.

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14 Enders Submission, pages 16 to 19.
15 Enders Submission, page 17.
16 Enders Submission, page 17.
17 Enders Submission, page 18.
18 Enders Submission, page 18.
19 Enders Submission, page 17.
20 Enders Submission, page 17.

3. The Enders Submission is founded on selective and, in certain instances, misleading market data

The Enders Submission compounds its legal and evidential flaws by the citation of misleading data. The Enders Submission emphasises the large and allegedly growing role of Sky in the media sector in the UK, with a particular emphasis on the *"surge in [Sky's] pay revenues" "in recent years".*[21] Charts 2 and 3 in particular are presented in support of these assertions. However, these charts appear to include the data for Sky revenues derived from activities beyond Sky's news-related activities (the supply of Sky News and the supply of news content to other TV channels). Indeed, the charts appear to include data relating to all Sky's pay TV operations, and other activities too (e.g. the supply of telephony and broadband services). Including revenues from non-news and non-TV services distorts the relevant analysis of the growth in Sky's revenues. For example, a significant portion of Sky's growth in recent years has been attributable to Sky's expansion into the provision of telecommunications services.

Conclusions

There is no reasonable legal or evidential basis for the SoS to conclude that, having regard to the relevant legal and regulatory framework and the evidence, the proposed transaction may be expected to operate against the public interest.

As explained in News' briefing to BIS of 20 July and this letter and its supporting Annexes, News submits that the proposed transaction does not give rise to potential concerns which would justify an intervention on public interest grounds on the basis that:

- the proposed transaction does not fall under any scenarios contemplated by the UK policy on intervention in media public interest cases;
- the threshold for intervention on public interest grounds is, in any event, high;
- there will be no material effect on the range or quality of plurality of news media available to any relevant audience;
- even if the SoS were to consider that there would be a reduction of plurality as a result of the change in the degree of control over Sky following the transaction, there will be a sufficient number and diversity of sources of news to protect plurality;
- the regulatory framework contains further safeguards of plurality;
- the Enders Submission misunderstands and presents a flawed and misleading view of the relevant legal and regulatory framework for the assessment of media public interest considerations, relies on unsupported and speculative assertions concerning the effects of the proposed transaction, and is founded on selective and misleading market data.

News would be happy to provide further information in relation to any of the points raised above and in the supporting Annexes and to meet with staff, if helpful.

Should you have any questions, please do not hesitate to contact me [redacted] (on direct line ++ 44 (0)20 [redacted] or email at [redacted]@hoganlovells.com) or [redacted] on direct line ++ 44 (0)20 [redacted] or email at [redacted]@hoganlovells.com) or [redacted] at News (on direct line +44 (0)20 [redacted] or email at [redacted]@newsint.co.uk).

Yours sincerely

[redacted]

[21] Enders Submission, pages 2 to 8.

Annex I

Legal errors in the Enders Submission

This Annex highlights areas of the legal argumentation in the Enders Submission which are either inaccurate or misleading as to the proper legal and regulatory framework for assessment of media public interest considerations. The Enders Submission distorts the proper framework for assessment of media public interest considerations as applicable to the proposed transaction.

1. **THE DEPARTMENT OF TRADE AND INDUSTRY GUIDANCE DOES NOT SUPPORT INTERVENTION IN THE PROPOSED TRANSACTION ON PUBLIC INTEREST GROUNDS**

Enders Submission

> *"Plurality requires a significant number of broadcasters (radio and TV) and newspapers designed to appeal to 'a wide variety of tastes and interests', as the legislation puts it.* ***The Guidance Document of the Department of Trade and Industry (now BIS) from May 2004 provides some useful examples of proposed transactions that were denied consent by the Secretary of State*** *or were granted his consent subject to remedies on plurality grounds"* (our emphasis)[1].

Comment

The references to the Guidance Document of the Department of Trade and Industry[2] are misplaced. Far from supporting intervention in the proposed transaction on plurality grounds, the DTI Guidance actually supports the contrary proposition - that the case is not appropriate for intervention on plurality grounds.

The DTI Guidance makes clear that the SoS would generally expect to intervene only in cases where the transaction would otherwise have been governed by media ownership rules which have been removed by the Communications Act 2003. The cases that come within this category relate to mergers involving:

- owners of national newspapers with a market share in excess of 20% and Channel 5;
- owners of national newspapers with a market share in excess of 20% and national radio;
- Channel 3 and national radio;
- Channel 5 and national radio;
- two national radio stations; and
- a takeover of a Channel 3 licensee.

None of the above scenarios would arise as a result of the proposed transaction.

The DTI Guidance also contemplates intervention in other "exceptional circumstances". The only such cases cited are ones where:

- a large number of news or educational channels would be coming under single control; or
- a single person were to take over all the music channels.

The proposed transaction would not give rise to either of these exceptional outcomes.

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1 Enders Submission, page 16.
2 Enterprise Act 2002: Public Interest Intervention in Media Mergers, Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004 ("DTI Guidance").

Nor is there any other reason to consider the proposed transaction to be "exceptional" and otherwise warranting intervention. In particular:

- there is no or no material overlap in the parties' activities in UK newspapers or television news; and
- neither of the parties uses any scarce spectrum resources or otherwise benefits from any special privileges (such as, for example, public funding).

See, further, 3 below.

2. THE THRESHOLD FOR INTERVENTION ON PUBLIC INTEREST GROUNDS IS HIGH AND IMPARTIALITY IS RELEVANT TO PLURALITY

The question for the SoS to decide is whether, following the proposed transaction, there would remain sufficient plurality of persons with control of each media enterprise serving each relevant audience.

2.1 **Threshold for intervention**

The DTI Guidance makes it clear that the threshold for intervention on public interest grounds is high. There is no statutory presumption that any particular level of reduction in plurality is contrary to the public interest. More specifically, this threshold would be met only if the transaction gave rise to "unacceptable levels of media and cross-media dominance"[3] and/ or a "***significant reduction in plurality*** in relation to any relevant audience" (our emphasis)[4].

As the Enders Submission in fact suggests and as confirmed by the DTI Guidance, the issue of plurality is fundamentally a concern about the ability to "influence opinions and ***control the agenda***" (our emphasis)[5].

Following the acquisition of the remaining shares in Sky that it does not already own, News would not be able to control the news "agenda" in relation to any relevant audience to justify intervention on plurality grounds. Most notably:

- Sky News has a very small share of overall viewing[6] and accounts for a relatively small share of television news viewing (4.9%[7]);
- Ofcom recognised that Sky News' share of UK television news remained "small in comparison to PSB news broadcasters."[8] This remains the case today. Audiences for all rolling news channels are, at any one time, a small fraction of those attracted to news on PSB channels; and
- there would remain sufficient alternative sources of viewpoints including traditional print, online, radio and TV each with their own distinct news and viewpoint presentations.

In fact, later paragraphs of the DTI Guidance raise the threshold for intervention in certain media public interest cases such as the present.

Paragraph 8.4 of the DTI Guidance suggests that there will rarely, if ever, be grounds to intervene in mergers affecting satellite broadcasters. Paragraph 8.8 of the DTI Guidance states that *"[i]n exceptional circumstances, the Secretary of State may consider it necessary to intervene in mergers in areas where there continue to be media ownership*

3 DTI Guidance, paragraph 7.7.
4 DTI Guidance, paragraph 7.11.
5 DTI Guidance, paragraph 7.7.
6 For each month from April to June 2010, Sky News' share of monthly multi-channel viewing was 0.7%, 0.9% and 0.6% respectively (source: BARB http://www.barb.co.uk/report/monthlyViewing?_s=4).
7 October 2006. Source: BARB/TNS Infosys, Magentum analysis, all hours. Cited in New News, Future News, The challenges for digital news after Digital Switch-over, 26 June 2007 (Ofcom), Figure 3.2.
8 New News, Future News, The challenges for digital news after Digital Switch-over, 26 June 2007 (Ofcom), paragraph 3.36.

rules or where there have never been such rules."[9] News is not aware of any relevant ownership rules that relate to the activities with which the proposed transaction is concerned. Paragraph 8.8 then goes on to make it clear that *the "Secretary of State will only consider intervening in such a merger where [he] believes that it may give rise to **serious public interest concerns**"* (our emphasis)[10].

In short, in assessing whether the proposed transaction gives rise to effects which are adverse to the public interest, regulatory intervention is justified only in "exceptional circumstances" in situations which give rise to "serious public interest concerns". It therefore falls to the SoS to identify any specific adverse effects on the public interest which are a direct result of the proposed transaction. The Enders Submission fails to establish such effects relying instead on speculation and assertion.

Annex II contains examples of speculative assertions from the Enders Submission as to how the proposed transaction could or might allegedly give rise to adverse public interest effects. Such assertions are unsupported by evidence.

2.2 Impartiality and plurality

Enders Submission

> *"It should be noted that impartiality is distinct from plurality. Section 5 of Ofcom's Broadcasting Code establishes a requirement of due impartiality in stories of a political or industrial nature by broadcast media (noting that no such requirement applies to newspapers, which are permitted to adopt editorial positions). In its Report to the Secretary of State on BSkyB's acquisition of ITV shares, Ofcom stated: 'These regulatory provisions, while they 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**"* (our emphasis)[11].

Comment

The Enders Submission distinguishes plurality from the requirement of impartiality. Whilst strictly correct, this approach ignores the practical relevance of the impartiality obligation for the protection of plurality for the following reasons:

- The requirement to maintain impartiality in the presentation of news necessarily contributes to maintaining balance and viewpoint diversity in the presentation of news by any one provider.
- The Competition Commission ("CC") acknowledged in the *Sky/ ITV* case that the requirement to maintain impartiality in the presentation of news reduces the scope for influence over editorial decisions by owners of television channels which broadcast news.[12] Furthermore, in the final decision by the SoS in that transaction, it was noted that separate regulatory mechanisms that impose specific standards relating to the quality of news provision are "relevant to an analysis of whether the range of information and views available to an audience may be adversely affected."[13]

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9 DTI Guidance, paragraph 8.8.
10 DTI Guidance, paragraph 8.8.
11 Enders Submission, page 16.
12 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, paragraph 5.54
13 Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group's acquisition of a 17.9% shareholding in ITV plc dated 29 January 2008, paragraph 18.

3. THE TRANSACTION DOES NOT ALLOW NEWS TO CONTROL MORE MEDIA IN THE UK THAN WOULD BE PERMITTED IN THE US AND AUSTRALIA

Enders Submission

> *"News Corp already owns more media in the UK than it is permitted to own in the US and Australia, the other two main markets for News Corp products, and the UK media market is often characterised as highly concentrated as a result"*[14].

Comment

A proper examination of the relevant legal regulatory contexts will reveal that this statement is incorrect.

US

There are no US antitrust precedents or US Federal Communications Commission ("FCC") regulations that prohibit common ownership and control of a pay TV provider (whether satellite direct distributor or terrestrial cable system operator) and a nationally distributed newspaper or locally/regionally distributed daily newspapers.

Nor is there any prohibition on cross-ownership by a vendor of regional or national pay TV programming with such newspapers. For example, the US Department of Justice and the FCC allowed News to acquire (although it later sold the business for business reasons) a substantial ownership interest in the largest US direct broadcast satellite pay TV operator (DirecTV), while News continued to own the NY Post newspaper, a broadcast network (Fox), various (Fox) broadcast stations in major cities, as well as interests in a number of cable programming networks distributed by satellite and cable in those same cities, and a movie and TV studio. Also News was allowed to acquire control of the nationally distributed Wall Street Journal newspaper while continuing to own these various TV-related interests.

In short, nothing said or done by the FCC in connection with any broadcast-newspaper cross-ownership matters suggests that the agency has any basis or interest in imposing cross-ownership restrictions on transactions such as the proposed transaction.

Australia

In Australia, broadcasting legislation (the Broadcasting Services Act 1992) prohibits the same person controlling *three* types of media (i.e. commercial radio, newspapers and commercial television) in the same city. However, this would not prevent a transaction such as the proposed transaction as there would be no concentration of all three types of platform that are regulated by the cross-media ownership rules (i.e. commercial television, commercial radio and newspapers).

4. ALLEGED BUNDLING

Enders Submission

> ***"First, products currently separately offered by BSkyB and News Corp titles may be combined in bundles, discounted or provided without charge.*** *For instance, BSkyB could bundle News International titles with monthly entertainment to its millions of customers in the UK. If this happens, long - held reader loyalty to titles such as The Mirror, The Daily Telegraph and even The Daily Mail could be severely tested. In other words, reader loyalty would be measured by a new and entirely different yardstick than previous competitor options, such as temporary price discounts or a new supplement. Strategic initiatives of this nature could lead to a much more rapid decline in competitor newspaper circulations than we have assumed, boosting News Corp's newspaper market share above 40% by 2014. Magazine publishers already know something*

14 Enders Submission, page 17.

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about this: Sky distributes 7.4 million copies every month of its magazine to subscribers of its TV services, making Sky the largest circulation magazine in the UK based on ABC data" (our emphasis)[15].

Comment

The alleged adverse outcomes put forward in the Enders Submission rely on speculation about possible future developments in the market based on the equally speculative theory that products currently offered by Sky and News titles may be bundled and that this may result in the progressive marginalisation of competing newspapers in the UK.

The initial premise is flawed. News has no plans to offer bundles of this type. A package offer of this type would have effects on the market for printed newspapers that would be no different from the effects were News to offer special discounts on subscriptions to its newspapers in the UK. If News wanted to attempt to increase newspaper circulation through this kind of promotional effort, it already has the means to do so (e.g., sending special offers in the post, magazine inserts, etc). News does not need control over Sky to offer this kind of discount on newspapers.

Moreover, even if such package deals were to occur, there is no basis for assuming that there would be any effect on media plurality. Hypothetical package offers involving subscriptions to Sky and subscriptions to newspapers owned by News would be unlikely to have any significant effect on newspaper market shares, much less any effect on the diversity and quality of viewpoints. In addition to the fact that newspaper readers in the UK and Ireland are very reluctant to switch from their preferred newspaper, if package offers ever threatened to attract more than a non-trivial share of the circulation of rival newspapers, these rivals could easily respond by making competitive offers, including possibly entering into strategic alliances that would allow them to offer their own bundles (e.g., The Mirror bundling newspaper subscriptions with subscriptions to Virgin Media services).

In any event, the impact (if any) of the proposed transaction on competition is an assessment that is properly conducted by the European Commission in the context of its exclusive review of the proposed transaction under the EU Merger Regulation ("EUMR") or, by the OFT, to the extent that there is a referral back to the UK[16]. Under Article 21(3) EUMR, "[n]o Member State shall apply its national legislation on competition to any concentration that has a Community dimension."

Pursuant to Article 21(4), EUMR Member States are given the right to take the necessary measures aimed at protecting certain "legitimate interests" (other than competition) that may be prejudiced by a concentration with a Union dimension. European case law has clarified that a Member State's intervention aimed at protecting legitimate interests, including those specifically recognised by Article 21(4), EUMR such as "plurality of the media", must be proportionate to its objectives, i.e. it should not go beyond what is strictly required to pursue its aim.[17] In the case of the proposed transaction, News submits that the speculative effects on media plurality put forward in the Enders Submission are too remote, tangential or unconnected with the proposed transaction to justify intervention by the SoS consistent with this requirement.

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15 Enders Submission, page 17.
16 Which News considers is not appropriate in the case of the proposed transaction.
17 See, for example, *BSCH/ Champalimaud*, Case M.1724, Commission decision of 20 July 1999.

Annex II

Unsupported assertions in the Enders Submission

This Annex contains examples of speculative assertions from the Enders Submission as to how the proposed transaction could allegedly give rise to adverse public interest effects. Such assertions are unsupported by evidence.

Emphasis has been added to highlight the speculative nature of the assertions and their foundation on hypothetical premises.

> *"First, products currently separately offered by BSkyB and News Corp titles **may be** combined in bundles, discounted or provided without charge. For instance, BSkyB could bundle News International titles with monthly entertainment to its millions of customers in the UK. **If this happens**, long - held reader loyalty to titles such as The Mirror, The Daily Telegraph and even The Daily Mail could be severely tested."* (page 17)

> *"Strategic initiatives of this nature **could** lead to a much more rapid decline in competitor newspaper circulations than we have assumed, boosting News Corp's newspaper market share above 40% by 2014."* (page 17)

> *"Once the News Corp purchase has been completed, stories from Sky News (especially video) will **presumably** be carried more and more frequently on News Corp websites. Links to newspaper stories **could** appear at the bottom of the Sky News screen. Progressively, News International papers and BSkyB channels, particularly Sky News, **may** merge into one stream of fact and opinion. **If this occurred**, plurality would decline, even if the combined organisation continued to maintain newsrooms that are nominally separate."* (page 17)

> *"The 2006 investigation by the regulators of the BSkyB purchase of ITV shares found no evidence of proprietor intervention in Sky News under its current shareholding structure, **but this could change** under full ownership."* (page 17)

> *"An attempt by a competitor to launch an alternative offering, or to compete directly against its channels, **could be impeded** by the failure of the News Corps titles to publicise the availability or pricing of competing services; or any systematic slant against its competitors and in favour of entities in News Corp or entities that are known to be supportive of News Corp."* (page 18)

> *"The proposed BSkyB transaction is likely to make it more difficult for even highly skilled regulators such as Ofcom to achieve this goal. **Should Ofcom's powers be materially reduced** in a new Communications Act, this concern would be exacerbated."* (page 18)

> *"**One illustration of how BSkyB could increase its dominance** yet further was provided by Sky Television's 2001 bid to provide ITV's national news services. The incumbent provider, ITN, battled successfully to retain the contract and still holds it today. **But if** Sky had won, ITN would have had to dramatically reduce its costs and reduce its news gathering operations around the world. Eventually its other main customer, Channel 4 News, **would probably** have been forced to obtain its material from elsewhere by using either Sky News or the BBC. Five switched to Sky News as its news provider in 2005, meaning that the BBC and Sky News **would** have been the only two significant national news providers in the UK. When the contract comes up for renewal in future years, **ITV could decide to switch** to a consortium led by BSkyB at any time."* (page 18)

29 September 2010

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[redacted]

[redacted]

From: Rees Andrew (CCP)
Sent: 05 October 2010 15:46
To: Cable MPST
Cc: Davey MPST; SPAD MPST; Chambers Sarah (CCP); [redacted] (CCP); [redacted] (LEGAL B); Perm Sec BIS; Kelly Bernadette (MPST DG); [redacted] (CCP); [redacted] (Communications); [redacted] (CCP)
Subject: RE: NEWSCORP/BSKYB

[redacted] On the NewsCorps/BSkyB case, to let you know we've just heard there is to be a further round of questioning between the European Commission and NewsCorps lawyers, and News Corps are now likely to file to the EC next week rather than this.

Andrew

Andrew Rees| Consumer and Competition Policy| Department for Business, Innovation & Skills |Tel: 7215 [redacted]

-----Original Message-----
From: Rees Andrew (CCP)
Sent: 01 October 2010 13:35
To: Cable MPST
Cc: Davey MPST; SPAD MPST; Chambers Sarah (CCP); [redacted] (CCP); [redacted] (LEGAL B); [redacted] (MPST MIN); Perm Sec BIS; Kelly Bernadette (MPST DG); [redacted] (CCP); [redacted] (Communications); Hendon David (IE); Warwick Ken (EPA); [redacted] (CCP); [redacted] (LEGAL B)
Subject: NEWSCORP/BSKYB

[redacted]

The Secretary of State has been considering carefully the range of representations put to him about the case for intervening on public interest grounds in the anticipated acquisition by Newscorp of 100% of the shares in BSkyB. He has had advice from officials, including [redacted] submission of 3 September, and has considered the written account of Counsel's advice which you said he found helpful. He met officials to discuss the representations and evidence on 26 August, and held a further meeting with them on 6 September. [redacted] further note of 16 September summarised the advice we received that morning from external Counsel on the legal basis for intervention, and I submitted the formal note of that conference with Counsel on 24 September. I now attach a note about a further submission by NewsCorps lawyers countering Claire Enders analysis, also including advice from Counsel on the merits of the points made. For ease of reference, I also attach a copy of the NewsCorps submission, and Counsel's earlier advice, although you already have copies. It would be helpful if the Secretary of State could now consider the latest submission from NewsCorps, alongside the other representations and advice from Counsel, and let us know his decision.

Andrew Rees

Andrew Rees| Consumer and Competition Policy| Department for Business, To Secretary of State

From Andrew Rees, CCP

Date 1 October 2010

Subject: Newscorp/BSkyB – Case for intervention

Issue

1. You have received a further submission from News Corps legal advisers countering the submission from Claire Enders arguing for a public interest intervention in the News Corps/BskyB case. We've taken further advice from Counsel who concludes that the latest submission does not change the essence of her earlier advice, namely, that the grounds to challenge an intervenion are not particularly strong given the significant discretion given the Secretary of State in deciding whether to intervene, and the non-determinative nature of that decision.

Action/timing

2. Urgent. NewsCorps lawyers tell us that they are likely to notify the deal to the EU Commission early next week – the timing having been delayed by further rounds of questions put by the EC. As previously explored, if an intervention were to be made, it should be announced as soon as possible after the deal is notified. It would therefore be helpful to have your decision on Monday, having considered carefully this further submission from Hogan Lovells, alongside the other representations, and advice from Counsel.

Background

3. The latest submission from NewsCorps lawyers, which is attached, argues that the Enders submission: presents a flawed and misleading view of the relevant legal and regulatory framework for the assessment of media public interest considerations; relies on unsupported and speculative assertions concerning the effects of the proposed transaction; and is founded on selective and, in certain instances, misleading market data.

4. BIS Legal forwarded News Corps submission to Counsel highlighting the accusation that Enders speculates on remote possibilities when she argues that the deal would affect media plurality. BIS Legal consider that a decision to intervene at this stage, which involves assessing whether media plurality may be a relevant concern in considering the impact of a proposed merger, has to involve some degree of speculation. Hence it is not unreasonable or ultra vires for the Secretary of State to consider what may happen, although this is a question of degree as clearly a decision based on a completely fanciful prospect could successfully be challenged.

5. Counsel responded along the following lines: *'I agree that the most significant point made by News Corporation in its submissions is that Enders Analysis refer to a number of potential effects of the merger which may be regarded as speculation. In deciding whether or not to intervene on public interest grounds in a merger, the Secretary of State will almost inevitably be required to take into account matters which are, at least for him, speculation. He has not had the benefit of a report arising out of an investigation and at this stage he must decide only whether plurality is or may be relevant to a consideration of the merger.*

That is not to say, of course, that he should place undue weight on highly speculative matters, and indeed he should take into account the fact that some of the concerns raised by Enders are merely speculation. This should be reflected in his reasons. However the most significant consideration in this case is that a large number of news outlets will be coming under single control as a result of this merger. That much is not speculation. The effects of a large number of news outlets coming under single control are at least to some extent necessarily speculative, and the effect of a decision by the Secretary of State to intervene is that those effects will be *investigated by Ofcom. On this basis, News Corporation's submission does not lead me to change the essence of the advice I have previously provided.'*

Special Advisers' (SpAds) advice
SpAds have been included on all exchanges to date on this matter.

Advice received from: BIS Legal

CC list: Davey MPST; SPADs; Permanent Secretary; Bernadette Kelly; David Hendon IE; Sarah Chambers CCP; [redacted] Stephen Amos Legal; [redacted] COMMS

Note by BIS Legal on NewsCorps submission of 29 September

Executive Summary:

1. The Enders Submission misunderstands and presents a flawed and misleading view of the relevant legal and regulatory framework for the assessment of media public interest considerations.

- The threshold for intervention at this stage is low, the question being whether the Secretary of State believes it is or may be the case that media plurality is a relevant consideration. Irrespective of Enders' arguments, this is our own assessment and the guiding principle for deciding whether to intervene.

- Although the Guidance does indeed suggest that intervention will occur only in exceptional circumstances (save in cases where media ownership rules have been removed by the Communications Act 2003) this merger, which involves a large number of news outlets coming under common control, could be said to qualify as an exceptional circumstance.

- The relative levels of plurality protection conferred by English, US and Australian law are not relevant to our consideration of whether media plurality may be relevant to this proposed merger.

- It is correct that media plurality concerns should be distinguished from competition concerns and that the European Commission will consider the impact on competition. Conversely, the fact that the impact on competition will be investigated does not mean any concerns about media plurality should be overlooked. Again, the question is whether media plurality is or may be relevant to the proposed merger.

- On the argument that intervention should not be driven by concerns about remote and speculative developments which might affect media plurality, it is inevitable that some speculation will be involved in assessing whether media plurality may be a relevant consideration (as the purpose of intervening at this stage is to initiate an investigation to assess whether media plurality is in fact a relevant concern). That the concerns may based on speculative or even remote developments should not prevent intervention at this initial stage.

- The existence of regulatory safeguards does not in itself provide a reason for not intervening, given that legislative framework clearly envisages a role for the Secretary of State in upholding public interest considerations (including media plurality).

2. The Enders Submission relies on unsupported and speculative assertions concerning the effects of the proposed transaction.

- As noted above, the test for initial intervention is whether media plurality is or may be a relevant consideration and assessing the future impact of a proposed merger must involve a degree of speculation. News Corporation suggests that the true test is to assess what qualitative change "would clearly" occur as a direct and immediate result of the proposed transaction. This appears to set the bar too high, bearing in mind that the assessment is whether media plurality is or may be a relevant consideration: qualitative changes which may occur can be assessed in determining this question.

