

DEPARTMENT FOR CULTURE, MEDIA AND SPORT

NOTICE OF CONSULTATION ON THE PROPOSED ACQUISITION BY NEWS CORPORATION OF UP TO 60.9% OF BRITISH SKY BROADCASTING GROUP PLC

UNDERTAKINGS GIVEN BY NEWS CORPORATION PURSUANT TO PARAGRAPH 3 OF SCHEDULE 2 OF THE ENTERPRISE ACT 2002 (PROTECTION OF LEGITIMATE INTERESTS) ORDER 2003

Views are sought by midday on 21st March 2011 as to whether the attached undertakings in lieu are sufficient to remedy, mitigate or prevent the public interest concerns in relation to media plurality raised by this merger. For reasons explained below, the Secretary of State is not consulting on any competition aspects of the proposed merger.

Background

On 3 November last year, News Corporation (News Corp) indicated that it intended to increase its shareholding in British Sky Broadcasting Group Plc (Sky) from 39.1% to 100%.

Given the nature of the merger and the way in which United Kingdom law works, any competition concerns arising in relation to the transaction fell to be considered by the European Commission.

On 21 December last year, the European Commission concluded that the increased shareholding would not significantly impede effective competition.

However, under UK law, an issue arose as to whether this transaction gave rise to concerns about plurality of persons controlling media enterprises. The Secretary of State for Business, Innovation and Skills issued a European intervention notice raising this public interest. He asked Ofcom to investigate and report to him by 31 December. That report was produced by Ofcom and provided to the Secretary of State for Culture, Olympics, Media and Sport, Jeremy Hunt (the Secretary of State).

On 25 January, the Secretary of State informed Parliament of his initial decision on the proposed News Corp/BSkyB merger. Having considered the Ofcom report and

considering that concerns raised in it meant that the relevant statutory test was met, he made it clear that he intended to refer the merger to the Competition Commission. However, before doing so he also made it clear that he would consider undertakings in lieu offered by News Corp which, in his opinion, had the potential to remedy, mitigate or prevent the potential threats to media plurality identified in the Ofcom report, the conclusion of which he shared.

The Secretary of State's statement, along with the Ofcom report and other supporting documentation, is published on the DCMS website at <http://www.culture.gov.uk/publications/7737.aspx>.

Undertakings in lieu were set out in detail by News Corp in a letter to the Secretary of State of 18 January and in a revised form on 24 January, both of which are published with this notice.

In brief, the proposal was that Sky News be spun-off as an independent public limited company. The shares were to be distributed amongst the existing shareholders of Sky in line with their existing shareholdings. The effect of this would be that, after the proposed News Corp/Sky merger was completed, the shareholdings in Sky News would remain as if the merger transaction had not happened. The new company would have a majority of independent non-executive directors and, importantly, have long-term carriage and brand licensing agreements with the newly-merged News Corp/Sky company so as to ensure its financial viability.

News Corporation would not be able to increase its shareholding in the new company without the permission of the Secretary of State.

In the Secretary of State's view, these undertakings in lieu had the potential to remedy, mitigate or prevent the effect of the increase in News Corp's shareholding to 100% of Sky News. On the face of it, they addressed the main concerns outlined in Ofcom's initial report and, as such, deserved serious consideration.

Having informed Parliament of his decision on 25 January, the Secretary of State wrote to the OFT on 27 January requesting them, under section 93 of the Enterprise Act 2002, as an expert public body with experience in negotiating undertakings in lieu, to discuss the undertakings in lieu with News Corp. On the same day he also asked Ofcom, under section 106B of the Enterprise Act, for advice on whether the undertakings in lieu addressed the potential impact on media plurality identified in their report. Both letters are published with this notice.

OFT and Ofcom reported to the Secretary of State on 11 February. Those reports are published alongside this notice, redacted as necessary for confidentiality.

It was clear from both reports that, in the discussions with News Corp, significant progress had been made towards resolving the concerns about plurality which had been identified to the Secretary of State by Ofcom and about which he continued to be concerned. As such, certain important issues remained unresolved.

The Secretary of State therefore wrote to News Corp on 15 February making clear that, unless News Corp were prepared to amend the undertakings in lieu to deal with the specific matters which the regulators considered needed to be dealt with in the undertakings, he would refer the merger to the Competition Commission. He asked them to respond within 24 hours.

News Corp replied the following day agreeing to make the necessary changes and providing the Secretary of State with a revised version of the undertakings in lieu. Both letters are published with this notice.

On 17 February the Secretary of State wrote to both OFT and Ofcom asking for further advice on the revised undertakings in lieu before taking a decision on whether to propose to accept them.

