



Response to Ofcom's Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation dated 31 December 2010

1. Introduction

- 1.1 We refer to Ofcom's report dated 31 December 2010 ('the Report'). We are grateful to the Secretary of State for the opportunity to make representations to him in relation to the Report. This document comprises Sky's representations on the Report.
- 1.2 As noted in Sky's response to Ofcom's Invitation to Comment,¹ the paramount consideration for the Independent Directors and the Executive Directors of Sky in relation to News Corporation's ('News Corp') proposal is to ensure that the interests of Sky, and Sky's shareholders and employees, are safeguarded. In the context of the present intervention, there are two important aspects to this consideration:
- a) First, the Independent Directors consider that an offer from News Corp could be in the interests of Sky shareholders in the future, provided that it is at an acceptable price. The prevention of such an acceptable offer would be adverse to those interests.
 - b) Second, Sky wishes to ensure that, in any review by the appropriate authorities of News Corp's proposal, no precedent is set which would inappropriately or unduly restrict any merger or acquisition opportunities which may be available to Sky (for example, as a result of Sky's continuing operation of Sky News).
- 1.3 Each of these matters speaks to the need for the present intervention to be:
- a) properly focused on the relevant question, and rigorously evidence based, treating with due scepticism submissions by commercial competitors; and
 - b) conducted in a manner which is mindful of the need for transparency and predictability in merger control, so as not unduly to undermine the ability or incentive for companies to expand, invest and innovate.
- 1.4 We note that, in preparing the Report, Ofcom has set itself the task of deciding whether, having assessed the available evidence, "[it reasonably believes] *that the proposed acquisition may operate or be expected to operate against the public interest*".²
- 1.5 It is to be noted that Ofcom's role is to advise the Secretary of State, in order to assist the Secretary of State in deciding how he should answer the questions posed to him by the Enterprise Act 2002 ("EA02"). The EA02 requires that the Secretary of State should, on the basis of his own reasonable assessment of the evidence:
- a) decide whether *he* believes that it is or may be the case that the proposed merger operates or may be expected to operate against the public interest; and
 - b) if so, decide whether he should refer the case to the Competition Commission ("CC") for further investigation.
- 1.6 It would not be appropriate for the Secretary of State simply to adopt the advice of Ofcom in a case such as the present one. It falls to the Secretary of State to make his own assessment of the evidence, on the basis of which he might reasonably reach different conclusions from Ofcom's as to whether the 'threshold' for a reference to the CC is met. But, if the threshold is met, it is also necessary to address the second question, namely

¹ [Confidential].
² Paragraph 1.4 of the Report

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whether it is appropriate for the Secretary of State to exercise his discretion to refer the case to the CC. (We mention this second question, in particular, as the Secretary of State's letter of 7 January 2011 makes no reference to it, but appears to envisage that he is minded to refer the matter to the CC simply in the light of Ofcom's evidence and analysis of the first question.)

- 1.7 Sky submits that, in the present case:
- a) Ofcom has subtly recast the statutory formulation of the "media plurality" test, with the result that it has approached in a distorted manner the questions which it should have answered; and
 - b) perhaps in consequence, Ofcom has given undue weight to particular pieces of evidence, and has discounted other relevant evidence.
- 1.8 Sky submits that it is therefore particularly important that, in the present case, the Secretary of State should assess the "raw" evidence summarised by Ofcom in its Report with an open mind, and by reference to a correct understanding of the relevant media plurality test.
- 1.9 Sky submits that such an assessment is likely to lead the Secretary of State to conclude that:
- a) Ofcom has overstated the risk that the proposed transaction might operate against the public interest;
 - b) on a proper assessment of the issues, there is a minimal, if any, risk that the proposed transaction might operate against the public interest; and
 - c) accordingly, it would be reasonable for the Secretary of State to exercise his discretion to decide not to refer the matter to the CC for further investigation.

Sky elaborates on these points in the remainder of this Submission.