- Whether or not the changes and outcomes predicted by Enders would occur, the question is whether the proposed merger creates the possibility that they will occur.

- Regardless of the editorial reputation of Sky News and the possibility that News Corporation would not wish to damage that reputation, the issue is whether the proposed merger creates a new opportunity – through the loss of independent Sky shareholders – to influence editorial coverage.

3. The Enders submission is founded on selective and, in certain instances, misleading market data

- We are not in a position to assess the accuracy of the data provided by Enders in support of its submissions. At this stage the question is whether the submissions provide grounds for believing that media plurality may be a relevant consideration.

Annex I

1. The DTI Guidance does not support intervention in the proposed transaction on public interest grounds

- The Guidance should not operate to fetter the Secretary of State's discretion and is not a substitute for the provisions of the Act, although it may create a legitimate expectation as to how intervention decisions will be approached.

- It is correct that the transaction does not fall within the "media ownership rules" cases listed in paragraph 8.2 of the Guidance, but it could fall within exceptional circumstances. Although paragraph 8.8 only cites two examples of exceptional circumstances, this is an indicative, not an exhaustive, list. The proposed transaction would involve a large number of new outlets coming under single control: Sky News (which supplies edited news broadcasts to Channel 5 and independent radio), national newspapers with a significant combined share of readership - and internet media. This is akin to one of the examples given in paragraph 8.8. This is good enough reason for considering the proposed transaction to be "exceptional".

2. The threshold for intervention on public interest grounds is high and impartiality is relevant to plurality

- At this initial stage, the threshold for intervention is not high. Under section 67 of the Enterprise Act 2002, the question for the Secretary of State to decide is not "whether, following the proposed transaction, there would remain sufficient plurality of persons with control of each media enterprise serving each relevant audience" but whether he believes that it is or may be the case that media plurality is relevant to consideration of the proposed transaction.

2.1 Threshold for intervention

- The Guidance is not a substitute for the provisions of the Act, which determine what the threshold for intervention is, although it can create a legitimate expectation as to how decisions will be approached. The quoted passages from the Guidance come from the Chapter explaining the scope of the broadcasting and cross-media provisions, as opposed to the threshold for initial intervention. So it does not supplant section 67.

- The observations on Sky News' share of overall viewing and alternative viewpoints do not appear to take account of the fact that Sky news is also provided to Channel 5 and local radio. Taking this together with the national newspaper titles, the merged entity would control a significant number of news outlets and as such would appear to be contemplated by the guidance on intervention.

- News Corporation suggests that, according to the guidance, the Secretary of State will only consider intervention in "exceptional circumstances" which give rise to "serious public interest concerns". However the guidance goes on to cite, as examples of such circumstances, cases where a large number of news channels come under single control, which is akin to this proposed transaction. News Corporation further assert that the Secretary of State must therefore identify specific adverse effects on the public interest which are a direct result of the proposed transaction. This obligation on the Secretary of State is not stated in, nor can it necessarily be implied from. the guidance. The Secretary of State must reasonably believe that a public interest consideration is or may be relevant: this may imply that he should foresee potential adverse effects on the public interest, but not that he should identify specific effect. There is no basis for saying the effects must be a direct result of the proposed transaction.

2.2 Impartiality and plurality

- Rules concerning impartiality of news presentation apply to all broadcasters under the Broadcasting Code. A change in ownership of BSkyB would not affect their application to BSkyB. The Hogan Lovells paper does not appear to contest that there is a distinction between impartiality and plurality. but does suggest that Enders fail to acknowledge the practical relevance of those rules on impartiality to "maintaining balance and viewpoint diversity in the presentation of news by any one provider". A substantive assessment of whether the merger actually had any negative impact on the sufficiency of plurality of persons with control of media enterprises would need to take into account the extent to which the applicable regulatory framework provided sufficient protection against outcomes detrimental to the public interest. But the simple existence of such rules does not appear to provide a particularly strong argument against initiating an investigation.

3 The Transaction does not all News to control more media in the UK than would be permitted in the US and Australia

- The relative levels of plurality protection conferred by English, US and Australian law are not relevant to our consideration of whether media plurality may be relevant to this proposed merger.

4 Alleged bundling

- The concerns about bundling appear to be relevant to the impact both on competition and media plurality. That the European Commission will investigate the former is not a valid reason for not considering the impact on the latter.

- It is not disproportionate to the objective of securing media plurality for the Secretary of State to intervene on the strength of a belief that media plurality may be a relevant concern with a view to obtaining an initial report from OFCOM and the OFT.

Annex II

As noted above, it seems inevitable that there would a degree of speculation in assessing whether a proposed transaction may have an impact on media plurality.

E-mail Message

From:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], [redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Wiskin Hannah (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=HWISKIN], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY] [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Parly Unit-Others [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=PBRANCH]
Sent:	08/10/2010 at 16:31
Received:	08/10/2010 at 16:31
Subject:	RE: Written Ministerial Statement for potential Newscorp Intervention
Attachments:	BSkyB Newscorp - text for a statement to Parliament Sept 2010.doc

[redacted]

As requested, I attach a draft statement that could be made to Parliament if the SofS decides to intervene in this case. Please note the aim would be to give Ofcom around 35 - 40 working days to report.

This would be a regulatory decision with the potential to impact on share prices. It is important to announce such decisions as soon as possible after they are made in a way that ensures all parties have access to the information at the same time. If a written ministerial statement is to be made, it is necessary to table the title of the statement the day before. If BIS tabling a written statement followed closely after an announcement that the deal had been filed with DG Competition, some Parliamentarians may guess the likely content of the statement. This could lead to press speculation. Accordingly, following discussion with Parliamentary Unit, our plan would be to table the title of the statement after 4pm when the stock market has closed, issue a press release at 07.00 as the market opens again, then release the written statement to Parliament about an hour or so later at 08.00 or 08.30.

[redacted]
CCP2
[redacted]

From: Cable MPST
Sent: 07 October 2010 18:07
To: [redacted] (CCP)
Cc: Rees Andrew (CCP)
Subject: Written Ministerial Statement for potential Newscorp Intervention

Hi [redacted]

Earlier we discussed whether we had all the paperwork in order in case the SoS decides that he would like to intervene in the Newscorp/BSkyB case once they eventually file with the EC. The one piece of information which had not yet been

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prepared was a Written Ministerial Statement. I know this isn't absolutely essential, but we spoke about the process which was followed when the last case of this sort came up (Sky/ITV) and I think the SoS will be keen to follow the same process this time around. He has expressed an interest in ensuring that Parliament is properly informed.

Please could you prepare a draft Written Miniserial Statement so it is ready if and when we need it?

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

BUSINESS, INNOVATION & SKILLS

Enterprise Act 2002

The Secretary of State for Business, Innovation and Skills (Dr. Vince Cable): I have today issued an intervention notice under section 67(2) of the Enterprise Act 2002 in respect of News Corporation's proposed acquisition of 100% of the shares in British Sky Broadcasting Group. Ofcom will now investigate whether there are any substantive public interest issues that may arise as a result of this transaction and report to me by [DATE].

The regulatory consideration of mergers is primarily a matter for the independent competition authorities. In this case, the European Commission is separately examining the merger under the EC Merger Regulation (139/2004) to establish whether it might result in an unacceptable impact on competition in the relevant market.

Having given careful consideration to the representations I have received, both from the parties directly concerned and from interested third parties, I believe that, in this case, it is appropriate for me to use the reserve power I have under the Enterprise Act to intervene in the merger. There are reasonable grounds to suspect that a relevant merger situation is in contemplation and I believe that one of the public interest considerations specified in the Enterprise Act may be relevant, namely the need for there to be a sufficient plurality of persons with control of media enterprises serving audiences in the UK. In reaching this decision, I have also had regard to the published Guidance on use of the power to intervene in media mergers. I am satisfied that circumstances of the kind envisaged in paragraph 8.8 of the Guidance may apply in this case.

I wish to emphasise that a decision to issue an intervention notice in respect of this transaction is not determinative of whether the transaction would give rise to any substantive public interest concerns. Intervention means Ofcom will undertake an initial investigation of the scope for the merger to impact on the public interest, allowing for a more substantive assessment of the arguments that have been put forward about this matter. Ofcom's report and summary of other representations will then be taken into account in taking a decision on whether to refer the transaction to the Competition Commission for fuller investigation.

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October 8, 2010

The Rt Hon Dr Vince Cable, MP,
Secretary of State for Business Innovation and Skills
1 Victoria Street
London SW1H 0ET

Dear Dr Cable

Proposed takeover of BSkyB by News Corporation

We understand that News Corporation is likely to notify the European Commission of, or otherwise formally to advance with, its intention to purchase the equity that it does not already own in BSkyB. Should this occur, we would ask that you refer the matter to Ofcom for further scrutiny of the relevant public interest considerations.

As representatives of a broad cross-section of the United Kingdom's communications and media industries, we believe that the proposed takeover could have serious and far-reaching consequences for media plurality.

We enclose an opinion from regulatory experts at Slaughter & May supporting the case for a referral on plurality grounds.

Yours sincerely

Mark Thompson
BBC Director-General

Ian Livingston
BT

Andrew Miller
Guardian Media Group

Kevin Beatty
Associated Newspapers Limited
Daily Mail, Mail on Sunday, Metro

Sly Bailey
Trinity Mirror Plc

Michael Pelosi
Northcliffe Media

David Abraham
Channel 4

Murdoch MacLennan
Telegraph Media Group

Signatories & Contact Details

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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.

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

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[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.

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.

- 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).

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.

[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 may 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.

Slaughter and May
7 October 2010

EC102670043

[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.

Dear Vince Cable,

We are pleased to hear that you might stand up to Murdoch and refuse to let his BSkyB takeover bid go through on the nod.

We know that his lawyers and lobbyists will be piling on the pressure. But please don't feel tempted to back down. We're signing the letter to you in our thousands to prove to you that if you do stand up to Rupert Murdoch, the public will support you.

Please don't give Rupert Murdoch even more control,

Yours,

18,956 38 Degrees members

38 DEGREES people, power, change

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14 October 2010

The Rt Hon Dr Vince Cable MP
Secretary of State for Business, Innovation and Skills and President of the Board of Trade
Ministerial Correspondence Unit
Department for Business, Innovation & Skills
1 Victoria Street
London SW1H 0ET

Dear Dr Cable,

I am writing to ask you to refer the proposed takeover of BSkyB by News Corporation to Ofcom for full scrutiny.

We at the FT believe the proposed move raises serious concerns about media plurality and cross-subsidy of media channels. In particular, we are concerned that the allocation of financial resources from TV to newspaper operations, and the scope for bundling TV channels with newspapers and websites, will distort the market for news media.

More broadly, we think this is a good and important time for Ofcom to consider its regulatory mission in light of the rapid evolution of the industry and the blurring of distinctions between media channels and operators.

I am attaching an opinion from Slaughter and May, which I think you may already have been sent by other media companies, and which articulates in more detail the sound case for your intervention and referral. We believe there is ample scope for a referral under the terms of the Enterprise Act 2002 (as amended by the Communications Act 2003).

Please don't hesitate to ask us for any further information or opinion.

Yours sincerely,

John Ridding
CEO, Financial Times

[DRAFT]

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 because of their ability to influence opinions and control the agenda. This broadcasting and cross-media public interest consideration, therefore, is intended to prevent*

[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.

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. "*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 competitors for competition law purposes.[10] Indeed, the EU Merger Regulation

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[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.

[10] Paragraph 7.3 DTI Guidance.

specifically provides for Member States to conduct their own parallel review of "legitimate interests" including "plurality of the media".[11]

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 used and most trusted platform for news:[12]

- There are only three significant suppliers of TV news: the BBC, ITN (supplying ITV and Channel 4) and BSkyB (supplying Sky News and Five).[13] These three providers supply virtually all TV news in the UK.
- The five main television channels (BBC, ITV, BSkyB, Channel 4 and Five) account for over 97.5% of television news viewing. We also note the Competition Commission's finding that day-to-day editorial control of output remains with the news provider.[14] 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.[15]
- Eight groups account for 100% of national newspaper circulation. News Corporation is by far the largest supplier, with a circulation of almost 8 million[16] and 37% of the audience.[17]

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[11] Article 21(4).

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

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

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

[15] 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)).

[16] ABC.

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

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.[18]

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:

- Although 40% owned by ITV, ITN's most recent accounts were heavily qualified, in part due to its pension deficit.
- News Corporation's share of national press circulation is forecast to increase by over 3% by 2014.[19]
- BSkyB's presence in pay-TV continues to grow rapidly, with net customer additions of 418,000 in the 12 months to June 2010.[20]

3.7 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,[21] it accounts for 67% of total UK residential subscriptions.[22] 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).[23] 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.

[18] 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.

[19] ABC and Enders Analysis forecasts.

[20] BSkyB Annual Report 2010.

[21] BSkyB Annual Report 2010.

[22] Enders Analysis.

[23] Enders Analysis.

- BSkyB's ability to generate cash (its revenues were almost £6bn last year) could support a campaign of "predatory pricing" by News Corporation newspapers.[24]

The Takeover will further reduce plurality

3.8 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.

3.9 A further threat to plurality arises from the Takeover's effect on cross-media dynamics. Specifically, the takeover of a broadcaster by a newspaper group seriously threatens the ability of the most diverse section of the national media (the newspapers) to inject plurality into the very consolidated broadcast media. Newspapers are an important source of stories covered on broadcast news[25] – this currently allows the newspapers to influence the agenda beyond their comparatively small direct audiences. This relies however on broadcasters being independent and selecting newspaper stories even-handedly. 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.

3.10 The Takeover's impact on plurality is likely to be even more serious in respect of some audiences. For example, the Competition Commission has found that News Corporation is especially dominant in the supply of news to the C2DE socio-economic groups.[26]

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

[24] BSkyB Annual Report 2010.

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

[26] Paragraph 5.49 Competition Commission report into BSkyB/ITV

Puttnam, who as Chair of the Joint Committee on the Communications Bill proposed two successive sets of amendment to introduce a media plurality consideration.[27]

4.2 In a recent article in The Observer[28] 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 referrals in relation to takeovers and mergers involving TV, radio and newspaper companies".

<u>Government guidance</u>

4.3 Consistent with the legislation, a sensible reading of the Guidance (as outlined above), suggests that the Secretary of State should intervene.

4.4 The Guidance does suggest that intervention would not normally be made in relation to mergers where there has not been any media ownership rules.[29] However, 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

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

[28] The Observer 19th September

[29] Paragraph 8.2

Channel 5 licence holder. And yet Five has a lower viewing share than BSkyB's[30] 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 that some of the transactions previously prohibited by Broadcasting Act 1990.

4.5 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.

4.6 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).[31] 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[32] 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)[33] are part of a

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[32] Section 58A(4).

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"merger situation" and thereby "cease to be distinct " (which includes a move from 39% to 100%) then:

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"*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[36] went on to clarify:[37]

"*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:

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[34] 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*".

[35] BSkyB v Competition Commission paragraph 53.

[36] Paragraph 121.

[37] Applying Section 58A(5).

(i) As a matter of law, the directors of BSkyB have an duty to promote the success of the company, for the benefit of the shareholders as a whole.[38] 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.

(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.[39] 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*".[40] 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.[41] Since jurisdiction only arises under the European Union Merger

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[38] Section 172 Companies Act 2006.

[39] Page 38 BSkyB Annual Review 2010.

[40] Paragraph 5.57 Competition Commission report into BSkyB/ITV

[41] News Corporation announcement dated 15 June 2010.

Regulation in the event of a change of control of the target company,[42] 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.

(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. News Corporation accounts for 37% share in the supply of national newspapers.

(iv) The Takeover would therefore combine one of the three broadcast 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).[43]

(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 only exceptionally would the Secretary of State consider intervention other than in cases where media ownership rules have been removed by the Communications Act 2003. The Secretary of State cannot hide behind that statement (which does not have force of law). To do so, would cut across both the Guidance more generally and the clear purpose behind the public interest regime. It would have bizarre consequences (as outlined above) and would therefore fail to meet basic public law requirements of reasonableness.

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

[43] The Takeover would give BSkyB the ability and incentive to favour stories in News Corporation newspapers.

(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.

Slaughter and May
[30 September 2010]

EC102670043

BIS | Department for Business Innovation & Skills

The Rt Hon Vince Cable MP
Secretary of State for Business, Innovation and Skills

Our ref: 218988
Your ref:

Ian Livingston
BT Group
BT Centre
81 Newgate Street
London
EC1A 7AJ

14 October 2010

Dear Mr Livingston

Thank you for your further letter of 16 September about News Corporation's plans to acquire 100% of the shares in British Sky Broadcasting (BSkyB). I will take your representations into account in considering whether to intervene in this merger on public interest grounds.

VINCE CABLE

1 Victoria Street, London SW1H 0ET
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BIS | Department for Business Innovation & Skills

The Rt Hon Vince Cable MP
Secretary of State for Business, Innovation and Skills

Our ref: 220292
Your ref:

Mark Thompson
Director-General
BBC
Room 5126
White City
201 Wood Lane
London
W12 7TS

20 October 2010

Mark

Thank you for your letter of 8 October enclosing analysis by Slaughter & May of the case for a public interest intervention in respect of News Corporation's plans to acquire 100% of the shares in British Sky Broadcasting Group. I will take this analysis into account in reaching a decision on whether to intervene in this merger.

VINCE CABLE

Cc:

Ian Livingston, BT
Andrew Miller, Guardian Media Group
Kevin Beatty, Associated Newspapers Limited Daily Mail, Mail on Sunday, Metro
Sly Bailey, Trinity Mirror Plc
Michael Pelosi, Northcliffe Media
David Abraham, Channel 4
Murdoch MacLennan, Telegraph Media Group

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Capital Research and Management

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Phone (213) 486 9200
Fax (213) 615 0430

ccp.

October 22, 2010

The Right Honorable Vince Cable
Secretary of State
Dept of Business, Innovation, and Skills
1 Victoria Street
London SW1 0ET
United Kingdom

Dear Mr. Cable,

I am writing to express our strong support for News Corp's current bid for the 61% of the British Sky Broadcasting they do not own.

Capital Research and Management Company is one of the leading investment management organizations in the world. It manages assets through two divisions that operate separately, Capital World Investors (CWI) and Capital Research Global Investors (CRGI); combined they manage over US$1 trillion. The organization was founded in Los Angeles in 1931 and has had significant presence in London since 1979. We are long term investors and currently have in excess of US$50 billion invested in the equity markets of the United Kingdom. The client mutual funds of CWI and CRGI have been among the largest shareholders in British Sky Broadcasting for several years, with a current stake of approximately 5%.

The proposed privatization of British Sky Broadcasting by News Corp has attracted considerable commentary from the press and competitors. As significant long term investors, we very much hope that any decision on intervention by the Government on the issues of public interest and plurality will be made solely on the basis of law and clear precedent.

Specifically, in the recent review of BSkyB's stake in ITV by OFCOM and the Competition Commission, News Corp was deemed to control BSkyB through its 39% stake. In the assessment on plurality of news, the Competition Commission determined that plurality was not affected. Both BSkyB and minority shareholders lost hundreds of millions of pounds due to the required partial divestment of BSkyB's ITV stake. To now revisit the conclusions of OFCOM and ultimately the Competition Commission would be both unnecessary and unfair toward one of the most innovative companies in the UK and its shareholders.

The threshold for intervention on plurality grounds is extremely high, especially since this transaction will be reviewed in detail from a competitive perspective. Among many factors, the strict impartiality requirements of the OFCOM Broadcasting Code, the emergence of the internet as an important source of news, the relatively small share of Sky News of television viewing, and the competitive intensity from various media groups will certainly ensure that the UK media and news industries remain vibrant and diverse.

We thank you for the opportunity to express our views.

Sincerely,

Paul G. Haaga, Jr.
Chairman of the Board

E-mail Message

From:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc:	
Sent:	12/01/2011 at 12:11
Received:	12/01/2011 at 12:11
Subject:	FW: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest
Attachments:	Submission.pdf Annex I.pdf

From: [redacted] [mailto:[redacted]@hoganlovells.com]
Sent: 27 October 2010 18:46
To: [redacted] (CCP); Rees Andrew (CCP); [redacted] (CCP)
Cc: [redacted]
Subject: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

Confidential

Gentlemen,

Please find attached a further News submission to the Secretary of State and supporting annex containing a draft of the third party submission to which this submission responds.

Best regards

[redacted]
Counsel

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

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News Corporation/British Sky Broadcasting

Public Interest Intervention

Rebuttal to Third Party Submission

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 News Corporation ("News") has already provided written submissions to the Secretary of State for Business, Innovation and Skills ("SoS") as to why there is no proper basis for the issuing of a public interest intervention notice in respect of News' proposed acquisition of full legal control of British Sky Broadcasting Group plc ("Sky") (the "Transaction").

1.2 News understands that the BBC, BT, Guardian Media Group, Associated Newspapers, Trinity Mirror, Northcliffe Media, Channel 4 and the Telegraph Media Group (the "Joint Complainants") have recently made a formal submission to the SoS urging the SoS to issue a public interest intervention notice, on grounds that the Transaction threatens media plurality in the UK (the "Submission").

1.3 Whilst News has not seen the final version of the Submission, it has obtained a copy of a draft of the Submission, which has apparently been circulated widely (and provided independently to the merging parties). A copy of the draft is enclosed at **Annex I.**

1.4 News sets out below its brief comments on certain erroneous and misleading statements contained in the draft Submission. To the extent that the final version of the Submission differs from the draft, News would wish to have an opportunity to comment on the final version, and invites the SoS to provide a copy of the Submission to News for that purpose.

1.5 In summary, News considers that:

(a) The Submission mis-states the law (and, in particular, the statutory basis for a media public interest intervention) in an attempt to raise doubts in relation to plurality when the Transaction raises no such issues. Contrary to the assertion that there is a "low standard" for intervention on media public interest grounds, the DTI Guidance[1] makes it clear that the threshold for intervention on media public interest grounds is high. The Transaction falls squarely within the letter and spirit of the DTI Guidance which makes clear that the Transaction is precisely the type of case where the UK policy is not to intervene (e.g. mergers involving satellite and cable TV and radio services which are cited in the DTI Guidance or mergers involving a newspaper publisher and a satellite TV provider as is the case in the current Transaction), unless there are exceptional circumstances.

(b) With regard to plurality concerns, the Transaction could only materially affect a cross-media audience, since News is not a TV or radio broadcaster and Sky is not a newspaper publisher and, in fact, there is no prospect of any reduction of cross-media plurality as a result of the Transaction.

(c) The possibility of a reduction of cross-media plurality was considered by the SoS following a comprehensive report of the Competition Commission ("CC") in the Sky/ITV transaction which ultimately **excluded** any reduction in plurality in both TV and cross-media audiences even though it assumed, for the purposes of

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[1] Enterprise Act 2002: Public Interest Intervention in Media Mergers, Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004 ("DTI Guidance").

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assessment, that Sky was already under the control of News Corporation together with News International and where ITV, an important UK broadcaster, was also assumed to come under Sky's control as a result of material influence.

(d) It is scarcely credible to see how an increase in the quality of News' control of Sky can give rise to plurality concerns in relation to a cross-media audience, which is the only audience relevant to this Transaction. But even if, for the sake of argument, the SoS' assessment were to proceed on the basis that the Transaction would lead to a material change in the control exercised by News over Sky and Sky News were to lose its current editorial independence (which is denied), such a reduction in cross-media voices would not materially impact plurality. Sky News has such a small share of TV viewing that the test for intervention in relation to any relevant audience would clearly not be met. In addition, the enforcement procedure of the regulatory framework which protects impartiality is well-established and has been implemented in practice.

(e) The Joint Complainants seek to dress up alleged competition issues (such as predation and bundling) as plurality concerns to encourage the SoS to intervene. However, where a merger is subject to the exclusive jurisdiction of the European Commission (the "Commission"), the SoS has no legal powers to intervene ostensibly on plurality grounds where the underlying alleged issue is one of competition law.

Confidentiality

1.6 Certain of the contents of this submission are confidential to News and the contents of this submission should not be disclosed to third parties without News' prior written consent.

2. STANDARD FOR PUBLIC INTEREST INTERVENTION

2.1 The Joint Complainants submit that the threshold for the issuing of a public interest intervention notice is low, citing the permissive wording of the Enterprise Act 2002 ("EA02") in support.[2]

2.2 In fact, the converse is true for the following reasons:

(a) EA02 *empowers* the SoS to issue an intervention notice where he believes that it "may be" the case that a public interest consideration is relevant, but *does not oblige* him to do so.[3]

(b) There is no presumption that any merger of two media enterprises will raise public interest concerns, such as to justify the issuing of a public interest intervention notice.

(c) The DTI's Guidance makes clear that, save in exceptional circumstances, the SoS will intervene only in cases where, prior to the enactment of the Communications Act 2003 ("CA03"), there were statutory restrictions on the accumulation of ownership interests in particular media enterprises.

2.3 There were no such restrictions on News' acquiring outright legal control of Sky under the pre-CA03 rules. This reflected the fact that, as a satellite broadcaster, Sky does not

2 Submission, Section 2.1.

3 In contrast to the mandatory wording of sections 22 and 33 EA02 in respect of references to the CC on competition grounds.

control any scarce spectrum resources, or benefit from public funding, or fulfil any public interest functions. The fact that a transaction amounts to a "cross-media merger" does not, in itself, imply that there will be a case for issuing a public interest intervention notice.[4]

2.4 Where the SoS undertakes an initial assessment as to whether to issue a public interest intervention in any particular case on the basis of concerns as to the effect of the transaction on the plurality of the media, he will consider that question by reference to the transaction's potential effect on the plurality of providers of news, or of educational services.

