



BRIEFING PAPER

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Media ownership and competition law - the BSkyB bid in 2010-11

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Summary

The *Enterprise Act 2002* effected a major reform of the control of mergers and takeovers, removing the decision-making powers of Ministers, save in defined exceptional cases, and passing this responsibility to the competition authorities – at the time, the Office of Fair Trading (OFT) and the Competition Commission (CC).

Under the Act, the competition authorities are required to assess whether a merger should be prohibited on the basis of whether the merger can be expected to lead to a *substantial lessening of competition*. Mergers are formally assessed if the company being taken over exceeds a given size (a turnover of £70m or more), or if the merged entity would control 25% or more of its market. In April 2014 the OFT and the CC were merged to form the Competition & Markets Authority (CMA), established in April 2014. While the establishment of the CMA was a major reform in the competition regime, it did not involve any changes either to Ministers' powers to intervene, or to the 'substantial lessening of competition' test which the CMA applies in assessing mergers.¹

The UK competition regime interlocks with the competition regime that applies across the EU. The European Commission has jurisdiction over mergers which have a 'Community dimension', determined by a turnover test similar to that applied by the UK competition authorities – established by the EU Merger Regulation, *Regulation 139/2004* (EUMR). As with UK law, the EUMR establishes a substantive test to determine whether a merger should be permitted or not: specifically, that it would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, and thus be incompatible with the common market.

The 2002 Act allows for the Secretary of State to intervene in mergers where they give rise to certain specified public interest concerns: specifically, issues of national security; media quality, plurality & standards; and, financial stability (under s58 of the Act). In these cases the Secretary of State may make an assessment of a merger purely on the grounds that it runs counter to the public interest, without deferring to the 'substantial lessening of competition' test, or they may give regard to both tests in coming to a final decision.

After some months of speculation, in November 2010 NewsCorp, the media giant run by Rupert Murdoch, formally notified the European Commission of its bid to takeover the satellite broadcaster BSkyB by purchasing the 60.9% of shares it did not already own. The size of the proposed acquisition meant that the Commission had the lead in determining whether the merger should proceed on competition grounds. The following month the Commission ruled that the merger would not significantly impede competition,² though during this time the Secretary of State for Business, Vince Cable, requested Ofcom – the independent regulator of the UK communications sector – to investigate the impact the merger would have on media plurality.³ Following publication of comments by Mr Cable to the effect that he was 'at war' with Mr Murdoch, the statutory responsibility for all competition and policy issues relating to the media was transferred to the Secretary of State for Culture, Olympics, Media & Sport.⁴

¹ For further details on the UK merger regime see, Competition & Markets Authority, [Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2](#), April 2014

² European Commission press notice IP/10/1767, 21 December 2010

³ Ofcom is one of a number of sectoral regulators – such as Ofgem and Ofwat – which have the power to enforce competition law in their own area, along with the competition authorities.

⁴ HC Deb 18 January 2011 cc35-6WS

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On 25 January the Secretary of State, Jeremy Hunt, published Ofcom's report – which had recommended that the merger be referred to the Competition Commission – along with correspondence with NewsCorp and BSkyB. Mr Hunt stated that “it may be the case that the merger may operate against the public interest in media plurality” but that, with advice from the OFT and Ofcom, he would consider “any undertakings in lieu offered by any merging party which have the potential to prevent or otherwise mitigate the potential threats to media plurality.”⁵ On 3 March Mr Hunt announced that he was proposed to accept undertakings from NewsCorp to spin off Sky News as an independent public limited company – rather than refer the bid; a public consultation on these undertakings would run until 21 March.⁶ On 30 June Mr Hunt published a further update, stating that although “the consultation did not produce any information that caused Ofcom or the OFT to change their earlier advice to me”; a short consultation would be launched on “a revised, more robust set of undertakings” until 8 July.⁷

Following the Secretary of State's statement it was widely reported that the bid would be approved.⁸ This was thrown into doubt by a sudden series of events: the disclosure of the alleged activities of the *News of the World* in widespread phone hacking and making illegal payments to police officers; Rupert Murdoch's decision to close the newspaper immediately; and, the Prime Minister's announcement that on the completion of police inquiries into the paper's actions, public inquiries would consider the police investigation into the newspaper, and on wider issues relating to the media.⁹ On 8 July the Secretary of State confirmed the formal end to the consultation process, but underlined that consideration of all the responses received would take ‘some time’.¹⁰

On 11 July the Secretary of State wrote to Ofcom and the OFT, to ask for their advice on how these events bore on concerns about the threat posed by the bid to media plurality, and the credibility of NewsCorp's undertakings.¹¹ Later that same day, Mr Hunt made a statement to the House confirming that NewsCorp had decided to withdraw its undertakings in lieu, and that as a result, he would refer the bid to the Competition Commission with immediate effect.¹² On 13 July the Prime Minister gave details of the two-part public inquiry: first, into the ‘culture, practices and ethics of the press’, and, second, in the light of the ongoing criminal proceedings, into the extent of unlawful or improper conduct at the *News of the World* and other newspapers, and the original police investigation into these matters.¹³ In addition the House debated and resolved a motion, moved by the then Leader of the Opposition, Ed Miliband, that in the public interest NewsCorp should withdraw their bid.¹⁴ The debate was pre-empted by the company's announcement that it had, in fact, withdrawn its bid.¹⁵

The controversy over the *News of the World* also led to calls for Ofcom to reconsider BSkyB's broadcasting licence, and whether the company still met the statutory test to be a

⁵ HC Deb 25 January 2011 cc3-4WS

⁶ HC Deb 3 March 2011 cc518-9

⁷ HC Deb 30 June 2011 c1107

⁸ for example, “Hunt ready to clear Murdoch's takeover of BSkyB”, *Financial Times*, 1 July 2011

⁹ Prime Minister's Office, *Morning press briefing*, 7 July 2011

¹⁰ DCMS, *Statement: News Corporation's proposed acquisition of BSkyB*, 8 July 2011. Material about the bid is collated [on the National Archives site](#).

¹¹ “BSkyB takeover: Jeremy Hunt seeking new advice”, [BBC news online](#), 11 July 2011

¹² HC Deb 11 July 2011 cc39-40, c50

¹³ HC Deb 13 July 2011 cc311-2. The first part of this inquiry, the Leveson Report, was published in November 2012. To date a second inquiry has not been launched. For more details see, [Press regulation after Leveson - unfinished business? Commons Briefing paper CBP7576](#), 9 June 2017.

¹⁴ HC Deb 13 July 2011 cc390-423

¹⁵ “NewsCorp scraps bid for BSkyB”, *Financial Times*, 14 July 2010

'fit and proper' person to hold such a licence.¹⁶ On 6 July the regulator issued a statement saying that while it was "clearly not for Ofcom to investigate matters which properly lie in the hands of the police and the courts ... we are closely monitoring the situation and in particular the investigations by the relevant authorities into the alleged unlawful activities."¹⁷ In September the following year Ofcom published its decision that the company, now renamed Sky, did, indeed meet the fit and proper test.¹⁸

This note gives a short description of the statutory procedure for the assessment of media mergers, before providing a timeline of events to NewsCorp's bid for BSkyB in 2010-11, and the company's decision in June 2011 to withdraw that bid in response to the public outcry over the phone hacking scandal.

More recently Rupert Murdoch has launched a second attempt to takeover the company, now renamed Sky plc, with a bid from 21st Century Fox, the successor company to NewsCorp. This is the subject of a second Library note: [Media ownership: the Fox/Sky merger, Commons Briefing paper CBP7969](#), 22 June 2017.

In brief, in March 2017 the European Commission confirmed it had received formal notification of the proposed merger, and the Secretary of State, Karen Bradley, announced that she had issued a European Intervention Notice, on the two grounds of media plurality and commitment to broadcasting standards. On 7 April the Commission approved the deal on competition grounds. On 20 June the Secretary of State confirmed receipt of reports from Ofcom and the CMA on public interest issues and jurisdiction, and announced she would announce her initial decision as to whether to refer the merger to the CMA for a more thorough investigation by 29 June. Documents and updates on the bid are collated [on the DCMS site](#).

¹⁶ For a summary of its statutory responsibilities in this area see, Ofcom, [Frequently asked Questions: 'Fit and Proper' in relation to broadcast licensees](#), May 2012

¹⁷ Ofcom, [Statement on Fit and Proper](#), 6 July 2011. The then chief executive of Ofcom, Ed Richards, set out the position at greater length in a [letter to John Whittingdale, chairman of the DCMS committee, on 8 July](#).

¹⁸ Ofcom press notice, [Ofcom decision on fit and proper assessment of Sky](#), 20 September 2012. See also, ["Sky is a fit and proper broadcaster, rules Ofcom"](#), *Guardian*, 20 September 2012.

1. Competition law & media mergers

The statutory provisions for the UK's merger regime are set out in part 3 of the *Enterprise Act 2002*.

