

22 November 2010

Andrew Rees
Deputy Director, Consumer and Competition Policy
Department of Business Innovation and Skills
1 Victoria Street
London
SW1H 0ET

John Pheasant
Partner

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Our ref PHEASJ/2612625.1
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*".

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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 programming²). 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

¹ Section 58A(2), Enterprise Act.

² 2010 year to date. Based on BARB data.

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 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] or email at [redacted]).

Yours sincerely

[Redacted signature line]

John Pheasant

Partner

³ Guidance, paragraph 8.4.
⁴ ME/4682/10.