2.5 Thus, among Sky's activities, it is only Sky's news services that are potentially relevant to a public interest assessment. Sky's growth and revenues are not driven by news. Indeed, Sky News is offered as a free to air service, and generates no subscription revenues from direct to home viewers. For the reasons outlined in this submission, it is clear that the joint ownership of Sky's news services with News' newspaper interests poses no threat to plurality of news media.

2.6 As indicated in **Table 1** below, since the DTI Guidance was issued in 2004, the position of Sky in the supply of news is not materially different and has, in fact, declined.

Table 1: Annualised Sky News share of viewing

	2004	2005	2006	2007	2008	2009
Sky News Share (%)	0.63	0.64	0.53	0.54	0.46	0.56

Source: BARB, derived from data in respect of all multi-channel homes

2.7 In short, the DTI's Guidance specifically contemplates that there will generally be no basis for a public interest intervention in a case such as the present, namely a merger of a satellite TV broadcaster and a newspaper publisher.[5] Nor are there any other factors which suggest that the present Transaction gives rise to any exceptional circumstances. The only examples of exceptional circumstances cited in the DTI Guidance are those where a large number of news or educational channels would be coming under single control or a single person were to take over all the music channels.

2.8 In light of the above, the Joint Complainants' thinly veiled threats of judicial review litigation are unworthy and have no place in a serious intellectual debate of the issues. Far from failing to meet public law requirements as alleged by the Submission[6], on the facts, a non-intervention decision would be legally correct, reasonable and the outcome of a balanced process in which third parties have expressed their concerns and the SoS has assessed those concerns strictly on their merits.

3. THE EFFECT OF THE TRANSACTION ON MEDIA PLURALITY

The Transaction will not produce a substantial effect on media plurality

3.1 The Joint Complainants submit that the Transaction will produce a substantial effect on plurality of news media on the basis that there are presently few sources of TV news, few

4 See, further, News' submission to BIS of 29 September 2010, Annex I, section 1.
5 See, further, DTI Guidance, paragraphs 8.4 to 8.8.
6 Submission, paragraph 4.5.

sources of radio news and concentration can be expected to increase in the provision of news, even in the absence of the Transaction.[7]

3.2 The Submission gives a simplistic presentation of the legal basis for intervention and the need, in any event, for a *qualitative* assessment of the effect on media plurality. Both sections 58 and 58A EA02 must be read in the context of the legislation as a whole. Section 58A(5) EA02 does not have an overriding effect and does not exclude a consideration of the extent of any control actually exercised or exercisable by one enterprise over another in the course of the qualitative assessment of media plurality under section 58(2C)(a). The need for such a qualitative assessment is ignored in the Submission.

No material impact on a cross-media audience

3.3 In addition, the Submission fails to frame the question within the required statutory context for the relevant public interest consideration. In particular, it does not attempt to identify the relevant audience for the plurality assessment as required by section 58(2C) EA02, which defines the relevant public interest consideration as follows:

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

3.4 The Transaction involves Sky, which is a TV and radio broadcaster, and News, which is a UK newspaper publisher. By definition, the only audience affected by the Transaction is a cross-media audience.

3.5 A cross-media audience has, and will continue to have post-Transaction, access to a wide variety of voices, controlled by a large number of different media enterprises.

A socio economic group is not an "audience" and, in any event, it is not affected differently from the UK population as a whole

3.6 The Submission speculates that the effect of the Transaction on plurality in respect of some audiences would be more serious.[8] A socio-economic group is not a relevant audience for a plurality assessment since members of any one socio-economic group have access to the same choice and plurality of media as the population as a whole.

3.7 In any event, the Submission provides no evidence in support of any reduction of plurality on that basis. In the Sky/ITV CC report, the CC assumed that News already "controlled" Sky. In that report:

(a) The CC did **not** consider that News was **dominant** in relation to C2DEs or in the UK as a whole (as misleadingly claimed in the Submission). It simply cited shares of viewers in various segmentations without concluding that such segmentations correspond to properly defined economic markets or, in the case of socio-economic categories, relevant "audiences" for plurality purposes. The CC described its process as follows:

> "*We looked at both national television news and cross-media news (obtained via television, radio, newspapers, magazines and the Internet) and the diversity of audiences for each. We also looked at the diversity of behaviour* ***within audiences—for example, variation in terms of location and socio-economic***

[7] Submission, Sections 3.1 ff.
[8] Submission, paragraph 3.10.

***group**. While the parties do not overlap in the provision of regional news, we considered whether the acquisition was likely to have a differential effect on news audiences in the regions or nations of the UK, including Scotland, Wales and Northern Ireland*" (our emphasis).[9]

(b) After reviewing data from TGI and Touchpoints[10], the CC found "***no fundamental differences in the significance of ITV, BSkyB and News International to particular sections of the UK population***". Nor did the CC find "***any fundamental differences in the significance of ITV, BSkyB and News International between nations within the UK***".[11]

Sky News has very small shares of TV news and the Transaction does not reduce plurality for TV or radio audiences

3.8 The Submission is misleading in its statement that "[t]here are only three significant suppliers of TV news: The BBC, ITN (supplying ITV and Channel 4) and BSkyB (supplying Sky News and Five)".

3.9 In fact, the CC noted, in its final report on the Sky/ITV transaction, that the "BBC is by some margin the most widely viewed channel provider for news, followed by ITV".[12] Post-Transaction, the BBC and ITV will remain significant independent sources of TV news with over 85% of TV news viewing share.

3.10 In addition, and contrary to the misleading statements in the Submission, Sky does not determine the editorial policy of any other major television news broadcaster. Although Sky provides raw news data and content to Five, Channel 5 Broadcasting Limited controls the editorial policy of its channels, including any news programming, and is the regulated broadcasting service provider under the CA03. In its final report on the Sky/ITV transaction, the CC emphasised the ultimate responsibility of the channel operator in matters of editorial responsibility.[13] This has a direct bearing on plurality, as it is the channel operator (i.e. Five in the example quoted by the Joint Complainants) and not the news service provider (Sky) who is responsible for strategic editorial decisions and who remains accountable for the news that is presented on its channels.

3.11 Finally, Sky News has very small shares of TV news viewing, as indicated in **Table 2** and **Table 3** below. To suggest that it is on a par with the BBC and ITV is self-evidently a device to inflate its apparent importance.

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9 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, paragraph 5.34.

10 It should be noted that the CC recognised that the data it used "will ...tend to overstate the importance of those channels that are included (including Sky News) and understate the importance of the BBC and, to a lesser extent, ITV" (Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, Annex I, paragraph 9).

11 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, paragraph 5.50.

12 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, paragraph 5.45(a).

13 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, paragraph 5.55.

Table 2: Share of TV news viewing, October 2006

Broadcaster	BBC1	BBC2	BBC24	ITV1	C4	Five	Sky News	Others
Share (%)	50.6%	4.6%	5.2%	26.8%	4.5%	2.8%	4.9%	0.6%

Source: BARB/ TNS infosys, Magentum analysis, All Hours. Cited in New News, Future News, The challenges for digital news after Digital Switch-over, 26 June 2007 (Ofcom), Figure 3.2.

3.12 The position is not materially different today.

Table 3: Share of multi-channel viewing, June to August 2010

Broadcaster	Share of total viewing (%)		
	Jun 2010	**Jul 2010**	**Aug 2010**
BBC1	21.4	21.4	19.6
BBC2	6.8	7.3	6.9
ITV1	18.2	14.5	14.5
Channel 4/S4C	5.9	6.5	6.4
Five	4.4	4.4	4.5
Sky News	0.6	0.7	0.5
BBC News	1.0	1.0	0.9

Source: Extracted from BARB at: http://www.barb.co.uk/report/monthlyViewing?_s=4

3.13 It is also misleading to assert that there are "only two significant suppliers of national radio news: the BBC and BSkyB".[14] Since 2009, Sky has held the contract for the supply of news content to Independent Radio News (IRN), the next largest player in radio news after the BBC, which supplies news to its own 57 licence fee funded radio stations and accounts for 54% share of total listening.

3.14 The current agreement, which commenced in March 2009 and expires in March 2012 is, in essence, a wholesale news content supply agreement. Under the terms of the IRN contract, Sky provides IRN and its client stations with a range of news content options, ranging from hourly live two minute news bulletins to collections of interviews, audio news stories and scripts which can then be collated by radio stations into unique news bulletins tailored for local audiences.

3.15 Consequently, it is an over simplification to claim that Sky News and IRN should be treated as being one and the same for plurality purposes. Sky News supplies news programming content under contract to IRN which in turn makes it available for use by its

[14] Submission, paragraph 3.3.

client stations. This is a qualitatively different arrangement from the supply of news content directly to stations by Sky and from that described in the Submission:

(a) stations are free to adopt a model in which they exercise editorial control over their news bulletins, whether or not such bulletins use the Sky material;

(b) subject to any agreement with any news aggregator such as IRN, stations are free to change the means by which they provide their news bulletins if they so wish (i.e. they can cease taking IRN's service and use alternative sources of news); and

(c) Sky was awarded the contract following public tender, bidding against the Press Association and ITN (the incumbent). IRN can be expected to reassess its needs and the service provided by Sky when the contract expires in 2012.

There is no reason to expect that the supply of cross-media news will become more concentrated

3.16 The Joint Complainants predict that, even without the Transaction, "the supply of news is expected to become more concentrated".[15] However, the Joint Complainants offer no proper evidence to support this statement.

3.17 In fact, the Joint Complainants' "evidence" as to the likely evolution of Sky's and News' shares of supply is entirely unconvincing:

(a) The evidence cited as to Sky's growing presence in pay TV, with net customer additions of 418,000 in the twelve months to June 2010, provides no support for the proposition that the supply of news will become more concentrated. Sky's growth and revenues are not, in any event, driven by news. Indeed, Sky News is offered as a free to air service, and generates no subscription revenues from direct to home viewers.

(b) So far as relates to News, the Joint Complainants rely on a prediction that News' share of the national press is expected to increase by over 3% by 2014, some three to four years after the Transaction. This prediction is sourced from Enders Analysis. It will be clear from News' submission to BIS of 29 September 2010 that Enders Analysis provides no reliable basis for intervention. But, in any event, even if correct, a 3% increase over three to four years is hardly spectacular or exceptional.

(c) Conversely, the Joint Complainants discount the significance of the "dramatic increase in the number of outlets providing news content in particular over the internet"[16], which increase would diminish the significance of any concentration which might otherwise occur.

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15 Submission, Sections 3.6 ff.

16 Submission, paragraph 3.6.

The Transaction will not affect cross-media dynamics by enabling the merged group to favour its own titles to the detriment of rivals

3.18 The Joint Complainants argue that "the takeover of a broadcaster by a newspaper group seriously threatens the ability of the most diverse section of the national media (the newspapers) to inject plurality into the very concentrated broadcast media."[17]

3.19 Whilst the wording of this sentence is somewhat obscure, it appears from the Joint Complainants' ensuing comments that they are concerned that separate ownership of newspaper and TV news enterprises encourages TV news providers to source their news stories from a diverse range of newspapers, and that the Transaction would lead to Sky News relying instead on News' newspapers as a source of news stories.

3.20 Such a concern cannot be substantiated:

(a) Sky News has a reputation for the quality of its new coverage and for its editorial independence, and its audience share is, in part, dependent on the maintenance of that quality and reputation. If Sky were to favour News-originated stories and ignore stories aired by other media enterprises, which audiences judge to be newsworthy, Sky News' reputation would decline, and its audience share would suffer. It is therefore difficult to imagine that Sky would choose to pursue such a strategy.

(b) Even if Sky chose to ignore news stories originating from non-News newspapers, many other TV and radio broadcasters would remain free to adopt and report on such stories.

(c) The Joint Complainants' argument rests on various assumptions as to the interaction between newspapers and television news which are simply not true. Most notably, the Joint Complainants appear to assume that the content of TV news services is derivative of the content of print newspapers. This is demonstrably untrue: as the CC found, commonality of news content across print and TV media arises, in part, from their common use of ultimate sources. TV news is not generally derived from newspaper sources.[18]

News' proposed acquisition of legal control of Sky will not give rise to "*unacceptable levels of media and cross-media dominance*", and/or "*a significant reduction in plurality in relation to any relevant audience*"

3.21 The Joint Complainants suggest that News' existing interest in Sky (which already confers on it an ability materially to influence the policy of Sky) does not obviate the need to assess whether a move to outright legal control of Sky will adversely affect the plurality of the media. It suggests that, with outright control and 100% ownership, the legal relationship between News and Sky will be fundamentally different.[19]

3.22 News' 100% ownership of Sky means only that there is, in technical terms, a merger situation, which falls to be examined as to whether it merits the issue of a public interest intervention notice. It does not address whether there are substantive grounds for the issue of such a notice.

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17 Submission, Sections 3.9 ff.

18 Acquisition by British Sky Broadcasting Group plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR) 14 December 2007, paragraph 5.45(d).

19 Submission, Sections 5.1 ff.

3.23 For the reasons outlined in this submission, there is no good reason for a public interest intervention in this case:

(a) This is not a case in which the DTI's Guidance contemplates that there should be an intervention (see, further, paragraph 2.2 above).

(b) Sky News has only a small share of the total audience for TV news, and does not exercise editorial control over any other news provider. Other TV news providers are much larger and more significant in terms of their "voice". There are numerous newspaper enterprises offering print news coverage, other than News, and other third party providers of radio news (to which sector Sky is a new entrant). There are increasingly numerous sources of news on the internet (see, further, paragraphs 3.8 to 3.15 above).

(c) There is a strong culture of editorial independence within UK television news production which will continue to be effective in protecting independence and diversity of views. In its assessment of the Sky/ITV transaction, the CC noted that the "*evidence ... received suggested to [the Competition Commission] that there was a strong commitment to editorial independence across television news broadcasting which would* ***lead to editors resisting any direct board intervention or intervention from shareholders to set the news agenda***" (our emphasis).[20]

(d) The Submission cites the finding of the CC that the latter "received ***no evidence from third parties to suggest that senior executives at BSkyB or its parent companies exerted influence on the Sky News agenda***" (our emphasis).[21] However, the Joint Complainants fail to recognise the full implications of this finding. It is not the independent directors of Sky who safeguard Sky's viewpoint diversity but its editors.

(e) Sky News' reputation for "balance, fairness and accuracy" is well recognised and News would not seek to compromise that reputation or, thereby, to undermine an important selling point for Sky News.[22] (See, further, paragraph 3.10 above).

(f) In addition, the regulatory framework reduces the scope for undue influence over editorial content by owners of TV news channels. This regulatory framework will continue to operate as an effective safeguard of impartiality (which in turn protects plurality):

(i) The obligations are clearly defined and established (i.e. the requirements of due impartiality in Ofcom's Broadcasting Code which includes a set of principles and rules to be followed by broadcasters[23]).

(ii) The sanctions for non-compliance can be severe. Ofcom has a wide range of sanctions at its disposal including financial penalties of up to the

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20 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, paragraph 5.68.

21 Acquisition by British Sky Broadcasting Group Plc of 17.9% of the shares in ITV Plc, Report sent to Secretary of State (BERR), 14 December 2007, paragraph 5.57. Cited at Submission, paragraph 5.6.

22 For example, in the context of the Sky/ITV transaction, during a hearing on plurality with media experts held on 11 July 2007, testimony was given at paragraph 21 that "*Sky News operated within a very British regulatory model whereas newspapers were self-regulated. There had been very few examples where Sky News had taken 'the Murdoch line' on anything [ ]. There was a difference between a news agenda and the way individual stories were covered.* ***People really focused on balance, fairness and accuracy within individual stories, but a day-to-day editor had the ability through the agenda to take it in a particular direction***" (our emphasis).

23 See, further, Ofcom Broadcasting Code, September 2010, where section 5 deals with impartiality.

greater of £250,000 or 5% of the broadcaster's qualifying revenue. Ultimately, the broadcaster's licence may be revoked.

(iii) The enforcement procedure is well-established and has been implemented in practice.[24]

3.24 In short, whilst the Transaction will bring Sky under the full legal ownership and control of News, it will not, on any analysis,:

(a) give rise to "***unacceptable*** *levels of media and cross-media dominance*", and/or

(b) "*a* ***significant*** *reduction in plurality in relation to any relevant audience*".

4. **INTERVENTION IN RELATION TO COMPETITION ISSUES WOULD BE INCOMPATIBLE WITH EU LAW**

4.1 The Submission states that "[i]t is clear that the competition review is not a substitute for a proper consideration of media plurality".[25] However, the Joint Complainants fail to take account of the implications of this for the purposes of a plurality review of the Transaction.

4.2 Where, as here, a merger is subject to the jurisdiction of the Commission, the SoS has no legal powers to intervene ostensibly on plurality grounds where the underlying alleged issue is one of competition law. Plurality cannot be used to replicate the Commission's competition law review.

4.3 The impact (if any) of the Transaction on competition is an assessment that is properly conducted by the Commission in the context of its exclusive review of the Transaction under the EU Merger Regulation ("EUMR") or, by the OFT, to the extent that there is a referral back to the UK.[26] Under Article 21(3) EUMR, "[n]o Member State shall apply its national legislation on competition to any concentration that has a Community dimension."

4.4 If the Commission considers that, for example, the Transaction will not give rise to foreclosure effects vis-a-vis competing newspapers (which News submits will be the case), then those same theories of harm cannot be considered a valid basis for intervention to consider a concern about a reduction in the number of media voices when evaluating the factual situation post-Transaction.

4.5 In any event, for the reasons outlined below, the Submission relies on unsupported and speculative assertions concerning the possible effects of the Transaction on rival newspapers.

Predation

4.6 The Joint Complainants suggest that the cash flow generated by Sky could be used by News to support a campaign of predatory pricing by the UK newspapers owned by News.[27] Such concerns are misplaced.

(a) News does not need to increase its ownership interest in Sky to be an effective competitor in the UK newspaper industry. News is a financially strong company that would be fully capable of making necessary investments in marketing and promotion whether or not it increases its ownership interest in Sky. In any event, News International is currently profitable and is not being subsidised.

24 See, for example, the recent case involving Islam Channel Ltd where a fine was imposed for breach of section 5 of the Broadcasting Code.

25 Submission, paragraph 2.8.

26 Which News considers is not appropriate in the case of the Transaction.

27 Submission, paragraph 3.7.

(b) The suggestion that the Transaction will increase the funds that News will have available to invest in a predatory price war is simply wrong. The Transaction in fact will **reduce** (not increase) the internally-supplied funds that News would have available over the near to medium term for alleged predation (or for any other investment). In order to fund the Transaction, News will have to spend a significant amount of its available cash and will need to take on additional debt. The fact that News will have to use its funds for this purpose means that, over the near to medium term, the Transaction will reduce (not increase) the funds that News would otherwise have had available for other investments.

Bundling (promotional packages)

4.7 The Joint Complainants suggest that, post-Transaction, News is likely to bundle subscriptions to Sky's pay TV services with subscriptions to print newspapers owned by News, and bundling of this type allegedly would create competitive pressure that rival newspapers would be unable to withstand.[28] Again, such concerns are misplaced:

(a) News has no current plans to offer a package of pay TV Sky subscriptions and printed newspapers owned by News. However, even if News were to offer a package of this type, it would be essentially equivalent to the offer of special discounts on subscriptions to the newspapers that it owns. In any event, if News wants to compete more vigorously in the UK newspaper industry, it already has the means to do so. There is no reason why the joint ownership of Sky with News' newspapers would make such discounts more attractive.

(b) In addition, even if it appeared that a special offer to Sky subscribers on newspapers owned by News was having an effect on newspaper market shares, rival newspapers could be expected to respond. The response might take the form of lower prices and/or increased promotional efforts. The response might also include cooperating with third parties (e.g. BT, Virgin Media or any other company with a subscriber basis) to offer their own package deals.

5. CONCLUSION

5.1 The factual and legal position that News has outlined above and in previous submissions to BIS is sufficient to justify a conclusion that there is no basis for the SoS to intervene in the proposed Transaction on media public interest grounds.

5.2 The Joint Complainants' arguments to the contrary (echoed in certain media sources) have no substance. The Joint Complainants' arguments disclose no grounds for believing that the Transaction will give rise to any appreciable reduction in the plurality of persons with control of media enterprises serving any particular audience in the UK.

5.3 There is therefore no basis in this case for the SoS to depart from the existing DTI Guidance. The DTI Guidance is intended to inform all interested parties of the way in which the SoS will approach the decision whether to issue a public interest intervention notice in any particular case, and thereby to provide legal certainty to interested parties as to the way in which the law will apply to them. That legal certainty would be undermined if the SoS were, in the present case, to depart without good cause from the policy laid down in the DTI Guidance.

27 October 2010

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28 Submission, paragraph 3.7.

Annex I

Draft Joint Complainants Submission

E-mail Message

From:	[redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Wiskin Hannah (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=HWISKIN], [redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES][redacted] [redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY]
Sent:	28/10/2010 at 17:54
Received:	28/10/2010 at 17:54
Subject:	FW: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest
Attachments:	Submission.pdf Annex I.pdf

PS/Secretary of State

The Secretary of State will wish to see the attached further submission from Hogan Lovells, the legal advisers representing News Corporation in relation to its bid to acquire 100% of BSkyB. They have seen the opinion from Slaughter and May that was recently submitted to the Secretary of State collectively by a group of media parties and wished to respond to certain of the arguments made in that opinion.

Many of the points are reiterations of arguments already presented to good effect in the two previous submissions we have had from Hogan Lovells arguing why intervention in this case would not be appropriate. But this latest may represent the most detailed explication of a number of those points and is worth careful review.

We are sending the submission to our Counsel for advice on whether it contains anything that might affect our view of the legal basis for intervention and of the risk of successful challenge. In particular, we are examining their arguments about Sky News providing "raw news data and content" to Channel 5 and IRN (radio news) but not exercising editorial control over news provided by the relevant radio and television stations. This is relevant to an assessment of whether the merger may be deemed to represent "exceptional circumstances" for the purposes of the published Guidance on use of the power to intervene in media mergers.

[redacted]
020 7215[redacted]

______

From: [redacted][mailto:[redacted]@hoganlovells.com]
Sent: 27 October 2010 18:46
To: [redacted](CCP); Rees Andrew (CCP); [redacted](CCP)
Cc: [redacted]
Subject: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

Confidential

Gentlemen,

Please find attached a further News submission to the Secretary of State and supporting annex containing a draft of the third party submission to which this submission responds.

Best regards

[redacted]

Counsel

———

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

Tel: +44 20 7296 2000
Direct: +44 20 [redacted]
Mobile: +44 [redacted]
Fax: +44 20 7296 2001
Email: [redacted]hoganlovells.com
www.hoganlovells.com

———

15

E-mail Message

From:	[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	[redacted] (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe]
Sent:	29/10/2010 at 12:06
Received:	29/10/2010 at 12:06
Subject:	RE: BSkyB
Attachments:	Doc1.doc

<>

[redacted]

I have amended accordingly for SofS's signature.

[redacted]

From: [redacted] (MPST MIN)
Sent: 29 October 2010 09:42
To: [redacted] (CCP)
Cc: Chambers Sarah (CCP)
Subject: RE: BSkyB

[redacted]

I have spoken to the office and the response is to go from the SoS. Are there any changes you wish to make with this in mind?

Regards

[redacted]
Correspondence facilitator to the Rt Hon Vince Cable MP.
Department for Business, Innovation & Skills

<< File: Doc1.doc >>

From: [redacted] (CCP)
Sent: 28 October 2010 12:58
To: [redacted] (MPST MIN)
Cc: Chambers Sarah (CCP)
Subject: RE: BSkyB

[redacted]

I attach a draft reply. Sorry for the delay. Sent it to colleagues for comment and forgot to chase.

The draft includes a reference to the media ownership rules. Not essential to include this but I would recommend it in order to emphasise that the SofS's reserve powers under the EA02 do not represent the primary way in which the interest of media plurality is protected.

Subject to the SofS being content, probably appropriate for Mr Davey to send the reply.

[redacted]

<< File: Doc1.doc >>

From: [redacted] (MPST MIN)
Sent: 26 October 2010 10:57
To: [redacted] (CCP)
Subject: FW: BSkyB

Dear [redacted]

Please could I have your advice on the below mentioned petition.

Many thanks

[redacted]
Correspondence facilitator to the Rt Hon Vince Cable MP.
Department for Business, Innovation & Skills

From: [redacted] (MPST MIN)
Sent: 14 October 2010 13:13
To: [redacted] (CCP)
Subject: BSkyB

Dear [redacted]

Please see attached a covering letter of a petition we have received from 38 degrees. Please could you advise on how to reply.

Many thanks

[redacted] | Correspondence Facilitator to the Rt Hon Vince Cable MP, Secretary of State for Business, Innovation & Skills | 1 Victoria Street, London, SW1H OET | [redacted]@bis.gsi.gov.uk | www.bis.gov.uk

<< File: 38 degrees Petition.pdf >>

Draft reply to 38 Degrees

1. Thank you for your recent letter about News Corporation's plans to acquire 100% of the shares in British Sky Broadcasting Group (BSkyB).

2. Merger control law is concerned primarily with ensuring mergers do not result in a substantial lessening of competition in markets. The independent competition authorities have all necessary powers to investigate mergers and take action as appropriate to prevent anti-competitive outcomes. In this case, the EU Commission (DG Competition) will consider the deal under the EC Merger Regulation (ECMR).