The primary responsibility for the regulation of mergers and takeovers lies with the independent competition authorities. At the time of the BSkyB bid in 2010-11, these functions were split between the Office of Fair Trading (OFT) and the Competition Commission (CC). Mergers would be formally assessed if the company being taken over exceeded a given size (a turnover of £70m or more), or if the merged entity would control 25% or more of its market. The OFT had a statutory responsibility to begin this process, referring a merger for detailed consideration by the CC, if it believed the merger would result in a "substantial lessening of competition" within the relevant market. In turn the CC was required to apply a similar test, and if it did, to frame what it saw as any appropriate remedies to the situation: to require the acquiring company to sell off part of its operations, say, or simply to prohibit the merger, or *reverse* it if it has already occurred. In April 2014 the Competition & Markets Authority was established, merging the functions of these two organisations, though it retains this two-part structure to merger inquiries.

A similar procedure applies to mergers that are anticipated, and firms often initiate pre-merger discussions to guard against the risk of an adverse decision. One very important feature of this regime is that it is quite independent of government: in general, the Secretary of State has no powers to intervene, in making a reference, conducting an investigation, or making a decision as to whether a merger should be permitted or not.

The Act allows for the Secretary of State to intervene in mergers only where they give rise to certain specified public interest concerns: specifically, issues of national security and certain 'media public interest considerations', including the need for accurate presentation of news and free expression of opinion in newspapers, the need for plurality of media ownership, and the need for a wide range of high quality broadcasting, appealing to a wide variety of tastes and interests (under section 58 of the Act).¹⁹ In these cases the Secretary of State may make an assessment of a merger purely on the grounds that it runs counter to the public interest, without deferring to the 'substantial lessening of competition' test – or he may give regard to both tests in coming to a final decision. The Act allows for the Government to amend this list of public interest considerations, to add further categories.²⁰

¹⁹ Detailed guidance on these provisions is in, "[Chapter 16: Public Interest Cases](#)", in [Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2](#), April 2014 (pp129-37).

²⁰ For more details see, [Mergers & takeovers: the public interest test, Commons Briefing paper CBP5374](#), 1 September 2016.

Finally, it is important to note that the UK regime interlocks with the European one: specifically, the Eu Merger Regulation, *Regulation 139/2004* (EUMR). The European Commission has jurisdiction over mergers which have a 'Community dimension', determined by a turnover test similar to that applied by the UK competition authorities. As with UK law, the EUMR establishes a substantive test to determine whether a merger should be permitted or not: specifically, that it would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, and thus be incompatible with the common market.

In March 2004 the former Department for Trade & Industry published detailed guidance on the operation of the public interest test; section 8 of the guidance discusses the policy on intervening in broadcasting and cross-media mergers, and is reproduced in full below:

8.1 In principle, the Secretary of State may intervene in any relevant or special merger situations involving media enterprises, including cross media mergers, where she believes that the broadcasting and cross-media public interest considerations are relevant.

8.2 The Secretary of State's policy is that, save in exceptional circumstances, she will consider intervention only in cases where media ownership rules have been removed by the Communications Act 2003.

These are:

- mergers involving national newspapers with more than 20% of the market and the Channel 5 licence holder;
- mergers involving national newspapers with more than 20% of the market and a national radio service;
- mergers involving a change in control of one or more Channel 3 licences such that the acquirer would control licences accounting for an audience share of greater than 15% (though such acquisitions are less likely to raise concerns where the acquirer is already an existing ITV licence holder in view of ITV's proven track record as a public service broadcaster);
- mergers involving two Channel 3 licences for the same area;
- mergers involving a Channel 3 licence holder and the Channel 5 licence holder;
- mergers involving the national ITV licence holder and the Channel 5 licence holder;
- mergers involving the national Channel 3 licence holder and a national radio service;
- mergers involving the Channel 5 licence holder and a national radio service;
- mergers involving two or more national radio services;
- mergers involving owners from outside the European Economic Area (except where prior to the Communications Act 2003 there were no restrictions on non-European Economic Area ownership).

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8.3 If some of the remaining restrictions on media ownership were to be lifted in future, the Secretary of State would expect to consider intervention in these areas as well.

8.4 In addition, the Secretary of State's policy is that, save in exceptional circumstances, she will not intervene in respect of mergers in areas where there are no media ownership restrictions and none were removed by the Communications Act 2003 (e.g. mergers involving satellite and cable television and radio services).

8.5 In relation to areas where there continue to be media ownership rules, the Secretary of State's policy is as follows.

8.6 For media owners within the European Economic Area, it would not normally be sensible or desirable to intervene on the grounds of the broadcasting and cross-media public interest considerations since the continuing rules will protect plurality (e.g. ownership of local sound broadcasting licences).

8.7 However, for media owners from outside the European Economic Area, the Secretary of State believes it would be sensible to consider intervening on the grounds of the broadcasting and cross-media public interest considerations, even where media ownership rules continue to apply, since foreign media ownership rules have now been removed completely.

8.8 In exceptional circumstances, the Secretary of State may consider it necessary to intervene in mergers in areas where there continue to be media ownership rules or where there have never been such rules. The Secretary of State will only consider intervening in such a merger where she believes that it may give rise to serious public interest concerns in relation to any of the three considerations. During Parliamentary debate of these provisions, Ministers suggested that these might include circumstances where a large number of news or educational channels would be coming under single control, or if someone were to take over all the music channels.

The Secretary of State may consider intervention if a prospective new entrant to local radio ownership has not shown a genuine commitment to broadcasting standards in other media or countries. The Secretary of State is not currently aware of any other types of cases in which exceptional circumstances might arise. She has also taken the view that an adverse public interest finding by a previous regulatory authority into a proposed merger is not necessarily in itself an exceptional circumstance meriting intervention; such cases should be considered in light of the reasons for the adverse finding and if the law has been changed to allow the sort of concentration resulting from the merger.²¹

As noted above, mergers above a given size fall under the auspices of the European competition authorities. That said, the EU rules make provision for national governments to intervene in mergers that would otherwise be considered by the Commission, specifically under Article 21(4) of the EUMR. A standard guide to the law explains that this allows for States to take "appropriate measures to protect legitimate interests other than those taken into consideration by the EUMR that are compatible with the general principles and other provisions of

²¹ [*Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers - guidance document*](#), May 2004 pp37-38. This remains the Government's guidance on this issue, following the transfer of statutory responsibility for media mergers to DCMS in January 2011.

Community law. Public security, plurality of the media and prudential rules – that is to say rules designed to ensure the stability and financial adequacy of banks, insurance companies and similar undertakings – are regarded as legitimate interests for this purpose.” It is relatively rare for the Commission to allow intervention of this kind: apparently only 8 had been granted by May 2011.²²

Another standard text notes that the provision “is defensive in nature. It enables a Member State to protect its legitimate interests by scrutinizing and, if necessary, prohibiting mergers which may raise concerns other than pure competition ones (even were the Commission to consider that the merger was compatible with the common market.” In their discussion of Article 21(4), the authors refer to a case that touched directly on the fact that UK competition law has treated media ownership as a distinct category, raising questions of public interest, and thus, potentially, an area where the Secretary of State might choose to intervene, though the case predates the consolidation of UK competition law in the *Enterprise Act 2002*.²³

²² Richard Whish & David Bailey, *Competition Law 7th ed*, Oxford, 2011 p852

²³ Jones & Sufrin, *EC Competition Law 3rd ed*, 2008 p985. The case was, [Newspaper Publishing Case IV/M.423](#). At this time newspaper mergers were covered by special rules set out in the *Fair Trading Act 1973*.

2. The report of the Lords Select Committee on Communications

In June 2008 the Lords Select Committee on Communications published a report on the ownership of the news, which looked at the regulatory regime for media mergers.²⁴

As the Committee noted, the public interest test to media mergers had been applied the year before, when BSkyB had announced an acquisition of 17.9% of the shares of ITV plc. In February 2007 the then Labour Government issued an intervention notice, triggering an initial investigation by Ofcom. Following this, in May 2007 the Government referred the bid to the Competition Commission, which completed its report in December that year, leading to the agreement of final undertakings with the company in early 2010.²⁵ At the time of NewsCorp's bid for BSkyB, Robert Peston, then BBC news economics editor, noted that this remained the only time the Commission had conducted an assessment of this type.²⁶

In its discussion of the public interest test, the Committee raised concerns about the fact that "Ministers are the only people to initiate the public interest test", and suggested Ofcom should have this power as well:

At the beginning of the process the Ministers' decision may be subject to very little scrutiny because the case will not yet necessarily have a high public profile. At least at the end of the process the Secretary of State's decision will be subject to significant media and public scrutiny. One possible safeguard would be to give Ofcom concurrent powers with the Secretary of State to initiate the Public Interest Test. ... How can Ofcom proactively promote the interests of the citizen in media mergers if it cannot decide that there should be an investigation of the impact a media merger has on those interests?

