

The Rt. Hon Jeremy Hunt, MP
Secretary of State for Culture, Olympics, Media and Sport
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Your ref CMS 164661/DC
Our ref COMP/5932
Date 1 March 2011

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Dear Secretary of State

Advice from the Office of Fair Trading on undertakings in lieu offered by News Corporation relating to the anticipated acquisition by News Corporation of British Sky Broadcasting Group plc

1. I refer to your letter of 17 February 2011 following on from our report to you of 11 February 2011 (the Report).
2. In your letter, you asked us to work with News Corporation (News) and British Sky Broadcasting Group plc (Sky) to agree a set of undertakings in lieu of reference (UIL), so that you can make a final decision whether or not to accept those undertakings, taking into account the OFT's further recommendations on whether they are practically and financially viable.
3. Since receiving your letter of 17 February, the OFT has engaged with News with a view to amending the UIL offered to you in light of the comments and recommendations in the Report. The OFT has also consulted with Ofcom in its role as sectoral regulator. This process has led to a revised set of UIL submitted by News on 1 March (the Revised UIL), a copy of which is annexed to this letter.
4. The advice and recommendations that I set out in this letter are based on the remit to the OFT set out in your letter of 27 January 2011. The OFT has advised on whether the UIL are practically and financially viable and has considered if there are any practical issues which could undermine the



operation of the UIL and whether they would be effective over the medium and long term. I note that your assessment of the Revised UIL will be in the context of their ability to resolve media plurality concerns. The OFT has not considered the effectiveness of the UIL in terms of their impact in addressing the media plurality concerns raised by Ofcom in its report of 31 December 2010. This issue is being addressed by Ofcom. To the extent that the OFT has been concerned with 'effectiveness' of the Revised UIL, this relates to their mechanical and operational effectiveness.

5. Before providing advice and recommendations in relation to the Revised UIL, I set out details of the amendments that have been made in the Revised UIL as against those originally submitted to the Secretary of State and considered by the OFT for the purposes of the Report.

Details of key amendments in the Revised UIL

6. The OFT set out in the Report (at paragraph 1.20) a number of amendments that it considered were necessary. These, together with the changes made since, are:
 - **interim protection** – this has been included in paragraph 8.1 of the Revised UIL;
 - **non reacquisition commitment** – this has been included in paragraph 8.1 of the Revised UIL;
 - **prior review / approval of key agreements** – this has been incorporated in relation to the brand licensing agreement in paragraph 4.6 of the Revised UIL; News has provided that the lease of the current Sky News premises and the arrangements between News/Sky and Newco in relation to satellite capacity, playout and uplinking should also be subject to approval by the Secretary of State under paragraph 5.1(ii) of the Revised UIL;¹
 - **inclusion of an arbitration / dispute resolution mechanism** – this has been incorporated in paragraphs 4.5(v), 4.7(v) and 5.3 of the Revised UIL;²

¹ Unlike the carriage agreement and brand licensing agreement, these would not need to be approved prior to the Effective Date (that is, acceptance of the UIL).

² News has provided details of the proposed arbitration mechanism to the OFT, but the OFT notes that the Secretary of State will have the ability to review and approve these in the carriage agreement and brand licensing agreement.

- **restrictions on termination of the key agreements** – this has been included in paragraph 4.8 of the Revised UIL; and
 - **other obligations** – the OFT set out in sections 7 to 12 of the Report further detail on each of the points raised above, together with further undertakings and amendments to the UIL; further material amendments to the Revised UIL are considered below in paragraph 7.
7. In addition to the above, there have been a number of additional material amendments incorporated in the Revised UIL,³ namely:
- **enumeration of transfer of assets** – as envisaged in paragraphs 9.13 and 9.14 of the Report – News has included in paragraph 4.1 of the Revised UIL an obligation to provide a schedule of assets to the Secretary of State prior to acceptance of the UIL;
 - **non-solicitation of staff** – as envisaged in paragraph 9.21 of the Report – News has agreed to include a two year non-solicitation clause in paragraph 4.2 of the Revised UIL; and
 - **operational agreements** – as envisaged in paragraph 11.10 of the Report – News has addressed in the Revised UIL the main points raised by the OFT in relation to the operational agreements (in particular, as well as prior review of key agreements (see above), termination rights by Newco in relation to all operational agreements).

Advice in relation to the Revised UIL

8. In light of the amendments proposed by News, and subject to prior approval of the key agreements, as described above, the OFT advises the Secretary of State that the Revised UIL are likely to be practically and financially viable in the short and medium term (that is, no more than 10 years).
9. The OFT also advises the Secretary of State that the amendments made to the Revised UIL do not address the essential structural limitation identified in the Report, that the UIL offered are unlikely to be practically and financially viable over the long term. The relevance of this limitation ultimately depends on the time horizon which the Secretary of State,

³ In addition, there have been a number of drafting changes to the Revised Undertakings that are not set out here.

advised by Ofcom, considers relevant to ensure the effectiveness of the UIL in addressing any media plurality concerns. The OFT notes that Ofcom's advice of 11 February 2011 sets out its views on the dynamics of the industry.

Advice in relation to process going forward

10. To the extent that you are minded to accept the Revised UIL, you will be aware that Schedule 10 Enterprise Act 2002 provides for a consultation period on UIL to give third parties an opportunity to make representations on them for you to consider.
11. Paragraph 2(2) of Schedule 10 provides an explanation of the contents of the notice that should accompany the publication of any UIL. In practical terms, this notice is normally effected by means of the publication of an accompanying text issued by the OFT (or, in this case, the Secretary of State) explaining why it/he is minded to accept the UIL in question. In order to fulfil the requirements of paragraph 2(2) and provide an informative basis for the consultation, the notice should identify the media plurality concerns that the Revised UIL are seeking to deal with and explain the intended purpose and effect of the Revised UIL.
12. In particular, having regard to the limited time period in which to consider the UIL offered and to consult with News, the OFT advises that it would be appropriate for you to test further the viability and robustness of the commitments offered during the statutory public consultation process.

Yours sincerely,

Clive Maxwell
Executive Director, OFT