3. Exceptionally, the Secretary of State for Business may intervene in a merger if he believes it may give rise to certain narrowly defined legitimate public interest concerns. For mergers involving media enterprises, there is specific published guidance setting out when the power to intervene might be exercised. This can be found on the BIS website at: http://www.bis.gov.uk/files/file14331.pdf.

4. Your views will be taken into account in considering the merits of intervening in the proposed merger between News Corporation and BSkyB.

5. It may be noted that separate statutory rules govern the ownership of broadcast media enterprises in the UK. These rules serve to ensure citizens continue to have access to a variety of sources of news, information and opinion. The rules were last reviewed in 2009 by Ofcom whose report and findings may be found on its website at http://stakeholders.ofcom.org.uk/consultations/morr/.

6. I hope that is helpful in explaining the scope to intervene in media mergers on public interest grounds.

E-mail Message

From:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Wiskin Hannah (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=HWISKIN], [redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY]
Sent:	01/11/2010 at 12:54
Received:	01/11/2010 at 12:55
Subject:	RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest
Attachments:	Capital Research and Management respresentation on News Corp.pdf

[redacted]

1. Further to [redacted] e mail earlier today, I attach a further submission from a third party - Capital Research and Management (CRM) which also urges the Secretary of State not to intervene. The letter states that it is an investment company which manages some US$1 trillion of assets worldwide, in excess of US$50 Billion of that is invested in the UK's equity markets. It declares that two of its clients are among the largest long term shareholders in BSkyB (approximately 5% in total).

2. CRM makes two specific points. The first that in its investigation into BSkyB's acquisition of a 17.9% shareholding in ITV, the Competition Commission (CC) and Ofcom already determined that News Corp was deemed to control BSkyB through its existing 39.1% shareholding and that the CC found that plurality was not affected. It states that to revisit this conclusion would be unnecessary and unfair - particularly as BSkyB and minority shareholders lost a significant amount of money as a result of the required partial divestment. The second is that the threshold for intervention is "extremely high". CRM notes that the strict impartiality requirements of Ofcom's Broadcasting Code, emergence of the internet as an important source of news and the relatively small share of Sky News television viewing ensures that the UK media and news industries remain vibrant and diverse.

Regards

[redacted]

Competition Law and Mergers |Department for Business, Innovation and Skills |
[redacted]bis.gsi.gov.uk | T: 0207 215[redacted]

From: [redacted] (CCP)
Sent: 01 November 2010 10:40
To: Cable MPST
Cc: Wiskin Hannah (LEGAL B); [redacted] (LEGAL B); Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); SPAD MPST; Kelly Bernadette (MPST DG); Davey MPST
Subject: RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

[redacted]

1. Counsel confirmed on Friday that nothing in the latest submission from Hogan Lovells caused her to change her previous assessment of the legal case for intervention and risk of challenge - the existence of uncertainty about the impact on the public interest does not preclude intervention to require a more substantive initial assessment of such impacts.

2. Separately, the Secretary of State will wish to see the attached further submission from another media third party - [redacted] It is commendably short. Having seen press reports that various parties have urged the Secretary of State to intervene in the proposed merger, [redacted] write to urge him not to do so. They say this would not be justifiable by reference to any likely substantive impact on the state of media plurality within the UK and suggest that other media enterprises may be confusing their own commercial interests with the public interest.

[redacted]

From: Cable MPST
Sent: 01 November 2010 09:36
To: [redacted] CCP)
Cc: Wiskin Hannah (LEGAL B); [redacted] LEGAL B); Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); SPAD MPST; Kelly Bernadette (MPST DG); Davey MPST
Subject: RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

Thanks for this [redacted] Please let me know what our Counsel's reaction is to this submission.

[redacted] Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

P286

[redacted] (CCP)

From: [redacted] (CCP)
Sent: 01 November 2010 12:46
To: Cable MPST
Cc: Wiskin Hannah (LEGAL B); [redacted] LEGAL B); Chambers Sarah (CCP); Rees Andrew (CCP) [redacted] CCP); SPAD MPST; Kelly Bernadette (MPST DG); Davey MPST
Subject: RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

Yes. [redacted] is drafting short responses to this letter and the other one from Capital Research and Management confirming their representations will be taken into account in taking a decision - similar to earlier replies.

[redacted]

From: Cable MPST
Sent: 01 November 2010 12:30
To: [redacted] (CCP)
Cc: Wiskin Hannah (LEGAL B); [redacted] (LEGAL B); Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); SPAD MPST; Kelly Bernadette (MPST DG); Davey MPST
Subject: RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

Thanks for this [redacted] Are you preparing a reply to this letter?

Thanks

[redacted] **| Private Secretary to the Secretary of State for Business, Innovation and Skills**

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (CCP)
Sent: 01 November 2010 10:40
To: Cable MPST
Cc: Wiskin Hannah (LEGAL B); [redacted] LEGAL B); Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (CCP); SPAD MPST; Kelly Bernadette (MPST DG); Davey MPST
Subject: RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

[redacted]

1. Counsel confirmed on Friday that nothing in the latest submission from Hogan Lovells caused her to change her previous assessment of the legal case for intervention and risk of challenge - the existence of uncertainty about the impact on the public interest does not preclude intervention to require a more substantive initial assessment of such impacts.

E-mail Message

From:	[redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] (COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc:	SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], [redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], [redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]mmunications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]ring Katie (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]lin Joanna (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=JCRELLIN], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY][redacted]EGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]
Sent:	03/11/2010 at 16:23
Received:	03/11/2010 at 16:23
Subject:	RE: BSkyB Plan
Attachments:	European Intervention notice.pdf BSkyB case - draft letter to Ofcom.doc 414

[redacted]
The finalised (signed) pdf version of the intervention notice is attached below (with tomorrow's date). [redacted] would you forward to [redacted] as agreed for publication on the BIS website tomorrow.
Also attached for information is the text of the letter Andrew proposes to send to Ofcom.
Finally, I attach a draft letter for the SofS to send to James Murdoch. For some reason this has appeared under a rather odd icon. But it is just a word document and can be opened as such. Just confirm you want to open it and it will give you options for doing so in different programmes, including Word.
As you know, it remains the case that we are asking Ofcom to report by 31 December.

[redacted]

<> <> <<414>>

From: Cable MPST
Sent: 03 November 2010 15:09
To: Rees Andrew (CCP); [redacted] COMMS); [redacted] (CCP)
Cc: SPAD MPST; [redacted] (Communications); Chambers Sarah (CCP); [redacted] Communications); [redacted] (Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST; Kelly Bernadette (MPST DG)
Subject: RE: BSkyB Plan

Hi Andrew

Thanks for this.

I'll let the SoS know that Ofcom have been informed.

On the James Murdoch letter, I think we should issue the letter COP today because the Stock Exchange will receive the press release tonight and so the intervention will become public at 7am tomorrow morning. I will ask the SoS to look at the draft letter this afternoon.

[redacted] Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Rees Andrew (CCP)
Sent: 03 November 2010 14:35
To: Cable MPST; [redacted] (COMMS); [redacted] (CCP)
Cc: SPAD MPST; [redacted] Communications); Chambers Sarah (CCP); [redacted] (Communications); [redacted] (Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST; Kelly Bernadette (MPST DG)
Subject: RE: BSkyB Plan

[redacted]

Thanks for this. [redacted]s drafting the letter to JM which will be with you shortly but I don't think JM should receive it until tomorrow. We would, however, plan to call NewsCorps lawyers this evening letting them know the SoS will make an announcement tomorrow morning.

On informing Ofcom, I've let the relevant lead official know, and we also have a call out to Ed Richards. They will get a letter from myself tomorrow morning, with the various representations, requesting a report on the plurality issues by end December.

Andrew

Andrew Rees| Consumer and Competition Policy| Department for Business, Innovation & Skills |Tel: 7215 2197|

From: Cable MPST
Sent: 03 November 2010 14:19
To: [redacted] (COMMS); [redacted] (CCP); Rees Andrew (CCP)
Cc: SPAD MPST; [redacted] (Communications); Chambers Sarah (CCP) [redacted] (Communications); [redacted]

P288

(Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST
Subject: BSkyB Plan
Importance: High

Hi All

We have discussed this with the SoS.

Here is the plan:

Today:
1. Send a short note from SoS to James Murdoch informing him of the SoS' intention to issue an intervention notice tomorrow. [redacted] you are already working on this. Can we please have a draft by 14.40pm?)
2. Inform Ofcom that SoS will issue an intervention notice tomorrow (Andrew/[redacted]- what is the best way to do this? Note from SoS to Ed Richards? Or at official level?)

Tomorrow:
1. Inform the Stock Exchange first thing [redacted]- not sure of the process for this, do you give them the press release?)
2. Send intervention notice in the morning
3. Issue press release in the morning

There will be no Written Ministerial Statement.

Thanks

[redacted] Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Cable MPST
Sent: 03 November 2010 12:28
To: [redacted] COMMS); [redacted](CCP); Rees Andrew (CCP)
Cc: SPAD MPST; [redacted](Communications); Chambers Sarah (CCP); [redacted](Communications); [redacted] (Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN)
Subject: URGENT: BSkyB - latest position for info
Importance: High

Dear [redacted]Andrew

We will try to establish with the SoS in the next 45 minutes to an hour whether he wants to intervene today or tomorrow. I will keep you updated.

In the next 30 minutes we need to get all the paperwork together and be poised for action.

[redacted] Can you double check with [redacted]that he is still happy with the press release that the SoS signed off? You have sent the media handling info (lines and Q&A) - thanks for that. Press release must be ready by 12.45pm please

[redacted]/Andrew - Please could you have the intervention notice, and covering letter, which would go from Andrew Rees to Ofcom, on behalf of the SoS ready to go by 12.45pm too please [redacted]- please can you send these through to the Cable inbox for my reference?).

As for the Written Ministerial Statement - if the SoS decides to announce his intention to intervene today there will be no point in informing Parliament via a WMS tomorrow (this was only being done as a matter of courtesy rather than necessity anyway).

However, if the SoS decides to announce his intention to intervene tomorrow we will lay the title of the Written Ministerial Statement this afternoon (it has to be done before 6.30pm).

Thanks

[redacted] Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (COMMS)
Sent: 03 November 2010 11:46
To: Cable MPST
Cc: SPAD MPST; [redacted]Communications); Chambers Sarah (CCP); Rees Andrew (CCP); [redacted](Communications); [redacted](Communications)
Subject: BSkyB/News Corp holding line pending any decision

Hi, please confirm that you're happy for us to start to sending out this holding line to those that ask.

Thanks, [redacted]

Holding line if a decision cannot be made straight away
The deal has been filed - will SoS issue an intervention notice?
A Department for Business spokesperson said:
"This is an important issue which the Secretary of State will consider carefully."

Background:

* The Secretary of State will consider whether or not to issue an intervention notice using his powers in the Enterprise Act 2002.
* If pushed: He will aim to make a decision within ten working days of any deal being notified to the competition authority.
* We will not speculate or comment further until he has made his decision.

| Press Office

BIS | Department for Business, Innovation & Skills | 1 Victoria Street, London, SW1H 0ET | 020 7215 Blackberry:

Text of letter to Ofcom

REQUEST TO OFCOM TO PRODUCE A REPORT PURSUANT TO ARTICLE 4A OF THE ENTERPRISE ACT 2002 (PROTECTION OF LEGITIMATE INTERESTS) ORDER 2003

The Secretary of State has today issued an intervention notice to the Office of Fair Trading under section 67(2) of the Enterprise Act 2002 ("the Act") in respect of the proposed merger of News Corporation and British Sky Broadcasting plc. A copy of the intervention notice is attached for reference. This requires the OFT to provide a report in accordance with article 4 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 within the period ending on 31 December 2010.

The intervention notice mentions that the media public interest consideration specified in section 58(2C)(a) of the Act is or may be relevant to a consideration of the merger.

In view of this, the Secretary of State now requires OFCOM to investigate the public interest issues raised by this merger and report in accordance with article 4A of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 also within the period ending on 31 December 2010.

The Secretary of State has received a number of representations as to the potential for this merger to result in outcomes detrimental to the public interest consideration specified in section 58(2C)(a) of the Act. Substantive submissions on this matter were received from:

- Hogan Lovells (Legal advisers to the parties);
- Enders Analysis;
- BT;
- The Guardian Media Group;
- Trinity Mirror;
- The BBC;
- A group of media enterprises covering an opinion from Slaughter & May;
- [redacted]
- Capital Research and Management.

I attach copies of these submissions for your reference. In accordance with article 4A(3) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 your report must contain advice and recommendations on any media public interest consideration mentioned in the notice under section 67 of the Act and which is or may be relevant to the Secretary of State's decision as to whether to refer the matter to the Competition Commission and a summary of any representations about the case which have been received by OFCOM which relate to any of those such media public interest considerations. I should be grateful if your report to the Secretary of State would include a substantive assessment of the merits of the various arguments presented in these submissions.

From: Andrew Rees
Department for Business, Innovation & Skills

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

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

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

> (i) enterprises carried on by or under the control of News Corporation will cease to be distinct from enterprises carried on by or under the control of British Sky Broadcasting plc; and
>
> (ii) the value of the turnover in the United Kingdom of the enterprise to be taken over exceeds £70million;

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

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

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

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

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

4 November 2010

Andrew Rees
An official of the Department for Business Innovation & Skills

Draft letter to James Murdoch

1. We spoke earlier in the year about News Corporation's proposed acquisition of 100% of the shares in British Sky Broadcasting Group. You may be aware that I have today issued a European Intervention notice in respect of this proposed merger. Ofcom will now investigate whether any substantive public interest issues may arise from the transaction and report to me by 31 December.

2. I appreciate the parties argued that it would not be appropriate for me to intervene in this merger and I have considered carefully the points made in support of that position. I am satisfied, however, there are reasonable grounds for believing the public interest consideration specified at section 58(2C)(a) of the Enterprise Act is or may be relevant to a consideration of the merger – that being concerned with the need for a sufficient plurality of persons with control of media enterprises serving audiences in the UK.

3. As you know, intervention will enable Ofcom to undertake an initial investigation of the scope for the merger to give rise to substantive public interest concerns, providing for a proper assessment of the various arguments that have been put forward about this matter. I will then take Ofcom's report and summary of representations received into account in taking a decision on whether to refer the transaction to the Competition Commission for more in-depth investigation.

VC

E-mail Message

From: [redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To: Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Cablem], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Arees], [redacted] (COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Cc: SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Spad], [redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe], [redacted]Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=J[redacted]Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]Waring Katie (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Kwaring], Crellin Joanna (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Jcrellin], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Edavey], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Bmkelly]
Sent: 03/11/2010 at 18:24
Received: 03/11/2010 at 18:24
Subject: RE: Informing Murdoch

Attachments: RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

[redacted]

I have now spoken to Hogan Lovells, News Corp's legal advisers. I followed the usual practice of giving parties advance notice of the timing of an announcement without giving information about its content. I followed the conversation up with the attached email confirming the position. I made clear the Secretary of State particularly wished to ensure James Murdoch was given advance warning and they confirmed they would contact him. I did not mention whether or not the Secretary of State would write to Mr Murdoch, leaving it open for him to do so tomorrow if he wishes.

[redacted]

<>

From: Cable MPST
Sent: 03 November 2010 16:42
To: Cable MPST; Rees Andrew (CCP); [redacted](COMMS); [redacted]CCP)
Cc: SPAD MPST; [redacted]Communications); Chambers Sarah (CCP); [redacted](Communications); [redacted] (Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST; Kelly Bernadette (MPST DG)
Subject: Informing Murdoch
Importance: High

Hi [redacted]

We spoke again and you confirmed you had concerns about this letter going out tonight. However, we agreed that we need to notify James Murdoch tonight one way or another.

You advised that the most appropriate, and quickest, way to do this would be for you to contact Newscorp's lawyers this evening. Please could I ask you to do this now and ask the lawyers to ensure that the message gets through to Murdoch? It is very important that this message gets through. As mentioned, the story will be running in the press first thing tomorrow and both the SoS and No 10 think it would be courteous to inform Newscorp tonight.

Could you confirm to the copy list when this has been done?

Thanks very much

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Cable MPST
Sent: 03 November 2010 15:09
To: Rees Andrew (CCP); [redacted] (COMMS); [redacted]CCP)
Cc: SPAD MPST; [redacted]Communications); Chambers Sarah (CCP); [redacted](Communications); [redacted] (Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST; Kelly Bernadette (MPST DG)
Subject: RE: BSkyB Plan

Hi Andrew

Thanks for this.

I'll let the SoS know that Ofcom have been informed.

On the James Murdoch letter, I think we should issue the letter COP today because the Stock Exchange will receive the press release tonight and so the intervention will become public at 7am tomorrow morning. I will ask the SoS to look at the draft letter this afternoon.

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Rees Andrew (CCP)
Sent: 03 November 2010 14:35

To: Cable MPST; [redacted](COMMS); [redacted]CCP)
Cc: SPAD MPST; [redacted](Communications); Chambers Sarah (CCP); [redacted](Communications); [redacted]
(Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST; Kelly Bernadette (MPST DG)
Subject: RE: BSkyB Plan

[redacted]

Thanks for this. [redacted]is drafting the letter to JM which will be with you shortly but I don't think JM should receive it until tomorrow. We would, however, plan to call NewsCorps lawyers this evening letting them know the SoS will make an announcement tomorrow morning.

On informing Ofcom, I've let the relevant lead official know, and we also have a call out to Ed Richards. They will get a letter from myself tomorrow morning, with the various representations, requesting a report on the plurality issues by end December.

Andrew

Andrew Rees| Consumer and Competition Policy| Department for Business, Innovation & Skills |Tel: 7215 2197|

From: Cable MPST
Sent: 03 November 2010 14:19
To: [redacted](COMMS); [redacted](CCP); Rees Andrew (CCP)
Cc: SPAD MPST; [redacted](Communications); Chambers Sarah (CCP); [redacted](Communications); [redacted]
(Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST
Subject: BSkyB Plan
Importance: High

Hi All

We have discussed this with the SoS.

Here is the plan:

Today:
1. Send a short note from SoS to James Murdoch informing him of the SoS' intention to issue an intervention notice tomorrow. [redacted] you are already working on this. Can we please have a draft by 14.40pm?)
2. Inform Ofcom that SoS will issue an intervention notice tomorrow (Andrew[redacted]- what is the best way to do this? Note from SoS to Ed Richards? Or at official level?)

Tomorrow:
1. Inform the Stock Exchange first thing[redacted]- not sure of the process for this, do you give them the press release?)
2. Send intervention notice in the morning
3. Issue press release in the morning

There will be no Written Ministerial Statement.

Thanks
[redacted]| Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Cable MPST
Sent: 03 November 2010 12:28
To: [redacted](COMMS); [redacted](CCP); Rees Andrew (CCP)
Cc: SPAD MPST; [redacted](Communications); Chambers Sarah (CCP); [redacted](Communications); [redacted]
(Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN)
Subject: URGENT: BSkyB - latest position for info
Importance: High

Dear [redacted] Andrew

We will try to establish with the SoS in the next 45 minutes to an hour whether he wants to intervene today or tomorrow. I will keep you updated.

In the next 30 minutes we need to get all the paperwork together and be poised for action.

[redacted]- Can you double check with [redacted] that he is still happy with the press release that the SoS signed off? You have sent the media handling info (lines and Q&A) - thanks for that. Press release must be ready by 12.45pm please

[redacted]Andrew - Please could you have the intervention notice, and covering letter, which would go from Andrew Rees to Ofcom, on behalf of the SoS ready to go by 12.45pm too please [redacted] - please can you send these through to the Cable inbox for my reference?).

As for the Written Ministerial Statement - if the SoS decides to announce his intention to intervene today there will be no point in informing Parliament via a WMS tomorrow (this was only being done as a matter of courtesy rather than necessity anyway).

However, if the SoS decides to announce his intention to intervene tomorrow we will lay the title of the Written Ministerial Statement this afternoon (it has to be done before 6.30pm).

Thanks
Jo

E-mail Message

From: [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To: [redacted] SMTP:[redacted]@hoganlovells.com]
Cc: [redacted] SMTP:[redacted]t@hoganlovells.com], [redacted] [SMTP:Jan.Howard@hoganlovells.com], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe], [redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted] Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Arees], [redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent: 03/11/2010 at 18:23
Received:
Subject: RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

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[redacted] copy as before

As discussed, I can confirm an announcement will issue from BIS early tomorrow morning about use of the Secretary of State's power to intervene in this merger. It is our usual practice in making announcements about use of the Secretary of State's powers under the Enterprise Act to provide advance information to the parties about the timing of the announcement. This is in order to enable parties to make appropriate preparations for handling media enquiries they may receive on the subject. I should be grateful if you would inform your clients as appropriate.

When the proposed transaction was first announced in June, James Murdoch contacted the Secretary of State to discuss the matter. In view of that earlier discussion, the Secretary of State wished particularly to try to ensure that information about tomorrow's planned announcement was communicated this evening to Mr Murdoch. We thought the most effective way of doing so would be for you to contact relevant staff at BSkyB. You confirmed you would make arrangements accordingly.

Many thanks for your assistance with this.

[redacted]
CCP BIS
020 7215 [redacted]

From: [redacted] [mailto:[redacted]@hoganlovells.com]
Sent: 28 October 2010 17:21
To: [redacted] (CCP)
Cc: [redacted] Chambers Sarah (CCP); [redacted] (LEGAL B); Rees Andrew (CCP); [redacted] (CCP)
Subject: RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

[redacted]

Many thanks for the confirmation.

Regards

[redacted]
Counsel

______

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

Tel: +44 20 7296 2000
Direct: +44 [redacted]
Mobile: +44 [redacted]
Fax: +44 20 7296 2001
Email: [redacted]hoganlovells.com
www.hoganlovells.com

______

______

From: [redacted](CCP) [mailto:Jonathan.Cook@bis.gsi.gov.uk]
Sent: 28 October 2010 17:00
To: [redacted]
Cc: [redacted] [redacted] Chambers Sarah (CCP); [redacted] (LEGAL B); Rees Andrew (CCP); [redacted] (CCP)
Subject: RE: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

[redacted]

Thank you for the further submission about this proposed merger. Just confirming its receipt and that it has been forwarded to the Secretary of State for consideration. I can also confirm that the note you attach does appear to be substantively the same as the one that was submitted separately to the Secretary of State by third parties.

Best wishes

[redacted]
Competition Policy Directorate
BIS
020 7215 [redacted]

______

From: [redacted]@hoganlovells.com]
Sent: 27 October 2010 18:46
To: [redacted] (CCP); Rees Andrew (CCP); [redacted]CCP)
Cc: [redacted] [redacted]

P298

Subject: News Corporation/ British Sky Broadcasting: Further Submission to the Secretary of State - Public Interest

Confidential

Gentlemen,

Please find attached a further News submission to the Secretary of State and supporting annex containing a draft of the third party submission to which this submission responds.

Best regards

[redacted]
Counsel

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

Tel: +44 20 7296 2000
Direct: +44 20 [redacted]
Mobile: +44 [redacted]
Fax: +44 20 7296 2001
Email: [redacted]@hoganlovells.com
www.hoganlovells.com

E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	[redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY],[redacted]LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	04/11/2010 at 12:49
Received:	04/11/2010 at 12:49
Subject:	RE: BSkyB Plan - another representation

This sounds sensible thanks.

By the way - if we receive further formal representations will we say in our reply that we will pass these on to Ofcomm?

[redacted] Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted]CCP)
Sent: 03 November 2010 18:17
To: Cable MPST; [redacted](CCP); Rees Andrew (CCP)
Cc: Chambers Sarah (CCP); Davey MPST; Kelly Bernadette (MPST DG); Evans Peter (LEGAL B)
Subject: BSkyB Plan - another representation

[redacted]

<< File: 29103_Media_11-2010-03_SectorNote Sky and Vince Cable.pdf >>

[redacted]

1. To see that the Department has received another representation. Berenberg Bank (an investment bank) has written to urge the SofS not to intervene in the merger. However, this is not a personal letter addressed to the SofS or indeed the Department, but a report from the bank that covers this merger, the media sector and media plurality. It declares no interest in either of the merging parties. The report is some 20 pages.

2. As it is not personally addressed, we do not believe that this report requires an official response from the Department. We will however send the report on to Ofcom and I will respond with a polite e mail.

Regards

[redacted]

From: Cable MPST
Sent: 03 November 2010 16:00
To: [redacted]CCP); Rees Andrew (CCP)
Cc: Chambers Sarah (CCP); Davey MPST; Kelly Bernadette (MPST DG); [redacted](LEGAL B); [redacted](CCP)
Subject: RE: BSkyB Plan

Thanks [redacted] We will need an address for James Murdoch. Do you know what this is by any chance?

[redacted] Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted]CCP)
Sent: 03 November 2010 15:24
To: Cable MPST; Rees Andrew (CCP); [redacted]COMMS)
Cc: SPAD MPST; [redacted](Communications); Chambers Sarah (CCP); [redacted](Communications); [redacted] (Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST; Kelly Bernadette (MPST DG); [redacted] (LEGAL B); [redacted](CCP)
Subject: RE: BSkyB Plan

[redacted]

The finalised (signed) pdf version of the intervention notice is attached below (with tomorrow's date). [redacted] would you forward to [redacted] as agreed for publication on the BIS website tomorrow.
Also attached for information is the text of the letter Andrew proposes to send to Ofcom.
Finally, I attach a draft letter for the SofS to send to James Murdoch. For some reason this has appeared under a rather odd icon. But it is just a word document and can be opened as such. Just confirm you want to open it and it will give you options for doing so in different programmes, including Word.
As you know, it remains the case that we are asking Ofcom to report by 31 December.