2. Ofcom's advice and recommendations

- 2.1 We note at the outset that, despite its final advice and recommendation that the Secretary of State should refer the matter to the CC for further investigation, Ofcom has, in fact, concluded that the proposed transaction poses a threat to media plurality only in certain limited respects:
- a) in technical (and purely numerical terms), the merger of News Corp and Sky will reduce by one the number of independently owned/controlled media enterprises active in the UK;³
 - b) but it is a separate question whether there will be a reduction in the number of independent voices, since it remains possible that internal plurality will be maintained within the enlarged News Corp group to such an extent as to lead to no diminution in the number of independent voices, relative to the status quo ante. Ofcom does not find that there will be a loss of internal plurality, but merely concluded that, having conducted only a first stage review, "*we do not consider that we can reach the view that internal plurality will ensure sufficient plurality in the provision of news and current affairs*";⁴
 - c) in terms of its static (immediate) effects the transaction would bring together News Corp's existing newspaper interests with Sky's retail and wholesale TV /radio news services, thereby conferring on News Corp an enhanced presence in terms of its share of total news consumption, its overall reach, its presence on several distribution platforms, its qualitative influence, and – allegedly in consequence – its "*ability to influence opinion*";⁵

³ Paragraph 1.36 of the Report.

⁴ Paragraph 1.39 of the Report.

⁵ Paragraph 1.48 of the Report.

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- d) no special concerns arise in respect of particular audiences (whether defined by geography, age, socio-economic status, or use of particular news sources). The concerns identified relate to UK audiences generally; and
 - e) although one can speculate as to (longer term) dynamic developments which might occur in respect of the provision of news services, there is no sufficiently tangible concern arising from such speculation as to justify its forming part of the evidence on which Ofcom relies.⁶
- 2.2 It is self-evident that News Corp's acquisition of 100% ownership of Sky will lead, in purely numerical terms, to a reduction – by one – in the number of independently owned/controlled media enterprises. This is of no substantive significance. Nor does Ofcom in fact conclude that the proposed transaction is, in fact, likely to lead to any significant reduction in internal plurality as between Sky News and News Corp's newspaper interests. It merely proceeds on the precautionary basis that it cannot rule out the possibility that that might happen. It follows that, if the Secretary of State were satisfied that such internal plurality would be maintained, then there would be no basis for a reference.
- 2.3 Furthermore, in suggesting that the Secretary of State might wish to consider putting new legislation before Parliament to allow ad hoc interventions on grounds of media plurality, unrelated to any particular merger in the media sector, Ofcom effectively acknowledges that the present transaction does not itself pose a dynamic threat to media plurality (but it would like to see additional powers of intervention, just in case anything unexpected happens).
- 2.4 Thus, Ofcom's advice that the present case should be referred to the CC ultimately rests entirely on an assessment of the potential immediate effect on external plurality of the combination of News Corp's newspaper interests with Sky News's TV/radio interests. For the reasons explained below, Ofcom has misdirected itself as to how to conduct that assessment, and its resulting advice is therefore flawed and unreliable.

3. Ofcom's assessment of external plurality

- 3.1 The specified public interest consideration which arises in the present case is a consideration which is concerned with the sufficiency of plurality of persons with control of media enterprises, that 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*".⁷
- 3.2 In the Sky/ITV case, the CC and the Court of Appeal made clear that, in assessing whether a transaction may be expected to operate against the public interest, by reference to this public interest consideration, the authorities should have regard to whether the merger will have the effect of so diminishing the number and range of voices serving a relevant audience as to mean that there will, after the merger, be an insufficient number and range of voices to protect the public interest.
- 3.3 Thus, the CC summarised the concept of plurality as follows in the Sky/ITV case:

*"There is no statutory definition of plurality in section 58A or elsewhere in the Act. We took the concept of plurality of persons with control of media enterprises to refer both to the range of and the number of persons with control of media enterprises."*⁸

and which was endorsed subsequently by the judgment of the Court of Appeal in the same case:

*"We agree with the Commission on this ... The word plurality can connote more than just a number exceeding one. It may carry an implication of range and variety as well."*⁹

⁶ Paragraph 1.54 of the Report.

