

J R J Murdoch  
Exhibit JRJM 5  
16 April 2012

**IN THE MATTER OF THE LEVESON INQUIRY INTO THE CULTURE,  
PRACTICES AND ETHICS OF THE PRESS**

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**EXHIBIT JRJM 5**

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**This is the exhibit marked "JRJM 5" referred to in the witness statement of James  
Rupert Jacob Murdoch dated the 16<sup>th</sup> day of April 2012**

**Note of a Meeting with News Corporation re BSkyB merger – 6 January 2011**

**Attendees**

DCMS

1. Secretary of State (SoS), Jon Zeff (Director, Media), Patrick Kilgarriff (Director, Legal), Adam Smith, (Special Advisor), Dean Creamer (Private Secretary).

News Corporation

2. James Murdoch (Chairman, CEO Europe & Asia, News Corporation), Frederic Michel (Director, Public Affairs), Matthew Anderson (Strategy and Corporate Affairs Director), Jeff Palker (General Counsel).

**Points Discussed**

3. The SoS made the following opening remarks:
  - i. The purpose of the meeting was to set out the process that will be followed from this point. Given that News Corp had not yet seen the OFCOM report there would be no substantial discussion at this stage of its substance. A full copy would be sent to News Corp tomorrow (7 January) with redactions for commercially sensitive material. In the meantime the report summary would be made available to News Corp at the end of the meeting.
  - ii. SoS gave assurances that the process will be fair and legally robust and any decisions taken by the SoS would need to be reasonable. The OFCOM recommendation and advice the advice the Secretary of State said he had received from Counsel meant he was minded to refer the merger to the Competition Commission (CC).
  - iii. The decision on whether to refer the matter to the CC was not about whether the merger would reduce plurality but whether the SoS believed that it may be the case that the merger may be contrary to the public interest in plurality. The threshold for referral was therefore very low.
  - iv. The next step was for News Corp to consider the OFCOM report and decide whether to make representations. These should be made in writing within a week. The SoS would consider any representations before deciding whether to proceed with the referral.
  - v. In the event that the SoS was minded not to refer, the SoS would invite other interested parties to submit representations. This process would ensure that all interested parties, including News Corp, would have had the opportunity to state their cases.
4. The following points were made in discussion by News Corporation:

- i. There were serious concerns around OFCOM's preliminary analysis contained in the report, including the general reasonableness and direction of their work. There were two areas where they could engage: i) providing a rebuttal of the OFCOM report itself and ii) to the extent that the SoS remained concerned there were issues of substance, to seek remedies that would allow the merger to move ahead without further investigation. There were ideas for possible remedies that News Corp had which they thought could be implemented as part of a fair process.
- ii. News Corp would want to explore remedies ahead of a possible referral and under the Enterprise Act the SoS clearly has the power to accept undertakings in lieu of referral.
- iii. Government needed to acknowledge the costs of a further review both to the public purse and to business and the implications for the prospective sale (ie whether it happens). This could lead to increased risk on the sale, the timetable could become an issue for News Corp shareholders and there may well be problems getting to a price with an open ended process. Referral in effect decreased the likelihood of the sale being completed.
- iv. News Corp wanted a robust process but questioned the robustness of the process so far. News Corp was reserving all their rights including on the legitimacy of the OFCOM report and the initial decision to refer the matter to OFCOM.

***Clarification on aspects of the OFCOM report***

5. There were four areas where SoS wanted to seek clarification on the OFCOM report. For the sake of openness and transparency the SoS would share those questions, and the answers, with News Corp. They were:
  - i. Clarification on the weight given to the impartiality requirements of the Broadcasting Code
  - ii. Clarification on why the potential change in plurality is significant enough to move from sufficiency to insufficiency
  - iii. Clarification on the number of people who will be served by fewer cross news services as a result of the merger
  - iv. Clarification of the position of wholesale news provision
6. These questions were not asking for any additional work, but were to clarify points already contained within the report.
7. In subsequent discussion News Corp made the following points:
  - i. Impartiality safeguards had previously been considered by Lord Pannick, and the conclusion had been that the requirements applied equally to choosing the news story as well as the presentation of the news story and there were sufficient safeguards in place.
  - ii. DCMS should look at the precedent of past CC deals and take them into consideration as part of this process. Precedent showed that previous merger

decisions at a time when there was less plurality than at the present time had gone through with the conclusion that there was no plurality case to answer.