[redacted]

<< File: European Intervention notice.pdf >> << File: BSkyB case - draft letter to Ofcom.doc >> << File: 414 >>

From: Cable MPST
Sent: 03 November 2010 15:09
To: Rees Andrew (CCP); [redacted](COMMS); [redacted](CCP)
Cc: SPAD MPST; [redacted](Communications); Chambers Sarah (CCP); [redacted](Communications); [redacted]

(Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST; Kelly Bernadette (MPST DG)
Subject: RE: BSkyB Plan

Hi Andrew

Thanks for this.

I'll let the SoS know that Ofcom have been informed.

On the James Murdoch letter, I think we should issue the letter COP today because the Stock Exchange will receive the press release tonight and so the intervention will become public at 7am tomorrow morning. I will ask the SoS to look at the draft letter this afternoon.

Jo

Jo Thompson | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Rees Andrew (CCP)
Sent: 03 November 2010 14:35
To: Cable MPST; [redacted] (COMMS); [redacted] CCP)
Cc: SPAD MPST; [redacted] Communications); Chambers Sarah (CCP); [redacted] Communications); [redacted]
(Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST; Kelly Bernadette (MPST DG)
Subject: RE: BSkyB Plan

[redacted]

Thanks for this. [redacted] is drafting the letter to JM which will be with you shortly but I don't think JM should receive it until tomorrow. We would, however, plan to call NewsCorps lawyers this evening letting them know the SoS will make an announcement tomorrow morning.

On informing Ofcom, I've let the relevant lead official know, and we also have a call out to Ed Richards. They will get a letter from myself tomorrow morning, with the various representations, requesting a report on the plurality issues by end December.

Andrew

Andrew Rees| Consumer and Competition Policy| Department for Business, Innovation & Skills |Tel: 7215 2197|

From: Cable MPST
Sent: 03 November 2010 14:19
To: [redacted] (COMMS); [redacted] (CCP); Rees Andrew (CCP)
Cc: SPAD MPST; [redacted] Communications); Chambers Sarah (CCP); [redacted] Communications); [redacted]
(Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST
Subject: BSkyB Plan
Importance: High

Hi All

We have discussed this with the SoS.

Here is the plan:

Today:
1. Send a short note from SoS to James Murdoch informing him of the SoS' intention to issue an intervention notice tomorrow. [redacted] you are already working on this. Can we please have a draft by 14.40pm?)
2. Inform Ofcom that SoS will issue an intervention notice tomorrow (Andrew [redacted] - what is the best way to do this? Note from SoS to Ed Richards? Or at official level?)

Tomorrow:
1. Inform the Stock Exchange first thing [redacted] - not sure of the process for this, do you give them the press release?)
2. Send intervention notice in the morning
3. Issue press release in the morning

There will be no Written Ministerial Statement.

Thanks
[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Cable MPST
Sent: 03 November 2010 12:28
To: [redacted] (COMMS); [redacted] (CCP); Rees Andrew (CCP)
Cc: SPAD MPST; Boughen Aileen (Communications); Chambers Sarah (CCP) [redacted] (Communications); [redacted]
(Communications); Waring Katie (MPST MIN); Crellin Joanna (MPST MIN)
Subject: URGENT: BSkyB - latest position for info
Importance: High

Dear [redacted] Andrew

We will try to establish with the SoS in the next 45 minutes to an hour whether he wants to intervene today or tomorrow. I will keep you updated.

In the next 30 minutes we need to get all the paperwork together and be poised for action.

Olivia - Can you double check with [redacted] that he is still happy with the press release that the SoS signed off? You have sent the media handling info (lines and Q&A) - thanks for that. Press release must be ready by 12.45pm please

[redacted] Andrew - Please could you have the intervention notice, and covering letter, which would go from Andrew Rees to Ofcom, on behalf of the SoS ready to go by 12.45pm too please [redacted] - please can you send these through to the Cable inbox for my reference?).

As for the Written Ministerial Statement - if the SoS decides to announce his intention to intervene today there will be no point in informing Parliament via a WMS tomorrow (this was only being done as a matter of courtesy rather than necessity anyway).

However, if the SoS decides to announce his intention to intervene tomorrow we will lay the title of the Written Ministerial Statement this afternoon (it has to be done before 6.30pm).

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (COMMS)
Sent: 03 November 2010 11:46
To: Cable MPST
Cc: SPAD MPST; [redacted] (Communications); Chambers Sarah (CCP); Rees Andrew (CCP); [redacted] (Communications); [redacted] Communications)
Subject: BSkyB/News Corp holding line pending any decision

Hi, please confirm that you're happy for us to start to sending out this holding line to those that ask.

Thanks, [redacted]

Holding line if a decision cannot be made straight away
The deal has been filed - will SoS issue an intervention notice?
A Department for Business spokesperson said:
"This is an important issue which the Secretary of State will consider carefully."

Background:
* The Secretary of State will consider whether or not to issue an intervention notice using his powers in the Enterprise Act 2002.
* If pushed: He will aim to make a decision within ten working days of any deal being notified to the competition authority.
* We will not speculate or comment further until he has made his decision.

[redacted] | Press Office

BIS | Department for Business, Innovation & Skills | 1 Victoria Street, London, SW1H 0ET | 020 7215 [redacted] Blackberry: [redacted]

Sector comment
Media

Private Bankers founded 1590
BERENBERG BANK
Joh. Berenberg, Gossler & Co. KG

Plurality and reality...

- With the long-awaited notification of the European Commission by News Corporation that it intends to bid for BSkyB, UK authorities now have 15 days to decide whether or not to recall the transaction for consideration on the grounds of plurality.
- Despite substantial protestation at the deal, largely by rival newspapers and broadcasters, it is our view that many of these complaints are based on competition grounds, not on plurality.
- In our view, it will be difficult to disregard the view of the Competition Commission, which in 2007 indicated that it was satisfied with the state of UK news plurality, provided BSkyB divest the majority of its stake in ITV plc.
- If anything, we think plurality has increased since the Competition Commission review, as a result of huge growth in both the number of online news providers and the consumption of news online, coupled with ongoing declines in newspaper circulation.
- While online has generally had a positive impact on plurality, there remains a significant risk relating to news aggregators, in our view, most notably Google, which is responsible for around 45% of all traffic to websites.

3 November

Sarah Simon
Analyst
+44 20 3207 7830
sarah.simon@berenberg.de

Private Bankers founded 1590
BERENBERG BANK
Joh. Berenberg, Gossler & Co. KG

To refer or not to refer?

➢ Decision time for Vince Cable

With the long-awaited notification of the European Commission (EC) by News Corporation that the latter intends to bid for BSkyB, UK authorities now have 15 days to decide whether or not to recall the transaction for consideration on the grounds of plurality. OFCOM's views will be sought initially, followed by those of the Competition Commission, if further investigation is required.

➢ Plurality is the key, not competition

Despite substantial protestation at the deal, largely by rival newspapers and broadcasters, it is our view that many of these complaints are based on competition grounds, not on plurality. Although the Office of Fair Trading (OFT) could argue for a domestic review of the competition issues, it seems more likely that it will be the EC that opines on this point, given its greater experience of pay-TV. Thus, it is more likely that plurality will be the subject of a UK review.

➢ The Competition Commission has already reviewed this situation

In our view, it will be difficult to disregard the view of the Competition Commission, which in 2007 indicated that it was satisfied with the state of UK news plurality, provided BSkyB divest the majority of its stake in ITV plc. At the time, the commission stated clearly that its decision and analysis were based on a supposition of material influence and control of BSkyB by News Corporation. Taking a different view now could result in litigation by BSkyB and/or its shareholders in relation to losses incurred on the ITV stake sale.

➢ Meanwhile, the Internet continues its rampage

If anything, we think plurality has increased since the Competition Commission review, as a result of huge growth in both the number of online news providers and the consumption of news online, coupled with ongoing declines in newspaper circulation. News Corp's share of the online market is tiny compared to its position in newspapers; meanwhile, Sky News is a distant number three in terms of television news providers.

➢ Google represents a potential threat to plurality

While online has generally had a positive impact on plurality, there remains a significant risk relating to news aggregators, in our view - most notably Google, which is responsible for around 45% of all traffic to news websites. The search giant's ability to prioritise or de-prioritise content based on an opaque ranking algorithm means that even if high-quality online content is produced, it may be hard to generate an audience, given consumer reliance on Google as a navigational tool. This is an area that we think needs watching closely.

➢ The clock is now ticking: News Corp formally notifies the EC

After months of waiting (it was five months ago that the 700p per share offer was made) News Corp has finally formally notified the European Commission of its intention to bid for BSkyB. Given the size of the proposed transaction, and the fact that News Corp also controls Sky Italia and has a 49.9% stake in Sky Deutschland (as well as other media assets in Europe), the EC has the power to investigate the impact of this deal on competition grounds.

At the same time, under the 2002 Enterprise Act, the UK Business Secretary, Vince Cable, has the power to issue an intervention notice, which would allow further domestic (UK) consideration as to whether the proposed takeover would restrict plurality that would be against the public interest. Mr Cable has 15 days to decide whether to issue such a notice.

If such a notice is issued, OFCOM will be given up to two months to determine whether or not the transaction should be more heavily scrutinised, following which the Competition Commission could conduct a more detailed assessment of the impact of the transaction on plurality (not competition) grounds. Potentially, this would leave UK consideration of the transaction still ongoing until late spring/early summer 2011, almost a year after the bid was first announced.

To judge from the level of response to this transaction, it may well be that in years to come, history notes that this deal marked the renaissance of letter-writing; for, in addition to specialist and generalist comment in the press, online and on television, industry analysts have written letters, while the BBC and Channel 4 have teamed up with a number of major newspaper publishers to protest against the transaction – an unprecedented unification that both *The Times* and the *Financial Times* have responded to in their leader columns.

➢ Plurality, plurality, plurality (not competition)

Clearly, the transaction has excited many, and generally the reactions of press and commentators have been negative. Moreover, with the financial and media strength of News Corporation already exceptionally strong in the UK, it is not hard to build a picture of the UK beholden to the American media giant – the "Murdochisation" of UK media. However, if the EU is to examine the issues of competition (it is possible for the OFT to do so, but not deemed likely, given the EC's expertise in pay-television competition, and its existing interest in cross-border rights buying etc.), then as noted above it is just plurality which should concern the UK authorities.

It is in this respect that we have considered the transaction, considering the *status quo* in terms of media choice available to consumers today, and examining how this might change if News Corporation were to own 100% of BSkyB, rather than the 39% it has today.

However, it is first necessary to examine whether there would in fact be any change were News Corporation to move from a 39% shareholding to a 100% shareholding. For while in the case of some companies, this would clearly represent a change of control, it would appear that in fact it has been the view of the UK authorities that News Corporation has been in a position of control over BSkyB for a considerable period of time. Indeed, this was the view of the Competition Commission in 2007 when it opined on the BSkyB/ITV transaction:

"For the purposes of our analysis, we assumed that News Corporation had material influence over BSkyB"

While this does not appear surprising - at the time of publication of the Competition Commission report, Rupert Murdoch was Chairman of BSkyB, while James Murdoch was CEO - the statement is highly important in that it is the basis on which the analysis was conducted. Although the ultimate decision to require BSkyB to reduce its ITV stake from 17.9% to below 7.5% was made on the basis of a "substantial lessening of competition" (SLC), the commission also examined issues of plurality, which it concluded would not be impacted as a result of BSkyB owning the larger stake in the free to air broadcaster.

Importantly, the Competition Commission additionally made the point that material influence is deemed to mean "control of". So, it was the view of the commission that, in 2007, News Corporation controlled BSkyB. If this was the case in 2007, and given no change in shareholding or other material issues, then it would be reasonable to assume that, having maintained broadly the same level of shareholding in BSkyB, News Corporation still controls the pay-television operator, meaning that, in the eyes of the Competition Commission:

- this transaction does not represent a "change of control".
- this transaction does not represent a change in the *status quo*.

It is true, of course, that there will be a financial change as a result of the proposed deal. For should News Corporation be successful, it will have full control of BSkyB's cash flow as opposed to just a 39.1% share of the dividend payment that the latter company choose to make each year. However, in order to access that cash flow, News Corporation will have to disburse a minimum of £7.5bn (based on the bid price of 700p per share, a price which the board of BSkyB has rejected as too low).

It has been argued that this access to cash flow might allow News Corporation to make strategic changes that could be harmful from a plurality perspective. For example, it has been suggested that BSkyB might choose to bundle News Corporation newspapers with its pay-television product, thus making life more difficult for other newspapers in the UK. However, this is an issue of competition, and therefore appears to be outside the parameters within which Mr Cable is mandated to examine the transaction. For as noted previously, issues of competition are, in this case, the remit of the EU authorities.

Moreover, industry watchers will be familiar with the fact that, even without access to the BSkyB cash flows, News Corporation has been more than able to discount its newspapers in a bid to increase circulation, has done so a number of times in the past, and is doing so currently. Given that News Corporation reported net income of $2.5bn, and free cash flow (before acquisitions and investments) of $2.9bn for the 12 months to June 2010 - and given that it apparently has access to £7.5bn in cash - it seems reasonable to assume that any aggressive marketing campaign, including the aforementioned bundling strategy, could be pursued without the need for a full takeover of BSkyB, and could still be pursued in the future, regardless of the presence of minority shareholders in BSkyB.

A final point on the issue of potential bundling: we note that the demographics of Sky News audiences and Sun readers is completely different. The Sun is more heavily skewed to C2DE readers, while Sky News is targeted towards the ABC1 demographic. This would seem to suggest that a bundling strategy would, in any case, be relatively unsuccessful. A bundling strategy between *The Times* and Sky would appear, on these grounds, to make more sense, but given that *The Times* takes a share of readership that is only just over 3.5% (according to the NRS), this does not look like the making of a newspaper giant that would kill the redtops which are so widely read in the UK.

Coming back to the key issue of plurality, the question is whether there will be a reduction in plurality if this transaction were to occur. Again, the Competition Commission has done a great deal of work in this area already, with regard to the analysis of BSkyB's 17.9% shareholding in ITV (which it was forced to reduce to below 7.5%). In the associated report, the commission stated that the public interest consideration related to the need:

"For there to be a sufficient plurality of persons with control of the media interprises serving that audience"

At the same time, the Competition Commission deemed it important to draw a distinction between the plurality of persons with control of media enterprises and the number of enterprises themselves, and to consider the implications of that plurality for the range of information and views made available to audiences.

As discussed above, given that the Competition Commission's vew was that News Corporation's 39.1% stake in BSkyB was sufficient to give it control over the company, the proposed buyout of the remaining 60.9% should not be deemed to result in a reduction in the number of people with control of the media enterprises serving UK audiences. This should be sufficient to answer the question being asked about plurality, but the CC also notes that it is important to distinguish between the range of information and views that are provided across separate groups (external) and the range provided within (internal).

In order to answer this separate point, we must start from the premise that the *status quo*, both internal and external, is acceptable to the Competition Commission – that following the sale by BSkyB of the majority of its stake in ITV, the level of plurality in the UK was deemed reasonable. On this basis, the question that must be asked is whether this situation could be changed as a result of an increase in News Corporation's shareholding.

We assume at this point that the question of plurality relates largely to news, this having been the issue under consideration in the BSkyB/ITV case. This makes sense, given that of all content types, it is news that is the most concentrated in supply, a point highlighted both by the Competition Commission and by commentators on the current News Corp/BSkyB transaction.

In considering this issue, it is important to remember that there is already legislation in place in the UK regarding how news is to be handled by different media. As regards newspapers, the Competition Commission noted that there are

"fewer regulatory restrictions on newspapers, newspapers are able and expected to take an explicit editorial position in relation to topical issues. Editors do not take instructions from management or board members or shareholders on editorial matters; their remit is to produce a newspaper which reflects the views and opinions of its readers, to increase the sales of the newspaper, to confirm or challenge accepted wisdom through columnists and writers and generally to provide as much news, information and entertainment as is possible within agreed budgets."

At the same time, the commission acknowledged that Rupert Murdoch had regular discussions with the editor of *The Sun* on a range of editorial matters; while his involvement with *The Times* and *The Sunday Times* was far more limited, due to the restrictions imposed by the DTI when granting consent for News Corporation's purchase of the titles in January 1981. For example, one of these undertakings was that there shall be no more than 20 directors of Times Newspaper Holdings of which at least six shall be the Independent National Directors. Equally it was agreed that News Corporation would seek the approval of the Independent National Directors regarding the hiring and firing of editors. As a result, Rupert Murdoch's involvement in the editorial direction of the Times and Sunday Times has been restricted, as noted by the Competition Commission:

"We concluded that there was a considerably greater degree of involvement to Mr Rupert Murdoch in relation to the Sun than some other News International newspapers"

This, therefore, was the situation with the newspapers in 2007 – admitted editorial influence over *The Sun*, a hands-off approach to *The Times* and *The Sunday Times* – and, with no changes having occurred since, it is clear that the mooted transaction will equally have no impact on the *status quo*. For it is DTI (now the Department for Business Innovation and Skills) rules that prevent interference in *The Times/The Sunday Times*, and these rules will remain in place regardless of a deal with BSkyB.

The question, therefore, is whether the degree of influence over BSkyB's editorial policy would change as a result of the transaction, and whether plurality could be affected in this way, by changing the range of information and views provided within the group (internal plurality, as described above).

Again, we return to the Competition Commission's point about material influence and control. If this is already the case, then News Corporation could be deemed already to control the editorial policy of BSkyB, so by moving to a position of full ownership, nothing actually changes. However, it is also important to remember that the Broadcasting Code requires impartiality in terms of news presentation, and breach of this code on a regular basis could result in the loss of the broadcasting licence. In other words, for BSkyB to remain a broadcaster of news, it must remain impartial in its news output. Indeed, the Competition Commission noted in its report that, in respect of Sky News itself,

"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"

At the same time, given that Sky is not just a broadcaster of news, but also a supplier of news to Five, it was important to note that,

"The channel operator remains ultimately accountable (including to the regulator) for the news that is presented on its channels. The channel operator is responsible for strategic editorial decisions including the look and feel of its news programming, tone and high level story prioritisation. This strategic direction helps differentiate news programming and is generally considered important to the brand image of the channel."

This suggests that while BSkyB provides the raw material for news programmes on Five, it is the channel that determines what stories will be prioritised and so on, making it different from Sky News, which separately determines these issues.

Nonetheless, the Competition Commision also noted that there is a difference between the broadcasting code, which is designed to ensure impartiality in terms of news presentation, and the statutory need for there to be a sufficient plurality of persons with control of media enterprises. This takes us back to the question of control, which the Competition Commission has already answered in determining that News Corporation's shareholding gave it control over BSkyB.

Based on the above arguments, it seems to us that the grounds for a referral based on plurality are very weak, unless it is deemed that the Competition Commission was incorrect in concluding that News Corporation controlled BSkyB at the time of its analysis of the BSkyB/ITV situation. For, as regards the relationship between the two, nothing has changed since then, making it very difficult to justify a change in the definition of control. Moreover, were the Competition Commission to change its view such that it regarded the proposed transaction as resulting in a change of control, that would render its January 2007 analysis incorrect, thus opening the way for redress by BSkyB and its shareholders for being forced to sell down its stake in ITV.

➢ "Murdochisation" is a red herring

A footnote to the discussion of editorial influence: some commentators have stated that they fear the "Murdochisation", or the "Fox factor", if News Corporation were to consummate the proposed transaction. Commentators cite the perceived bias of Fox News in the US, fearing that a takeover of BSkyB could see the award-winning Sky News forced to follow the Murdoch political party line.

While this is an easy scare-story to convey, the facts of regulation would appear to be against such a change taking place. For what commentators with such an argument appear not to have made clear is that:

- In the US there are no laws that require impartiality of news media, whether print, broadcast (or indeed online). In fact, the First Amendment (free speech) would appear to render impossible any law aiming at impartiality. Indeed a previous FCC policy, the "Fairness Doctrine", which required broadcasters to present both sides of "a controversial issue of public importance" was deemed to be unconstitutional and therefore repealed.
- By contrast, as discussed above, it is a legal requirement that television news in the UK is impartial, meaning that it would be impossible for Sky News to take sides without risking its broadcasting license. As regards the newspapers, it is already acknowledged that Murdoch has editorial influence over *The Sun*, but *The Times* is protected from such by the 1981 DTI rules noted earlier. In any case, a purchase of the remaining 61% of BSkyB would not have any impact on News Corporation's ability to influence (or otherwise) the newspapers that it already controls.

On this basis, it remains our view, that if there are issues to be considered in this transaction, they relate to competition, rather than plurality.

➢ What about online?

It is notable that arguments against the proposed transaction have essentially ignored the internet as a source of news. The focus has been squarely on television news and hard-copy newspapers, with little regard paid to the online market, despite the huge growth in this form of news distribution. We believe, however, that any analysis of plurality must take account of the following:

- Statistics suggest that, as broadband penetration rises, and average speeds increase, broadband users increasingly turn to the internet as their primary source of news. OFCOM's analysis of the internet as a source of news does note that this is a growth area, but dismisses it as secondary. That research is now four years old, and in the meantime, the number of residential broadband connections in the UK has increased by 50%, and, as discussed below, online usage per person has jumped considerably.

- As with newspapers, there are no regulatory requirements for online newspapers to be editorially impartial. As online news becomes more and more the most important source of news, impartiality will likely decline due to the lack of restrictions. This will happen regardless of the proposed News Corporation/BSkyB transaction
- The low cost of entry online has resulted in a profusion of non-traditional news providers, increasing plurality for the average user of the internet. New providers include independents (e.g. specialist subject websites such as Beehive City, blogs, and user generated content sites such as YouTube) as well as established players from other countries hitherto not available in the UK (e.g. US news websites e.g. *The Washington Post*)
- Newspaper websites are hugely dependent on third-party websites for traffic to their sites. On average, less than 30% of their traffic comes direct, with the balance coming from third party websites. Google itself accounts for just under half of all traffic to UK newspaper websites. This is a potential gatekeeper position that could seriously damage online plurality, and, given the aforementioned growth in online as the dominant source of news, could have a material impact in national plurality, in our view.

Looking at the first of these points, the Competition Commission report on ITV/BSkyB noted that by 2006 there had been a threefold increase (from 2% to 6%) in the number of people who consider the Internet to be their main source of news. At the same time, around 20% of the population visited news sites, compared with over 60% who actively watched television news. These figures being relatively limited, the Commission took the view that:

"for the time being and for the foreseeable future, online sources of news are more likely to complement than to replace television and other traditional news platforms"

Fast-forward four years, and the situation has changed massively. Fixed-line residential broadband penetration has increased by 50% since 2006, and time spent online per internet user has grown by 65% over the same period. According to UKOM, around 2.8% of time spent online goes on news sites, up from 1.5% in 2007. As a result, while the time spent online by UK consumers has increased by nearly two thirds, the time spent on online news sites has increased by 212%, secondly only to social networks and blogs.

As a result of this growth, the average UK internet user now spends an average of 37 minutes and 23 seconds a month looking at online news sites. Moreover, this ignores any news, or associated commentary, that might be seen on the home pages of portals, on social networks and blog sites, or indeed any broadcast news which might fall into the streamed video category. Similarly it excludes news sent via e-mail. Including these categories we would expect online news consumption to be far, far greater than that which is reported for dedicated news websites.

Meanwhile, according to McKinsey, total news consumption has increased by around 20% over the past three years, with average consumption in 2009 running at 72 minutes per day as opposed to 60 minutes in 2006. Although the data sources are different, the fact that UKOM reports a 212% increase in online news consumption, vs McKinsey's 20% total consumption growth, would tend to suggest that online has substantially increased its share of total news. This is reflected in Figure 2, which shows interest in different news sources, and suggests that particularly younger viewers are heavily dependent on the web for this type of information. Indeed, as McKinsey notes, if it were not for the behaviour of the 55+ category, the Internet would be ranked the second most popular news source in 2009. Including the 55+ group takes the rank down to third position. This compares markedly to the results published by OFCOM in June 2007 (*New News, Future News*), which were referred to by the Competition Commission, where, as shown in Figure 1, the Internet comes a distant fourth in terms of sources of news.

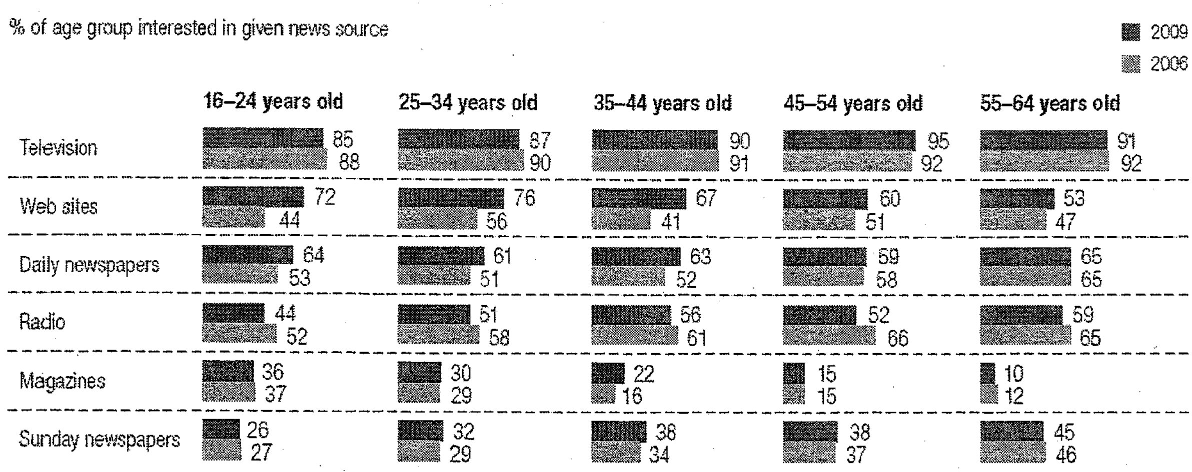
Meanwhile, according to Nielsen, news is the most popular content on the iPad, with 44% of iPad users viewing news regularly. The same study found that more people still access news from their iPhones, with 51% of users reading the news on their phone. This type of consumption wasn't even in consideration in 2006, when OFCOM looked at news, and how it is consumed.

