



**SUBMISSION TO THE SECRETARY OF STATE
FOR CULTURE, OLYMPICS, MEDIA AND SPORT**

1. INTRODUCTION/OVERVIEW

(a) Background/decision to be taken by the Secretary of State

1.1 This submission is made on behalf of News Corporation (**News**) in relation to its proposed acquisition of those shares in British Sky Broadcasting Group plc (**Sky**) that it does not already own (the **Transaction**).

1.2 On 4 November 2010, the Secretary of State for Business, Innovation and Skills (Secretary of State for **BIS**) issued an European Intervention Notice which identified the following public interest consideration (**PIC**) as potentially relevant to a consideration of the Transaction:

"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 media enterprises serving that audience;" (section 58 (2C)(a) of the Enterprise Act 2002)

1.3 Ofcom was required to provide advice and recommendation with regard to the PIC pursuant to Article 4A of the Enterprise Act (Protection of Legitimate Interests) Order 2003 (the **Order**) and OFT was required to advise as to the creation of a European relevant merger situation pursuant to Article 4(4) of the Order.

1.4 Following the revelations which emerged in the press on 21 December, indicating clear bias against News by the Secretary of State for BIS, the Secretary of State for BIS and his department were removed from a decision making role in relation to the Transaction and decision making powers were transferred to the Secretary of State for Culture, Olympics, Media and Sport (**Secretary of State**) who must now take the decision on whether or not to refer the Transaction to the Competition Commission (**CC**) under Article 5 of the Order.

1.5 Ofcom issued its report to the Secretary of State on 31 December 2010 (the **Report**).¹ A redacted copy of the Report was provided to News on Friday 7 January 2011, after business hours. OFT issued its report to the Secretary of State on 30 December 2010 (the **OFT Report**) and a copy of the OFT Report was also provided to News on 7 January 2011, after business hours.

1.6 In its Report, Ofcom has advised the Secretary of State that, in Ofcom's view, the Transaction "*may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences*" (paragraph 1.57) and has indicated that in its view, there is a need for a full review of the issues and the Secretary of State should refer the Transaction to the CC for a more detailed review.

¹ All paragraph references are to the Report except where stated otherwise.

- 1.7 The Secretary of State is not bound to follow Ofcom's recommendation. Under Article 5(3) of the Order, the Secretary of State is obliged to take his own decision taking account of the PIC and considering whether the Transaction may be expected to operate against the public interest. Moreover, the Secretary of State has a power rather than a duty to refer. He may make a reference to the CC if he believes that the Transaction may operate against the public interest, but he is not obliged to do so.
- 1.8 Up to now News has been subject to an administrative review process which was seriously flawed: the initial decision to intervene in relation to this Transaction on the basis of a public interest concern was taken by a Secretary of State for BIS who was biased against the interests of News and its shareholders.
- 1.9 News believes that Ofcom has failed to approach the effects of this Transaction with an open mind and has carried out a review process with the intention of identifying concerns.
- Ofcom has been notably more receptive to submissions made by third party complainants than it has been to submissions made by News and has selectively omitted relevant evidence.
 - As an example, Ofcom quotes vague evidence from Andrew Neil (widely reported in the press as having left his position as editor of The Sunday Times in 1994 "on bad terms") in support of its arguments but does not refer at all to the direct oral evidence provided to Ofcom by John Witherow (editor of The Sunday Times since 1994) who reported that no editorial influence whatsoever was exercised by News over the content of The Sunday Times.
- 1.10 The Report contains a number of serious errors in legal and analytical approach which undermine the validity of the Report and which render Ofcom's conclusions unreliable. Therefore there can be no presumption that rejecting its recommendation for a reference to the CC, on the weight of evidence available to him, would be unreasonable. On the contrary, for the reasons set out below, the Report provides no legitimate basis for a decision that the Transaction should be reviewed by the CC in more detail.

(b) Serious legal and analytical errors in Ofcom's Report mean that Ofcom's recommendation to refer to the CC cannot be relied upon in a number of key respects

- (i) **Ofcom does not address the question of whether media plurality is currently "sufficient" and whether plurality may be rendered "insufficient" as a result of the Transaction.** Therefore, it fails to address the fundamental question on which the Secretary of State has to decide. It cannot be the case that *any reduction of* plurality is to be considered to lead to insufficient plurality - otherwise every media merger would need to be subject to a detailed review or blocked
- (ii) **Ofcom also confuses the permissive nature of a first stage review. A lower standard of proof does not mean that Ofcom is permitted to stop short of an analysis whether the Transaction will result in insufficient plurality** - the key question posed by the PIC. The fact that the Secretary of State may make a reference to the CC if he believes that it is or "*may be the case*" that the transaction "*may be expected to operate against*" the relevant PIC does not remove the fact that the relevant PIC concerns "*sufficiency of plurality*" of "*persons with control of media enterprises serving that audience*".
- (iii) **Ofcom's mistreatment of Sky's wholesale activities lead it to dramatically overstate the potential impact of the Transaction.** The provision of news content to third party media enterprises, who themselves maintain editorial control over content, is an activity which falls outside of the statutory definition of a media

enterprise and, even if Ofcom considers that it should be taken into account, it cannot be **equated** with the audience share of a broadcast entity. Ofcom attributes the full extent of independent commercial radio's share of news consumption (which is itself overstated) to Sky. Moreover, while Ofcom generally analyses data both including and excluding the wholesale supply of news, in drawing its conclusions it inevitably relies on the data which takes account of the wholesale supply of news by Sky News to Channel 5. Indeed, in its analysis of cross-media consumption (key to its overall conclusions) it *only* presents data including the wholesale supply of news.

- (iv) **Ofcom's approach to assessing plurality, based primarily on measures of reach and share, contains a number of flaws.** Once key errors are corrected, it is clear that the Transaction does not result in insufficient plurality.
- (v) **Ofcom fails to explain why internal plurality does not ensure sufficient cross-media plurality.** Sky News is a TV broadcaster operating within the culture of editorial independence and impartiality in TV news which is reflected in statute and the Broadcasting Code. Ofcom avoids the issue, concluding that "*in light of conflicting views*" they "*do not consider that we can reach the view that internal plurality will ensure sufficient plurality in the provision of news and current affairs as part of a first stage review*". The Secretary of State, reviewing all of the evidence, should come to the only reasonable conclusion which is that, given the existing level of external plurality, and the predictable continuance of Sky News as an independent voice due to internal plurality mechanisms (both cultural and regulatory), there is no threat to the sufficiency of plurality as a result of this Transaction.
- (vi) **Ofcom's forward looking "dynamic assessment" is speculative and, by Ofcom's admission, provides no basis for a decision that there may be plurality concerns.** Ofcom explicitly does not rely on these issues in recommending to the Secretary of State that a reference to the CC be made (at paragraphs 6.72 and 6.73 of the Report) and the Secretary of State should ignore these speculative concerns which provide no reasonable basis for a reference to the CC. Moreover, Ofcom fails to distinguish in its assessment between effects on plurality and effects on competition; the latter is subject to the exclusive jurisdiction of the European Commission which unconditionally cleared the Transaction in a first stage review on 21 December 2010.
- (vii) **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.

1.11 Should the Secretary of State decide to refer the Transaction on the basis of the Report, the flaws identified in this submission would taint his decision.

1.12 Furthermore, 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 positive conclusion from its findings (purportedly on the basis that it is unable to decide on the relevance of various factors to an assessment of media plurality in the time available to it). These are crucial factors on which the Secretary of State can and should come to a view and which would enable him to conclude that the Transaction may not be expected to operate against the public interest without the need of a CC reference. For example:

- (i) The UK consumer group currently consuming news from Sky and News only is minimal, less than 1%. This is accepted by Ofcom (paragraph 5.109) and follows a similar finding by the CC in Sky/ITV.

- (ii) Plurality in news consumption is crucial to the required qualitative assessment. Ofcom acknowledges that the multi-sourcing of news is of relevance to plurality (paragraph 4.59) and even "important" (paragraph 5.115). However Ofcom states at paragraph 5.114 that: "*The implications of multi-sourcing in relation to this proposed transaction are complex and as a first stage authority we do not have sufficient time to consider it fully*". In fact, multi-sourcing by consumers is a key feature contributing to the sufficiency of media plurality in the UK and this follows on from the CC's analysis of plurality in Sky/ITV. It is hard to see how increased access to news sources, including the internet, does not enhance plurality. The Transaction will have a minimal impact on the plurality of consumption by consumers and consumers will, on Ofcom's analysis continue to access on average 2.8 independent sources of news if News and Sky were treated as a single source (as opposed to 2.9 if they are treated separately).
- (iii) Given the recognised ongoing existence of a multiplicity of other media enterprises cross media the effect of the Transaction on the broader UK news agenda is crucial. Ofcom concludes paragraph 5.123 that: "*the available evidence does not point to a conclusion that News Corp's ability to influence through other media would be materially enhanced by the acquisition.*"
- (iv) The importance of internal plurality for Sky News as a TV broadcaster operating within the culture of editorial independence and impartiality in TV news which is reflected in statute and the Broadcasting Code has been accepted by the CC in Sky/ITV. As noted above Ofcom avoids the issue, concluding that "*in light of conflicting views*" they "*do not consider that we can reach the view that internal plurality will ensure sufficient plurality in the provision of news and current affairs as part of a first stage review*".