By contrast the Committee was happy with the fact that the final judgement about a merger would rest with Ministers:

We accept that Ministers have a legitimate role at this point ... While it can be argued that there is still a conflict of interest in Ministers having the final say on the recommendations of the Competition Commission, this part of the process will be very high profile. The recent BSkyB/ITV judgment was covered in great detail by the press and discussed in Parliament. Given this level of scrutiny we believe that there are sufficient safeguards at this end of the process. Ultimately, there is the option of judicial review if it is believed that Ministers have made an unreasonable decision.²⁷

The Committee also recommended that the statutory division of responsibilities between Ofcom and the Competition Commission should be amended, because in the BSkyB/ITV case the two regulators

²⁴ *The ownership of the news*, 27 June 2008 HL Paper 122 2007-08

²⁵ A timeline with links to associated documentation is on [the archive site of the Department](#).

²⁶ "Hunt cannot avoid BSkyB decision", [BBC news](#), 12 July 2011

²⁷ HL Paper 122 2007-08 paras 259-260

had come to *different* conclusions about the impact the purchase would have on plurality in media ownership:

After its investigation [into the BSkyB purchase] Ofcom concluded that because of the acquisition, "there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for national news and the UK TV audience for national news". Later in the process the Competition Commission considered the same issue. Its final report drew different conclusions to Ofcom in that it "did not expect BSkyB's ability materially to influence ITV to have an adverse effect on plurality of news" and that therefore "the acquisition would not materially affect the sufficiency of plurality of persons with control of media enterprises servicing audiences for news". In summary the two regulators came to different conclusions about whether the merger would affect the plurality of news ...

Given the design of the Public Interest Test it would have been perfectly possible for the Competition Commission to have come to different conclusions to Ofcom not only on plurality but on the appropriateness of the merger overall. It is just a coincidence that despite disagreeing with Ofcom on plurality, the Competition Commission found there was a significant lessening of competition and therefore suggested there was a problem with the merger. If the Competition Commission has not found a significant lessening of competition then there would have been a situation where one regulator had suggested a merger was likely to operate against the public interest, but the other regulator, the one with the powers to recommend remedies, found there was no problem at all and recommended the merger go ahead.

The BSkyB/ITV case has only served to reinforce our concern that Ofcom does not have a strong enough input.

We recommend that legislation should be amended so that Ofcom investigates the mergers only on the basis of the public interest criteria, and the Competition Commission considers only the competition aspects of a merger. They should make their recommendations separately to the Secretary of State on whether the merger should be blocked or go ahead (with or without remedies). The Secretary of State would then have the final responsibility for accepting or rejecting Ofcom's recommendations and remedies, as they relate to the public interest criteria. As is the case now, the Secretary of State would continue to be bound by the Competition Commission's findings on the competition issues.²⁸

Ofcom has a statutory responsibility to review the rules regarding media ownership, including the public interest test for media mergers, every three years.²⁹ The year after the Select Committee's report Ofcom launched its next review, suggesting that the rationale for the test had not changed,³⁰ a recommendation it retained in its final report published in November 2009.³¹

²⁸ HL Paper 122 2007-08 para 268, paras 270-1

²⁹ Material on this aspect of Ofcom's work is [collated on its site](#).

³⁰ [Media ownership rules review](#), July 2009 p82

³¹ [Report to the Secretary of State on the Media Ownership Rules](#), November 2009 p47

3. NewsCorp's bid for BSkyB : the initial bid

In mid-June 2010 NewsCorp announced proposals to make a £7.8 billion bid for the 61% of BSkyB which it did not already own. It was reported that BSkyB had refused an offer of 700p per share, but might agree to a bid of 800p or more.³² As talks between the two companies continued, in preparation of a submission to the European competition authorities, many commentators and media groups raised concerns about the impact that a successful takeover might have.³³ In an editorial, the *Financial Times* argued that there was a "clear public case" for the Secretary of State to formally intervene:

A News-Sky merger would threaten plurality in several ways. Although technically News already controls BSkyB, owning 39.1 per cent, a merger would give Mr Murdoch unfettered power to direct its management and cash flows. He could bundle his newspaper websites with Sky subscriptions, potentially giving him a big advantage as news migrates to an online subscription model. The FT should declare an interest at this point.

But access to Sky's substantial cash flows (rather than a taxed dividend, as at present) would give Mr Murdoch substantial firepower to cross-subsidise his loss-making UK newspapers, enabling them to compete with rivals more on price. Price wars are an established stratagem for News. In the 1990s, it grew the circulation of the Times through savage price cuts. The UK newspaper industry as a whole is struggling, as it is in many parts of the world. Were Mr Murdoch to embark on fresh price wars, more rival papers would be marginalised - or even forced from the newsstands.³⁴

The paper's columnist Martin Wolf, echoed these concerns, and went on to make the case for a wider review of the law on media ownership:

Anybody who cares about the future of democracy should want a diverse media, by which I mean not many titles, but a media that no one individual or company can dominate. Yet that is precisely what the UK now risks with the planned takeover of BSkyB by News Corp. As the FT argued in an editorial on the subject, Mr Murdoch "could bundle his newspaper websites with Sky subscriptions, potentially giving him a big advantage as news migrates to an online subscription model." Already far and away the most powerful force in UK media, Mr Murdoch could become still more potent, as competitors collapse.

I will, accordingly, judge Vincent Cable, the UK's Liberal Democrat secretary of state for business, by whether he is prepared to take on this takeover. The law allows him "to ensure the existence of a range of media voices". He should do so. But, in my judgement,

³² "NewsCorp bid for BSkyB wins early support from investors", *Financial Times*, 16 June 2010

³³ "Media groups line up against Murdoch's bid for BSkyB", *Financial Times*, 12 October 2010; "British media join forces against Murdoch takeover of BSkyB", *Guardian*, 11 October 2010

³⁴ "Editorial: Cable should call Murdoch to heel; UK government should intervene in News-BSkyB merger", *Financial Times*, 20 September 2010

preventing the takeover of BSkyB by News Corp does not go far enough to redress the imbalances that now exist in British media.

I would argue that there is a strong case for much tougher control over media ownership. No private individual should be so powerful that politicians tremble before him. That is not democracy. I would argue, therefore, that no individual or company should own both national newspapers and national TV stations. I would also suggest that no individual should own more than, say, two national newspaper titles or more than 10 per cent of national readership (whichever gives the higher share of the market). I cannot see why laws to this effect should not be passed: they would be simple and clear. They would make obvious the aim, which is to avoid putting too much political power in the hands of any one private organisation or individual.³⁵

The BBC's economics editor, Robert Peston, noted that one difficulty faced by NewsCorp was that relatively few commentators were actively supporting the bid:

Perhaps the biggest problem for News Corp is that there is a clamour of voices shouting that the deal must be blocked, but very little public argument in favour of the takeover. It would have helped News Corp's cause if British Sky Broadcasting and its respected chief executive, Jeremy Darroch, could stand up in public and argue the merits of combining his company with News Corp. But he can't do that, because News Corp refused to pay the £8 per share price demanded by Sky's independent directors. Unless and until News Corp and Sky reach a concord on the price of the takeover, Mr Darroch and his colleagues cannot campaign for the takeover. All of which, for the first time, makes me think that there is a chance that - after all the noise has subsided and the dust has settled - News Corp's ambition to raise its holding in Sky from 39% to 100% may yet be frustrated.³⁶

To put NewsCorp's bid into some context, two diagrams, prepared by the BBC in the wake of the phone hacking scandal,³⁷ are reproduced below: first, on NewsCorp's media reach in the UK ...

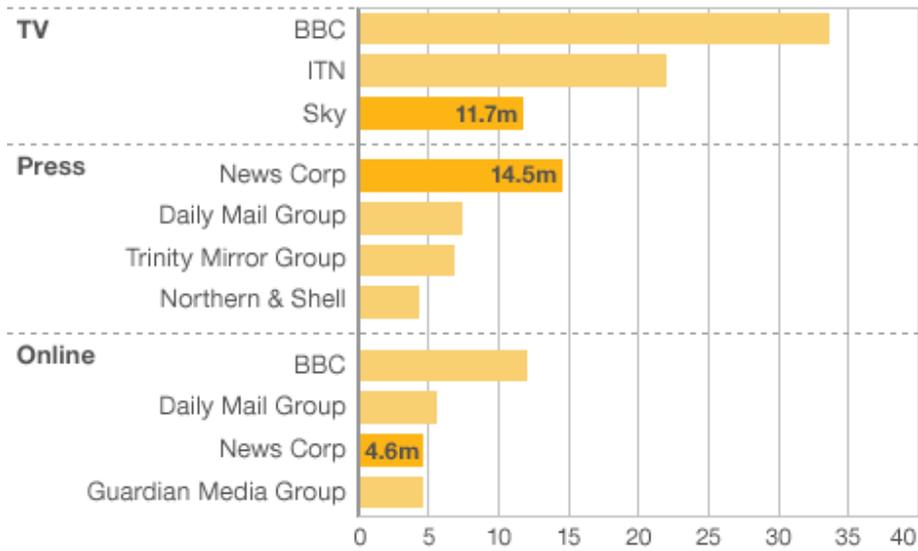
³⁵ "Martin Wolf's exchange: Why News Corp should be blocked from taking over BSkyB", [Financial Times](#), 19 October 2010