Figure 1: Online news consumption has grown hugely in the past few years

Rank	Leading sector by total/share of UK Internet time - April 2010	Total UK Internet time (millions of hours) - April 2010	Total UK internet time (millions of hours) - April 2007	Change 2010/2007
1	Social Networks/Blogs	176	40	340%
2	E-mail	56	30	88%
3	Games	53	27	96%
4	Instant Messaging	38	65	-42%
5	Classifieds/Auctions	36	23	60%
6	Portals	31	17	87%
7	Search	31	19	64%
8	Software Info/Products	26	24	9%
9	News	22	7	212%
10	Adult	21	13	65%

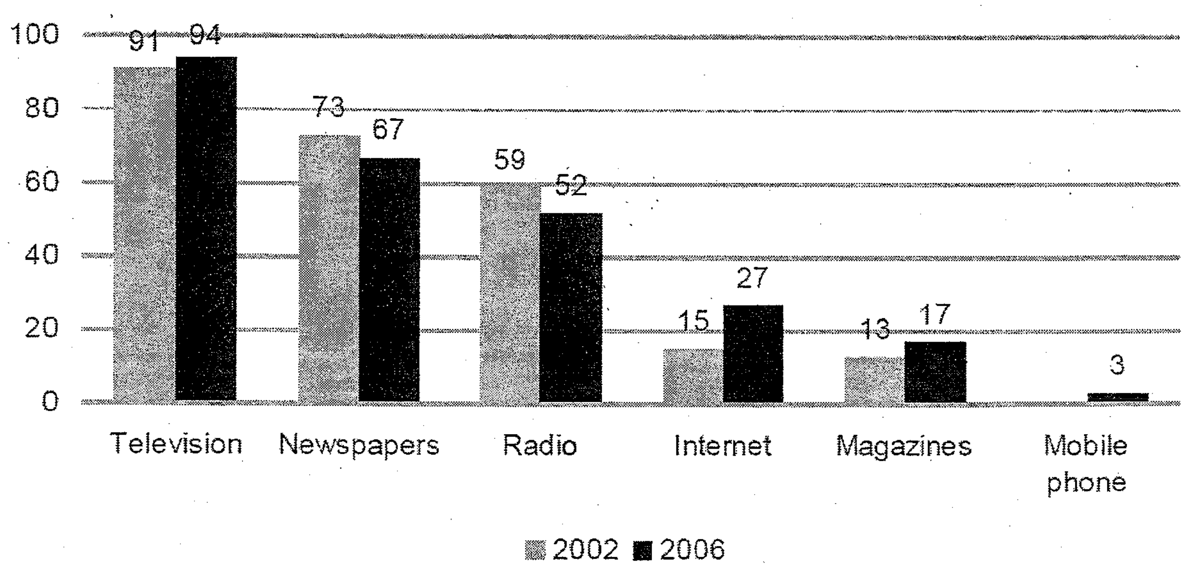
Source: UKOM

Figure 2: Websites are an increasingly important news source



Source: McKinsey Quarterly

Figure 3: Historically, the web was far less important as a news source



Q3a) Which of the following do you EVER use for news? Base: All adults 16+, 4662 (2002) and 2216 (2006)
Note1: 2002 question = Q1b) What OTHER sources do you use

Source: OFCOM

➢ Anyone can create a news website

From the above it is clear that the Internet and other online platforms have become an increasingly important source of news, and ones that were essentially ignored by the Competition Commission in its discussion of plurality in 2007. At the time, such a stance was in keeping with the low level of news consumption online. We would argue that in 2010, any discussion of plurality must take online into account.

For if online were simply repeating what is available offline, in newspapers and broadcast television, that would be one thing. This is not the case however: there are no regulatory rules requiring impartiality of online news. It is true that the BBC Trust has put in place editorial guidelines stressing the need for impartiality in online news, but this is self-imposed as opposed to a regulatory requirement that covers other creators of news.

With the huge growth in online news consumption, coupled with growth in the number of online news providers, it is clear that the average consumer has seen a significant increase in the availability of news from different sources. For unlike television, where there are significant barriers to entry, both financial and regulatory, online anyone can become a news provider. As a result, whereas the market that the Competition Commission considered was, in the case of television the BBC, ITN and Sky, and offline a relatively small number of newspapers, if we take into online there is a huge number of news providers, which must surely increase plurality in news supply. Indeed, it was noted by the House of Lords Select Committee Report "The Ownership of the News" that internet news content is produced across the world, which suggests a far broader perspective available online than offline (where content supply is constrained by distribution).

Figure 4 shows the leading online news sites in August 2009, according to Experian Hitwise. The dominance of the BBC is unmistakeable (and raises interesting questions about why the Director General, Mark Thompson, has protested so loudly about News Corporation's dominance, particularly given that the BBC also takes a very commanding market share in television news. Indeed, as noted by OFCOM in the aforementioned New News, Future News, in October 2006, Sky News accounted for around 4.9% of total news viewing, and Five (for which BSkyB has the production contract) 2.8%. By contrast, at the time the BBC accounted for around 61% of news consumption and ITV around 27%. According to News Corporation, the figures are broadly similar today.

Meanwhile, as far as online is concerned, it is worth noting that these figures do not reflect the paywall strategy of News Corporation, which has seen online traffic to the Times and Sun websites decline substantially. Indeed, taking into account the decline in audience reported for News Corporation newspaper-linked websites, we estimate that in aggregate, the group accounts for around 4.5-5.0% of UK online news traffic. Given that the BBC takes the single largest share of online news traffic, it is reasonable to assume that it may have benefited in some way from the News Corporation paywall strategy, implying that its online share could be approaching 40% by now.

Figure 4: UK online news traffic, August 2009

BBC	37.14
Sky News	3.11
Yahoo!	2.36
Met Office	2.24
Daily Mail	1.92
Google News UK	1.65
Telegraph	1.63
The Sun	1.60
Times Online	1.50
Guardian Unlimited	1.34
ITV	1.33
MSN News UK	1.22
Independent	0.63
Metcheck.com	0.59
NewsNow	0.59
AOL-News	0.54
The Weather Channel	0.48
Other	40.13

Source: Hitwise

➤ A "weighted average" approach to plurality

If the growth in online has resulted in an increase in number of news sources, and if, in the meantime, consumers are increasingly less reliant on newspapers for their daily fix of information - the OECD reports that between 2007 and 2009 UK newspaper circulation has declined by 25%, and continues to drop as people move online - it seems clear that a "weighted average" dependence on media for news would see newspapers dropping markedly, with online increasing share. This is important because it implies a rising number of news sources, on a weighted average basis, and weakens, in our view, the arguments about plurality, which seem to rely heavily on News Corporation's position as a newspaper publisher.

In other words, if the level of plurality was considered acceptable in 2007, when broadcast news and newspaper readership were considered the main ways that news is consumed, then in 2010, with newspaper readership declining (and with it News Corporation's influence on news), growth in online (a medium in which Murdoch's influence is far smaller, as shown in Figure x above) and TV broadly maintaining its position - indeed OFCOM recently released research indicating that there has been a halt in the decline of audiences for flagship news programmes on the PSB channels - then on this basis, plurality would appear to have improved vs 2007.

Furthermore, any analysis of plurality must take into account the expected evolution of the market, not just the current situation. In this respect, it should be noted that upcoming generations will likely be even less dependent on newspapers (News Corporation's traditional source of "media control") and on television, and increasingly influenced by the internet, the medium in which Murdoch is weakest. For example, as noted by the House of Lords Select Committee:

"overall the number of people reading any one or more of the top ten national newspapers on an average day has declined by 19%, but this decline is much more marked in the younger age brackets. The number of 15-24 year olds reading anyone or more of the top ten national newspapes on an average day has declined by 37% and the number of 25-34 year olds doing the same has declined by 40%"

Likewise, while OFCOM research has shown that while 67% of all adults over 16 cite the television as their main source of UK news, that figure falls to 59% among 16-24 year olds (who, as shown in Figure 2) are turning increasingly to the internet.

➢ Gatekeeper role a possible future concern?

As argued above, we believe that

- People are increasingly consuming news online
- Consumers have a large choice in terms of websites containing news content

Given this situation, we believe it must be factored into any consideration of plurality of news supply and availability in the UK. In our view, this would seem to weigh against arguments relating to plurality that focus only on news available via television and in hard copy newspapers.

However, while all this is positive for the consumer, one thing is disconcerting - the way that consumers find this plethora of online news. As noted above, and as shown in Figure 5, newspaper websites are hugely dependent on third-party websites for traffic to their sites. On average, less than a third of their traffic comes direct, with the balance coming from third-party websites. Of those third parties, Google alone accounts for 45% of all traffic to newspaper websites, some 41% more than the newspaper sites represent themselves in aggregate.

Given the opaque nature of the algorithm that determines whether or not a website will feature at the top of search results (excluding paid-for search), this is a situation which, at the very least, requires very careful monitoring. For it would technically be possible for Google to change its algorithm such that a particular publication, or publications, no longer featured high up in search results. Given how important Google is as a driver of traffic to websites, this could have a huge impact on the number of users visiting newspaper sites, which would in turn have serious commercial implications.

We note that there are, and have been in the past, lawsuits that relate to the way that Google ranks search results. For example, SearchKing sued Google in 2003 claiming that Google "arbitrarily and purposefully" lowered the rankings of SearchKing's pages for competitive reasons. That lawsuit was lost by SearchKing on the basis that Google claimed First Amendment rights, stating that its rankings were simply the company's view of opinion of the importance of the webpage. Similarly Roberts vs Google and KinderStart vs

Google have attempted (and lost) litigation against the search giant for the same reason.

The point of this is not to claim that Google lowered the search rankings of these companies for anti-competitive reasons (although this was alleged in some cases), but to make the point that it can be done – Google admitted that it had changed the page rankings. Moreover, it can do so because of the laws relating to free speech and because it is a commercial business that is not regulated in respect of impartiality (or indeed plurality). In our view, this poses potential problems for companies that are highly dependent on Google for traffic to their websites, namely, in this case, the newspaper companies, which as noted above, get nearly half of their hits from this single source.

More importantly, at least in respect of this argument, it seems clear that Google News could represent a threat to plurality. For if, as noted above, Google can change page rankings at will, then that it has the power to promote, or demote, specific news providers as it pleases. Thus a provider of online news may simply disappear (for practical purposes) as a source of information about a particular topic. For example, if one enters "BSkyB, News Corporation, Vince Cable" into Google News today, as shown in Figure xx, the story that appears on the top of the results page is that provided by Broadband TV News (an online dedicated industry website). The second source is the Guardian, the third Marketing Week and the fourth the Telegraph. Below that is a link to "all 19 news articles". Realistically, the average consumer won't click on that link, and will probably click on the news story that is highlighted in larger font (Broadband TV News).

If newspapers get around 45% of their traffic from Google, then this power to change the rankings represents potentially a very significant threat to plurality in our view. For it is one thing to produce the content, and another to get the consumer to read it. In an offline world, arguably this would be akin to all the supermarkets refusing to stock a particularly newspaper (supermarkets/multiples account for 40-45% of all newspaper copy sales), or, perhaps putting all the copies of a particular title at the bottom of the pile of newspapers, so that other titles took sales predominance.

It is interesting that in the aforementioned Select Committee on News it was noted that news aggregators such as Google News could be an issue, indeed Guardian Media Group commented that:

"Online aggregators, potentially, can have a 'double negative' effect on high-quality, plural news provision: acting as a gatekeeper to multiple news sources, whilst extracting revenue direction from news content, without re-investing in journalism"

The Select Committee also noted this issue, but focused more on the fact that the news aggregators were not investing in journalism of their own, and thus piggy-backing on the content creators' investment, rather than on the issue of the gatekeeper role which concerns us here.

Private Bankers founded 1590
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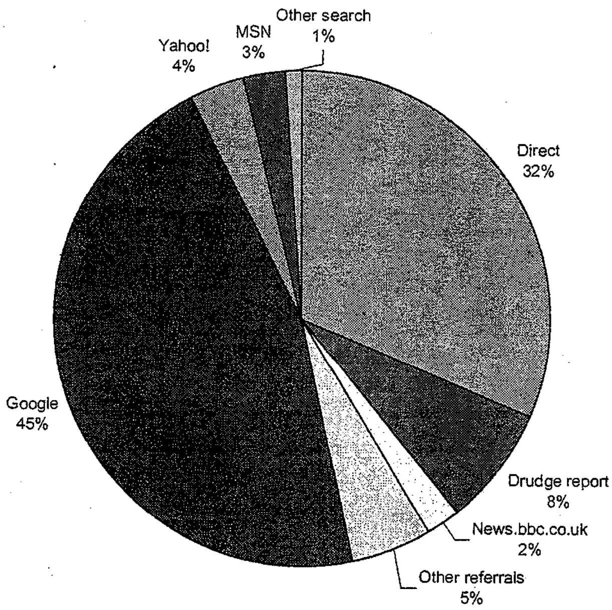
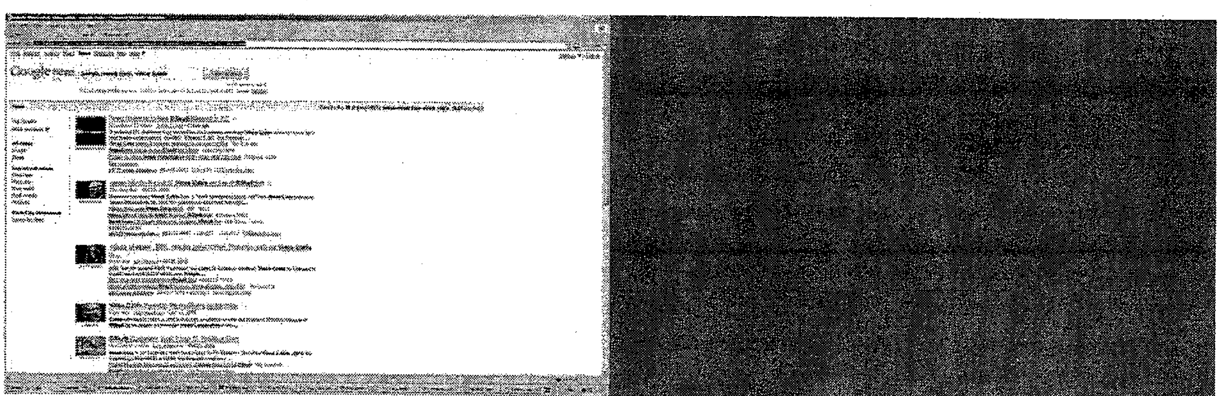
Joh. Berenberg, Gossler & Co. KG

Figure 5: Google accounts for 45% of internet traffic to newspaper sites



Source: Hitwise

Figure 6: Example of Google News site results



Source: Google

➢ Implications of a referral

As discussed above, we believe that the case for a referral of the proposed transaction on plurality grounds is weak, given that:

- In 2007 the Competition Commission took the view that News Corporation already controlled BSkyB.
- The Competition Commission gave no indication that it was unhappy with the state of plurality at the time.
- Plurality has increased, in our view, with the advent of the internet and its multiple routes to news.

However, were Mr Cable to take the decision to refer – a decision which we we believe would be made on political grounds – then the resulting additional delay could prove problematic for News Corporation, due to:

1. **Appreciation of sterling against the dollar**: since the bid was made in June, the pound has strengthened c10% against the dollar. With a transaction of this size, a weakening US dollar could make the deal less attractive than it initially appeared. This could make News Corporation less willing to increase its bid, thereby reducing its chances of success
2. **Continued strong trading by BSkyB**: as the most recent results have shown, Sky continues to go from strength to strength. The better the company's results, the more likely are the group's independent directors to demand a premium valuation. Having already stated that the minimum bid price that the independent directors would entertain was 800p, this could rise further. Coupled with the weakening dollar, this could prove VERY costly for News Corporation and ultimately derail a transaction
3. **Or a deterioration in trading?** On the other hand, with the launch of YouView next year, and given that the timetable of referral and analysis could push any decision back to early summer 2011, there is always a chance that BSkyB could be negatively impacted by the launch of the new platforms. We note that the launch of Freeview had a substantially negative effect on BSkyB, at least in the early period, prior to BSkyB's launch of free broadband and calls. This puts the risk back in the court of BSkyB's current shareholders.

Whatever the outcome, it is clear that the implications for Sky shareholders will be substantial. A referral of the transaction – even if ultimately waved through – could materially impact the likelihood of News Corporation actually completing the transaction.

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Remarks

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To:	ed.richards@ofcom.org.uk [SMTP:ed.richards@ofcom.org.uk]
Cc:	Steve Unger [SMTP:Stephen.Unger@ofcom.org.uk] [redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe], Hendon David (IE) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=DHendon]
Sent:	04/11/2010 at 13:30
Received:	04/11/2010 at 13:30
Subject:	NEWSCORPS - BSKYB
Attachments:	Letter - NewsCorps BSkyB - November 2010.doc European Intervention notice.pdf

Dear Ed I attach a letter relating to the Secretary of State's intervention on the NewsCorp/BSkyB deal (I gather you've also had a brief word with David Hendon about this). We look forward to your report (and hoping it won't eat too hard into Steve's Christmas plans!).

Kind regards

Andrew Rees

<> <>

Andrew Rees| Consumer and Competition Directorate | Department for Business, Innovation & Skills |Tel: 020 7215 2197| www.bis.gov.uk

Ed Richards
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4 November 2010

Dear Ed

NEWSCORP/BSKYB MERGER - REQUEST TO OFCOM

You are aware that the Secretary of State has today issued an intervention notice to the Office of Fair Trading under section 67(2) of the Enterprise Act 2002 ("the Act") in respect of the proposed merger of News Corporation and British Sky Broadcasting plc. A copy of the intervention notice is attached for reference. This requires the OFT to provide a report in accordance with article 4 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 within the period ending on 31 December 2010.

The intervention notice mentions that the media public interest consideration specified in section 58(2C)(a) of the Act – concerned with the sufficiency of plurality of persons with control of media enterprises - is or may be relevant to a consideration of the merger. In view of this, the Secretary of State now requires OFCOM to investigate the public interest issues raised by this merger which relate to section 58(2C)(a) of the Act, and report in accordance with article 4A of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 also within the period ending on 31 December 2010.

In accordance with article 4A(3) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 your report must contain advice and recommendations on any media public interest consideration mentioned in the notice under section 67 of the Act, and which is or may be relevant to the Secretary of State's decision as to whether to refer the matter to the Competition Commission. Your report should also contain a summary of any representations about the case which have been received by OFCOM which relate to any of those such media public interest considerations.

The Secretary of State has received a number of representations on whether the merger has potential to result in outcomes detrimental to the public interest consideration specified in section 58(2C)(a) of the Act. I have asked colleagues to forward the representations to your staff today. I should be grateful if your report to the Secretary of State would include a substantive assessment of the merits of the various arguments presented in these submissions, and any other factors you may consider relevant to section 58(2C)(a) of the Act.

Kind regards

ANDREW REES
Deputy Director, Consumer and Competition Policy

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

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

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

> (i) enterprises carried on by or under the control of News Corporation will cease to be distinct from enterprises carried on by or under the control of British Sky Broadcasting plc; and
>
> (ii) the value of the turnover in the United Kingdom of the enterprise to be taken over exceeds £70million;

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

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

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

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

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

4 November 2010

Andrew Rees
An official of the Department for Business Innovation & Skills

E-mail Message

From:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
To:	[redacted]@ec.europa.eu [SMTP:[redacted]r@ec.europa.eu]
Cc:	[redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	04/11/2010 at 13:34
Received:	04/11/2010 at 13:34
Subject:	RE: NEWSCORP/BSKYB
Attachments:	European Intervention notice.pdf

Dear [redacted] Just to let you know that this morning the Secretary of State issued a European Intervention Notice on the Newscorp/BSKYB case which I attach for reference. It would be helpful if we could keep in contact on your competition study.

Regards

Andrew Rees

<>

Andrew Rees| Consumer and Competition Policy| Department for Business, Innovation & Skills |Tel: 7215 2197|

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E-mail Message

From:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
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Cc:	Waring Katie (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Kwaring], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Spad], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Edavey], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Bmkelly], Cook Jonathan (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]
Sent:	04/11/2010 at 15:14
Received:	04/11/2010 at 15:14
Subject:	RE: Intervention Process - what happens next?
Attachments:	Merger control - Public interest interventions - November 2010.doc

[redacted] I attach a two page note on the process which we prepared earlier which answers the questions you raise. Plse note the CC process would be lengthier (in statute they have up to 24 weeks). The Secretary of State has wide ranging powers if a reference is made to the CC and on receipt of their report ie he has powers to block a merger. In the first phase, on receipt of the report from OFCOM, he can clear the transaction, accept undertakings which remedy the plurality affect which may be offered by the parties, or refer it to the CC for a fuller investigation. Hope this helps.

Andrew

Andrew Rees| Consumer and Competition Policy| Department for Business, Innovation & Skills |Tel: 7215 2197|

From: Cable MPST
Sent: 04 November 2010 14:22
To: Rees Andrew (CCP); [redacted] CCP)
Cc: Waring Katie (MPST MIN); SPAD MPST; Davey MPST; Cable MPST
Subject: Intervention Process - what happens next?

Hi Andrew, [redacted]

SoS was just asking what happens next in the intervention process - so say hypothetically SoS gets his Ofcom report at the end of December and decides he wants to refer this to the Competition Commission for further investigation.

Firstly, I understand the legal threshold for proceeding to this stage is higher than referring to Ofcom, but please could you provide a summary of the criteria the SoS would need to take into account when assessing the Ofcom report and deciding whether to refer to CC?

Secondly, if he were to refer the case to the CC, I understand they would report back within 30 days and then what happens? What will the SoS do with this report? I am not clear what the options are for action at the end of this process.

Please could you shed some light on these two areas for me?

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

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Tel: 0207 215[redacted]

Merger Control: Public Interest Intervention

In keeping with the UK's open markets stance, competition law provides that mergers are regulated primarily by the competition authorities against a competition test. Ensuring rigorous competition provides safeguards to the public interest, which are reinforced by regulatory controls in areas such as the utilities.

The BIS Secretary of State has, however, limited powers to intervene - where there are public interest considerations (PICs) relating to national security; media plurality and stability of the UK's financial system. The powers are set out in the Enterprise Act 2002 and confer duties at 3 stages; powers relating to national security and media plurality can also be used in relation to larger mergers where the EC has jurisdiction.

Stages of intervention

Stage 1: Initially, you must decide whether to issue an intervention notice to require a brief look into whether the transaction raises substantive public interest concerns which warrant investigation.

What is the standard for intervening?

You must have 'reasonable grounds for suspecting that it is or may be the case that' a relevant merger situation has been created, and one of the three PICs set out above is relevant. These initial thresholds are relatively low. You do not have to intervene if they are met, but you have discretion to do so.

It is, however, important, that you take the decision by applying your mind to the facts of the case. In the intervention on Lloyds/HBOS, the decision was judicially reviewed on the allegation that the Secretary of State's decision had been fettered by statements by the Chancellor and Prime Minister. As a statutory decision maker you should resist calls to state your preliminary views on actual or rumoured mergers as any such statements might be subsequently used against you in a judicial review as evidence that there was not a full and dispassionate assessment of the facts.

How long do you have to decide whether to intervene?

You may issue an intervention notice any time until the OFT publishes its decision on whether to make a reference to the Competition Commission - their studies take around 25 – 30 days - or in cases where mergers are either not notified or are completed and there is no competition investigation, you may intervene within 4 months of announcement or completion of the merger.

As a matter of good practice, we seek to issue intervention notices as soon as possible - within days of the merger either being announced or notified to the competition authority. The timetable for intervention in European merger cases is not similarly specified in the Act but as a matter of practice, we tend to follow the same timetable as in UK merger cases.

What happens once you've intervened?

You will then receive a short report on the public interest issues raised by the merger (within such time as you may specify). The report will be provided by the OFT in the case of an intervention made on the basis of national security or financial stability, or by Ofcom if the intervention is made on grounds of media plurality.

(ii) Stage 2: On receipt of the OFT's report (or Ofcom if the issue is media plurality) you must decide whether to make a reference to the Competition Commission for a full investigation. If so, they will provide a report to you within 24 weeks.

To do so you must have reasonable grounds for believing that it is or may be the case that: a relevant merger situation has been created; the PIC is relevant; and the situation operates or may be expected to operate against the public interest. Meeting these thresholds requires a higher evidential burden than for intervention, and will often carry a high risk of legal challenge – whether the challenge would succeed is a different matter and would of course depend on the facts. Though it is still only a decision about whether further investigation is merited to enable a properly informed decision.