(c) In fact, the Transaction poses no threat whatsoever to the sufficiency of plurality in the UK

- 1.13 News has always submitted, and continues to submit, that the proposed Transaction poses no threat whatsoever to the sufficiency of plurality when considered on an impartial and objective basis and in the framework of the evidence which is relevant to the applicable statutory test.
- 1.14 Indeed, many of News' propositions are supported by Ofcom's own analysis and/or are based upon the detailed analysis which was already carried out by the CC of how to assess plurality in the context of the Sky/ITV transaction and which does not, as a consequence, need to be revisited in the context of this Transaction.
- 1.15 It is necessary, as a starting point to assessing plurality, to step back and to consider the broader media environment and the number of voices available to and accessed by consumers in the UK.

(i) The Transaction can only affect a cross-media audience and there is no reduction in the number of independent newspaper proprietors or TV broadcasters in the UK as a result of the Transaction

The number of newspaper enterprises in the UK remains entirely unaffected by this Transaction. Enterprises such as DGMT plc, Guardian Media Group, Telegraph Media Group and Pearson are well funded, with a strong commitment to the continued provision of news in the UK and with distinct approaches to reporting and commenting on news. Alexander Lebedev's 2010 acquisition of the Independent, and the successful subsequent launch of its sister title, "i", demonstrates that it is still possible for support to be found even for loss-making newspaper enterprises in the UK. Indeed, after Lebedev acquired the Evening Standard in 2009 and made it a free paper, circulation had increased to over

610,000 by February 2010, the highest in the paper's 180 year history and more than twice as high as the September 2009 figures (256,000).²

The number of TV news broadcasters in the UK also remains entirely unaffected. Sky News will continue to face competition from competitors including both larger ones (such as the BBC, ITV, Channel 4) and smaller ones (including, but by no means limited to, Euronews, CNN, CNBC, Bloomberg, Al Jazeera).

Online, each of these enterprises and more compete for audience attention and provide distinctive sources of news reporting.

The BBC dominates each of TV, radio and online news and, as result, cross-media news provision in the UK. On Ofcom's own numbers, the BBC's share of consumption is in each of these media at least three times as large as the combined News/Sky group (even on the basis of Ofcom's inflated 'wholesale' calculation of the group's share). For TV, the media that on Ofcom's own research is by far the most important for UK news consumers, the BBC's share is eight times that of the combined News/Sky group. News references and reach tell a similar story:

"The BBC has the largest share, representing 37% of the total [wholesale news] references" (paragraph 1.28). "In terms of reach, the BBC (in the form of TV, online or radio) is used by 81% of UK adults at least once a week. This compares to 40% for ITN, 33% for Sky News and 32% for News Corp." (paragraph 1.30).

The BBC has also recently reached an agreement with the government which secures its funding for the next six years.

(ii) News' position in newspapers (a declining segment within cross-media consumption) is unchanged and Sky's relatively modest share of TV news provision is unchanged.

Ofcom calculates that News titles have a reach of 29.4% of UK adults (paragraph 4.23 and Figure 10). News still faces competition from a wide variety of strong newspaper competitors. Newspapers are in any event, a declining segment, as acknowledged by Ofcom:

"Newspaper readership is also in decline, with the number of people reading a Sunday title falling by almost 5% per annum over the nine years to 2009, while daily readership has fallen at an average annualised rate of almost 3% over the same period" (Report paragraph 4.20).

Sky News' position in TV news remains relatively modest. Ofcom calculates Sky News to represent 6% of TV news viewing (paragraph 4.16 and Figure 7). Consumers of Sky News, by definition, have access to digital channels and therefore have a wide range of alternative news channels available to them. In other words, they consume news in a more plural TV environment.

Ofcom acknowledges that there is no change in the relative influence of News or Sky within each traditional media platform:

"This transaction does not result in a change in the number, range or relative ability to influence within three of the individual platforms – TV, radio and newspapers." (paragraph 5.19)

² See <http://www.pfj.co.uk/news/london-evening-standard-enjoying-record-circulation-figures-news-03139182187>.

- (iii) **A culture of editorial independence in broadcast news supported by regulatory requirements (the Broadcasting Code) will continue to ensure that Sky News remains as an independent voice and that internal plurality within the broader News group will be secured. This, together with the existing level of external plurality, removes any doubt that might arise as to the sufficiency of plurality post-Transaction.**

Ofcom recognises that these factors play a role in the analysis, but Ofcom fails to draw the requisite conclusion that the Transaction raises no cause for concern.

"We recognise that the impartiality rules may contribute as a safeguard against potential influence on the news agenda by media owners" (paragraph 1.41).

"It is our view that cultural safeguards may be expected to go some way to maintaining the editorial impartiality of Sky News" (paragraph 5.96).

In fact, the broadcast segment is characterised by consumer expectations for greater impartiality than in other media, which News can hardly ignore:

"Many consumers do however understand that newspapers are more prone to expressing a particular position than TV news" (paragraph 4.85).

- (iv) **In Sky/ITV, News was already assumed to have control/material influence over Sky and no concern about plurality was identified.**

The OFT stated that "[BSkyB's] largest shareholder is News Corporation (News Corp) with a 39.02 per cent stake, along with several directorships, which is sufficient to confer control over BSkyB."³

In fact Ofcom assessed plurality in the previous Sky/ITV case precisely on the basis that Sky and News were assumed to be part of the same enterprise. Ofcom took into account the links between News and Sky in its plurality assessment on the basis that it treated "*all media enterprises under the same ownership or the same control as being controlled by one person.*"⁴ **Ofcom has entirely reversed its position in this case** and in its substantive assessment of the effects of the Transaction it treats Sky as an entity which is entirely unconnected with News. This clear reversal by Ofcom was entirely unexplained.

The CC also took into account that News had material influence over Sky when assessing media plurality in Sky/ITV and, having carried out a detailed review, advised that there was no concern about plurality raised by Sky's acquisition of an interest in ITV.

- (v) **Ofcom ignores the importance of multi-sourcing and online news as a significant contributor to plurality.**

The average consumer in the UK accesses five different sources of news. Multi-sourcing exposes consumers to a variety of different views and enables them to take their own decisions as to which sources of news coverage they find most interesting and attractive.

As acknowledged by Ofcom, the Transaction will not affect the number of sources to which consumers have access, and will not impact on the fact that most consumers consume news from a variety of sources.

³ OFT Report, paragraph 25.

⁴ Ofcom Report, paragraphs 4.4-4.7.

"The loss of Sky as a distinct media enterprise would not materially change this average number of news providers used by individual consumers" (paragraph 1.44).

The internet encourages more plurality in consumption and facilitates access to a greater range and variety of voices. Ofcom acknowledges that the internet is an expanding medium.

"we consider the internet and wider online news provision to be relevant in any consideration of the sufficiency of plurality in the provision of news and current affairs" (paragraph 2.18).

(vi) Ofcom acknowledges that the actual impact of the Transaction on consumers of news will be minimal.

Replicating the analysis of media plurality which was carried out by the CC in Sky/ITV (as set out in Appendix 1 to the CC's report in Sky/ITV) News calculated that the number of consumers in the UK who would in reality be directly impacted by a combination of Sky News and News International newspapers is very small.⁵

- Only 6% of UK adults actively watch Sky News or visit SkyNews.com and actively read News International newspapers or actively visit News International websites (the "Sky/ NI Overlap Group").
- Approximately 96% of the Sky/ NI Overlap Group make use of other news sources, in addition to Sky and News International sources.
- Only 0.3% of the Sky/ NI Overlap Group use only Sky and News International news sources.

These figures appear to have been accepted by Ofcom (although Ofcom, misleadingly, describes this consumer group as "relying on" news from Sky and News when in fact they simply choose to consume news from Sky and News).

"Across the population as a whole, we found that few regular news consumers rely solely on Sky titles or solely on News Corp titles: at the retail level, 2% rely solely on news from Sky; and 1% rely solely on news from News Corp; these shares do not change materially if considering wholesale news provision" (paragraph 4.79).

"News Corp estimated that 6% of all UK consumers relied on both News Corp and Sky for news. Of these, approximately 96% also sourced news from other sources as well. News Corp therefore estimated that the proportion of consumers who would, post transaction, rely on only News Corp and Sky News and no other news provider would be 0.3% of the population" (paragraph 5.109).