- iii. One possible outcome could be a reduction in plurality if News Corp had to cease some services. There were also fiduciary duties to be considered.
  - iv. News Corp also questioned whether it was legally robust for the SoS to read submissions on this issue from other parties. Those in opposition to the merger had already had a chance to contribute to the OFCOM report.
  - v. If written representations were not successful News Corp would seek further meetings to discuss their submission and potential remedies as necessary. It would be unreasonable to refuse a remedy if what is proposed would work.
8. DCMS officials made the following points in discussion:
- i. The SoS would need to receive submissions from a range of interested parties in the event of a decision not to refer - there must be equal treatment for proponents of both sides.
  - ii. Any representations could not be a re-submission of News Corp's evidence to OFCOM. Instead, it had to be an evidenced explanation of why the OFCOM report, in News Corp's view, was fundamentally flawed in its facts and analysis.
  - iii. It was agreed to add clarification on the role played by precedent in the questions for OFCOM.

**Timing**

9. SoS said that he expected a decision by early next month at the latest – but the process would only last that long if he decided to accept News Corp's evidence and had to consult other interested parties.
10. It was agreed that subject of these discussions would be kept confidential at this stage but both sides would be open about the fact meetings that had taken place. It was expected that the OFCOM and any News Corp submissions would be released no later than the SoS' decision on referral.



**Note of a Meeting with News Corporation to discuss BSkyB merger - 20 January 2011**

**Attendees**

DCMS

1. Secretary of State (SoS); Jon Zeff (Director, Media), Patrick Kilgarriff (Director, Legal), Daniel Beard (Counsel), Adam Smith (Special Advisor); Sue Beeby (Special Advisor), Dean Creamer (Private Secretary).

News Corporation

2. James Murdoch (Chairman, CEO Europe & Asia, News Corporation), Frederic Michel (Director; Public Affairs), Matthew Anderson (Strategy and Corporate Affairs Director), Jeff Palker, (General Counsel), Andrea Appella (Deputy General Counsel).

**Points Discussed**

3. SoS made the following opening remarks:
  - i. The News Corp submission made some strong points but on the basis of the evidence presented he was still minded to refer the case to the Competition Commission (CC).
  - ii. It was essential to a robust outcome that the SoS act reasonably in coming to a decision. There was clear disagreement between the reports from News Corp and OFCOM respectively, and given the low threshold for referral, sending the case for further investigation was, in the SoS's view, the reasonable approach.
  - iii. However, SoS acknowledged News Corp had additionally submitted an Undertakings In Lieu (UILs) aimed at addressing any potential impact on the sufficiency of plurality (of news) from the proposed merger. The legal framework was clear that undertakings were permissible at this stage, and it was reasonable to give the UILs appropriate consideration before taking a final decision on whether to refer.
  - iv. This meeting would give News Corp the opportunity to discuss their submission, the subsequent UILs and the process to be followed from this point.
4. News Corp made the following points in discussion on their submission:
  - i. The News Corp submission starts from the point that the evidence compiled in the OFCOM report was not a legitimate foundation to base a decision on whether to refer to the CC. There were fundamental errors in the analysis, particularly around measures of reach and share alongside inappropriate weighting given to key assessment areas, not least the treatment of wholesale news. There was also a disregard of the impact of internet news consumption and the safeguards that ensure editorial independence.
  - ii. Moreover at the heart of the problem were errors in the way that OFCOM had undertaken the assessment of sufficiency of plurality. Plurality in the UK market had

increased hugely in recent times. Instead of assessing whether there was likely to be a change in plurality, as a result of the proposed merger, OFCOM should have undertaken an assessment of whether there was currently a sufficiency of plurality in the market, and if so, whether the proposed merger moved this assessment to one of insufficiency. In doing this, News Corp felt Ofcom should have given due weight to the precedents set in the BSkyB/ITV deal which failed to identify plurality issues in the UK market.

