

BY COURIER

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Dear Victoria,

News Corporation - British Sky Broadcasting Group Plc

I enclose, on behalf of News Corporation (**News**), a submission to the Secretary of State for Culture, Olympics, Media and Sport (the **Secretary of State**) in relation to Ofcom's report dated 31 December 2010 (the **Report**) on News Corporation's (**News**) proposed acquisition of those shares in British Sky Broadcasting Group plc (**Sky**) that it does not already own (the **Transaction**), which you sent to us on 7 January 2011.

As you will see from our submission, in our view the serious legal and analytical errors in the Report mean that Ofcom's recommendation to refer the Transaction to the Competition Commission (**CC**) cannot be relied upon by the Secretary of State. Any decision to refer the Transaction to the **CC**, which was taken by the Secretary of State on the basis of the Report, would itself suffer from legal flaws. In particular:

- (a) Ofcom does not address the statutory question of whether media plurality is currently "sufficient" and whether plurality may be rendered "insufficient" as a result of the Transaction.
- (b) Ofcom also confuses the permissive nature of a first stage review in terms of the threshold to be met with an ability to stop short of analysing whether the Transaction will result in insufficient plurality, which is the key question posed by the relevant public interest consideration (**PIC**).
- (c) Ofcom's mistreatment of Sky's wholesale activities leads it dramatically to overstate the potential impact of the Transaction.
- (d) Ofcom's approach to assessing plurality, based primarily on measures of reach and share, contains a number of serious deficiencies and analytical errors. Once key errors are corrected, it is clear that the Transaction does not result in insufficient plurality.
- (e) Ofcom fails to explain why internal plurality does not ensure sufficient cross-media plurality.
- (f) Ofcom's forward looking "dynamic assessment" is speculative and, by Ofcom's admission, provides no basis for a decision for a reference to the **CC**.

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- (g) Any potential need for additional regulatory mechanisms in order for media plurality to be monitored on an ongoing basis is irrelevant to the review of the Transaction and any decision by the Secretary of State relating to this Transaction.

There are a number of areas where Ofcom either fails to provide advice to the Secretary of State at all, or fails to draw the natural conclusion that the Transaction will not result in insufficient plurality:

- (i) Ofcom accepts that the UK consumer group currently consuming news from Sky and News only is minimal, less than 1% (which is a similar to the finding by the CC in Sky/ITV).
- (ii) Ofcom acknowledges that the multi-sourcing of news is of relevance to plurality and even "important".
- (iii) Ofcom finds that News Corp's ability to influence the setting of the wider news agenda will not be enhanced by the Transaction.
- (iv) Ofcom avoids taking a position on internal plurality, despite the evidence that Sky News is a TV broadcaster operating within a culture of editorial independence and impartiality in TV news, which is reflected in the Broadcasting Code and has been accepted by the CC in Sky/ITV.

The Secretary of State, applying the legal test objectively on the basis of the relevant evidence, can reasonably and should: (i) decide that the Transaction will not result in insufficient plurality for any audience in the UK; and/or (ii) decide that the Transaction will not operate against the public interest; and/or (iii) exercise his discretion not to refer.

We note in this regard, that the Secretary of State is not bound to follow the recommendations set out in the Report. Under Article 5(3) of the Enterprise Act (Protection of Legitimate Interests) Order 2003, the Secretary of State is obliged to take his own decision taking account of the relevant PIC and considering whether the Transaction operates or may be expected to operate against the public interest. Even if the Secretary of State believes that, taking account only the PIC which is relevant to this case, the Transaction operates or may be expected to operate against the public interest he has a power rather than a duty to refer. He may make a reference to the CC if he believes that the Transaction operates or may operate against the public interest, but he is not obliged to do so.

News submits that the only reasonable course for the Secretary of State is to decide not to make a reference to the CC. However should the Secretary of State have any remaining doubts as to the sufficiency of plurality or the balance of the public interest, News is prepared to offer undertakings to the Secretary of State which News is confident will remove all of the (unsubstantiated) concerns relied upon by Ofcom in advising the Secretary of State to refer.

Yours sincerely

Antonio Bavasso
Partner

cc: Jeff Palker and Andrea Appella - News Corporation; John Pheasant and Suzanne Rab - Hogan Lovells International LLP; Cerry Darbon and Dominic Long - Allen & Overy LLP