(vii) Ofcom acknowledges that the Transaction will have no impact whatsoever on the setting of the wider news agenda within the UK

Having considered carefully the evidence as to influence over the broader news agenda in the UK, Ofcom concludes that:

"the available evidence does not point to a conclusion that News Corp's ability to influence through other media would be materially enhanced by the acquisition" (paragraph 5.123)

⁵ See FTI Report paragraphs 6.24 to 6.44 and paragraph 2.9 of the Response to the Issues Letter

- 1.16 The fact that Ofcom acknowledges both the minimal impact on consumers and the lack of any impact on the broader news agenda should provide the Secretary of State with significant comfort that it is reasonable to conclude, having reviewed the evidence relied upon by Ofcom in its Report, that the Transaction does not result in insufficient plurality for any audience in the UK.
- 1.17 News has made a number of submissions to Ofcom setting out its view of how the PIC should be applied to the current Transaction. Each of the key submissions is attached to this submission to the Secretary of State, as follows:

- (i) News' Initial Submission to Ofcom (**Initial Submission**) – attached at **Annex 1**;
- (ii) FTI Report measuring plurality in news (Annex I of the Initial Submission, **FTI Report**) – attached at **Annex 2**;
- (iii) Perspective Report on past and future trends in plurality and the setting of the news agenda (Annex II of the Initial Submission, **Perspective Report**) – attached at **Annex 3**;
- (iv) News' Response to Ofcom's Issues Letter (**Response to Issues Letter**) – attached at **Annex 4**;
- (v) Opinion of Lord Pannick QC (Annex 1 of the Response to Issues Letter, **Lord Pannick Opinion**) – attached at **Annex 5**; and
- (vi) Perspective analysis of media's use of other media outlets as a source for stories (**Perspective Sources Analysis**) – attached at **Annex 6**.

- 1.18 Without seeking to replicate this comprehensive body of evidence, News summarises the main points of its case below, at the same time as addressing the key flaws in Ofcom's report.

(d) News is prepared to offer undertakings which eliminate Ofcom's concerns

1.19 [REDACTED]

- 1.20 A decision on UIL rests with the Secretary of State. Ofcom has not provided the Secretary of State with advice on this issue. Ofcom repeats a number of third party views on possible remedies at paragraph 7.3 to 7.6 of its Report but it has not endorsed these views. In fact, remedies were not discussed with Ofcom. In fact, no advice on this issue is required to be given by Ofcom and it is for the Secretary of State to take his own decision on whether or not to accept UIL in place of a reference to the CC, exercising his unfettered discretion. Specifically, if the Secretary of State would otherwise intend to make a reference to the CC, he has the power to accept UIL from News under paragraph 3 of Schedule 2 of the Order:

"The Secretary of State may, instead of making such a reference and for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have or may have resulted, or which may be expected to result, from the creation of the European relevant merger situation concerned accept from such of the parties concerned as [he] considers appropriate undertakings to take such action as [he] considers appropriate."

- 1.21 Should the Secretary of State still have concerns, having reviewed and considered News' submissions, News is prepared to offer UIL in order to remedy, mitigate or prevent those concerns from arising. These arguments will be addressed more fully in a UIL Proposal which will be separately submitted to the Secretary of State, if required.

1.22 Pending a decision by the Secretary of State all News' rights in relation to a possible legal challenge based on the significant flaws in the way the administrative process has been run and/or the serious flaws in the Ofcom Report are reserved.

2. THE RELEVANT STATUTORY QUESTION: THE KEY ISSUE IS THE SUFFICIENCY OF PLURALITY WHICH OFCOM SIDESTEPS ENTIRELY

(a) The PIC which the Secretary of State must take into account

2.1 In this case the PIC which the Secretary of State must take into account 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 media enterprises serving that audience;" (section 58 (2C)(a) of the Enterprise Act 2002)

2.2 Ofcom, at paragraph 2.8 of its Report quotes from Paragraph 7.7 of the Guidance on Public Interest Intervention in Media Mergers published by the DTI in 2004 which makes clear that the PIC:

*"is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and **control the agenda**. This broadcasting and cross-media public interest consideration, therefore, is intended to prevent **unacceptable levels of media and cross-media dominance** and ensure a **minimum level of plurality**." (emphasis added)*

2.3 Ofcom does not acknowledge the clear implication of this formulation which is that, ultimately, the relevant public interest threshold is set at a high level. It is not any reduction in plurality which would lead to preliminary concerns but only a reduction in plurality which threatens a "minimum level of plurality". It is not any increase in the strength of one voice which would lead to concerns but only an increase which leads to "unacceptable levels of media and cross-media dominance" where dominance, in competition law terms, is a well understood and high threshold describing a significant degree of market power. Furthermore, sufficient plurality is concerned with an ability to "control the agenda". As noted above, the Report acknowledges at paragraph 5.123 that the Transaction will have no impact whatsoever on the setting of the wider news agenda within the UK.

2.4 It must also be borne in mind that when the Transaction has been evaluated in parallel on competition grounds, it has been unconditionally cleared by the European Commission in a first stage review concluded on 21 December 2010 meaning that no concern as to the continued existence of effective competition in media markets arise in this case.

2.5 It would therefore be unreasonable for the Secretary of State to trigger a lengthy and costly CC process where, on an objective view, he is not convinced that the threshold for intervention is met (as should be the case, in News' submission, taking an objective view of the evidence set out in the CC's Report).

2.6 While media plurality is important and a matter of public interest, it is not the case that *any* reduction in media plurality must be the subject of close examination, otherwise all media mergers would automatically be required to be reviewed by the CC. Ofcom appears to have fundamentally ignored this and to have drafted a Report to the Secretary of State based on a misunderstanding of the legal test.

(b) Need for counterfactual assessment is clear – this should not be confused with an assessment of sufficiency of plurality

- 2.7 Ofcom is correct that it is necessary to assess the possible effects of the Transaction with reference to the current situation/ the situation where the Transaction does not occur.
- 2.8 However, at paragraph 1.14 of its Report, and paragraphs 2.9 to 2.12 of its Report Ofcom confuses two issues which should in fact be distinct steps in the statutory process. The first is for the effects of the merger to be compared with the expected situation absent the merger – a counterfactual analysis. The second is the need for an assessment of sufficiency of plurality post-Transaction.
- 2.9 Ofcom makes no real attempt to consider (and provides no advice to the Secretary of State on) whether there is sufficient plurality in the UK before the Transaction and what difference the Transaction makes to the sufficiency of plurality. Ofcom ignores the concept of sufficiency altogether and purports to treat any potential reduction in the level of plurality which currently exists as a reason for a reference to the CC. This is explicit in paragraph 2.12 of the Report:

"We consider how the proposed transaction may affect the level of plurality in the market today, and whether this may raise risks for the public interest in terms of a potential reduction in media plurality such that a fuller second stage investigation is warranted."

- 2.10 This is a misstatement of the legal test on the basis of which the Secretary of State is to make his decision on reference to the CC under Article 5 of the Order. The PIC does not arise in every case where two media voices which were previously distinct cease to be distinct. The PIC is narrower than this and is potentially relevant only where a reduction in the number of voices is such that it threatens to result in insufficient plurality. The Report has failed to provide advice on the fundamental question to be addressed by the Secretary of State in his decision on reference.
- 2.11 The Secretary of State must form a view on the level of plurality which is/would be sufficient in order to assess the potential effects of the Transaction and to decide whether the Transaction raises concerns which might justify a reference to the CC. In addressing the former question, it is highly relevant that (a) at the time of entry into force of the Communications Act 2003 Parliament must have assumed that plurality was sufficient; and (b) in 2007 as result of the Sky/ITV review, plurality both in TV and cross-media was found sufficient, even if Sky had retained its stake in ITV. This suggests that the CC felt that the level of plurality was not only sufficient in 2007, but that there was an appreciable margin of safety. Moreover, media plurality has increased since both 2003 and 2007 for reasons set out in the FTI and Perspective Reports. The assumption must therefore be that pre-Transaction plurality was already sufficient by some margin. Ofcom has failed to demonstrate that plurality would be reduced, as a result of the present Transaction, to a level below that subsisting in 2003 (or 2007) that could reasonably be said to lead to insufficient plurality.
- 2.12 Ofcom sidesteps this question at paragraph 2.10 of its Report by referring to a number of submissions from third parties⁶ which claim that plurality is insufficient in the UK. In a controversial case such as this one, the fact that two lobbying organisations, the NUJ and two academics (cited by Ofcom in footnote 35) express a particular view can hardly be taken as evidence that that view holds any weight whatsoever and it is not acceptable for Ofcom to refrain from taking its own view on this issue and advising the Secretary of State accordingly. Ofcom's failure to engage with the issues calls into question the reliability of its Report and the Secretary of State must come to a conclusion on whether or not he would be minded to refer in full awareness of the flaws in the Report.
- (c) A lower standard of proof for a preliminary "phase I" review does not mean that the statutory test can be disregarded or changed or that Ofcom is permitted to avoid difficult questions altogether**

⁶ Specifically, Ofcom refers to submissions from: 38 Degrees, Campaign for Press and Broadcasting freedoms, the NUJ and two academics.