If you decide there are grounds to refer the merger to the Competition Commission, you have discretion to accept statutory undertakings from the parties to address the public interest concerns raised by the merger as an alternative to doing so. This has been the outcome in all the interventions that have been made on national security grounds in defence sector mergers.

(iii) Stage 3: On receipt of the report of the Competition Commission, you must take the final decision on whether or not the transaction operates against the public interest. At this stage, your decisions clearly need to be supported by strong evidence if they are to be robust against legal challenge (see next section).

What can you do if the merger is against the public interest?
You may to take action which you consider reasonable and practicable to remedy, mitigate or prevent any of the effects that are adverse to the public interest. These are wide ranging powers which include being able to block a proposed merger, or require the divestment of shares if the purchase has already taken place. You must do so in a proportionate way using remedies which are the least intrusive to achieve the objective.

Scope for judicial review
Each stage of the process for considering a merger is carried out in a transparent way with all decisions published along with reasoned arguments. This includes the public interest intervention notice, the report received from the OFT, the reference decision, the report back from the CC and final decisions. All decisions are open to challenge if a party considers the supporting reasons are not adequately robust.

With significant risks of judicial review, the process can become overly protracted. In the Sky/ITV case, which was referred to the Competition Commission on both competition and public interest grounds, it was some 3 years after the initial public interest intervention that Sky finally implemented the remedy imposed to address competition concerns (selling a proportion of their shares in ITV).

(12)

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Sent:	09/11/2010 at 19:50
Received:	09/11/2010 at 19:51
Subject:	News/ Sky: Intervention Notice
Attachments:	BIS letter 9 Nov.pdf

Confidential

[redacted]

I attach a further letter for your attention. [redacted] and I are able to discuss.

Best regards

[redacted]

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9 November 2010

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D 0207 296 [redacted]

Our ref [redacted]
Matter ref A0020/78918

Dear [redacted]

News Corporation - British Sky Broadcasting – Intervention Notice

I am writing further to the intervention by the Secretary of State on 4 November, under section 67 of the Enterprise Act 2002 regarding the proposed acquisition by News Corporation ("News") of the remaining shares in British Sky Broadcasting Group plc ("Sky") that News does not already own (the "Transaction").

News has already made detailed substantive submissions to the Department for Business, Innovation and Skills ("BIS") and continues to believe that there is no proper basis for the issuing of such notice in the present case.

News attaches considerable importance to understanding the substantive basis for the intervention notice in order to focus its further submissions to Ofcom on any particular concerns which have prompted intervention in this case. This is particularly the case where the decision by the Secretary of State involves departure from previous policy guidance and, in contrast with the only other case in which a public interest intervention notice was issued in a media merger, no statement has been made to Parliament providing any indication of the reasons for such an intervention.

Specifically, we are keen to understand the grounds on which the Secretary of State has concluded that a media public interest consideration specified in section 58 of the Enterprise Act 2002 is relevant in relation to sufficiency of plurality of persons, including which of the arguments presented by third parties have been considered by the Secretary of State to be sufficient to warrant intervention in this case and to justify a departure from the published DTI Guidance.

We await hearing from you on these issues as a matter of priority. As you will appreciate, provision of timely details of the substantive basis for the Secretary of State's intervention is necessary in order to avoid slowing down and duplicating the process of responding to the intervention notice and to enable News to make meaningful and effective submissions to Ofcom.

Should you have any questions, please do not hesitate to contact me [redacted] on direct line ++ 44 (0)20[redacted] or email at [redacted]@hoganlovells.com) or [redacted] (on direct line ++ 44 (0)20[redacted]r email at [redacted]@hoganlovells.com) or [redacted] at News (on direct line +44 (0)20[redacted]r email at [redacted]newsint.co.uk).

Yours sincerely

[redacted]

John Pheasant

Partner

E-mail Message

From:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=PBANNIST], Evans Peter (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]
Sent:	11/11/2010 at 11:11
Received:	11/11/2010 at 11:11
Subject:	FW: News Corporation/ BskyB
Attachments:	BIS letter 9 Nov.pdf Draft Reply to Hogan Lovells for Counsel's approval.doc

[redacted]

Please note that we received the attached letter from Hogan Lovells seeking information on the Secretary of State's reasons for intervening. Our proposed reply is also attached. We have sent it to Counsel for clearance. There is no need for the Secretary of State to approve the text but he will want to be aware of the exchange. We expect to send the reply to Hogan Lovells by close tomorrow.

[redacted]

From: Evans Peter (LEGAL B)
Sent: 10 November 2010 18:00
To: 'Elisa Holmes'
Cc: 'Steven Duffett'
Subject: News Corporation/ BskyB

Elisa

You'll recall advising on the above case. The Secretary of State issued a European Intervention Notice on 4th November and we have received the attached letter from News Corporation's solicitors asking for information about the reasons for the Secretary of State's decision. I also enclose our proposed reply and would welcome your comments on this. If you would like to discuss this, please do not hesitate to contact me on the number below.

[redacted]
<> <>

[redacted] Legal Adviser (Competition) | Legal Services B6 (Consumers and Competition) | Department for Business, Innovation & Skills |
[redacted]@bis.gsi.gov.uk | 020 7215 [redacted] www.bis.gov.uk |

The Department for Business, Innovation & Skills (BIS) is building a dynamic and competitive UK economy by creating the conditions for business success; promoting innovation, enterprise and science; and giving everyone the skills and opportunities to succeed. To achieve this we will foster world-class universities and promote an open global economy. BIS - Investing in our future

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DRAFT REPLY TO HOGAN LOVELLS LETTER OF 9 NOVEMBER

1. Thank you for your letter of 9 November. You request information about the reasons underpinning the Secretary of State's decision to intervene in respect of News Corporation's proposed acquisition of 100% of the shares in British Sky Broadcasting Group.

2. The Secretary of State's decision reflects his belief that it is or may be the case that the public interest consideration specified at section 58(2C)(a) of the Enterprise Act is relevant to a consideration of the proposed merger – this being concerned with the need to ensure there is a sufficient plurality of persons with control of media enterprises.

3. British Sky Broadcasting Group is one of the largest providers of broadcast news in the UK, operating the Sky News television channel and website and also supplying news content to Channel 5 as well as the majority of the UK's most significant commercial radio stations, having recently won the contract to supply news content to Independent Radio News. News Corporation owns News International whose newspaper titles represent a substantial proportion of the market for national newspapers in the UK.

4. Your previous submissions have set out News Corporation's arguments against intervention in this case. Other submissions expressed arguments to the effect that the merger would give rise to outcomes that would have substantive negative consequences for the sufficiency of plurality of persons with control of media enterprises.

5. The Secretary of State considered that there were credible arguments that the merger could result in an impact to relevant to the public interest as it relates to the sufficiency of media plurality. He considered he was not in a position to determine finally that the merger was not capable of having any such impacts. In the absence of such certainty, he considered it appropriate to require Ofcom to undertake an initial investigation, enabling the substantive arguments to be explored more fully in a transparent and balanced way. Ofcom's report and summary of other representations may then be taken into account by the Secretary of State in deciding whether or not to refer the transaction to the Competition Commission for fuller investigation.

6. You suggest that this decision departs from the published Guidance on use of the power to intervene in media mergers. Your previous submissions referred to the statement in the Guidance that intervention would generally be considered only in cases where statutory media ownership rules would previously have applied had they not been removed by the Communications Act 2003. The Guidance does not set out absolute rules in relation to interventions by the Secretary of State. As is stated in paragraph 1.7 of the Guidance, it is no substitute for the provisions of the Enterprise Act itself. It should also be borne in mind that, whilst the guidance is intended to provide an indication of how the media public interest merger regime will operate in practice, and the approach the Secretary of State is likely to adopt in considering cases, each transaction will be looked at on its merits on a case-

by-case basis. Furthermore, whilst we do not consider any previously applicable media ownership rules would have applied to this present transaction, the Guidance makes clear that in exceptional circumstances the Secretary of State may consider it necessary to intervene in cases where media ownership rules did not previously apply.

7. The Guidance refers to cases where "exceptional circumstances" might apply and, without seeking to define such circumstances in any exhaustive way, specifically states in paragraph 8.8 that a situation where a large number of news channels were coming under single control is a case where exceptional circumstances might be considered to arise. In view of the fact that this merger involves a situation where several significant sources of news would be coming under common control, we are satisfied that this does not amount to a departure from the published Guidance.

8. You have already seen the submission to the Secretary of State from Enders Analysis and the opinion from Slaughter & May that was submitted jointly by a group of media organisations. We believe these papers provide a good indication of the types of arguments that were put forward as to why the proposed merger may be expected to give rise to outcomes that are adverse to the public interest. All the substantive submissions received by the Secretary of State have been forwarded to Ofcom to assist them in undertaking their investigation and preparing their report.

E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	[redacted] [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]MPST Correspondence [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Mpstco]
Cc:	
Sent:	11/11/2010 at 16:15
Received:	11/11/2010 at 16:15
Subject:	RE: New Standard Line for Sky letters

Thanks [redacted]

I was reviewing standard lines today as it happens so have incorporated these changes into the Sky one.

Jo

Jo Thompson | Private Secretary to the Secretary of State for Business, Innovation and Skills

5th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted](CCP)
Sent: 11 November 2010 13:06
To: Cable MPST; MPST Correspondence
Subject: RE: New Standard Line for Sky letters

[redacted]

Here it is again using track changes. It may be that all letters have already issued.

The other text was fine but it failed to include the words "plurality of" between "sufficiency of" and "persons". The reference to "Sufficiency of persons" gets across the idea perfectly well but is not quite right. And I thought the replies did not really need to include the detail that the European Intervention Notice was issued under Section 67 of the Enterprise Act. People can read that in the press notice if they are really interested.

The other main change was to make the text say that the Ofcom report, and any other representations, will be taken into account in reaching a decision on whether to make a reference to the Competition Commission. This is more accurate than saying that such a decision would be based on Ofcom's report. Important to reflect the fact that this decision rests with the SofS alone - he does not simply rubber stamp advice from Ofcom.

[redacted]

From: Cable MPST
Sent: 11 November 2010 12:42
To: [redacted](CCP); MPST Correspondence

Subject: RE: New Standard Line for Sky letters

Hi [redacted] - what change have you made? I can't tell...

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] CCP)
Sent: 11 November 2010 12:41
To: Cable MPST; MPST Correspondence
Subject: RE: New Standard Line for Sky letters

All

Please note I would suggest a very slight re-working of that line for any future replies - if there are any.

[redacted]

From: Cable MPST
Sent: 04 November 2010 14:13
To: MPST Correspondence
Cc: Rees Andrew (CCP); [redacted] (CCP); Bannister Paul (CCP)
Subject: RE: New Standard Line for Sky letters

[redacted]

The SoS has approved the attached standard line - please can we start reprinting Sky letters for signing this afternoon. I will bring round a batch.

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Cable MPST

Sent: 04 November 2010 11:52
To: MPST Correspondence
Cc: Rees Andrew (CCP); [redacted] (CCP); [redacted] (CCP)
Subject: RE: New Standard Line for Sky letters

[redacted]

I will get this cleared by the SoS asap and let you know when you can start reprinting the Sky letters.

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (CCP)
Sent: 04 November 2010 11:08
To: Cable MPST; [redacted] (CCP)
Cc: Rees Andrew (CCP); MPST Correspondence
Subject: RE: New Standard Line for Sky letters

[redacted]

As requested - I attach a new standard line.

[redacted]

Competition Law and Mergers | Department for Business, Innovation and Skills |
[redacted]@bis.gsi.gov.uk | T: 0207 215 [redacted]

The Department for Business, Innovation and Skills (BIS) is building a dynamic and competitive UK economy by creating the conditions for business success; promoting enterprise and science; and giving everyone the skills and opportunities to succeed. To achieve this we will foster world class universities and promote an open and global economy.

BIS - Investing in our future

From: Cable MPST
Sent: 04 November 2010 10:07
To: [redacted] (CCP); [redacted] (CCP)
Cc: Rees Andrew (CCP); MPST Correspondence
Subject: New Standard Line for Sky letters
Importance: High

Hi [redacted]

We have about six Sky letters which have not yet been signed which have been drafted with the current standard line. As of today this is now out of date. Please could I ask you to draft a new line which will tide us over until Ofcom reports in December?

Today will be the last opportunity the SoS has to sign letters before he goes to China for a week so I would really appreciate it if we could try and get this new line drafted today - do you think this is feasible?

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

News Corp/BSkyB

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Thank you for your letter of [date] about News Corporation's plans to acquire 100% of the shareholding in British Sky Broadcasting Group (BSkyB).

Deleted: proposal

I announced on 4 November that I had issued a European Intervention Notice in respect of this transaction. This requires Ofcom to investigate the public interest consideration relating to the sufficiency of plurality of persons with control of media enterprises and provide a report to me by 31 December. I will then take that report, and any other representations received, into account in deciding whether or not to refer the proposed transaction to the Competition Commission for a full investigation.

My announcement can be seen at the following link:
http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=416355&NewsAreaID=2

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Formatted: Font: Univers (W1)

Deleted: under Section 67 of the Enterprise Act 2002

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Deleted: . Ofcom will submit

Deleted: Based on

Formatted: Font: Univers (W1), 11 pt

Deleted: information, I will then decide

Formatted: Font: Univers (W1)

Deleted: potential acquisition

Formatted: Font: Univers (W1)

E-mail Message

From:	[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
To:	[redacted] SMTP [redacted] @hoganlovells.com]
Cc:	Pheasant, John [SMTP:john.pheasant@hoganlovells.com], [redacted] [SMTP [redacted] @hoganlovells.com], [redacted] [SMTP:stephanie.ricard@hoganlovells.com], Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Arees], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe] [redacted] LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	15/11/2010 at 16:22
Received:	15/11/2010 at 16:22
Subject:	RE: News/ Sky: Intervention Notice
Attachments:	Reply to Hogan Lovells - 15 Nov 2010.doc

[redacted]

On behalf of Andrew Rees, I attach a response to your letter of 9 November about the Secretary of State's reasons for issuing an intervention notice in respect of News Corporation's proposed acquisition of BSkyB Group.

[redacted]
CCP BIS
020 7215 [redacted]

From: [redacted] [mailto: [redacted] @hoganlovells.com]
Sent: 09 November 2010 19:51
To: [redacted] CCP)
Cc: Pheasant, John; Howard, Jan; Ricard, Stephanie; Rees Andrew (CCP); [redacted] (CCP); Chambers Sarah (CCP); Evans Peter (LEGAL B)
Subject: News/ Sky: Intervention Notice

Confidential

[redacted]

I attach a further letter for your attention. [redacted] and I are able to discuss.

Best regards

[redacted]
Counsel

P344

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

Tel: +44 20 7296 2000
Direct: +44 20 [redacted]
Mobile: +4[redacted]
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Minicom +44 (0)20 7215 6740

15 November 2010

Dear

NEWSCORP/BSKYB CASE – PUBLIC INTEREST INTERVENTION

Thank you for your letter of 9 November in which you requested information about the reasons underpinning the Secretary of State's decision to intervene in respect of News Corporation's proposed acquisition of the 60.9% of shares in British Sky Broadcasting Group ("BSkyB") which it does not already hold.

The Secretary of State's decision reflects his belief that it is or may be the case that the public interest consideration specified in section 58(2C)(a) of the Enterprise Act 2002 ("the public interest consideration") is relevant to a consideration of the proposed merger. The public interest consideration is concerned with the need to ensure that there is a sufficient plurality of persons with control of media enterprises serving every different audience in the UK.

Your previous submissions addressed to the Department of Business, Innovation and Skills ("BIS") set out News Corporation's arguments against intervention in this case. BIS has received submissions from other entities which expressed arguments to the effect that the merger would give rise to outcomes which would have significant negative consequences for the sufficiency of plurality of persons with control of media enterprises.

Having considered all of the submissions received, the Secretary of State considered that it was or may be the case that the public interest consideration was relevant to a consideration of the merger. The Secretary of State considered, therefore, that it was appropriate to require Ofcom to undertake an initial investigation, enabling the substantive arguments to be explored more fully. Ofcom's report and other representations may then be taken into account by the Secretary of State in deciding whether or not to refer the transaction to the Competition Commission for fuller investigation.

BSkyB is one of the main providers of broadcast news in the UK, operating the Sky News television channel and website and also supplying news content to Channel 5 as well as the majority of the UK's most significant commercial radio

Continuation 2

stations, having recently won the contract to supply news content to Independent Radio News. News Corporation owns News International whose newspaper titles represent a substantial proportion of the market for national newspapers in the UK. Although News Corporation already has a significant shareholding in BSkyB, it is possible that the acquisition of the remaining 60.9% of shares, so that News Corporation is the sole shareholder in BSkyB, will have a relevant impact on the sufficiency of plurality of persons with control of the media enterprises serving UK audiences. As a result of the merger, News Corporation will be the only shareholder whose interests BSkyB will need to consider and News Corporation will have total control of BSkyB.

You have already seen the submission to the Secretary of State from Enders Analysis and a draft submission from Slaughter & May that was submitted on behalf of a group of media organisations. These papers encapsulate the arguments that were put forward as to why the proposed merger may be expected to give rise to outcomes that are adverse to the public interest, and which the Secretary of State took into account. The Secretary of State also took into account all of the submissions received on your behalf. All the substantive submissions received by the Secretary of State have been forwarded to Ofcom to assist it in undertaking its investigation and preparing its report.

You suggest that the Secretary of State's decision departs from the published Guidance on use of the power to intervene in media mergers. Your previous submissions referred to the statement in the Guidance that intervention would generally be considered only in cases where previously applicable statutory media ownership rules would have prevented the merger had they not been removed by the Communications Act 2003.

As paragraph 1.7 of the Guidance makes clear, the Guidance is not a substitute for the provisions of the Enterprise Act 2002. Whilst the guidance is intended to provide an indication of how the media public interest merger regime will operate in practice, and the approach the Secretary of State is likely to adopt in considering cases, each transaction will be looked at on its merits on a case-by-case basis. The Secretary of State has taken into account the Guidance, but applying the statutory test for intervention, he considers that the circumstances of this case warrant his intervention.

In any event, whilst the Secretary of State does not consider any previously applicable media ownership rules would have applied to this transaction, the Guidance sets out a list of exceptional circumstances in which the Secretary of State may consider it necessary to intervene in cases where media ownership rules did not previously apply. In this respect paragraph 8.8 of the Guidance should be noted, which provides that at the time of publication of the Guidance, the Secretary of State was not "currently aware of any other types of cases in which exceptional circumstances might arise". This indicates that the list of exceptional circumstances encapsulated such circumstances which the Secretary of State foresaw at the time of publication of the Guidance which might warrant his intervention, but was not necessarily exhaustive.

Further, the Guidance states in paragraph 8.8 that a situation where a large number of news channels were coming under single control is a case in which exceptional circumstances might be considered to arise. In view of the fact that this merger involves a situation in which several significant sources of news

Continuation 3

would be coming under common control, the Secretary of State considers that this merger is at least akin to paragraph 8.8 of the Guidance in that the same or similar concerns may arise in the circumstances of this merger. The Secretary of State is satisfied that exceptional circumstances warrant his intervention in this case.

Kind regards

ANDREW REES
Deputy Director, Consumer and Competition Policy

E-mail Message

From:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN: [redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE]
Sent:	22/11/2010 at 17:02
Received:	22/11/2010 at 17:02
Subject:	FW: News Corporation/ Sky: Public interest intervention
Attachments:	Letter to BIS dated 22 November 2010.pdf

[redacted]

(i) To see that we've received more correspondence from News Corp's lawyers asking for further details on the basis of the Secretary of State's intervention following up a letter I sent them a few days ago. We're currently preparing a draft reply and consulting Counsel, but just to alert you that I'd like to clear the draft with the Secretary of State before sending it.

(ii) Can I also flag up that Ofcom are working to the deadline of 31 December but have told me that they may get a very large volume of correspondence on this one in which case they may come back to ask for a short extension of a few days. The initial deadline is relatively generous in providing 37 working days until New Year's Eve (in the Sky/ITV and Lloyds/HBOS interventions we gave Ofcom and the OFT 30 days respectively for the first phase). But we see no reason why a short extension shouldn't be granted, if it turns out to be needed. Could you check that the Secretary of State would be prepared to consider the case for a short extension, if needed. Thanks.

Andrew

From: [redacted]hoganlovells.com]
Sent: 22 November 2010 10:40
To: Rees Andrew (CCP)
Cc: [redacted] (CCP); [redacted]
Chambers Sarah (CCP); [redacted] (LEGAL B); [redacted]
[redacted]
Subject: News Corporation/ Sky: Public interest intervention

Andrew

I attach a letter in response to your letter of 15 November.

Regards

[redacted]

Counsel

Hogan Lovells International LLP

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______

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22 November 2010

Andrew Rees
Deputy Director, Consumer and Competition Policy
Department of Business Innovation and Skills
1 Victoria Street
London
SW1H 0ET

[redacted]
Partner
[redacted]@hoganlovells.com
D [redacted]

Our ref [redacted]
Matter ref A0020/78918

Dear Mr. Rees

News Corporation - British Sky Broadcasting – Public Interest Intervention

I refer to your letter of 15 November responding to our letter of 9 November seeking reasons for the intervention by the Secretary of State in the proposed acquisition by News Corporation ("News Corp") of the remaining shares in British Sky Broadcasting Group plc ("Sky") that News does not already own ("Transaction").

We have reviewed your letter and have a number of points of clarification to raise.

First, you note that the Secretary of State's decision reflects his belief that "***it is** or **may be** the case*" or that "***it was** or **may be** the case*" (emphasis added) that the public interest consideration specified in section 58(2C)(a) of the Enterprise Act is relevant to the Transaction (paragraphs 2 and 4 of your letter).

It was not clear to us whether the Secretary of State has already decided that the cited public interest consideration is relevant to this case. We would respectfully submit that, notwithstanding the intervention notice, the Secretary of State must decide in his discretion - also in light of the advice he has sought from Ofcom - whether he believes that (1) the public interest consideration specified in section 58(2C)(a) of the Enterprise Act is relevant to the Transaction, and (2) taking into account only that public interest consideration, the Transaction operates or may be expected to operate against the public interest. We would request clarification that the Secretary of State has reserved judgment on both these issues at this stage.

Secondly, you note that Sky is "*one of the main providers of broadcast news in the UK*" and that it supplies news content to Channel 5 as well as the "*majority of the UK's most significant commercial radio stations, having recently won the contract to supply news content to Independent News and Radio*".

For the purposes of section 58 of the Enterprise Act, an enterprise is a media enterprise if it "consists in or involves broadcasting".[1] A "media enterprise" is therefore not one which consists in or involves the provision of news content or services to broadcasters. That the supply of news content or services is irrelevant to the plurality assessment is logical and consistent with the overall regulatory framework, where the focus is not on the provider of content or ancillary services but on the owner of channels and programming and editorial control. This has important implications for the assessment of sufficiency of plurality in relation to the Transaction. Any activities of Sky or News Corp in relation to the supply of raw news or content or other services to third parties which do not confer control over editorial policy are not relevant to any public interest consideration. Accordingly, there is potentially a clear legal error relating to the basis of which Ofcom has been requested to conduct its review and the consequent decision to be taken by the Secretary of State.

Thirdly, you note that the Guidance states at paragraph 8.8 that a situation where a large number of news channels were coming under single control is a case in which "exceptional circumstances" might be considered to arise for the purposes of intervention. It is then stated that the Transaction involves a "*situation in which several significant sources of news*" would be coming under common control and that, accordingly, the Secretary of State considers that the Transaction is "*at least akin*" to the situation in paragraph 8.8 of the Guidance.

We do not consider that the situation cited in paragraph 8.8 in any way describes or is analogous to the Transaction. News Corp is a newspaper provider and Sky is a TV channel provider. There is no overlap in the provision of TV news channels. It is not the case that the Transaction involves a large number of news channels coming under common control since there is no change in the *status quo ante* in respect of TV news.

The reference to a situation in which significant "sources" of news are coming under common control therefore requires elucidation in relation to any relevant public interest consideration. The relevant public interest consideration, as we understand from your letter, is "*the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience.*" However, the letter does not set out the basis for the Secretary of State's conclusion that it "is or may be" the case that the Transaction will result in insufficient plurality of persons serving any particular audience in the UK and, if so, what that relevant audience might be.

Furthermore, the intervention in relation to the Transaction is at odds with the approach of the Secretary of State in relation to the recent completed acquisition of Channel 5 by Northern & Shell where no public interest intervention was made. Both transactions involve an acquisition by a corporation that also owns a company that produces newspapers. In both cases, the BBC and ITV remain as significant independent providers of TV news with greater shares of TV news than the target by a considerable margin (accounting for, collectively, around 75% of news programming[2]). Overall, the Northern & Shell/ Channel 5 transaction would appear to present a stronger case for intervention:

- The Northern & Shell/ Channel 5 transaction is closer to the categories of case in which the Secretary of State would generally consider intervention in accordance with paragraph 8.2 of the Guidance, where the acquisition of Channel 5 by a national newspaper is specifically mentioned.
- The acquisition of a terrestrial channel such as Channel 5, with a reach covering the majority of the UK population, is clearly of greater significance than the acquisition of Sky News which broadcasts by satellite (DTH). In fact, the Guidance provides that, save in exceptional circumstances, the Secretary of State will not intervene in respect of mergers

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1 Section 58A(2), Enterprise Act.
2 2010 year to date. Based on BARB data.