⁷ Paragraph 1.2 of the Report.

⁸ Paragraph 5.7 of the CC Report in B SkyB/ITV.

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- 3.4 In the present case, Ofcom has looked beyond the wording of the statutory test, and the approach approved by the CC and the Court of Appeal for the application of that test, and has instead laid emphasis on an informal explanation of the test advanced in Parliament at the time of the enactment of the EA02, or advanced in subsequent statutory guidance.¹⁰
- 3.5 Accordingly, Ofcom appears to have concluded that its assessment should focus not on whether the presently proposed transaction will lead to such a diminution in the number and range of independent voices as to lead to insufficient plurality. Instead, its assessment focuses on whether the merged News Corp/Sky would have a “louder” voice, relative to other voices, with the implication that News Corp/Sky would then drown out other voices, such as to render the state of plurality insufficient to protect the public interest (a proposition which itself is not self evident): Ofcom has sought to decide who has greatest ability to influence the formation of public opinion, when it should instead have focused on whether there remained a sufficient number and range of sources of news provision to the public.
- 3.6 Sky submits that this approach distorts Ofcom’s assessment. Ofcom has strained to quantify the relative ability to influence which a merged News Corp/Sky would have, using unreliable metrics, and making questionable judgments as to the way in which users of one news source can be expected indirectly to influence wider public opinion by debating what they have seen/read with other members of the public.
- 3.7 We elaborate on these errors in section 4 below.

4. Ofcom has adopted a flawed methodology

- 4.1 There is no established metric for analysing a media enterprise’s ability to influence and inform opinion, as these are, arguably, not measurable concepts. As established above, *“the range of and the number of persons with control of media enterprises”* effectively acts as a proxy for all the concerns underlying the statutory test precisely in order to avoid this issue.
- 4.2 In this context, Ofcom has taken ‘ability to influence’ as being synonymous with consumption. Such an approach is questionable as even Ofcom notes that it does not take into account the varying ability of different media to influence opinion,¹¹ the impact of multi-sourcing on opinion forming, or, indeed, consumers’ own judgments as to whether to accept everything that they read, see or hear.¹²
- 4.3 This is particularly so in relation to the use of ‘share of minutes of news’ as a relevant metric. Ofcom’s analysis of the relative weights of ‘minutes of use’ across different media is, at best, speculative, without empirical basis. For example, Ofcom asserts that a ‘TV news minute’ would hold greater weight in terms of ability to influence than other media as *“TV news broadcasts are designed to deliver information and messages effectively in a relatively short time period compared to that available to newspapers”*. No attempt is made to assess the relative influence of (non-linear) media that provide for in depth reporting or investigation as compared to the brief news reports that are usually contained in linear broadcast media with limited schedule time.
- 4.4 At best, Ofcom’s three metrics demonstrate consumers’ actual use of media and their views on their sources of news on a cross-media basis.
- 4.5 However, whilst Ofcom acknowledges the limitations of these three factors it considers in its assessment (audience share and reach, minutes of use per day, and share of references), considering them to provide *“useful insight”*, Ofcom then goes on to rely solely on this analysis to conclude that *“the proposed transaction will result in an increase in News’s ability to influence public opinion”*.

⁹ Paragraph 90 of the Court of Appeal judgment. See also paragraphs 114 and 116 of that judgment.

¹⁰ Paragraphs 1.5 and 1.11 of the Report.

¹¹ Paragraph 1.25 of the Report.

¹² Paragraphs 4.81 – 4.87 of the Report.