- 2.13 Ofcom also confuses the permissive nature of a first stage review in terms of the threshold to be met before Ofcom can recommend to the Secretary of State that the Transaction might merit further review (described at paragraph 2.4 of its Report) with an ability to stop short of analysing the key question posed by the PIC – whether there is a risk that the Transaction will result in insufficient plurality.
- 2.14 The fact that the Secretary of State is only required at this stage to determine whether it is or "*may be the case*" that the Transaction "*may be expected to operate against*" the relevant PIC does not remove the fact that the relevant PIC concerns "*sufficiency of plurality*" of "*persons with control of media enterprises serving that audience*". Ofcom has side-stepped the key question of the statutory test.
- 2.15 Throughout the Report there are many places where Ofcom's view is that it is unable to decide on the relevance of various factors to an assessment of media plurality in the time available to it. In many cases, these "open" questions are not specific to this Transaction but would apply equally to any merger between media enterprises operating on different media platforms.
- 2.16 For example, Ofcom states at paragraph 5.114 that: "*The implications of multi-sourcing in relation to this proposed transaction are complex and as a first stage authority we do not have sufficient time to consider it fully*". In fact, multi-sourcing by consumers is a key feature contributing to the sufficiency of media plurality in the UK and this follows on from the CC's analysis of plurality in Sky/ITV. It is hard to see how increased access to news sources, including the internet, does not enhance plurality. Ofcom is a specialist regulatory body which carries out regular, broad reviews of media consumption by consumers in the UK. Ofcom understands very well that consumers use varying platforms to consume content and that access to content is being increasingly facilitated by the growth of the internet and digital media. Ofcom also had 40 days to carry out its "first stage" review (having been warned in advance by the Secretary of State that a reference might well be made). In a similar length of time, the European Commission, assessing the competition impact of the Transaction, carried out a full and detailed review, consulted with all interested parties, and came to the decided view, set out in a reasoned decision of 60 pages, that the Transaction raised no competition concerns.
- 2.17 Ofcom's struggle with these issues is even more baffling given that only three years ago Ofcom, and then the CC, had to assess the sufficiency of media plurality for a cross media audience in Sky/ITV, where Sky's existing links with News were already taken into account. In any event, there is ample evidence to conclude that the Transaction would not result in insufficient plurality, as summarised in section 1(c) above.
- 2.18 It is therefore unacceptable that News should be penalised, by means of a reference of this Transaction to the CC for a more detailed review, because Ofcom had not decided what they believe the appropriate framework for the analysis of plurality in cross-media markets to be and/or were not able to progress to form a view on the facts within the reasonable time allotted.

3. OFCOM'S MISTREATMENT OF SKY'S ACTIVITIES PROVIDING NEWS CONTENT TO THIRD PARTIES PERVADES ITS ANALYSIS AND LEADS TO A DRAMATIC OVERSTATEMENT OF THE POTENTIAL IMPACT OF THE TRANSACTION

(a) The share of media enterprises to whom Sky wholesales news cannot be attributed to Sky under the relevant statutory test

- 3.1 The PIC specified in this case and set out at section 58 (2C) of the Enterprise Act requires an assessment of the sufficiency of the number of "persons with control of media enterprises serving [each different audience in the UK]".

3.2 Section 58A provides a definition of media enterprises:

"(1) For the purposes of section 58 and this section an enterprise is a media enterprise if it consists in or involves **broadcasting**.

(2) In the case of a merger situation in which at least one of the enterprises ceasing to be distinct consists in or involves broadcasting, the references in section 58(2C)(a) or this section to media enterprises include references to newspaper enterprises.

(3) In this Part "newspaper enterprise" means an enterprise consisting in or involving the **supply of newspapers.**" (emphasis added)

3.3 Sky's wholesale provision of news is not an activity of a "media enterprise serving a relevant audience" under the Enterprise Act and should therefore be disregarded.⁷

3.4 It is the controller of Channel 5 who is responsible for the content and editorial policy of Channel 5 news, regardless of the fact that the content is in practice, at this time, sourced by Channel 5 from Sky. The same applies to Sky's wholesaling of news content to Independent Radio News (**IRN**). It is the radio broadcasters who remain responsible for their news content rather than Sky.

3.5 Ofcom acknowledges this to some extent. It comments, at paragraph 2.20, that:

"Sky's provision of news...to other media enterprises may not, of itself, bring Sky within the definition of "media enterprise" for the purpose of the statutory test. However, it is relevant to the question of the contribution made by those other media enterprises to plurality. In any event, Sky...indirectly serves a variety of audiences besides its retail audiences, through wholesale news provision."

3.6 Later, Ofcom generally analyses data both including and excluding the wholesale supply of news, but in drawing its conclusions inevitably relies on the data which takes account of the wholesale supply of news by Sky News to Channel 5 and IRN. Indeed, in its analysis of cross-media consumption (key to its overall conclusions) it *only* presents its data including the wholesale supply of news.

3.7 Ofcom treads a very fine line as regards wholesale provision, emphasising that the type of wholesale arrangement entered into by Sky and ITN must be taken into account, but that the upstream supply of stories by news agencies such as Reuters and AP does not need to be taken into account (paragraphs 4.6 to 4.8). Such a selective approach to defining the relevant sources of influence seems designed to emphasise the importance of Sky News, while minimising the relevance of other media players. By contrast, the CC in Sky/ITV reported submissions it had received as follows:

"Five told us that, in its experience, the costs of news provision are falling, due to advances in digital technology and distribution. This could mean many more companies being potential news providers to Five when its contract is next up for renewal. In addition to Sky News and ITN, this could include international news organizations such as CNN, Reuters and APTN. Should they feel inclined, Five considered that any one of these organizations could recruit the staff to provide the dedicated 'front end' resources for a high-quality news programme, while relying on its own infrastructure to support this".⁸

(b) Agreements for the supply of news content are temporary commercial arrangements

⁷ See, in addition News' Initial Submission, paragraphs 3.14 to 3.18.

⁸ At Appendix H of the CC Report.

3.8 There is nothing permanent at all about the supply arrangements between Sky and Channel 5 or IRN and they can be lost as well as won. The current arrangements represent a choice on the part of the responsible broadcaster, to source wholesale content from Sky for a particular period, on the understanding that the broadcasters will (as they are obliged to do) retain full editorial control over their own stations.

(c) News cannot interfere with the editorial content provided by Sky to third parties – this is highly relevant to the issue of internal plurality

3.9 Ofcom does not even take into account the indirect, limited and temporary nature of these arrangements when assessing the extent to which "internal plurality" is relevant to the analysis in section 5 of its Report.

3.10 It does not consider that:

- (i) in practice, there is no reason to believe that News would interfere with editorial decision making at Sky News;
- (ii) there is a clear and important additional barrier preventing News from interfering with editorial decision making in relation to news provided to Channel 5 and IRN given that the broadcasters who remain responsible for broadcast news content could object to any interference by news and would certainly be likely to object to any bias in the news content presented to them; and
- (iii) in addition to drawing on the IRN feed, many commercial radio stations create their own national news bulletins drawing on a variety of sources.

3.11 As the CC noted in its Report in Sky/ITV (in the same paragraph 5.55 from which Ofcom selectively quotes in its Report):

"The channel operator remains ultimately accountable (including to the regulator) for the news that is presented on its channels. The presentation of individual news stories may on some occasions be discussed between the programme provider and the channel operator either before or after transmission."

3.12 By contrast, Ofcom did acknowledge the limits to wholesale provision to a greater extent in its Report to the Secretary of State for BIS in Sky/ITV in relation to the arrangements which were then in place between ITN and IRN (albeit later drawing the wrong conclusion as to a potential threat to media plurality, as was later found by the CC and the Secretary of State for BIS who identified no such threat):

"since IRN self-supplies some news and ITN acts only as a sub-contractor of IRN in the provision of news content for radio stations, ITN's influence on radio news may be less significant" (paragraph 4.33 of Ofcom's Report in Sky/ITV)"

(d) Ofcom's analysis of the share and influence of Sky News is misleading

3.13 It is not legitimate to attribute the audience share of Channel 5 and independent commercial radio to Sky when assessing the strength of different media enterprises and to treat this "indirect" audience as the equivalent of the direct audience of Sky News, which Ofcom does at paragraphs 1.23 and 1.27 of its Report and throughout section 5.

3.14 Sky's provision of News content to third party broadcasters accounts for the vast majority of the increment that Ofcom identifies as resulting from the Transaction. At paragraph 5.28 Ofcom claims

that "News Corp will account for 23.7% of all minutes of news consumption – a 9.8 percentage point increment". A full 6.7 percentage points of the share of minutes attributed by Ofcom to Sky News in fact represents commercial radio listening. An additional 0.7 percentage points of the share attributed to Sky News represents viewing of Channel 5. Ofcom places appreciable weight on this analysis of consumption, saying it "provides a useful overview of the parties' relative positions and ability to influence public opinion". Stripping out the provisions of news via IRN and Channel 5, which is a wholly different activity from broadcasting directly to consumers, **the increment to News' existing share of consumption, on the basis of Ofcom's calculation, is a mere 2.4%**, representing a total share of consumption of 16.2%. This is hardly at a level where concerns would arise as to "*unacceptable levels of media or cross media dominance*" as required by the DTI's Guidance on the application of the media plurality test. If other flaws in Ofcom's exercise (identified below) were corrected, this share would be even lower.

