

News Corporation/ British Sky Broadcasting

Briefing to Office of Fair Trading

Possible Consultation on Referral to Office of Fair Trading under Article 9, EU Merger Regulation

1. INTRODUCTION

- 1.1 This briefing paper is provided by News Corporation ("News") in respect of the possible offer by 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"). The Transaction was notified to the European Commission (the "Commission") under the EU Merger Regulation ("EUMR") on 3 November 2010. The Secretary of State for Business, Innovation and Skills ("SoS") issued an intervention notice pursuant to section 67, Enterprise Act 2002 in relation to the Transaction on 4 November 2010.
- 1.2 News requests that the information provided in this paper should not be disclosed to third parties beyond the OFT case team who are dealing with this matter, without News' prior written consent.
- 1.3 News understands that the OFT is considering whether to launch a consultation to seek third party views on whether it is appropriate in this case for the OFT to seek a referral pursuant to Article 9 EUMR.
- 1.4 This paper does not seek to repeat the detail of News' previous substantive submissions to the OFT, specifically in News' paper to the OFT of 17 August 2010 explaining why there are no grounds for the OFT to seek a referral in this case pursuant to Article 9 EUMR and no grounds for the Commission to grant such a referral. It will be recalled that News submits that the Transaction should be appropriately reviewed in its entirety by the Commission as the best placed authority. The criteria for a potential referral under Article 9 EUMR are exceptional and are not met in this case; the Transaction relates to economic activities in more than one Member State, which are best addressed by the Commission; and there is no relevant factor in OFT guidance when requesting referral present in this Transaction.
- 1.5 The purpose of this paper is to explain why News believes that there is no proper basis to consult on a referral in this case. The approach in this paper is informed by:
- (a) the circumstances in which consultation would assist the OFT in making a decision regarding whether to make an Article 9 request; and
 - (b) consideration of previous consultations in Article 9 referral cases.

2. SUMMARY

- 2.1 The OFT has a *discretion*, rather than an *obligation*, to launch a consultation for the purposes of making a decision on whether to seek a referral.
- 2.2 The OFT has not specified the test that should be met before it launches a consultation on referral. However, News submits that the appropriate test should be based on the extent to which a consultation can be expected to assist the OFT in making its decision on whether to seek a referral. In other words, ***the test should turn on the likely usefulness of a consultation for the purposes of informing the OFT's decision whether to seek a referral.***

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- 2.3 It will be apparent from the extensive and comprehensive Form CO (a copy of which is now available to the OFT) that the Transaction does not raise any material substantive competition concerns in relation to which a consultation could usefully inform the OFT's decision on referral.
- 2.4 A range of third parties have already expressed their views in relation to the Transaction. News has provided detailed argumentation and evidence to the OFT and in the Form CO as to why any competition concerns are unsubstantiated. There are no material competition issues which require further detailed elaboration.
- 2.5 Despite commentary by third parties against the Transaction, many if not most of the alleged concerns identified by third parties are based on alleged plurality issues which are unsupported. In any event, such alleged concerns are properly examined by the SoS in the context of the plurality review of the Transaction which is pending.
- 2.6 A consultation in this case would serve no useful purpose in informing the OFT's decision on whether to request a referral and would depart from past OFT practice where consultation was carried out only in limited cases.

3. LEGAL FRAMEWORK

- 3.1 Given that the EUMR proceeds on the general principles that jurisdiction to review mergers should lie where it falls and that, preferably, only one competition authority should deal with Union dimension transactions (the so-called one-stop-shop principle), it will only be in exceptional cases that the authorities of a Member State should seek a referral under Article 9 EUMR. Similarly, it will rarely be appropriate to consult on the possibility of a referral.

Request for referral

- 3.2 News has previously submitted that there are no substantive grounds for the OFT to make a request for referral (see News' paper to the OFT dated 17 August 2010). News does not propose in this paper to comment further on the absence of a substantive basis for referral other than to say that, based on this reasoning alone, there is no reason for the OFT to hold a consultation in order to decide whether or not to make a request for referral.

Consultation

- 3.3 The OFT has *discretion* rather than an *obligation* to consult with respect to a request for referral to the UK pursuant to Article 9 EUMR.
- 3.4 The EUMR does not *require* a national authority to consult on possible referral cases. It is true that Article 21(3) EUMR provides that the exclusive jurisdiction of the Commission in respect of concentrations with a Union dimension is:

*"without prejudice to any Member State's power to carry out any enquiries necessary for the application of [Article 9(2)]... (emphasis added)."*¹

- 3.5 However, this provision regarding the power of Member States to conduct enquiries is permissive and in no way obliges a national authority to consult on referral in all cases which may involve its national markets.

¹ Article 21(3) EUMR.