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- 4.6 As demonstrated above, this conclusion does not follow from the evidence.
- 4.7 Furthermore, by exclusively focussing on ‘relative ability to influence’, Ofcom’s methodology obliges it to adopt further distortions of the plurality test in order to overcome evidence pointing to a sufficiency of plurality post-transaction.
- 4.8 For example, Ofcom discounts the lack of direct harm to plurality that might result from the transaction. Only a very small number of people rely solely on News Corp and Sky for news content and would therefore lose an alternative source of news content.¹³ Furthermore, Ofcom’s research shows that regular Sky News users source news from more providers than the general population.
- 4.9 This is dismissed by Ofcom as not being adequate to ensure sufficient plurality as what matters more than the consumption of news by individuals is “*the number and range of news providers used by all consumers and their relative significance*”.¹⁴ It is not clear to Sky why public debate and discussion of news by individuals should be given greater weight than the number of news providers used by each individual. The two seem inextricably linked and should be given equal weight in any assessment of whether there will be sufficient plurality.¹⁵

5. Discounting of relevant evidence and considerations

- 5.1 Sky submits that, instead of seeking to evaluate the relative value/strength of the “voice” which a merged News Corp/Sky would represent, Ofcom should instead have sought to evaluate the number and range of voices which would remain post-transaction. Much of the evidence which Ofcom cites would be relevant to a properly-directed assessment. But Sky submits that, if Ofcom’s assessment had been more appropriately directed, it would have attached more weight to:
- a) the range of other news providers who will remain active, independently of News Corp/Sky, post-merger, and will continue to generate and disseminate diverse news content and comment. Such news providers include numerous newspaper groups and powerful TV broadcasters who are committed to the continued provision of TV news coverage;
 - b) the readership/audience share which such other providers already achieve, and the scope for them to reach additional readers/audiences if the quality/diversity of news coverage offered by News Corp/Sky were to diminish (in a context where Sky News’ share of national TV news is only around 7% (and under 10% if Five News’ share is included), compared to the BBC at 71% and ITV at 15%);
 - c) the fact that News Corp/Sky would not control any scarce resources or privileged means of distribution of news services, since News Corp/Sky would not control any scarce spectrum resources (e.g. terrestrial TV frequencies/franchise) or have access to public funding (such as the BBC’s licence fee). Indeed, Ofcom fails to assess the relative impact of the BBC as “*the strongest provider of news and current affairs in the UK*”.¹⁶ Ofcom merely notes its institutional and editorial independence, and that this is “*fundamentally different from other media enterprises, including News Corp*”;
 - d) the fact that there is no real prospect that News Corp/Sky could prevent a full range of news stories and opinions from being made known to UK audiences, since other news providers (providing content and/or editorial control) would remain sufficiently numerous and well-established to provide a diverse range of content and comment; and
 - e) the fact that the growth of access to the internet, and the unique facility which it provides to disseminate news stories and comment very quickly to end users, provide

¹³ Paragraph 5.112 of the Report.

¹⁴ Paragraph 5.116 of the Report.

¹⁵ Sky notes that this argument was not put to it as part of Ofcom’s Issues Letter.

¹⁶ Paragraph 5.51 of the Report.

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a strong protection against the risk that any media enterprise could deny 'airtime' to the widest possible range of content and commentary.