3.15 In addition, there are two specific factual errors in Ofcom's calculation of the importance of news on commercial radio:

- (i) Ofcom's "share of minutes" analysis is based on a weighting of 5% of commercial radio output being national news, or three minutes per hour. Ofcom's "share of minutes" analysis is based on a weighting of 5% of commercial radio output being national news, or three minutes per hour. In fact, the actual amount of news included in such services will vary considerably, for example, the main news programming provided by Sky to IRN for on-sale to its client stations is a two minute news bulletin each hour.
- (ii) Ofcom assumes that Sky (via IRN) supplies all national news on commercial radio. But this too is an error. Many stations do simply rebroadcast the IRN bulletins in off-peak hours, but in peak hours (obviously far more important for minutes of news consumption) many stations will create their own national news bulletins, writing their own scripts drawing from a number of sources, including but by no means limited to IRN.

3.16 Correcting for these two errors (based on a conservative assumption of half of radio news consumption being of bulletins created locally rather than by Sky), the impact of the transaction would drop significantly. If Sky was treated as providing two minutes of news per hour rather than three this would change from a 9.8 percentage point increase to 5.3 percentage point increase, even on Ofcom's inappropriate wholesale basis.

3.17 Ofcom's approach in emphasising the degree of trust which consumers place in Sky News, in addition to the aggregate share of Sky taking into account wholesale provision, is equally flawed. Nowhere in the Report does Ofcom suggest that commercial radio stations are a key source of news content or an influential source of news for consumers or that an acquisition by News of some level of influence over content provided to independent radio stations (which is ultimately under the editorial control of those stations) is a matter which would raise concerns. To be coherent, if the trust and authority of Sky News were to form any part of the Secretary of State's analysis, the consumption of news via independent radio stations and via Channel 5 must be ignored.

3.18 Stripping out Sky's wholesale of news to other news providers, it is clear that Sky News has only a very small share of minutes of consumption and a very limited audience reach; the increment to News existing share of news consumption is modest. If the Secretary of State were to take the reasonable view that Sky's provision of wholesale news must be discounted when assessing its audience share and its ability to influence consumers, this in itself would fundamentally change the conclusions which should be drawn from the Ofcom Report. The small increment to News' existing share of cross-media consumption (combined with the lack of any change in the number, range or News' relative ability to influence other news providers within newspapers or TV news

acknowledged by Ofcom at paragraph 5.123 of the Report) is in fact a reasonable basis for concluding that the Transaction does not raise media plurality concerns or pose any threat to the public interest.

4. ERRORS IN OFCOM'S ANALYSIS OF NEWS PROVISION AND CONSUMPTION

4.1 Ofcom makes a number of key errors in analysing news provision and consumption:

- (i) It relies excessively on "share of minutes" which understates BBC's role and the importance of online and over-emphasises the importance of newspaper publishing.
- (ii) Ofcom attributes the entire reach and share of national commercial radio news to Sky News and essentially treats this as the equivalent of Sky News' ability to reach and influence consumers directly. This is both factually incorrect and nonsensical.
- (iii) It relies excessively on a narrow view of reach which is not a good proxy to measure the plurality of voices available to a cross-media audience.
- (iv) The issue of multi-sourcing, which is crucial to an assessment of cross-media plurality, is noted to be "important" but in practice is ignored in Ofcom's analysis of the impacts of the Transaction. In fact, multi-sourcing (which is increasingly being facilitated by use of the internet as a medium of accessing news) plays a crucial role in ensuring that consumers are exposed to a variety of opinions. The absolute level and the rise of multi-sourcing contribute substantially to the sufficiency of plurality and will continue to ensure a plural news environment in the UK.

4.2 Ofcom excludes from its analysis the regional newspaper groups (which publish numerous titles that provide national news) on the basis that "they do not provide news to a UK-wide audience, and will have lower circulations and readerships for individual titles compared to national newspaper groups". However, across their titles, these groups do provide news to a very significant portion of the UK population, and the reach of each of the groups is comparable to that of the FT or the Independent (which Ofcom does include in its analysis). While individual titles will have lower readership, Ofcom elsewhere in the Report dismisses the value of internal plurality, and as a practical matter national news may well be centrally provided to relevant titles within a group. Thus to be consistent, Ofcom should view regional press on a group basis, not a title-by-title basis (exactly as it does for News).

4.3 Ofcom has undertaken new research to investigate cross-media consumption (described in paragraph 4.39 of the Report), asking consumers which media outlets they regularly use. However, there are two substantial errors in this research:

- (a) It has defined 'regular' usage differently for Sunday newspapers ('once a month') from all other media ('once a week'). This is an arbitrary and highly distorting distinction. There is no reason to believe that, as regards influencing public opinion, reading a Sunday newspaper once per month is equivalent to reading a daily newspaper once per week – the far more natural assumption is that the same frequency gives the same influence. The effect of this error is to materially overstate the starting share of News, since the importance of Sunday papers (where News is relatively strong) is likely over-weighted by a multiple of 4 or 5.
- (b) There was an error in the design of the questionnaire acknowledged by Ofcom in footnote 89 of the Report. Ofcom offered consumers a list of Sunday papers to select which ones they read. However this list omitted high circulation titles including the Mail on Sunday, Daily Star on Sunday, Sunday Express and People (none of which are News titles). While respondents were able to 'write in' other responses, it is a fundamental principle of consumer

research that prompted responses will be higher than unprompted. Thus the effect of this error is to suppress reporting of usage of non-News Sunday titles, thereby exaggerating News' share.

- 4.4 In addition to its analysis of cross-media consumption based on market research, Ofcom also considers cross-media consumption based on minutes of usage (described in paragraph 5.24 onwards of the Report). However, this analysis is based on fundamental errors of fact, specifically in relation to the amount of news provided by Sky to IRN and Ofcom's erroneous assumption that Sky (via IRN) supplies all national news on commercial radio (as set out in more detail at paragraph 3.14 above). These errors have the effect of substantially overstating the impact of the Transaction. As discussed in section 3 above, it is a further error to attribute this wholesale share to News.
- 4.5 Given that correcting for even these basic factual errors would substantially reduce both the incremental impact of the Transaction (from 9.8 percentage points to 5.3 percentage points) and News' aggregate share, it calls into question whether (even on its own logic) Ofcom's overall conclusions regarding the Transaction are valid and adds weight to the argument set out at paragraph 3.16 above that in fact the analysis set out in Ofcom's Report, once key errors have been corrected, provides a basis for deciding that the Transaction does not result in insufficient plurality.

5. FLAWS IN OFCOM'S ANALYSIS OF THE POTENTIAL EFFECTS OF THE TRANSACTION

(a) Ofcom does not take account of Sky's existing links with News

- 5.1 News accepts of course that the Transaction brings about a change in the nature of its legal control over Sky. However, as confirmed by the Court of Appeal in *Sky/ITV*, this does not mean that – in carrying out a qualitative analysis - it is permissible to ignore the current level of control exercised over Sky's editorial policy and the changes that the Transaction will bring about in that respect:

*"[...] it seems to us that the Commission was correct to hold that, whereas in reckoning the number of controllers of media enterprises for the purposes of section 58(2C)(a) only one controller is to be counted in respect of both or all of the relevant enterprises (here Sky and ITV), nevertheless, when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the Commission may, and should, take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control."*⁹

- 5.2 In fact, Ofcom assessed plurality in the previous *Sky/ITV* case precisely on the basis that Sky and News were assumed to be part of the same enterprise. **Ofcom has entirely reversed its position in this case** and in its substantive assessment of the effects of the Transaction it treats Sky as an entity which is entirely unconnected with News. The CC also took into account that News had material influence over Sky when assessing media plurality in *Sky/ITV* and, having carried out a detailed review, advised that there was no concern about plurality raised by Sky's acquisition of an interest in ITV.
- 5.3 Although it acknowledges that pre-Transaction Sky is not an entity which is unconnected with News at paragraphs 5.3 and 5.4 of the Report, Ofcom proceeds to treat Sky News as: (i) an entity entirely separate from News pre-Transaction; and (ii) an entity under the editorial control of News post-Transaction.

⁹ *British Sky Broadcasting Group Plc v Competition Commission*, Court of Appeal (Civil Division), 21 January 2010, [2010] EWCA Civ 2 (*Sky/ITV*), at paragraph 121.