- iii. Had the assessment been undertaken in this way, Ofcom should have arrived at a different conclusion. There was a much higher threshold for CC referral than was suggested. Ofcom's approach to the 'Double May test' (set out in the 2003 Communications Act) would mean that all media mergers would be automatically referred to the CC.
- iv. The dynamic analysis was wholly speculative and there was a need to ensure this aspect did not form part of the decision process.
- v. OFCOM had not drawn the right conclusions despite acknowledging that multi-sourcing is relevant but not crucial to the decision, and that News Corp could not widen its influence on the overall news agenda as a result of this transaction.
- vi. OFCOM should have given more weight to the presence of internal as well as external editorial independence constraints. The culture of internal editorial independence within News Corp was clearly recognised by Ofcom but this was not taken into consideration.
- vii. The OFCOM assessment of minutes spent consuming news should have reflected the differences between reading a newspaper and watching a news programme on TV.
- viii. The report reflected the bias displayed in the early part of this process, on which News Corp still reserved their rights.
- ix. Under the Enterprise Act, SoS was not bound to follow Ofcom's recommendations. For the reasons explained in News Corp's submission, SoS's discretion to act in this case was key. This discretion was likely to reduce as the process and once CC had made recommendations.

5. In discussion of these points DCMS officials made the following observations:

- i. The interpretation of the 'double may' test had been established in the IBA merger case and it was not clear how the SoS decision could reasonably diverge from this. In the Sky/ITV merger it had been established that it was appropriate to consider sufficiency in the context of a change as deciding absolutes in these cases was extremely difficult.
- ii. While a benchmark might be attractive the idea was likely to be contentious. Benchmarks would be continually shifting with issues dealt with ex ante and every

case assessed differently. While the statutory scheme didn't preclude such an approach it was difficult to see how it might be applied. There were many theoretical approaches to understanding sufficiency but it was not clear that there was any one right way to make an assessment. OFCOM had however clearly followed a precedent.

**6. Consideration of the UILs**

7. News Corp made the following points in relation to their proposed remedy:
- i. The main argument put forward by Ofcom and opponents of the merger was that it would result in the loss of Sky News as an independent voice. The UILs had therefore been constructed to ensure that there was no material change in the position of Sky News as an independent entity with independent status.
  - ii. This would essentially be achieved by separating Sky and Sky News into two entities and proceeding with the merger without Sky News as part of the deal. News Corp would guarantee a level of funding on a long term basis to ensure financial viability of Sky News. This would allow Sky News to operate independently as a UK plc and means that news provision no longer forms part of the proposed merger.
  - iii. Under the Enterprise Act, SoS has the power to accept UILs.
8. SoS explained that he was prepared to explore the proposal but would want to look very closely at the detail, including the implications for financial viability of an independent Sky News.

**9. Next steps**

10. SoS wanted to ensure the process remained fair and transparent for all interested parties and next steps should therefore be:
- a. Publish the Ofcom report (redacted for confidential information)
  - b. Publish non-confidential version of News Corp's submission
  - c. To announce that SoS was minded to refer to the CC, however News Corp have come back with a potential remedy which we were going to explore
  - d. Alongside this, invite OfT to act on SoS's behalf to explore whether acceptable UILs could be reached.
  - e. Ask OFCOM to offer specific advice on the UILs in relation to (i) plurality and (ii) financial sustainability
  - f. Having worked through the detail, if SoS is minded to accept, there would follow statutory public consultation of 15 days, otherwise this would be referred to the CC
11. In advance of that SoS would need:
- a. An undertaking that the representations and UILs reflected the position of BSkyB.



- b. A summary of the UILs and the News Corp submission ready for public release
- c. Fully worked up UILs, upon which DCMS would seek OFCOM advice and publish in due course