- 5.2 Instead of recognising the contribution which these factors necessarily make to media plurality (in terms of the number and range of providers), Ofcom has sought to quantify the significance of such factors,¹⁷ with the result that it has discounted the significance of some of these factors for no good reason. Thus, for example, Ofcom discounted the significance of the internet, because not all consumers have access to it,¹⁸ whilst (inconsistently) relying on the power of conventional news providers to influence public opinion, on the basis that their influence is not limited to their own immediate audience, but extends further, since their immediate audience can be expected to pass on views sourced from such providers to other members of the public.¹⁹ Likewise, Ofcom discounted the significance of 'raw' news providers, who have no editorial control, without attaching weight at all to the range of websites which provide comment on raw news stories.²⁰
- 5.3 In addition, Ofcom's analysis places greater emphasis on the position of the merged entity in relation to the wholesale provision of news content than at the retail level. This has the effect of increasing significantly the cross-media share of consumption of the merged entity due to Sky News' supply of news content to Five and to commercial radio stations, particularly via IRN.
- 5.4 In doing so, Ofcom fails to give due consideration to the following:
- a) the editorial control exercised by Five in relation to the Five News service; and
 - b) the different news content services available to commercial radio stations which enable them to select news stories to suit their own target audiences and editorial requirements.
- 5.5 Accordingly, even if Ofcom's methodology were appropriate, its conclusions are flawed. For example, Ofcom asserts that "*a similar picture [to that at the wholesale level] is displayed when considering all sources of retail news provision, ..., and when considering the main source of news at the retail level*".²¹ Ofcom has not considered that the increments resulting from the transaction at the retail level (which correctly counts Five News and commercial radio stations as having separate voices to Sky News) are significantly less (around half) the level in the wholesale analysis and cannot be viewed as being significant, at 5% and 10% for 'share of references' and 'reach' respectively. It cannot be the case that any increase in such shares should result in a reference to the CC.
- 5.6 Thus, Ofcom's resulting assessment is no more than the sum of a series of idiosyncratic weightings attached to different inputs to media plurality, from which it concludes that a merged News Corp/Sky would be likely to have too much influence over public opinion. The consequence of Ofcom's error is well-illustrated by examining the graphs contained in paragraphs 5.33 to 5.44 of the Report, which divide media enterprises into numbered Groups, according to their relative contribution to plurality on different measures. It is self-evident that Ofcom has erred in discounting the significance, in terms of their contribution to plurality, of the combined membership of Groups 3 and 4 in each graph. In effect, Ofcom decides that these Groups provide no voices capable of contributing sufficient plurality alongside the BBC, a merged News Corp/Sky and ITV. Sky submits that this is self-evidently wrong.

6. The Secretary of State should exercise his discretion not to make a reference

- 6.1 For the reasons outlined above, Sky submits that the evidence clearly demonstrates that the presently proposed transaction poses no threat to the sufficiency of media plurality.

¹⁷ Paragraphs 4.39 ff of the Report.

¹⁸ Paragraph 4.31 of the Report.

¹⁹ Paragraph 5.116 of the Report.

²⁰ Paragraph 2.21 of the Report.

²¹ Paragraph 1.34 of the Report.

Absent any such threat, the Secretary of State may not therefore reasonably conclude that it is or may be the case that the proposed transaction may operate or be expected to operate against the public interest. Ofcom's advice to the contrary is based on its erroneous approach to the assessment of the sufficiency of media plurality, and, in consequence, its distorted evaluation of the evidence.

- 6.2 In addition, in making his assessment, the Secretary of State needs to give due consideration to the following factors:
- a) the DTI Guidance makes clear that the purpose of the media plurality public interest provisions is to "*prevent unacceptable levels of media and cross media dominance*"²² and to act as a safeguard against "*a significant reduction in plurality*".²³ Furthermore, this is a case in which the media plurality public interest provisions are intended to operate only "*in exceptional circumstances*" where such mergers give rise to "*serious public interest concerns*". Ofcom's Report singularly fails to provide evidence of such concerns; and
 - b) Ofcom has confirmed that, in its view, any media plurality concerns relate solely to Sky News. Sky therefore repeats the point made in its response to Ofcom's Invitation to Comment that it has invested for many years, and continues to invest, in the operation of Sky News as a distinct, impartial and independent news service. Indeed, the Board of Sky (including the members of the Board connected to News Corp) have for many years authorised growing investment in Sky News to that end as part of Sky's overall annual budgeting process. Such investment serves to enhance the overall attractiveness to customers of the services Sky offers. The availability of Sky News to audiences, therefore, is the result of a strong commercial incentive, not of any obligation to provide television news. This commercial investment incentive would remain irrespective of a change in ownership of Sky. Conversely, it has the potential to be undermined if merger control were to operate such that the operation of Sky News inappropriately or unduly restricted any merger or acquisition opportunities which may be available to Sky. Thus, a conclusion that the proposed transaction would result in a loss in plurality could perversely increase the risk of that very situation by undermining the incentives which have resulted in the provision of Sky News to date. This would be a wholly unwelcome outcome, and itself contrary to the public interest.
- 6.3 Accordingly, it would be appropriate in the circumstances for the Secretary of State to exercise his discretion not to make a reference in the present case.

Sky

13 January 2011

²² Paragraph 7.7, DTI Guidance.

²³ Paragraph 7.11, *ibid*.