³⁶ "Robert Peston's blog: Will News Corp's bid for Sky be blocked?", [BBC news](#), 12 October 2010

³⁷ "What next for NewsCorp", [BBC news](#), 17 July 2011

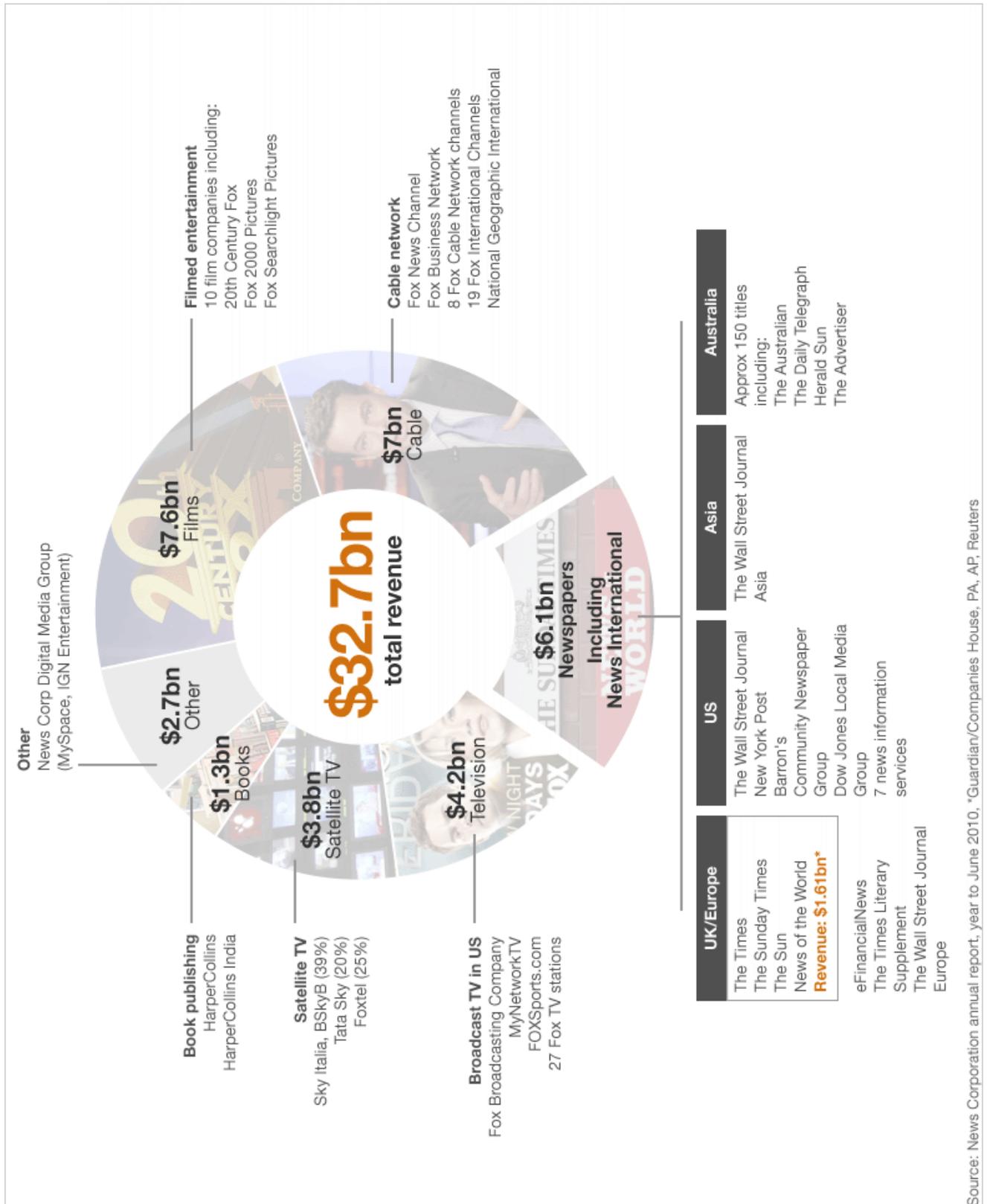
News Corporation's media reach in the UK

Millions of people



Source: Ofcom

... and second, on how the company's UK operations figured in its worldwide empire:



Source: News Corporation annual report, year to June 2010. *Guardian/Companies House, PA, AP, Reuters

Many of these concerns about the implications of the merger were raised in a debate on media ownership in the House of Lords in November 2010. Speaking for the Government on this occasion Baroness Rawlings, gave a succinct summary of the public interest test regarding media mergers ...

Merger control is concerned with protecting competition. However, European law also recognises that Governments may take appropriate measures to protect certain other public interests that may arise from a merger. Any such exceptional action is tightly constrained in law and must be justifiable and proportionate. It is not a broad power enabling Governments to interfere as they wish and determine what mergers and acquisitions may or may not be allowed to proceed. Use of the power necessarily involves exercising a degree of discretion and judgment—a role that rightly falls to the Secretary of State rather than a regulator. All decisions are open to legal challenge and must be founded solely on the impact the specific merger might have on a specified public interest consideration. Extraneous factors may not be taken into account.

For mergers involving media enterprises, the public interest must be protected by there being no reduction in standards and quality, and sufficient range of different voices and owners. This complements the separate statutory ownership rules that impose absolute restrictions to prevent unacceptable concentration of media ownership. There is published guidance setting out how the power to intervene in media mergers will be used, and this must be given due regard in reaching decisions on whether to intervene.

... before going on to confirm that the Secretary of State, Vincent Cable, had decided to intervene:

As of today, there have been two interventions made in respect of media mergers. The first was made when Sky bought a 17.9 per cent stake in ITV plc. That merger was referred to the Competition Commission on competition grounds and on grounds of a potential impact on the plurality of persons with control of media enterprises. In the event, no action was taken on public interest grounds. However, the Competition Commission found that the transaction resulted in a substantial lessening of competition in the market and required Sky to reduce its shareholding in ITV to below 7.5 per cent.

The second intervention has been made today by the Secretary of State, who has now decided to intervene in respect of News Corporation's plan to acquire the remaining shares of the BSkyB group. This will give it 100 per cent ownership. This means that Ofcom will provide an initial report by 31 December, examining whether there are substantive reasons to believe the merger may result in outcomes detrimental to the public interest as it relates to ensuring sufficient plurality of media ownership. On receipt of Ofcom's report, the Secretary of State must then decide whether to refer the merger to the Competition Commission for a more in-depth investigation of the merger's likely impact on the public interest.³⁸

Baroness Rawlings also noted that the Commission would be examining separately whether the merger raised competition concerns. As it transpired, the Commission's assessment was completed in December 2010, when it concluded that the takeover would not significantly impede competition; the details of this decision are reproduced below.³⁹

³⁸ HL Deb 4 November 2010 cc 1809-10

³⁹ [European Commission press notice IP/10/1767](#), 21 December 2010

European Commission press notice, *Mergers: Commission clears News Corp's proposed acquisition of BSkyB under EU merger rules, 21 December 2010*

The European Commission has approved under the EU Merger Regulation the proposed acquisition of British and Irish pay TV operator BSkyB by News Corporation, a global media and communications company headquartered in the US. The Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

The Commission's findings concern solely the competition aspects of the proposed transaction. They are without prejudice to the ongoing investigation by the competent UK authorities of whether the proposed transaction is compatible with the UK interest in media plurality, which is different from the Commission's competition assessment. The UK remains free to decide whether or not to take appropriate measures to protect its legitimate interest in media plurality (as permitted under Article 21 of the EU Merger Regulation).

Commission Vice-President and Commissioner for Competition Joaquin Almunia said: "I am confident that this merger will not weaken competition in the UK. The effects on media plurality are a matter for the UK authorities."

The proposed transaction

The proposed transaction will bring together BSkyB, the leading pay-TV operator in the UK and Ireland, with News Corp, one of the six major Hollywood film studios (20th Century Fox), a TV channel producer (such as Fox, National Geographic), a leading newspaper publisher in the UK and Ireland (such as The Sun and The Times) and a leading pay-TV operator in Italy (Sky Italia) as well as in Germany and Austria (Sky Deutschland). News Corp announced on 15 June 2010 its offer to acquire the remaining 60.9% of the shares in BSkyB which it does not already own. On 3 November 2010, it notified the proposed transaction to the Commission for regulatory clearance.

News Corp and BSkyB are mainly active in different markets in the UK and Ireland and compete with each other only to a limited extent, in the wholesale supply of basic pay-TV channels and in the supply of online and TV advertising space. The Commission found that the proposed transaction would only lead to a small increment on BSkyB's existing share of the market for the supply of basic pay-TV channels in the UK and Ireland. The parties also have a small combined market share in the market for online and TV advertising. Therefore, the transaction does not give rise to horizontal competition concerns.