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- 3.6 The OFT's Jurisdictional and Procedural Guidance clearly contemplates that the OFT will not necessarily consult in all cases where a referral might be appropriate. Specifically, it provides that:

*"To assist in considering whether to make an Article 9 request, the OFT may, where it considers it relevant to do so, publish an invitation to comment seeking views from any interested third party on the implications of the merger for competition in the UK and seeking the views of the parties (emphasis added)."*²

Test for exercising discretion

- 3.7 News submits that the OFT should use its discretion to issue a consultation where this would be **likely to be genuinely useful for the purposes of arriving at an informed decision on a potential request for referral**.
- 3.8 The remainder of this paper explains that a consultation is neither necessary to assist the OFT in reaching its decision on a request for referral nor an appropriate use of the OFT's resources.

Obtaining evidence/ information

- 3.9 News submits that the main determining factor for whether a consultation would be useful or not is whether the OFT requires additional evidence/ information on the relevant issues in order to reach its decision on referral.
- 3.10 The significance of this factor depends on whether there is relevant information that has not otherwise been communicated (for example, through the media or own-initiative submissions that have already been made).
- 3.11 The OFT has exercised its discretion to consult on referral in only 13 cases since the Enterprise Act 2002 came into force. News notes that in all of those cases, there have been any one or a combination of the following features:
- (a) significant horizontal overlap issues which could have significantly affected competition in the UK³; and/or
 - (b) local, regional or predominantly national UK markets where the OFT could be best placed to review the transaction⁴; and/or
 - (c) the possible weakening of a significant competitor⁵; and/or
 - (d) collective dominance concerns.⁶
- 3.12 The OFT has not consulted in relation to cases where there was no evidence of material competition issues and/ or where the referral request criteria were clearly not met. Where the OFT has all that it requires to take an informed decision on referral, which is the case for this Transaction, holding a consultation would serve no useful purpose and would be a waste of regulatory resources.

4. APPLICATION TO THE TRANSACTION

- 4.1 News submits that this Transaction is clearly a case where the OFT does not need to obtain additional information from stakeholders to inform its own assessment. As the

² Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph 11.27.

³ For example, M.3554 *Serco/Nedrailways/Northern Rail* (OFT consultation dated 19 August 2004).

⁴ For example, M.4298 *Aggregate Industries/Foster Yeoman* (OFT consultation dated 26 July 2006).

⁵ For example, M.5650 *Orange/T-Mobile* (OFT consultation dated 14 January 2010);

⁶ For example, M.3130 *Arla Foods/Express Dairies* (OFT consultation dated 23 April 2003).

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OFT will be aware, News has engaged extensively with Commission officials since June 2010 in order to ensure that its Form CO contains the fullest possible information to assist the Commission to examine the case. The same information is now available to the OFT. The OFT has all that it requires to take an informed decision on referral.

- 4.2 In addition, since there has been a long period since the Transaction became public on 15 June 2010, third parties have already taken ample opportunity for comment.⁷ There has been wide coverage and debate, for example in the press and in the House of Lords. All relevant views have been expressed and the OFT will be aware of them. In addition, the OFT has launched a consultation on the jurisdictional aspects of the European Intervention Notice. This consultation adds further visibility to the Transaction, providing a further opportunity for third parties to comment. In such circumstances, it is difficult to conceive what purpose could usefully be served by a consultation on referral.
- 4.3 On the substantive assessment of the case, News has already provided the OFT with reasons why referral is not appropriate in this Transaction, not least on the basis that it does not threaten to materially affect competition in the UK.⁸ There are no material competition issues which require further detailed elaboration at this stage. There is not even a plausible basis for concern in a transaction which raises no or no material horizontal overlaps, raises no significant non-horizontal concerns and spans a number of European markets which can properly be examined by the Commission.
- 4.4 The issue for the OFT in deciding whether to consult is whether that process would usefully contribute to its decision on referral in carrying out its functions under the enabling legislation. Adopting the correct test, as submitted in this paper, is desirable in terms of good administration and efficiency, which would not be served by a consultation in this case, which is already subject to concurrent reviews by other agencies (namely, the Commission and Ofcom) and an OFT consultation on the jurisdictional aspects of the European Intervention Notice.

5. CONCLUSION

- 5.1 News submits that there is no basis for the OFT to seek a referral in this case and no basis for the Commission to grant any such request.
- 5.2 A consultation in this case would serve no useful purpose in informing the OFT's decision on whether to request a referral and would depart from past OFT practice where consultation was carried out only in limited cases. No further evidence or debate is required which cannot be procured other than through consultation.
- 5.3 Should you have any questions, please do not hesitate to contact John Pheasant (on direct line [REDACTED] or email at [REDACTED]) or Suzanne Rab (on direct line [REDACTED] or email at [REDACTED]) or Andrea Appella at News (on direct line [REDACTED] ; email at [REDACTED]).

John Pheasant and Suzanne Rab

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⁷ For example, a media consortium (made up of the BBC, BT, Guardian Media Group, Associated Newspapers, Trinity Mirror, Northcliffe Media, Channel 4, Telegraph Media Group) and the Enders media consultant have commented on plurality issues.

⁸ Briefing paper of 17 August 2010.