P352

in areas where there are no media ownership restrictions and none were removed by the Communications Act. It cites a specific example of such mergers, namely one involving *satellite* and cable television and radio services, which is analogous to the Transaction.[3]

The Secretary of State will be aware that on 19 November the OFT published its decision in relation to the completed Northern & Shell/ Channel 5 acquisition.[4] The OFT did not believe that that transaction may be expected to result in a substantial lessening of competition, even on a conservative basis of examining an 'all-media' news provision market.

We would invite you to explain why a specific public interest consideration is or may be relevant to the Transaction (and, therefore, is considered by the Secretary of State to justify intervention) and not to Northern & Shell/ Channel 5; and why the two transactions have been treated in a different manner.

I would like to reiterate that News Corp remains committed to answering any questions that relevant authorities may have in relation to the Transaction and to elaborate on its views as to why the Transaction does not give rise to plurality concerns. However, we remain unclear as to the substantive basis for intervention and believe that this lack of clarity may adversely impact the review which the Secretary of State has requested Ofcom to undertake in the sense that this review lacks focus and a clear legal basis and may potentially taint any subsequent decision by the Secretary of State.

As you will expect, News Corp is preparing submissions to Ofcom to inform the next stage in the process. We would appreciate your timely response to the points raised above in order to provide the basis for a meaningful and focused debate on the issues within a precise legal framework.

Should you have any questions, please do not hesitate to contact me [redacted] (on direct line ++ 44 (0)20 [redacted] or email at [redacted]@hoganlovells.com) o [redacted] (on direct line ++ 44 (0)20 [redacted] or email at [redacted]@hoganlovells.com) or [redacted] at News (on direct line +44 (0)20 [redacted] or email at [redacted]@newsint.co.uk).

Yours sincerely

[redacted]

Partner

3 Guidance, paragraph 8.4.
4 ME/4682/10.

E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
Cc:	[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE]
Sent:	25/11/2010 at 10:15
Received:	25/11/2010 at 10:16
Subject:	RE: News Corporation/ Sky: Public interest intervention

Hi Andrew

Sorry I didn't reply to this yesterday. This letter looks fine to me and as long as you and lawyers are happy with it then I am too.

Thanks for sharing this

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Rees Andrew (CCP)
Sent: 24 November 2010 10:31
To: Cable MPST
Cc: [redacted] (CCP); [redacted] (LEGAL B); Chambers Sarah (CCP)
Subject: FW: News Corporation/ Sky: Public interest intervention

[redacted] Just to follow up my first point below, I now attach a draft reply which has been cleared with BIS lawyers and Counsel which I'd like, if possible, to send out tonight. Are you content? (I think it's fairly straightforward).

Andrew

Andrew Rees| Consumer and Competition Policy| Department for Business, Innovation & Skills |Tel: 7215 2197|

From: Rees Andrew (CCP)
Sent: 22 November 2010 17:02
To: Cable MPST
Cc: [redacted] (CCP); Chambers Sarah (CCP)
Subject: FW: News Corporation/ Sky: Public interest intervention

[redacted]

(i) To see that we've received more correspondence from News Corp's lawyers asking for further details on the basis of the Secretary of State's intervention following up a letter I sent them a few days ago. We're currently preparing a draft reply and consulting Counsel, but just to alert you that I'd like to clear the draft with the Secretary of State before sending it.

(ii) Can I also flag up that Ofcom are working to the deadline of 31 December but have told me that they may get a very large volume of correspondence on this one in which case they may come back to ask for a short extension of a few days. The initial deadline is relatively generous in providing 37 working days until New Year's Eve (in the Sky/ITV and Lloyds/HBOS interventions we gave Ofcom and the OFT 30 days respectively for the first phase). But we see no reason why a short extension shouldn't be granted, if it turns out to be needed. Could you check that the Secretary of State would be prepared to consider the case for a short extension, if needed. Thanks.

Andrew

From: [redacted] [mailto [redacted] @hoganlovells.com]
Sent: 22 November 2010 10:40
To: Rees Andrew (CCP)
Cc: [redacted] (CCP); [redacted] Chambers Sarah (CCP); [redacted] (LEGAL B);
[redacted]
Subject: News Corporation/ Sky: Public interest intervention

Andrew

I attach a letter in response to your letter of 15 November.

Regards

[redacted]
Counsel

P354

[redacted]
Hogan Lovells International LLP
Atlantic House
Holburn Viaduct
London
EC1A 2FG

Department for Business,
Innovation and Skills

1 Victoria Street
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Tel +44 (0)20 7215 2197
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Minicom +44 (0)20 7215 6740

25 November 2010

Dear [redacted]

NEWSCORP/BSKYB CASE – PUBLIC INTEREST INTERVENTION

1. I refer to your letter of 22nd November.

2. Decisions to intervene in mergers on public interest grounds under section 67 of the Enterprise Act 2002 are taken on the basis of whether the Secretary of State believes it is or may be the case that a specified public interest consideration is relevant to a consideration of that merger. This is the decision which the Secretary of State has taken. As you are aware, he has decided that it is or may be the case that the media plurality public interest consideration is relevant to a consideration of the proposed transaction.

3. The decision to intervene under section 67 must be distinguished from the decision the Secretary of State must subsequently take under article 5 of the Enterprise Act (Protection of Legitimate Interests) Order 2003 on whether or not to make a reference to the Competition Commission. I can confirm that the latter decision (which inter alia requires the Secretary of State to assess whether a public interest consideration mentioned in the intervention notice is relevant to considering the transaction and whether, taking account of that public interest consideration, it is or may be the case that the contemplated merger would operate or may be expected to operate against the public interest) has not yet been taken by the Secretary of State.

4. We are satisfied no legal error has occurred in deciding to intervene in this case. The case for intervention in any merger must be considered by reference to the relevant statutory provisions and the specific circumstances of that individual case. The Secretary of State has intervened in this particular merger because he believes it is or may be the case that the media plurality public interest consideration is relevant to a consideration of the proposed transaction.

Continuation 2

5. In taking the decision to intervene in a merger on public interest grounds, the Secretary of State does not need to determine finally the merits of any particular substantive argument as to whether a merger may give rise to effects adverse to the public interest. In this case, he is satisfied there are credible arguments on the matter that may not be dismissed at this stage and that merit fuller investigation. The existence of uncertainty as to the merits of any particular argument in no way precludes making such an intervention.

6. We expect the parties to make representations to Ofcom about the merits of whether the merger may in fact be capable of giving rise to effects adverse to the public interest. We assume those representations will include arguments as to whether the fact that Sky provides news content to other broadcasters should be considered relevant to a consideration of the merger's potential impact on the sufficiency of plurality. These arguments will then be taken into account in reaching a decision on whether to make a reference to the Competition Commission. We do not understand you to be suggesting that either BSkyB or News Corporation are not media enterprises within the meaning of the Enterprise Act.

7. You state that you do not accept that this transaction is analogous to that cited in paragraph 8.8 of the Guidance. For the reasons set out in our letter of 22 November 2010, the Secretary of State considers it is in some relevant respects, analogous. In any event, as previously explained, the published guidance is not a substitute for the legislation, although it is important and has been taken into account in reaching decisions on whether to intervene in media mergers.

8. As paragraph 7.7 of the Guidance explains, section 58(2C)(a) is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This broadcasting and cross-media public interest consideration, therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality. It should be noted in this regard that "media enterprise" means not just an enterprise that consists in or involves broadcasting (section 58A(1)) but also a newspaper enterprise where a merger involves a broadcaster (section 58A(2)).

9. Both the parties involved in this present merger are significant sources of news. News produced by Sky is broadcast by a large number of other television channels and radio stations. In deciding whether or not to issue an intervention notice in this case, the Secretary of State did not need to reach any final conclusions as to whether or not this latter fact means Sky influences the content of the news bulletins of other broadcasters or whether, for the purposes of considering the sufficiency of media plurality, this means that the merger would or may increase News Corporation's ability to influence opinions and control the agenda. On the

Continuation 3

basis of information provided to the Secretary of State, a credible argument might be made that it does. It is one of the substantive matters that can now be subject to more in depth analysis.

10. You compare the decision to intervene in respect of News Corporation's proposed acquisition of 100% of the shares in BSkyB Group with the Secretary of State's approach to Northern & Shell's recent acquisition of Channel 5. The Secretary of State carefully considered the respective merits of each individual case. His decision to intervene in relation to the former case reflected his belief that public interest considerations were or may be relevant to consideration of this particular transaction.

Kind regards

ANDREW REES
Deputy Director, Consumer and Competition Policy

E-mail Message

From:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To:	[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY]
Cc:	SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], Waring Katie (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=KWARING], Wilkes Giles (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=GWILKES], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Crellin Joanna (MPST MIN) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=JCRELLIN]
Sent:	29/11/2010 at 15:56
Received:	29/11/2010 at 15:56
Subject:	SoS Call with Commissioner Almunia
Attachments:	SoS call with Commissioner Almunia 29.11.10.doc

Dear All

Please see attached for your information a note of the SoS' call with Commissioner Almunia which took place earlier today.

(Please ignore earlier email)

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

SoS call with Commissioner Almunia
Monday 29th November

Commissioner Almunia requested the call with the SoS to update him on the likely timings of the conclusion of the Commission's investigation into whether the Newscorp acquisition of Sky presented competition issues.

The Commissioner reported that he was expecting to be in a position to make his decision on 9 December. However he added that it was possible the Commission might need to seek some further information from Newscorp in which case the announcement of his decision would be delayed until 22 December. The Commissioner said that his officials would be in touch with BIS officials to share details of this announcement.

The SoS thanked the Commissioner for this update on the Commission's progress. He said that Ofcom was not due to finish his report on whether there are media plurality issues in this case until about 10 January. He said he would not announce his decision about whether to refer the case to the Competition Commission for a fuller investigation until after 10 January.

SoS Discussion with James Harding, Editor of The Times
Thursday 9 December

JH and SoS discussed a wide range of political issues throughout the interview during which JH and SoS had a brief conversation about SoS' intervention into Newscorp's acquisition of the remaining shares of BSkyB that it does not already own. The SoS explained that he had received a number of representations from a range of different individuals and groups and that, on this basis, he had decided to use his powers under the Enterprise Act to ask Ofcom to investigate whether the acquisition raised concerns over media plurality. He explained that the European Commission was conducting its own separate investigation into the competition aspects of the case.

JH commented on Newscorp's considerable contribution to the UK's economy. The SoS stressed that this was not the issue and explained that his legal powers related to plurality of media ownership. On this basis, and on this basis alone, he had asked Ofcom to investigate. SoS said that he had not been in contact with Ofcom since he had issued the intervention notice on 4th November and refused to speculate about the findings of Ofcom's report. He also declined to comment about whether he would ask the Competition Commission to investigate the case further, as he explained this would depend upon the findings of the Ofcom report.

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E-mail Message

From:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Grossman Russell (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=RGROSSMA], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=JECOOK], Vaizey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=PSVAIZEY], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Willetts MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AWILLET], Prisk MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=MPRISK], Wilcox MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=WILCOXJ], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Perm Sec BIS [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=FRASER], [redacted] LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted] (COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]
Sent:	13/12/2010 at 16:23
Received:	13/12/2010 at 16:23
Subject:	BSKYB/NEWSCORPS
Attachments:	Newscorp BSkyB - Intervention process - December 2010.doc

Bernadette Kelly suggested I put up a note on next stages in the process on the NewsCorp/BSkyB case, which is attached. If you want to discuss, feel free to give either myself or [redacted] a call.

Regards

Andrew
(x2197)

<>

Newscorp/BskyB – Intervention Process

What happens now that the SoS has intervened?

- The SoS will receive a short report on the public interest issues raised by the merger from Ofcom by 31 December 2010. They will carry out a public consultation and also report on the substantive issues put to the SoS prior to intervention, which relate to there being a sufficient plurality of persons with control of media enterprises. Ofcom are working to the statutory deadline the SoS has set though there is a small chance they may ask for a few more days. BIS Legal have confirmed this should be possible, but point out that there is a lack of clarity in the legislation which means the SoS will want to weigh the strength of Ofcom's case against the possible legal risk involved.

- On receipt of Ofcom's report at the end of December the SoS must decide whether to make a reference to the Competition Commission for a full investigation, or clear the merger, or accept undertakings in lieu of a reference. There is an administrative guideline of 10 working days from receipt of Ofcom's report for the SoS to take his decision although, in principle, it would be acceptable to take a few days longer if, for example, the issues are complex and we need further dialogue with Ofcom, or if the parties were to offer undertakings.

- If the Secretary of State decides the case should be referred to the CC for a full investigation, it is open to him instead to accept from the parties statutory undertakings if he believes these would effectively remedy the concerns about plurality which he considers are raised by the merger. In assessing the potential for accepting such undertakings, he will take into account their effectiveness in remedying the identified concerns as well as the ease of enforcement.

- If the Secretary of State decides to refer the merger to the CC, they will provide a report within 24 weeks containing advice on whether the merger is likely to operate against the public interest and on the appropriateness of any remedies. On receipt of the CC's report, the SoS must take the final decision on whether or not the transaction operates against the public interest. At this stage, his decisions clearly need to be supported by strong evidence if they are to be robust against legal challenge.

What can the SoS do if the merger is against the public interest?

- He may take action he considers reasonable and practicable to remedy any of the effects that are adverse to the public interest. These are wide ranging powers which include being able to block a proposed merger, or require the divestment of shares if the purchase has already taken place. He must do so in a proportionate way using remedies which are the least intrusive to achieve the objective.

How do the public interest and competition processes interact?

- The public interest intervention is running at the same time as the European Commission are conducting a competition assessment on the merger. Their first phase is due to report by 22 December and they will then decide whether to conduct an in–depth second phase investigation.

P362

- In principle, the two processes are separate, and the SoS will need to assess any plurality concerns independently of decisions by the EC about any effects on competition. But the outcome of the Commission's study is relevant in that, for example, a remedy to any anti-competitive effects might also resolve any plurality concerns which could be identified by Ofcom's study. Moreover, if the EC were to clear the merger on competition grounds, it would be good practice not to keep the parties waiting too long for a reference decision on the plurality issues.

Handling Media / Parliamentary queries

- In responding to queries, Ministers and officials should avoid commenting on the substance of the case or, importantly, appearing to pre-judge the outcome of investigations before considering all the evidence.

- Decisions fall to be taken on their merits by the SofS in accordance with his statutory duties under the Enterprise Act. All relevant information and representations must be given proper consideration in an even handed way.

- At this stage, any substantive representations should be made direct to Ofcom. These can then be properly considered and reflected in Ofcom's report to the SoS. There may be a case for officials meeting the parties after Ofcom have reported to ensure we fully understand their representations or any undertakings they may propose but, again, this would need to be done in an even handed way.

E-mail Message

From: Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
To: Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
Cc: Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=BMKELLY], [redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=ABOUGHEN], Grossman Russell (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=RGROSSMA], SPAD MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SPAD], [redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Vaizey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=PSVAIZEY], Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=EDAVEY], Willetts MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AWILLET], Prisk MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=MPRISK], Wilcox MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=WILCOXJ], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Perm Sec BIS [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=FRASER], [redacted] (LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted] (COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]
Sent: 16/12/2010 at 15:44
Received: 16/12/2010 at 15:44
Subject: RE: BSKYB/NEWSCORPS

Thanks for this note Andrew. The SoS has seen and noted...

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Rees Andrew (CCP)
Sent: 13 December 2010 16:24
To: Cable MPST
Cc: Kelly Bernadette (MPST DG); [redacted] (Communications); Grossman Russell (Communications); SPAD MPST; [redacted] CCP); Vaizey MPST; Davey MPST; Willetts MPST; Prisk MPST; Wilcox MPST; Chambers Sarah (CCP); Perm Sec BIS; [redacted] (LEGAL B); [redacted] (COMMS)
Subject: BSKYB/NEWSCORPS

Bernadette Kelly suggested I put up a note on next stages in the process on the NewsCorp/BSkyB case, which is attached. If you want to discuss, feel free to give either myself or [redacted] a call.

Regards

Andrew
(x2197)

<< File: Newscorp BSkyB - Intervention process - December 2010.doc >>

E-mail Message

From:	Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=AREES]
To:	Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=CABLEM]
Cc:	[redacted] BRE) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=SACHAMBE], Swift Jane (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=JSWIFT], [redacted] Strategy) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted] (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS[redacted]
Sent:	16/12/2010 at 22:46
Received:	16/12/2010 at 22:46
Subject:	RE: Actions from SoS Meeting this morning
Attachments:	BSkyB - note on next steps.doc

[redacted] I attach a further note prepared by [redacted] on the process (though I still think the best option is for us to speak to him directly about it).

Andrew

From: Chambers Sarah (CCP)
Sent: 16 December 2010 16:46
To: Swift Jane (CCP); Rees Andrew (CCP); [redacted] (Strategy)
Cc: [redacted] (BRE)
Subject: FW: Actions from SoS Meeting this morning
Importance: High

Sorry guys - I should have passed this on earlier. I hadn't realised how restricted the copy list was.

Jo: The team will do what they can in advance of the box deadline, but I'm afraid I didn't realise that this had not been copied wider, so they have not seen this until now. Perhaps they could let you know when they will be able to get something to you.

With rather short notice, could I please ask:

[redacted]

[redacted]

[redacted]

Andrew: On Sky, you have already put up a note, but I don't think it covers all the points below, in particular the point about how we would deal with a request to give undertakings. Advice at this stage can of course only be interim and hypothetical, but we should give some sort of indication of the range of possibilities.

On everything else, I think we can revert in the New year.

Sarah

From: Cable MPST
Sent: 16 December 2010 16:18
To: Chambers Sarah (CCP)
Subject: FW: Actions from SoS Meeting this morning

Hi Sarah

I have received the Sky process note, and the note on pre-notification and mergers - thanks for arranging both of these.

Do you think you/colleagues are on track to provide advice on referral vs. undertakings and also [redacted]

Thanks
Jo

Jo Thompson | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: Cable MPST
Sent: 13 December 2010 19:47
To: Carter Richard (CLG); Kelly Bernadette (MPST DG); Chambers Sarah (CCP)
Cc: Wilkes Giles (MPST MIN); Crellin Joanna (MPST MIN); Davey MPST; [redacted] (Communications); [redacted] (COMMS); [redacted] (COMMS); Waring Katie (MPST MIN); Cable MPST
Subject: Actions from SoS Meeting this morning

Hi All

Thanks for your time earlier. SoS found this very helpful.

Here is a quick list of the actions (in red): (please let me know if you think I have missed something).

(N.B. The deadline I have set for the [redacted] and the Sky advice and lines to take are this Friday because this may be the last box before recess. If this is going to be impossible please let me know...)

[redacted]

[redacted]

[redacted]

Sky
We need the following advice for this Friday's box:

1. How to handle the Ofcom report...
Advice on whether to release the Ofcom report as soon as SoS receives it; or whether to wait to release it until SoS has decided what action to take off the back of it. What are the pros and cons of each?
2. What to do with the Ofcom report...
Advice on whether to a) refer the matter to the Competition Commission for further information or b) not refer to CC, but instead use the Ofcom report's findings and recommendations to negotiate directly with Sky to find remedies. What are the pros and cons of these two options?

We will also need lines to take on the following for this Friday's box:

1. On the EC's findings (laying out the difference between the competition angle on the one hand, and the media plurality angle on the other)
2. Holding lines for when the Ofcom report is delivered (this should cover two scenarios: 1. releasing the report straight away before action has been decided; and 2. not releasing the report straight away to wait for action to be decided)
3. On the next steps (i.e. what SoS decides to do with Ofcom report) (this should cover two scenarios 1. SoS decides to refer to CC; and 2. SoS decides the negotiate directly with Sky to find remedies to the problems highlighted in the Ofcom report).

Thanks

[redacted] | Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

NEWS CORPORATION / BSKYB CASE

Advice on timing of publication of Ofcom's report.

The legislation states only that the Secretary of State shall publish Ofcom's report. It does not specify when this should happen. Accordingly, the Secretary of State has a choice. He could ask Ofcom to publish the report at the time they deliver it to the Secretary of State or he could publish it at the time he announces his decision on whether or not to make a reference to the Competition Commission. In the Sky/ITV case, the report from Ofcom and the report from the OFT on the competition findings were both published on delivery. Primarily this reflected a concern to remove the scope for any uncontrolled leak of the substance of the reports – particularly that of the OFT which contained its determinative finding that a reference was appropriate on competition grounds.

As well as avoiding therisk of leaks, publishing early would also avoid the scope for speculation about the report's contents and pressure on the Secretary of State to publish it. But there would instead be scope for media commentators to publish their own interpretation of the report's findings and their views as to what decision the Secretary of State should take on whether or not to make a reference to the Competition Commission.

Our preference would be to publish the report only when the Secretary of State announces his decision. This would prevent media comment taking place prior to that announcement.

Advice on whether or not to make a reference to the Competition Commission

The Secretary of State's decision on a reference must be based on whether, taking into account the Ofcom report and any other representations and information received, he believes it is or may be the case that the merger operates or may be expected to operate against the public interest.

We cannot prejudge the outcome of the Ofcom review. The Ofcom report is likely to set out and analyse the various arguments that have been put forward on this matter.

Our expectation is that it may prove difficult for Ofcom to conclude determinatively from the evidence presently available that the merger would not result in an unacceptable reduction in the plurality of media ownership. It seems more probable that there will be sufficient evidence of a possible problem for Ofcom to conclude that the Secretary of State would be justified in deciding that further investigation of the merits of the case would be appropriate.

Scope to accept undertakings from the parties as an alternative to making a reference

If the Secretary of State believes a reference is appropriate, it becomes open to him instead to accept statutory undertakings from the parties that effectively address the potential impact on plurality. In this case, however, it may be difficulty to identify a remedy that could effectively address the plurality concerns short of preventing the acquisition altogether. Accordingly, it is not clear undertakings in lieu is a likely outcome. The Secretary of State could not accept undertakings that did not effectively resolve the problem identified and the parties would not be likely to offer undertakings to the effect they would not effect the merger. They would probably prefer to go to a second stage investigation by the Competition Commission in the hope of winning the substantive argument as to whether or not the merger operates against the public interest.

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E-mail Message

From: [redacted] CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted]

To: Cable MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Cablem], [redacted] COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted]

Cc: Davey MPST [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Edavey], [redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=[redacted] Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=ABoughen], Cookson Fiona (Communications) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted] (COMMS) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted] Rees Andrew (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Arees], [redacted] LEGAL B) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN[redacted] Kelly Bernadette (MPST DG) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Bmkelly], Chambers Sarah (CCP) [EX:/O=DTI/OU=DTIHQ/CN=RECIPIENTS/CN=Sachambe]

Sent: 21/12/2010 at 11:08

Received: 21/12/2010 at 11:08

Subject: RE: Media handling: BSKYB / NEWS CORP TAKEOVER – EC REPORT INTO COMPETITION

[redacted]

Our contact at the EU Commission informs me the decision will be published imminently. They are presently notifying the parties legal advisers - so I would expect publication very soon afterwards.

Just to confirm, we see no problem with the SofS being unable to consider the Ofcom report until 10 January. Officials will need a few days anyway to consider the substance of the report with Counsel and prepare advice on the case for a reference. The published guidance states the SofS would aim to take decisions within 10 working days of receipt of the report. This is an administrative target - not a statutory deadline. That would take us to 17th January. It may be possible to reach a decision within this period though we may find we do need longer - for example if there are substantive issues to explore further with the parties.

[redacted]
CCP
[redacted]

From: Cable MPST
Sent: 21 December 2010 10:41
To: [redacted] (COMMS)
Cc: Davey MPST; [redacted] Communications); [redacted] (Communications); Boughen [redacted] (Communications); Cookson Fiona (Communications); [redacted] (COMMS); [redacted] (CCP); Rees Andrew (CCP); [redacted] (LEGAL B); Kelly Bernadette (MPST DG)
Subject: RE: Media handling: BSKYB / NEWS CORP TAKEOVER - EC REPORT INTO COMPETITION

Hi [redacted]

As discussed, it would be really helpful to know when the EC's report will be in the public domain [redacted]/Andrew/Bernadette - perhaps you can help?)

I have amended the key messages and the quote in tracked changes. Please see

attached.
<< File: BSKYB NEWS CORP TAKEROVER EC REPORT INTO COMPETITION - 201210.doc >>
Thanks

[redacted] Private Secretary to the Secretary of State for Business, Innovation and Skills

8th Floor | 1 Victoria Street | London | SW1H 0ET

Tel: 0207 215 [redacted]

From: [redacted] (COMMS)
Sent: 20 December 2010 14:35
To: Cable MPST
Cc: Davey MPST; [redacted] (Communications); [redacted] (Communications); [redacted] (Communications); [redacted] (Communications); [redacted] COMMS); [redacted] (CCP); Rees Andrew (CCP); [redacted] (LEGAL B)
Subject: Media handling: BSKYB / NEWS CORP TAKEOVER - EC REPORT INTO COMPETITION

Dear [redacted]

Please see attached a media handling submission for this Wednesday's expected report from the European Commission on the competition impacts of the potential merger of BSkyB and Newcorp.

If SoS is happy for us to go ahead we will issue this statement once the EC's report is in the public domain.

Many thanks,

[redacted]

<< File: BSKYB NEWS CORP TAKEROVER - EC REPORT INTO COMPETITION - 201210.doc >>

[redacted]
Press Office
BIS | Department for Business, Innovation & Skills | 1 Victoria Street, London, SW1H 0ET | tel: 020 7215 [redacted] blackberry: [redacted] | out of hours press officer: 020 7215 [redacted] | web: http://www.bis.gov.uk/newsroom

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