Given that the merging companies are mainly active at different levels of the market, the Commission's assessment focused on whether the proposed transaction could lead to possible anticompetitive effects arising from vertically linked or neighbouring activities in the audiovisual sector, in newspaper publishing, or in advertising.

Audiovisual sector

The Commission investigated whether, as a result of the proposed transaction, News Corp would be able to prevent or significantly limit access by BSkyB's competitors to premium movie content. The Commission found that News Corp lacks sufficient market power in the market for the licensing of broadcasting rights for premium movies and that BSkyB's competitors would retain several alternative suppliers with equally attractive content. While the market investigation revealed strong concerns over BSkyB's exclusive deals for premium movies with all six Hollywood majors for the first pay-TV window, the transaction will do little to worsen this market situation that exists already today – and is currently under investigation by the UK Competition Commission following a recent decision by UK regulator OFCOM (OFOM, *Premium pay TV movies. Market investigation reference to the Competition Commission*, decision of 4 August 2010).

The Commission also investigated whether the proposed transaction would lead to a risk of exclusion from BSkyB's pay-TV offering of competitors of News Corp in the licensing of premium film content and TV programmes and in the wholesale supply of basic pay-TV channels. The Commission found that News Corp's premium movie content and TV programmes and basic pay-TV channels constitute a minimal part of Sky's bouquet and that BSkyB would continue to have the incentive to acquire content from News Corp's competitors to have the most attractive retail packages.

As the proposed transaction brings BSkyB into the same group as Sky Italia and Sky Deutschland, the Commission investigated if the new company would enjoy increased bargaining power vis-à-vis rights holders by purchasing premium content jointly for several territories, to the detriment of its pay-TV competitors. The Commission found that it was unlikely that the merged company would be able to impose upon content rights holders a change from current licensing practices (along national territories or language areas) towards simultaneous negotiations across several countries such as Germany, Austria, Italy, UK and Ireland.

Newspaper publishing sector

The Commission investigated whether the merged company would be able to foreclose competing newspaper publishers by offering mixed bundles of subscriptions to Sky and News Corp's print, online or tablet-based newspapers. With respect to bundling with print subscriptions, the market investigation revealed that price is only one, and not the main factor determining readers' choice of and loyalty to a newspaper. Furthermore, no such bundling has been attempted before. Finally, tabloid papers such as The Sun do not offer any subscriptions to its print editions and a low subscription rate to newspapers of 6% of overall UK circulation and of 25-33% for quality titles indicates that the subscription model currently does not appeal to a majority of readers. With respect to bundling with online news, the vast majority of newspapers' online editions – apart from most News Corp titles – as well as other news sources are currently free of charge and there is no evidence that this will dramatically change in the foreseeable future. For these reasons, the Commission excluded that competition concerns in the newspaper publishing sector would arise from the transaction.

Advertising sector

The Commission investigated concerns that the merged entity could either refuse advertising by BSkyB's competitors in News Corp's newspaper titles or charge a competitive premium, thereby impeding their ability to attract subscribers or viewers. The Commission's investigation revealed that there are sufficient alternative opportunities to advertise with other print media. It also found that, in any event, News Corp's refusal would not have a significant impact on subscription rates in the pay-TV market. The Commission also found that the merged entity was unlikely to be able to tie the purchase of advertisements in News Corp's print newspapers to the purchase of advertisements on BSkyB's TV channels given that News Corp or BSkyB lack the required market power to engage in such tying.

UK media plurality review and Article 21 of the EU Merger Regulation

The Commission has exclusive jurisdiction to assess the impact of the proposed transaction on competition in the various markets. However, Article 21 of the EU Merger Regulation recognises that Member States may take appropriate measures, including prohibiting proposed transactions, to protect legitimate interests, such as the plurality of the media.

The purpose and legal frameworks for competition assessments and media plurality assessments are very different. The competition rules focus broadly on whether consumers would be faced with higher prices or reduced innovation as a result of a transaction. A media plurality assessment reflects the crucial role media plays in a democracy, and looks at wider concerns about whether the number, range and variety of persons with control of media enterprises will be sufficient.

The UK Secretary of State for Business Innovation and Skills issued a European intervention notice on 4 November 2010. This notice requires the relevant UK authorities to investigate and report by 31 December 2010 on whether the proposed transaction is or may be expected to operate against the public interest in sufficiency of plurality of persons with control of media enterprises (Section 58 of the UK Enterprise Act 2002).

The Commission's findings concern solely the competition aspects of the proposed transaction. Today's clearance decision is therefore without prejudice to the UK's ongoing media plurality review of the proposed transaction.

4. The Secretary of State's inquiry

4.1 Reference to Ofcom (November 2010)

On 4 November the Secretary of State issued an 'intervention notice', requiring Ofcom to investigate the public interest consideration of media plurality arising from the BSkyB bid. In addition the OFT was required to report on whether the Secretary of State would have jurisdiction to refer the bid to the Competition Commission, on the assumption that the bid would give rise to a 'European relevant merger situation'. The regulators would be required to complete their work by the end of the year.⁴⁰

The intervention notice directed the focus on Ofcom's inquiry, noting that "the Secretary of State believes that it is or may be the case that the public interest consideration specified in section 58 of the [*Enterprise Act 2002*] concerned with the sufficiency of plurality of persons with control of media enterprises is relevant to a consideration of the merger situation." In this context it may be helpful to reproduce s58 of the Act:

58 Specified considerations

(1) The interests of national security are specified in this section.

(2) In subsection (1) "national security" includes public security; and in this subsection "public security" has the same meaning as in article 21(4) of the EC Merger Regulation.

(2A) The need for—

- (a) accurate presentation of news; and
- (b) free expression of opinion;

in newspapers is specified in this section.

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

(2C) The following are specified in this section—

- (a) 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;
- (b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
- (c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

⁴⁰ BIS press notice, 4 November 2010

The decision appears to have been welcomed by many, including the Opposition.⁴¹ In a piece on the regulator's work, the *Financial Times* commented that at "the big question is: on what basis will Ofcom make its decision?":

The answer is a simple but much misunderstood word: plurality.

The principle of protecting plurality - by maintaining a sufficient number of different "voices" in the UK media - is laid down in part of the 2003 Communications Act known as the Puttnam principles, after Lord Puttnam, the film producer, who introduced them to the legislation as an amendment.

In 2004, the then Department of Trade and Industry produced a 52-page guidance note on what plurality meant and how it should be protected. Among its pages were examples of cases in which ministers blocked mergers of newspapers in Northern Ireland. While the mergers might have been perfectly reasonable on competition grounds, their effects would be to silence outlets of opinion representing either the Unionist or nationalist cause.

"Plurality is an anticompetitive construct," Chris Goodall, regulatory specialist at Enders Analysis, said. "Its function is to prevent market forces being the sole determinant of the provision of news and current affairs because we have decided as a society that we would rather have a wider choice of opinions and information."

But Sarah Simon, an analyst with the investment bank Berenberg, said the plurality argument was unlikely to lead to a block on the bid. She cited a commission decision on the 17.9 per cent stake BSkyB bought in ITV in 2006. "It will be difficult to disregard the view of the Competition Commission, which in 2007 indicated that it was satisfied with the state of UK news plurality, provided BSkyB divest the majority of its stake in ITV plc. "If anything, plurality has increased since that review, as a result of huge growth in the number of online news providers and the consumption of news online." News Corp executives point out that in the same review, the commission treated Rupert Murdoch's media group as BSkyB's owner, making it hard for it to conclude the bid made any material difference.⁴²

4.2 Request for undertakings in lieu (January 2011)

Before Ofcom and the OFT could complete their inquiries, statutory responsibility for all competition and policy issues relating to the media was transferred to the Secretary of State for Culture, following publication of comments by Vincent Cable to the effect that he was 'at war' with Rupert Murdoch.⁴³

⁴¹ Ivan Lewis, shadow Culture Secretary, welcomed the move in a piece in the *Guardian*: "For the sake of democracy, Vince Cable must intervene over BSkyB", *Guardian*, 4 November 2010

⁴² "Ofcom weighs case in interests of public", *Financial Times*, 5 November 2010

⁴³ "Cable stripped of media brief after saying he 'declared war' on Murdoch", *Financial Times*, 22 December 2010. Details were given in a statement in the New Year: HC Deb 18 January 2011 cc35-6WS.

On 25 January Jeremy Hunt published both regulators' reports, along with correspondence he had had with BSkyB and NewsCorp, and set out the next steps to the process. Crucially in its report Ofcom had recommended that the bid be referred to the Commission, and in his statement Mr Hunt acknowledged "it may be the case that the merger may operate against the public interest in media plurality." He went on to explain that NewsCorp had offered to make 'undertakings in lieu' – commitments about future behaviour or the structure of the business – to mitigate these concerns, and that it was appropriate for him to do so, with advice from the OFT and Ofcom.⁴⁴ The Secretary of State's statement is reproduced in full below.⁴⁵

Statement by the Secretary of State for Culture, Olympics, Media and Sport (Mr Jeremy Hunt) on Media Ownership, 25 January 2011

On 3 November 2010 News Corporation notified the European Commission of its intention to acquire the shares in BSkyB that it does not already own. On 4 November 2010 the Secretary of State for Business, Innovation and Skills issued a European intervention notice in relation to the proposed acquisition. He asked Ofcom to investigate and report back to him by 31 December 2010 providing advice and recommendations on the public interest consideration in section 58 of the Enterprise Act 2002. This public interest consideration concerns the sufficiency of plurality of persons with control of media enterprises.