Both regulators wrote to the Secretary of State on 1 March and set out their further advice. Ofcom advised that the undertakings address their concerns over the plurality of news provision and the OFT has advised that they are likely to be practically and financially viable for up to 10 years. It is in the light of this

independent advice, and the two regulators' previous advice, that Secretary of State has reached his decision. The advice is published with this notice.

Basis of decision

In its initial report, Ofcom identified a range of concerns, including:

- News Corp would be the only news and media provider present on all four media platforms (TV, newspapers, on-line and radio) at the wholesale level;
- News Corp would be one of three providers of UK-wide news and current affairs on three of four platforms at the retail level;
- That, in terms of "news minutes" consumed, News Corp would consolidate its position as the second place as provider behind the BBC;
- Primary research indicated that, in terms of "share of references", News Corp would leapfrog ITV into second place behind the BBC. This was true both on a retail and a wholesale basis.

The Secretary of State agreed with Ofcom's conclusion that the proposed acquisition raised concerns about whether there would be a sufficient plurality of persons with control of media enterprises.

Having carefully considered the subsequent OFT and Ofcom advice, and the reasoning set out in that advice, the Secretary of State considers for the reasons given in that advice that the undertakings in lieu which are proposed by News Corp will prevent, remedy or significantly mitigate the potential threat to media plurality, which might be caused by Newcorp's increased shareholding from 39.1% to 100% of Sky News. The Secretary of State takes the view that the proposed undertakings would offer significant editorial, operational, financial and commercial independence for the new company, and he would therefore propose to accept them.

Details of undertakings in lieu

Key aspects of the undertakings in lieu include:

- The Board of the new company will have a majority of independent directors who have no other News Corp, or News Corp-associated, interest;
- The Board, including the independent non-executive directors, will have the appropriate balance of skills, experience, independence and knowledge, and at least one must have senior editorial and/or journalistic experience ;
- The Chairman will be an independent director;
- Sky News' services will abide by the principle of editorial independence and integrity in news reporting;
- The Board will have a Corporate Governance and Editorial Committee to ensure compliance with the principles of editorial independence and integrity in news reporting;
- A 10 year carriage contract;
- A 7 year brand licensing (with potential to extend for a further 7 years).

The principles of the arrangements are clear and set out in the proposed UILs. There are detailed provisions of the carriage and brand licensing agreements which will need to be finalised. The terms of the UILs ensure that these agreements will need to be approved by the Secretary of State. In deciding whether or not to approve the drafting, the Secretary of State will take the advice of Ofcom and OFT as appropriate. The merger cannot, of course, go ahead until the Secretary of State has been satisfied on all these matters.

The OFT has said that the undertakings are likely to be practically and financially viable in the short and medium term. They expressed concerns about whether the undertakings in lieu would be viable over the long term, but recognised that the appropriate time-frame in this market was for the Secretary of State to decide, with Ofcom's advice.

Ofcom have considered the impact of a 10 year carriage agreement in the context of this industry. Given the rapid pace of technological change, they have advised the Secretary of State that in this environment a carriage agreement of 10 years is a long-term measure. The Secretary of State agrees with this view and therefore concludes that the provision of a 10 year carriage agreement and a 7 year brand

licensing agreement with the option to extend for a further 7 years are of sufficient length to remedy, or significantly mitigate the concerns in relation to media plurality. He will of course only reach final conclusions on this and other aspects of the undertakings in lieu after this consultation.

In the circumstances, the Secretary of State considers that if the concerns relating to plurality identified by Ofcom are now prevented, remedied or significantly mitigated by the undertakings then he would propose to accept those undertakings in lieu of a reference to the Competition Commission. He considers that the arrangements involve a carriage agreement and a brand licensing agreement (along with various operational agreements) which will ensure the financial and commercial independence of the new Sky News company over what is a very long period in terms of this sector. The agreements are coupled with governance provisions, a number of which are highlighted above, which he considers ensure editorial and operational independence.

Consequently the Secretary of State has concluded that a referral to the Competition Commission would not be merited at this stage, and instead proposes to consult on the undertakings in lieu, the final version of which are published with this document.

In line with the legislation, the Secretary of State, by this notice, is commencing a consultation period during which time all interested parties will be able to express their views on the undertakings in lieu. Once he has considered representations, he will reach a decision on whether he still considers that the undertakings of lieu should still be accepted in lieu of a reference to the Competition Commission.

If after consultation he remains of the view that the undertakings in lieu address the concerns about media plurality, he will accept them and not refer this merger to the Competition Commission. If any amendments are made to the undertakings in lieu following this consultation, there will be a further notice of consultation before he takes any decision to accept amended undertakings in lieu.

Representations should be sent to bskyb-newscorp.consultation@culture.gsi.gov.uk
by midday on 21st March 2011.

Postal representations should be sent to:

BSkyB-News Corporation Consultation

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