- 5.4 In fact, News was a founding share-holder of Sky over which it initially had sole control. Sky News was launched as a channel in 1988, at a point when the then four-channel Sky Television service was under the sole control of News, having been announced to the British Academy of Film and Television Arts by Mr Rupert Murdoch on 8 June 1988.
- 5.5 At the present time, News clearly continues to have a degree of commercial influence over Sky which is sufficient to count as "control" for the purposes of the Enterprise Act. News holds 39.02% of the shares in Sky and from 2007 until the present day has had between four and five affiliated Directors on the board of Sky at any one time. Mr James Murdoch was the CEO of Sky from 2003 to 2007 and is currently the non-executive Chairman of Sky.¹⁰
- 5.6 Ofcom's attempts to consider what has changed as a result of the Transaction are unsatisfactory. At paragraph 5.6 Ofcom considers that, as a result of the Transaction, News would be able to take decisions that are in the exclusive commercial interest of News. At paragraph 5.7 Ofcom considers that, as a result of the Transaction, News "may also gain a greater ability to exert influence over editorial decisions". The first issue is irrelevant to plurality and the competition implications of News acquiring control over Sky have already been assessed by the European Commission. The second concern can be addressed entirely by establishing that there is adequate internal plurality (a question which is dealt with below).
- 5.7 Ofcom does not consider whether, if News was really motivated to interfere with editorial decisions at Sky News (which Ofcom appears to assume in identifying concerns about plurality), it already has some ability to do so **but does not**. Again, the failure to engage with the issues arising in this case fundamentally calls into question the reliability of Ofcom's analysis and the conclusion that any real risk to the sufficiency of plurality arises as a result of the Transaction. In contrast, the CC in its review of the Sky/ ITV transaction expressly recognised the editorial independence of Sky News:

*"BSkyB and the BBC, which both provide news in-house, emphasized the role of their editorial staff in determining the day-to-day content of their programming. BSkyB told us that all editorial decisions regarding the content of BSkyB's various news services were taken by the Sky News editorial staff. BSkyB board's role was to consider the competitive strategy and funding of BSkyB's news content at a high level; it had no role in the day-to-day editorial control of Sky News content on television or online. We received no evidence from third parties to suggest that senior executives at BSkyB or its parent companies exerted influence on the Sky News agenda."*¹¹

(b) Ofcom fails to give sufficient emphasis to the fact that the number of newspaper providers, and the number of TV broadcasters is unaffected

- 5.8 Ofcom correctly identifies that in this case the only conceivable impact of the Transaction would be on a cross-media audience in the UK. On any analysis: (i) the number of newspaper voices in the UK remains unchanged post-Transaction; (ii) the number of TV broadcast voices in the UK remains unchanged post-Transaction; and (iii) radio is unaffected and/or the number of radio voices remains unchanged; and (iv) while News and Sky both provide news content via the internet, so do a multitude of other providers.
- 5.9 The Transaction therefore has no impact whatsoever on the sufficiency of plurality for consumers who only read newspapers and consume no other sources of news. It also has no impact whatsoever on consumers who only watch television news and consume no other sources of news. It is simply not credible to suggest that combining the internet platform of Sky with those of News International

¹⁰ See paragraphs 4.4 to 4.11 of the Initial Submission. That these interests confer "control" over Sky was acknowledged by the Ofcom, the OFT and the CC in the 2007 review of Sky's acquisition of 17.9% of the shares in ITV (See paragraph 4.5 of Initial Submission in particular).

¹¹ At paragraph 5.57.

newspapers could conceivably reduce plurality to any material extent or have an adverse effect on the public interest in the UK. **It is only consumers who consume news via multiple platforms who would potentially experience any change.**

5.10 Therefore, it must surely be the case that the fact that the existing number of providers will continue to provide news within each separate medium "raises the bar" in terms of identifying a public interest concern arising from this Transaction.

(c) **Combination of Sky News and News International newspapers would have no material impact on the range and variety of cross-media voices available to and accessed by consumers in the UK**

5.11 Any analysis needs to take account of the fact that alternative sources of news are increasingly not "substitutes" in any meaningful sense. Those news media which are fastest growing (internet news and, to a lesser extent, TV news) are in most cases free at the point of consumption, enabling consumers to access multiple sources of news at no incremental cost and thereby encouraging consumption from multiple sites or channels, as the case may be. Furthermore an increase in audience for one source of news does not necessarily mean a reduced audience for another source of news. A qualitative assessment of cross media plurality is possible (and it has been done in the Sky/ITV case) but cannot be done in a meaningful way without looking at both news provision and news consumption - not separately (as Ofcom does) but in combination.

5.12 More multi-sourcing in consumption means that UK consumers are exposed to a variety of different views and should be able to take their own decisions as to which sources of news they find more interesting and attractive.

5.13 In fact, on average, in the UK each consumer of news currently consumes five different sources of news according to the FD Survey of news consumption in the UK (see FTI Report paragraph 5.38). Trends in multi-sourcing, and an increased tendency by consumers to access news via the internet (described further below) will continue to operate to increase plurality in the UK¹²:

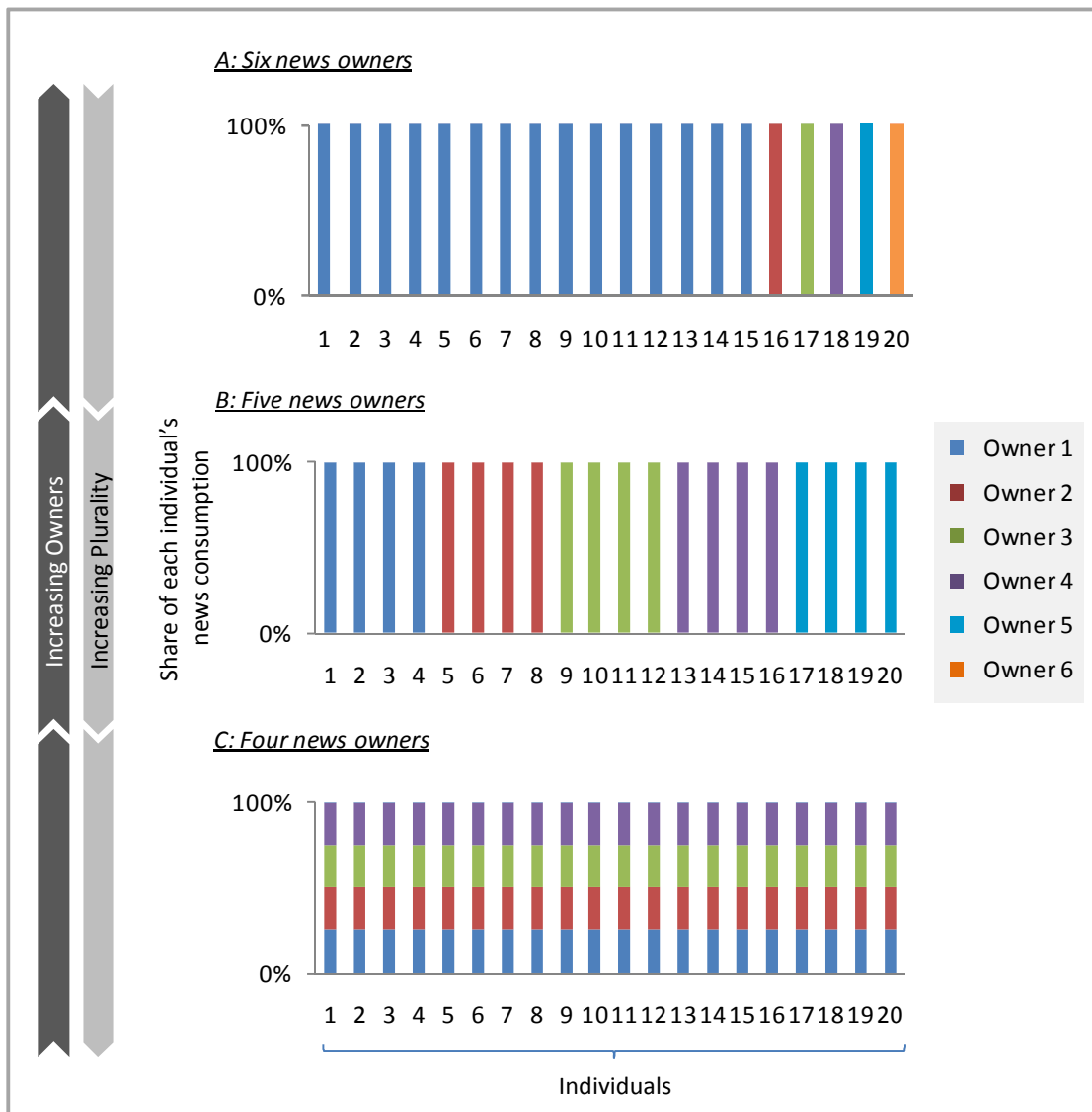
- Most viewers of TV news consume one or two source of news (and most of those using a single source will exclusively watch BBC news given that the BBC has a 75% share of news viewing);
- Most readers of newspapers read only one national paper, with a smaller group reading two.
- Most people who use internet news sources consume 3 or 4 sources of news.

5.14 Ofcom acknowledges that the multi-sourcing of news is of relevance to plurality (paragraph 4.59) and even "important" (paragraph 5.115). News submits that, particularly given the need to focus on a cross-media audience (which by definition is consuming news across multiple platforms), the Secretary of State should acknowledge that the multi-sourcing of news by consumers is fundamental to any analysis of the sufficiency of plurality.