On 21 December 2010 the European Commission cleared the proposed acquisition of BSkyB by News Corporation. The Commission concluded that the transaction would not significantly impede effective competition in the European economic area or any substantial part of it. The Commission made it clear that its decision did not prejudice my jurisdiction in relation to the merger's impact on the separate question of sufficiency of plurality in the media.

Following receipt of Ofcom's report and in the interests of transparency I want to inform the House of the timeline and process that I have followed to date in my considerations of the relevant public interest.

As such I am today publishing the following documents, copies of which will also be deposited in the Libraries of both Houses:

- Ofcom's report on the public interest issues relating to News Corporation's proposed acquisition of BSkyB that was sent to me on 31 December 2010 (with redactions for confidentiality).
- The OFT's report on jurisdiction that was sent to me on 30 December.
- My letters to News Corporation and BSkyB of 7 January 2011.
- BSkyB's response of 13 January 2011 with confidential information redacted.
- News Corporation's response of 14 January 2011 with confidential information redacted.

After careful consideration of the Ofcom report which recommends referral to the Competition Commission, and as provided by section 104 of the Enterprise Act 2002 that sets out my duty to consult adversely affected parties, I met with News Corporation on 6 January to set out the process that I would follow and briefly explain Ofcom's conclusions. Having informed them of the process I then wrote to News Corporation and BSkyB on 7 January enclosing a copy of Ofcom's report. In this letter I explained that I was minded to refer the case to the Competition Commission but that I would receive written, and if necessary oral, representations from them if they wanted to challenge my thinking.

On 10 January I met with Ofcom to seek clarification on a number of aspects of their report.

In response to my letter of 7 January BSkyB and News Corporation provided written representations challenging elements of Ofcom's report on 13 and 14 January respectively.

These documents have today been published. After considering these responses and consistent with section 104 of the Enterprise Act I therefore met again with News Corporation on 20 January to hear representations on the issues they highlighted.

⁴⁴ DCMs new release 009/11, *New Corp/BSkyB merger*, 25 January 2011

⁴⁵ HC Deb 25 January 2011 cc3-4WS. The papers cited in this statement were deposited in the Commons Library at this time: [DEP2011-0119](#).

As a result of these meetings and my consideration of the Ofcom report and subsequent submissions from the parties involved I still intend to refer the merger to the Competition Commission. On the evidence available, I consider that it may be the case that the merger may operate against the public interest in media plurality.

However, before doing so it is right that I consider any undertakings in lieu offered by any merging party which have the potential to prevent or otherwise mitigate the potential threats to media plurality identified in the Ofcom report.

News Corporation says that it wishes me to consider undertakings in lieu which it contends could sufficiently alleviate the concerns I have such that I should accept the undertakings instead of making a reference. It is appropriate for me to consider such undertakings. In considering whether to accept undertakings in lieu, I will ask the OFT under section 93 of the Enterprise Act 2002 as an expert public body with experience in negotiating undertakings in lieu to be involved in the process from this stage. I will also ask Ofcom under section 106B for advice whether undertakings in lieu address the potential impact on media plurality.

If this process produces undertakings in lieu which I believe will prevent or otherwise mitigate the merger from having effects adverse to the public interest, and which I propose to accept, I will then publish the undertakings in lieu and (as required under the Act) begin a formal 15-day consultation period during which time all interested parties will be able to express their views.

It is in the nature of this process that I cannot give clear dates for each step as we move forward. My main concern is not to work to an arbitrary timetable but to ensure that I reach my decision in a fair and even-handed way which is transparent and ensures that all concerns are properly considered.

Two sections of Ofcom's report are worth highlighting.

First, in the report's summary the regulator addressed the public interest test, and how it had interpreted the statutory requirement for media plurality:⁴⁶

We have taken account of the relevant DTI Guidance⁴⁷, the Competition Commission's report on the Sky/ITV case⁴⁸, and the Court of Appeal's judgment in the Sky/ITV case.⁴⁹ We have also considered other relevant regulatory provisions, in particular, the impartiality requirements under Ofcom's Broadcasting Code ...

We have looked at the public interest consideration in two ways:

- the 'static' effects of the proposed acquisition – on plurality immediately after the transaction in terms of range and number of persons controlling media enterprises including their ability to influence opinions; and
- the 'dynamic' effects of the proposed acquisition – issues that may arise over time, within a forward view of how plurality may develop.

In considering plurality and the need for there to be sufficient plurality, we have considered the range and number of persons

⁴⁶ Ofcom, *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, 31 December 2010 paras 1.7-1.14

⁴⁷ *DTI Guidance: the Enterprise Act 2002: Public Interest Intervention in Media Relevant merger situations*, May 2004

⁴⁸ *Competition Commission Report on the Acquisition by BSkyB plc of 17.9% of the shares in ITV Plc sent to Secretary of State (BERR) 14 December 2007*, ("Competition Commission")

⁴⁹ *British Sky Broadcasting Group plc v The Competition Commission and The Secretary of State for Business Enterprise and Regulatory Reform* [2010] EWCA Civ 2 ("Court of Appeal")

having control of media enterprises in the context of their ability to influence opinions and control the agenda.⁵⁰

In doing so we have had regard to the Government statement during the debate of the plurality provisions⁵¹ ... and the Secretary of State's guidance on the media public interest merger provisions, which states that the public interest consideration "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."⁵²

Ofcom has a wide discretion in relation to the assessment of sufficient plurality. Following the Court of Appeal decision in Sky/ITV, what is required is "a qualitative assessment of the position resulting, or likely to result", from the proposed acquisition.⁵³ This is inevitably a matter of judgment, which we have exercised with regard to the considerable importance Parliament has attached to media plurality for the functioning of a healthy and informed democracy.

News Corp argued to us that plurality has increased since Parliament last legislated in relation to it, the inference being that it must now be more than sufficient such that the proposed transaction (even if it reduces plurality) cannot be said to operate against the public interest. On the other hand, many other respondents have argued that plurality is already insufficient and that the proposed transaction would exacerbate the problem.⁵⁴

When examining the effects of the proposed transaction on the sufficiency of plurality of persons in control of the media, we adopt the same approach taken by the Competition Commission in the Sky/ITV case:

*"Whilst recognising that it would not be sufficient for plurality purposes to rely on a single provider (for example, the BBC), we do not consider it necessary to take a view on precisely how many owners would constitute a „sufficient“ level of plurality of persons. Rather, we have looked qualitatively at sufficiency. We have considered sufficiency by reference to the current levels of plurality, having regard to any change in plurality that arises as a result of the acquisition."*⁵⁵

Second, the report noted that the statutory regime only provided for Ministerial intervention if plurality was threatened by a takeover – a point noted by Robert Peston, the BBC's economics editor:

⁵⁰ Competition Commission report, paragraph 5.7 and Court of Appeal paragraph 90 on range and number.

⁵¹ [Lord McIntosh of Haringey (Parliamentary Under Secretary, DCMS) 2 July 2003, Hansard : "[media] plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda".]

⁵² DTI Guidance, paragraph 7.7

⁵³ Court of Appeal, paragraph 87

⁵⁴ See for example responses from 38 Degrees, Campaign for Press & Broadcasting Freedom paragraphs 4.1 to 4.3 and 5.1, NUJ pages 3 and 4, Robert Beveridge page 2 and Prof Steven Barnett page 6.

⁵⁵ Competition Commission, 2007, paragraph 5.15

The regulator says that - with the technology of news distribution changing so fast, the rise of the electronic tablet (iPads et al) and all of that - there is a risk that one or two companies could come to dominate the provision of news and current affairs, irrespective of whether there are further takeovers.

But there are no legislative provisions for addressing damaging reductions of plurality or choice for consumers in those circumstances. Ministers can only intervene when plurality is imperilled by a takeover (which is what Ofcom alleges could happen if News Corp buys all of Sky). So Ofcom urges the government to consider whether it should take new powers to intervene in the market for news if it sees the creation of excessively powerful news providers.⁵⁶

An extract of the regulator's argument for a review of the statutory framework is given below:

Many of the submissions we received raised additional concerns which are relevant to plurality, but which are not specific to this transaction. These concerns arise from the rapid and far reaching changes that are taking place within the media as a result of technological advances and new business models. They include:

Adoption and use of new media technologies combined with a contraction in some of the more traditional media forms. For example, according to Ofcom research online news was the main source of news for 7% of consumers in 2009, up from 3% in 2005.⁵⁷ The majority of online news is accounted for by online versions of current newspapers, but also includes aggregators such as Google and Yahoo. At the same time, newspaper circulation has been falling, down from 25 million for daily newspapers and 27 million for weeklies in 2000, to 22 million for each in 2009.⁵⁸

Organic change in market shares of key players – since 2003, we have seen material changes in the relative standings and importance of different players. For example, ITN (which provides news for ITV and Channel 4) has seen its share of all national news viewing fall from 34% in 2003 to 22% in 2009⁵⁹ as a result of ITV's falling share and the loss of the Five news contract to Sky.

Changes to wholesale news provision – wholesale news provision can change fairly quickly through changing contractual relationships. As a result, the structure and ownership of news provision on platforms like TV or radio can alter with the change of a significant contract.

Evolution in upstream content provision – we may witness the emergence of a few stronger players in the upstream gathering and provision of news as a result of the economics of news provision. This possible development was discussed in more detail in our review of the Media Ownership Rules in 2009.

Under the current statutory framework, a media public interest consideration of plurality can only be triggered when there is a proposed merger involving media enterprises. The future market developments considered in this report suggest that the current statutory framework may no longer be fully equipped to achieve

⁵⁶ "Robert Peston blog: Can News Corp salvage the Sky takeover?", [BBC news](#), 25 January 2011

⁵⁷ Ofcom Media Tracker, 2009, all adults 15+.

⁵⁸ NRS / MediaTel / Ofcom calculations

⁵⁹ Barb, Network Plus, Ofcom

Parliament's objective of ensuring sufficient plurality of media ownership.

The market developments identified include the risk of market exit by current news providers, or a steady organic growth in audience shares and increase in ability to influence by any one provider. For example, in a situation where a company grows organically through entirely legitimate business strategy which does not involve any anti-competitive behaviour but finds itself in the relevant media market with 90% share of audiences. While this may not have raised competition concerns, it very clearly may raise plurality concerns.

While there is a clear statutory framework for remedying competition concerns which may arise in the context of a merger,⁶⁰ the same is not true of concerns related to plurality more generally. This means that if a transaction is found not to operate against the public interest in relation to plurality at the time, there is no subsequent opportunity or mechanism to address or even to consider any plurality concerns which develop over time.

This suggests that a more fundamental review and possible reform of the current statutory framework may be required. Any such review would be a matter for Parliament.⁶¹

In an analysis of Mr Hunt's statement the *Financial Times* noted that while a majority of commentators regarded it as "a favour" to Rupert Murdoch, others thought "the culture secretary is ensuring that NewsCorp and BSkyB have no basis to challenge his decision by judicial review, because they have been given an adequate chance to shape their undertakings in an acceptable way."⁶²

Writing for the LSE British Politics and Policy blog, Charlie Beckett, reviewed the case for and against the bid:

I think there are many good reasons why [the Secretary of State] should not block it ...

- Murdoch has increased plurality in journalism by saving failing newspapers and creating Sky News
- We should see NewsCorp in a global context where they are smaller, compared to a UK journalism context where they are bigger
- This decision to take full control of BSkyB in itself does not shift power so significantly
- Murdoch is certainly someone who creates a particular culture in his newsrooms that serves his ends, but the degree of independence to each other they show is remarkable
- Murdoch could have achieved much greater market and financial and editorial synergies with his companies already but hasn't done so

⁶⁰ These include the use of ex post powers under the Competition Act, as well as the possibility of a market investigation reference under the Enterprise Act

⁶¹ *Report on public interest test ...*, 31 December 2010 paras 7.8-12

⁶² "Hunt takes political heat out of BSkyB bid", & Minister plays fair but with little room for manoeuvre", *Financial Times*, 26 January 2011

- It sets a poor precedent to interfere with £7 billion investment in UK creative industries to interfere on non-commercial grounds

There are, of course, very strong arguments against the deal One of the best I have heard is from Guy Black of the Telegraph who says it should not go through if it reduces market plurality, but also if it impacts on the diversity of news gathering, not just title-ownership or market share. Then, of course, there is the more political argument that the phone-hacking scandal shows that the Murdochs are morally incompetent to be trusted with so much media power.

There is also the argument based not so much on this deal, but what will flow from it. It will lead, say critics, to bundling of services between papers and TV channels and websites etc to create a behemoth that will consume weaker rivals. It is difficult for the authorities to assess that in advance, but past evidence suggests that Murdoch is rarely content with what he has. Ofcom has now said that it will have an impact on media plurality. Hunt must now decide if that can be ameliorated by remedies such as the sale of Sky News or the Times. I think that is a rather clunky way to do a deal. It is grossly unfair on the people working for those news organisations. But it also feels like saying you can only be a bit pregnant.

The other remedy is to get promises on editorial independence, but Murdoch hasn't got a great track record on observing those commitments. And anyway, they will be nigh-impossible to monitor. Likewise, undertakings not to bundle services or not to acquire others organisations seem to go against market efficiencies and the trend towards convergence. And, of course, all this is taking place against a background of the phone-hacking scandal but also of a media Establishment that has risen up almost as one to voice its hatred of Murdoch and their fear of his economic and editorial power.⁶³

The editor of the *Financial Times*, Lionel Barber, presented the annual Hugh Cudlipp lecture at this time, and as part of his speech on the future of journalism, Mr Barber suggested that concerns over alleged phone hacking by journalists on the *News of the World* was likely to play a part in the assessment of the bid:

Harold Evans, who alongside Hugh Cudlipp must rank as one of the finest British newspaper editors of the post-war era, said the other day that deception may ultimately be justified in the pursuit of the public interest. But it must only be used in the most exceptional circumstances. The reason is that can be deeply corrosive not just to the newspapers bond with its readers but also to the body politic.

In this respect, the Daily Telegraph's decision to dispatch two journalists posing as constituents to interview the business secretary Vince Cable falls into a very different category than its earlier scoop on MPs expenses. The latter story, though acquired for money and deeply damaging to the standing of the Westminster class, clearly met the public interest test; the first did not.

⁶³ "A Newscorp takeover of BSkyB will not significantly shift media power: blocking the deal could set a poor precedent", [British Politics & Policy at LSE blog](#), 27 January 2011

It was nothing more than entrapment journalism. The Telegraph's conduct, while regrettable, pales by comparison with the phone-hacking scandal which has engulfed Rupert Murdoch and News International and jeopardised his bid to take full control of BSkyB, the highly profitable satellite TV channel ... News Corporation can argue, with some justification, that opposition to its BSkyB bid is motivated by base commercial interests rather than a high-minded concern over media plurality.

Yet the concentration of broadcast and print power which would result from a fully combined BSkyB and News International's titles is troublesome, especially in the light of still unresolved questions about the extent of phone hacking at the News of the World. The bid deserves proper scrutiny by the authorities. Promises about editorial independence for Sky should be judged in the light of repeated assurances that the phone hacking was the work of a lone actor at the News of the World.⁶⁴

4.3 Publication of undertakings (March 2011)

On 3 March the Secretary of State announced he was proposed to accept undertakings from NewsCorp to spin off Sky News as an independent public limited company – rather than refer the bid; more details were given in a press notice:

The undertakings that News Corporation has offered would involve Sky News being 'spun-off' as an independent public limited company. The shares in that company would be distributed amongst the existing shareholders of BSkyB in line with their shareholdings - News Corporation would therefore retain a 39.1 per cent stake in the new company. To ensure editorial independence and integrity in news reporting, the company would have a board made up of a majority of independent directors, including an independent chair, and a corporate governance and editorial committee made up of independent directors (who would have no other News Corporation interests). News Corporation would not be allowed to increase its shareholding in the new company without permission from the Secretary of State for 10 years.

The company would have a ten year carriage agreement and a seven year renewable brand licensing agreement to ensure its financial viability – measures considered by the regulators to be long term in the rapidly-changing media sector.⁶⁵

Mr Hunt published the undertakings for public consultation, along with the advice he had received from the OFT & Ofcom, and his correspondence with NewsCorp – and made a statement to the House; part of his statement is reproduced below:

Earlier this morning, I announced that the independent media regulator, Ofcom, had advised me that undertakings in lieu offered by News Corporation would address the plurality concerns that Ofcom had identified in its report to me of 31 December 2010. I also announced that the OFT considered the undertakings to be practically and financially viable for up to 10 years. In the light of this independent advice, I propose to accept such

⁶⁴ "Lionel Barber's Hugh Cudlipp lecture: the full text", [Guardian](#), 31 January 2011

⁶⁵ DCMS news release 020/11, 3 March 2011

undertakings instead of referring the matter to the Competition Commission...

In short, the editorial independence of Sky News will be better protected not only than it would have been had Sky News formed part of the buy-out of Sky shares, but even than it is right now. The principles of the arrangements are clear and set out in the proposed undertakings. There are still some detailed provisions of carriage, brand licensing and certain operational agreements that need to be finalised, and the terms ensure that such agreements need to be approved by me. In deciding whether or not to approve them, I will again take the advice of Ofcom and the OFT as appropriate. The merger cannot, of course, go ahead until I have been satisfied on all these matters.