5.15 Assuming an equal number of news voices, it is indisputable that where the relevant audience engages in more multi-sourcing of news rather than less multi-sourcing of news, the environment is more plural. This idea is illustrated further in the diagram set out at paragraph 2.5 of News' Response to the Issues Statement and reproduced below. It seems indisputable that scenario C is a more plural news environment than A or B (even though C has the smallest number of players and, as a market, C is more concentrated than B):

Illustrative Scenarios of News Consumption

¹² (See paragraph 5.6 of the FTI Report which is based on data from Touchpoints and other sources. See also paragraphs 2.4 to 2.8 of the Response to the Issues Letter.)



- 5.16 At paragraph 5.116, having said that the level of multi-sourcing of individual consumers is important, and having calculated that the Transaction makes essentially no difference to the number of distinct enterprises used by the average consumer (a drop from 2.9 to 2.8 on Ofcom's wholesale basis), Ofcom dismisses this factor on the basis that "what matters more [...] is the number and range of news providers used by **all** consumers and their relative significance, rather than the number of news providers used by each individual consumer."
- 5.17 The distinction that Ofcom purports to draw is meaningless and it cannot be relied upon rationally to dismiss a factor that Ofcom recognises to be important. If the range of news providers used by all consumers is acknowledged to be relevant, then the range of news providers used by individual consumers must be relevant to the overall assessment, since the latter represents an aggregate view of the range used by individual consumers. News has provided evidence on patterns of behaviour which in the aggregate enable a decision-maker to reach a view of degree of overall plurality. Moreover, in so far as Ofcom believes the "word of mouth" transmission of views between consumers to be an important factor, this would tend to increase the potential reach of smaller players by comparison with larger players. The vast majority of people will already be aware of the BBC's reporting of an issue but they might find out something new from discussions of Al Jazeera's coverage.

5.18 The importance of multi-sourcing was implicitly recognised by the CC in Sky/ITV. In Appendix I to the CC's Report, setting out evidence used by the CC to assess plurality, the CC considers, among other metrics:

- The number of different media platforms through which consumers actively take news;
- The number of different channels on which customers actively watch television news;
- The proportion of the population who actively took news from ITV and Sky/News International but from no other source.

5.19 News has also estimated the proportion of consumers who would, post Transaction, rely only on News International and Sky News and no other news provider. It has done so using the same methodology used by the CC in Sky/ITV. This group accounts for only 0.3% of the UK population, a very similar share to that identified in Sky/ITV (see paragraph 1.15(vi) above for a more detailed summary of News' overlap analysis). Ofcom accepts that these estimates are broadly correct. Therefore, the Transaction would have no material impact on the range and variety of cross-media voices in the UK.

5.20 Given the plethora of choices of news provision available to consumers in the UK, if consumers should begin to dislike the approach taken by Sky News, they are far from obliged to continue to watch it. Consumers have more than sufficient other choices available to them and can easily switch channels, or, for that matter, switch newspapers if they prefer. By definition, consumers of Sky News have access to digital channels and a wide variety of alternative news content. Ofcom acknowledges that within TV (as well as within newspapers), this Transaction does absolutely nothing to reduce the continued existence of that field of choice. Should Sky News consumers wish to switch to a different news media, there are many sources of news available that are independent of News, both in paper copy and online.

6. OFCOM FAILS TO EXPLAIN WHY INTERNAL PLURALITY DOES NOT ENSURE SUFFICIENT CROSS MEDIA PLURALITY

(a) TV broadcast news operates in a particular cultural and regulatory context

6.1 Ofcom does not adequately address the question of internal plurality in relation to Sky News as a TV broadcaster and its relevance to an overall assessment of plurality. Ofcom simply states that "*in light of conflicting views*" they "*do not consider that we can reach the view that internal plurality will ensure sufficient plurality in the provision of news and current affairs as part of a first stage review*" (paragraph 1.39).

6.2 Ofcom does not explain why it considers that internal plurality resulting from Sky News' position as a TV news broadcaster does not ensure sufficient cross media plurality *in combination with* other external factors. In contrast, the opinion by Lord Pannick QC (as provided by News to Ofcom and as attached at Annex 5), makes clear that the impartiality rules in the Communications Act 2003 help to ensure that, in practice, the owner of a television station (or the news editor) could not intervene to require news items to receive lesser (or indeed greater) prominence for political reasons, or no coverage at all. The Secretary of State can and should come to a definitive decision on this issue without the need for a protracted investigation by the CC.

6.3 TV news in the UK has traditionally been very different from news presented in newspapers and this tradition of strict impartiality in broadcast news is protected in the Broadcasting Code which

prevents broadcast channels from displaying bias in their presentation or selection of stories.¹³ As the CC found in Sky/ITV:

*"[W]e concluded that **the regulatory mechanisms, combined with a strong culture of editorial independence within television news production**, were likely to be effective in preventing any prejudice to the independence of ITV news"* (emphasis added).¹⁴

"In television news, existing regulatory mechanisms—including quality controls (eg in the Broadcasting Code), requirements for impartiality and quotas for television news and current affairs programming—reduce the scope for influence over editorial decisions by owners of television channels which broadcast news".¹⁵

6.4 The Report states that News' submissions on internal plurality "*are made in the context of a regulatory framework*" (paragraph 1.40). News' submission goes further than this - internal plurality in TV broadcasting results from practical/cultural factors which would prevent News from dictating the editorial policy of Sky News, and these factors are reflected in and reinforced by the regulatory environment and the Broadcasting Code. This is entirely consistent with the CC's findings in Sky/ITV and there is no need for further regulatory consideration of this issue.

(b) There is no reason to believe that the independence of editorial decision making at Sky News will be impacted as a result of the Transaction

6.5 As noted above Ofcom acknowledges but does not take account of the fact that pre-Transaction, Sky is not an entity which is unconnected with News. News' commercial influence has not in the past and will not in the future translate to an ability to dictate the editorial policy of Sky News due to: (i) the prevailing practice and culture of editorial decision making in TV news in the UK and (ii) the regulatory context within which broadcast news operates

6.6 At paragraph 5.100 and 5.101 the Report states "*We recognise that it is possible that Sky News may remain a strong and independent voice from an internal plurality perspective even while no longer part of a distinct media enterprise. However, in a situation where Sky is wholly owned by News Corp and where we have received a significant number of representations that a proprietor may want to interfere with editorial decisions, we need to understand what would in practice prevent such intervention.*"

6.7 The nature of editorial decision making, particularly in the specific environment of TV news in the UK means that it cannot be assumed that commercial influence necessarily translates into editorial influence. Editorial decisions will remain with the Sky News management and are not a matter for the shareholders or the board of Sky¹⁶. In reviewing Sky/ITV, the CC commented that:

"the evidence that we received suggested to us that there was a strong commitment to editorial independence across television news broadcasting which would lead to editors resisting any direct board intervention or intervention from shareholders to set the news agenda." (Paragraph 5.68 CC Report)

6.8 News would also argue strongly that the experience with The Times, which operates under the supervision of an independent board specifically established to maintain impartiality and prevent interference with editorial content, shows that the independence of specific titles can be maintained

¹³ These arguments are set out further in paragraph 4.20 of the Initial Submission, in paragraphs 4.4 to 4.7 of the response to the Issues Statement and in the Lord Pannick's Opinion. Lord Pannick's Opinion shows that the position set out by the CC in Sky/ITV which is relied upon by Ofcom in paragraph 1.42 of the Report is not correct.

¹⁴ CC Report, paragraph 41.

¹⁵ CC Report, paragraph 5.54.

¹⁶ This was described further at paragraphs 4.12 to 4.19 of News' Initial Submission.

even in the newspaper context which is very different, indeed at the other end of the spectrum, from broadcast news and where no general obligation of impartiality applies.

6.9 Ofcom casts doubt on the practical independence of The Times at pages 68 and 69 of its Report in an egregious example of the selective quoting of evidence. Ofcom quotes vague evidence from Andrew Neil (widely reported in the press as having left his position as editor of the Sunday Times in 1994 "on bad terms") and does not refer at all to the direct oral evidence provided to Ofcom, in a meeting on 2 December 2010, by John Witherow who has been the editor of the Sunday Times since 1994. John Witherow reported that no editorial influence whatsoever was exercised by News over the content of the Sunday Times.

6.10 In addition, evidence in relation to the independence of Sky News (summarised in paragraph 5.76 of the Report) is unreasonably dismissed without explanation on the basis that "past behaviour may not necessarily be a reliable indicator of future behaviour." In fact, as News maintained in the Initial Submission, the acquisition by News of full legal control over Sky would not jeopardise the editorial independence of Sky News for the following reasons: (a) Sky's editorial policy is not a matter for Board determination. In fact, to date, editorial policy has not been a debated issue at Board level; (b) as recognised by the CC, despite its commercial influence over Sky, News has not sought to influence the editorial policy of Sky News; (c) the Sky News editorial directors are experienced individuals, each with expertise to manage and direct the editorial policy of Sky News (d) there is no evidence that independent directors have had to "defend" the editorial policy of Sky News against influence by News executives; and (e) News has no special arrangements with Sky News which would confer on it control over editorial policy.

7. OFCOM ACKNOWLEDGES THAT THE TRANSACTION WOULD HAVE NO IMPACT ON THE SETTING OF THE WIDER NEWS AGENDA IN THE UK

7.1 Ofcom considers the evidence as to influence as to whether the Transaction will give News any significant degree of influence over the broader news agenda carefully and finds that News' ability to influence the broader news agenda (the news agenda of other media outlets) would not be enhanced as a result of the Transaction (paragraph 5.123).

7.2 The fact that the Transaction will have no influence whatsoever on the broader news agenda in the UK should provide significant comfort to the Secretary of State should he decide (as he should) not to refer the Transaction to the CC.

7.3 In fact, the various powerful media enterprises in the UK, with the BBC an enormously powerful influence and with a large number of well funded independent voices providing a multiplicity of different views, mean that the UK has a very healthy and very plural media environment within which the overall news agenda is broadly set and within which a combined News/Sky would continue to operate¹⁷.

7.4 The Secretary of State should rely on the conclusion reached by Ofcom in this respect where the weight of the evidence was clearly overwhelming. It is self-evident that News does not now influence the news agenda in the UK to any material extent, nor will it do so post-Transaction. While News International's newspapers (more so than Sky News) do indeed break news stories and generate controversy in the UK they are merely individual voices in an environment which is one of healthy, if not fierce competition among news providers. If the volume of negative comment and media coverage about the proposed Transaction illustrates anything, it is that News and Sky together are very far from being able to influence the news agenda in the UK or to silence voices of dissent.

¹⁷ See also, paragraph 5.7 of News' Initial Submission, the Perspective Report, paragraphs 5.1 to 5.3 of News' Response to the Issues Letter and the Perspective Sources Analysis.

8. THE TRANSACTION DOES NOT RESULT IN INSUFFICIENT PLURALITY

(a) The level of plurality post-Transaction must be compared with a "sufficient level of plurality"– there needs to be a benchmark

8.1 It is a necessary part of the statutory test to assess whether plurality would be "sufficient" post-Transaction, which necessarily involves forming a view as to whether plurality is sufficient pre-Transaction.

8.2 It can be assumed that plurality was considered to be sufficient in the UK by Parliament at the time of the enactment of the Communications Act 2003 which relaxed controls on media ownership. It can also be assumed that the plurality was considered to be sufficient in the UK by the CC and by the Secretary of State when they applied the media public interest test to Sky's acquisition of 17.9% of the shares of ITV in 2007. Neither the CC nor the Secretary of State found concerns about the sufficiency of plurality arising from that acquisition (which has subsequently been partly unwound).

8.3 In fact, since both of these benchmarks, news provision in the UK has become significantly more plural. The implication of News' submission is that plurality would need to be reduced, as a result of the present transaction, to a level below that subsisting in 2003 (or 2007) before it could reasonably be said to lead to insufficient plurality.

(b) Trends in plurality in the UK are towards greater rather than lesser plurality

8.4 Using the level of plurality in the supply of news content and the plurality of consumption of news content by consumers in 2003 as a benchmark, and assuming that plurality was at that stage "sufficient", News' view is that there is significantly greater plurality of news provision today and that the Transaction is demonstrably very far away from creating an insufficiency of plurality.

8.5 Trends are towards greater rather than lesser plurality and any dynamic analysis of likely future impacts most assume that these trends will continue:

- (i) There has been a dramatic increase in the range of TV news available to consumers in the UK, largely due to the rise in digital TV penetration and in the choice of channels across all platforms. The UK now has one of the highest levels of digital penetration in Europe and UK consumers have access to the largest number of TV channels in Europe, including a wide variety of digital news channels;
- (ii) The internet has had (and continues to have) a transformative effect on access to and consumption of news, and has meant that many more consumers access a significantly broader variety of news sources;¹⁸
- (iii) Consumers are increasingly shifting from media with comparatively less plurality in the provision of news and the consumption of news: while there are a large number of newspaper providers in the UK there are a far greater number of sources of news accessible via the internet; consumers tend to read one paper newspaper (if they read a newspaper at all) but to access multiple news sources online;¹⁹
- (iv) The easy accessibility of information via internet search and the ease with which information can be disseminated by individuals via Twitter, YouTube, blogs and so on has an important

¹⁸ The circulation of paid-for newspapers declined by 3.5% between 2003 and 2010 (FTI Report figure 8).

¹⁹ The circulation of paid-for newspapers declined by 3.5% between 2003 and 2010 (FTI Report figure 8); time spent on online news sources has grown by 214% since 2007 (Perspective Report page 27); and Mintel has found that the internet is currently the second most important source of news in the UK with 46% of consumers accessing it regularly (Initial Submission, paragraph 6.7).

influence on the news agenda. Controllers of media enterprises are simply not in a position to block the dissemination of information and stories to a broad UK audience.

8.6 Further information on trends in the UK media landscape since 2003/2007 through to the present day which demonstrate that there is more than sufficient plurality in the provision of news in the UK both pre and post-Transaction can be found at paragraphs 5.8 and 6.5 to 6.6 of News' Initial Submission.

(c) For the reasons set out in section 1(c) above, the Transaction poses no threat to the sufficiency of plurality in the UK

8.7 To summarise and conclude, News believes that the Secretary of State can reasonably rely on the following significant factors in deciding against a reference to the CC:

- (i) The Transaction can only affect a cross-media audience and there is no reduction in the number of independent newspaper proprietors or TV broadcasters in the UK as a result of the Transaction.
- (ii) Ofcom acknowledges that News' position in newspapers (a declining segment within cross-media consumption) is unchanged and Sky's relatively modest share of TV news provision is unchanged:

"This transaction does not result in a change in the number, range or relative ability to influence within three of the individual platforms – TV, radio and newspapers." (paragraph 5.19)

- (iii) A culture of editorial independence in broadcast news supported by regulatory requirements (the Broadcasting Code) will continue to ensure that Sky News remains as an independent voice and that internal plurality within the broader News group will be secured. This, together with the existing level of external plurality, removes any doubt that might arise as to the sufficiency of plurality post-Transaction.
- (iv) In Sky/ITV, News was already assumed to have control/material influence over Sky and no concern about plurality was identified.
- (v) Multi-sourcing of news by consumers, facilitated by an increase in the consumption of news over the internet, contributes significantly to plurality and is an increasing trend.
- (vi) Ofcom acknowledges that the actual impact of the Transaction on consumers of news will be minimal:

"Across the population as a whole, we found that few regular news consumers rely solely on Sky titles or solely on News Corp titles: at the retail level, 2% rely solely on news from Sky; and 1% rely solely on news from News Corp; these shares do not change materially if considering wholesale news provision" (paragraph 4.79).

- (vii) Ofcom acknowledges that the Transaction will have no impact whatsoever on the setting of the wider news agenda within the UK:

"the available evidence does not point to a conclusion that News Corp's ability to influence through other media would be materially enhanced by the acquisition" (paragraph 5.123).

9. CONCLUSION

- 9.1 It is highly unfortunate that the administrative process leading to this point has been seriously flawed and that the initial decision to intervene in relation to this Transaction on the basis of a public interest concern was taken by a Secretary of State for BIS who was biased against the interests of News and its shareholders. News is still unclear as to the extent to which the biased and prejudiced approach of the Secretary of State for BIS has tainted the wider process and has requested that it be provided with copies of relevant correspondence in order to establish whether there is direct evidence of this.
- 9.2 News believes that Ofcom has failed to approach the effects of this Transaction with an open mind and has carried out a review process with the intention of identifying concerns. Ofcom has been notably more receptive to submissions made by third party complainants than it has been to submissions made by News and has chosen to present the evidence in a one sided way (in some cases selectively omitting relevant evidence).
- 9.3 For the reasons set out above, News believes that the Report issued by Ofcom to the Secretary of State is flawed, misinterprets the test which the Secretary of State is obliged to apply to the Transaction under the Order, contains fundamental flaws in analysis and should not be relied on 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 Ofcom report would itself suffer from legal flaws.
- 9.4 Pending receipt of all relevant information and a further consideration of its position News reserves its rights as regards the possibility to challenge earlier steps in the administrative process and/or the Report by way of judicial review.
- 9.5 News hopes that the Secretary of State, applying the legal test objectively on the basis of the relevant evidence, will take the view that no reference to the CC is necessary or appropriate given the facts of this case.
- 9.6 If the Secretary of State does believe, having considered News' submissions, that he has remaining concerns about the sufficiency of plurality in the UK, News is, without prejudice to its views as to the effects of the Transaction, prepared to offer UIL which would remedy, mitigate or prevent all of the effects adverse to the public interest which Ofcom erroneously identifies may result from the Transaction. The Secretary of State has the power to accept such a UIL from News under paragraph 3 of Schedule 2 of the Order:

"The Secretary of State may, instead of making such a reference and for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have or may have resulted, or which may be expected to result, from the creation of the European relevant merger situation concerned accept from such of the parties concerned as [he] considers appropriate undertakings to take such action as [he] considers appropriate."

- 9.7 [REDACTED]

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