I also want to draw the House's attention to the long-term sustainability of these undertakings. The OFT has said that the undertakings are likely to be practically and financially viable in the short and medium term, but expressed concerns about whether they would be viable over the longer term. It stated, however, that the appropriate time frame in this market was for me to decide, with Ofcom's advice.

Ofcom has considered the impact of a 10-year carriage agreement in the context of the media industry, and it has expressed the view that, in a rapidly changing media and technological environment, a carriage agreement of 10 years is a long-term measure. I agree with its independent view about the difficulties of predicting with any certainty how the plurality issues will develop over a longer time frame. However, I will of course reach a final conclusion on that and other aspects of the undertakings only after the consultation is complete.

In his statement the Secretary of State went on to mention the separate, if related, issue of the public interest test itself, and Ofcom's concerns as to its potential weakness, which the regulator had reiterated in its response to NewsCorp's undertakings:

I should add that, quite separately to my consideration of the merger, I have carefully noted Ofcom's point that there is a potential weakness in the current public interest test with respect to media plurality—namely, that it can be applied only when there is a commercial transaction to consider. That wider question is one that I intend to consider in the context of the forthcoming review of communications regulation which I announced earlier this year.⁶⁶

Speaking for the Opposition, Ivan Lewis, raised concerns that the Minister had changed his mind in proposing to accept NewsCorp's undertakings; he argued that the Government had been "cavalier about their responsibility to be impartial and contemptuous of the importance of transparency" while noting that he would "engage with interested parties before deciding whether we believe that referral to the Competition Commission remains the most appropriate course of action."⁶⁷

⁶⁶ [HC Deb 3 March 2011 cc518-9](#). The consultation was formally launched on 7 March, to expire on 21st of the month. Mr Hunt reiterated this point in an interview with the *Guardian* a few days later: "Jeremy Hunt hints at rules to curb Murdoch media dominance", 21 March 2011.

⁶⁷ HC Deb 3 March 2011 cc520-1

Many Members raised concerns about the Minister's statement, and in answer to questions Mr Hunt made two important points: first, on the constraint presented by the threat of judicial review – from both opponents *and* supporters of the bid:

In reality, we have to assume, because there are so many interests at stake, that any side that is disappointed with this decision will attempt judicially to review it. For that reason, at every stage of the process, we have sought to be completely transparent, impartial and fair, which is why today we are publishing all the documents relating to all the meetings—all the consultation documents, all the submissions we received, all the exchanges between my Department and News Corporation. People can thereby judge for themselves whether the process has been completely fair, impartial and above board.⁶⁸

The Minister also addressed concerns, raised by Caroline Lucas MP, about the market power that NewsCorp would have if the bid went ahead:

The second issue [the hon.Lady] raised, on the market power of News Corporation, is not one that I can consider in this quasi-judicial process, because this is about plurality in the provision of news. The market-dominance and competition issues in this country are decided not by Ministers, but at arm's length. In this case, the EU had jurisdiction, and it made its ruling on 21 December 2010.⁶⁹

In his initial reaction to the announcement the BBC's economics editor Robert Peston underlined the fact that Ofcom had revised its own view of the bid given NewsCorp's amended undertakings: "correspondence published today between Mr Hunt and News Corp indicates that News Corp has - under pressure - made greater concessions than it wanted to to guarantee Sky News' independence. And as a result of these concessions, Ofcom - the media regulator - has said that the harm it perceives as flowing from the deal, that it would restrict choice or plurality of news providers, would be purged." Mr Peston went on to predict, "even so there will be a storm of protest that Mr Hunt is allowing the deal."⁷⁰ Much of the commentary in the press the next day bore this out.⁷¹

In an editorial the *Financial Times* argued that this was "an unsatisfactory answer that shows up the inadequacy of UK media law":

To secure its independence, and thus preserve plurality, Mr Hunt has designed an extremely convoluted mechanism for separating the loss-making (and probably unsaleable) business from its parent and then spinning it out to Sky's shareholders. The aim is to preserve the status quo ante. Mr Murdoch's stake in the new Sky News will be capped at 39.1 per cent for 10 years. The entity's independence will be bolstered by a long-term contract to

⁶⁸ HC Deb 3 March 2011 c526

⁶⁹ HC Deb 3 March 2011 c526

⁷⁰ "Robert Peston blog: Why Jeremy Hunt is allowing BSkyB takeover", [BBC news](#), 3 March 2011

⁷¹ For example, "Media rivals cry foul as Murdoch wins battle for full control of BSkyB", *Independent*, 4 March 2011; "Murdoch's rivals press for legal action", *Financial Times*, 4 March 2011. For the case for and against the merger see, "The Sky News spin-off: muddled meddling or craven capitulation?", *Guardian*, 3 March 2011

supply TV news and other safeguards to ensure the autonomy of its editorial and governance arrangements. It is unclear whether this complex solution will actually work in practice. Mr Murdoch has been placed under similar constraints in the past, such as after he acquired Times Newspapers in 1981. These measures were ineffective.

But the bigger issue is that such constraints simply miss the point. They do not deal with the concerns that exist about the market power Mr Murdoch will wield once the takeover is complete. European competition law cannot be relied on to police things. Mr Hunt must look again at the UK's media ownership rules as a matter of urgency. A proper definition of media plurality is needed. It is illogical to regulate it only when there is a change of control. Factors such as organic growth and technological change do lead to big shifts in media consumption - and hence plurality. Preserving this is fundamentally important in a democracy. The law must be changed to secure it.⁷²

Over the following weeks investors appear to have taken the collective decision that the bid would succeed as BSkyB's share price rose well over 800p,⁷³ though some commentators expressed surprise that no announcement had been made by the end of April.

At DCMS questions on 16 June the shadow Culture Secretary, Ivan Lewis, argued that many had "no confidence in the integrity of the process"; in response Mr Hunt said, "I was accused before of rushing the decision, so now I am taking as long as it takes because we want not a rushed decision, but the right decision. I am not personally overseeing the negotiations [on NewsCorp's undertakings]. It is being done by Ofcom and the Office of Fair Trading, and I am receiving independent written advice from them at every stage, which I have either published or will publish."⁷⁴

⁷² "Editorial: Why Hunt could not stop Murdoch", 4 March 2011

⁷³ "Investors bet on green light for BSkyB merger", *Financial Times*, 25 April 2011

⁷⁴ HC Deb 16 June 2011 c909

5. The collapse of the BSkyB bid

5.1 The Minister's statement on 30 June

On 30 June the Secretary of State published a further update, stating that although the consultation on NewsCorp's undertakings "did not produce any information that caused Ofcom or the OFT to change their earlier advice to me", he was publishing "a revised, more robust set of undertakings", on which he invited views until 8 July.⁷⁵ Full details were given in a long written statement which is reproduced in full below.⁷⁶

Statement by the Secretary of State for Culture, Olympics, Media and Sport (Mr Jeremy Hunt) on NewsCorp/BSkyB merger, 30 June 2011

I am today publishing the results of the consultation on the undertakings in lieu I launched on 3 March alongside the subsequent advice I have received from Ofcom and the OFT. The consultation did not produce any information which has caused Ofcom and the OFT to change their earlier advice to me. I could have decided to accept the original undertakings. However a number of constructive changes have been suggested, and as a result, I am today publishing a revised, more robust set of undertakings and will be consulting on them until midday Friday 8 July.

As previously, I was not required to involve independent regulators in assessing the revised undertakings. However I have again done so, and sought their independent advice. I am today also publishing that advice, which after careful consideration I have decided to accept.

Background

On 3 March I informed the House that based on advice that I had received from OFT and Ofcom, I was minded to accept undertakings from News Corp in lieu of a reference to the Competition Commission. As the Enterprise Act 2002 requires, I published these undertakings for a public consultation which ended on 21 March.

I received over 40,000 representations to this consultation, including a very large number of near-identical responses as a result of internet campaigns. I have placed summaries of the main responses on the DCMS website. I met representatives from Trinity Mirror, Guardian Media Group, Telegraph Media Group, Associated News and Media, and Slaughter and May on 24 March and met Avaaz on 15 April. Notes of meetings will be published at the end of the process.

The substantive points have been carefully considered by me, advised by the independent regulators.

The Carriage and Brand Licensing Agreements

The carriage and brand licensing agreements are an important part of this process and I will only accept the undertakings once I have approved these agreements.

These documents have been reviewed in great detail by OFT, Ofcom and external lawyers. I believe that their independent, expert advice provides confidence that the undertakings and key agreements are robust. They have concluded that the drafts of the carriage agreement and the brand licence agreement are now fully consistent with the proposed undertakings. In addition, OFT confirm that the terms of the carriage agreement and brand licensing agreement mean that Sky News will be practically and financially viable for the lifetime of the carriage agreement. I can now therefore confirm that I am satisfied with both agreements and am able to approve them in line with the requirement in the undertakings. I will not be publishing these agreements given the nature and the extent of the commercially confidential material they contain.

Undertakings in Lieu

I received advice from Ofcom and OFT on 22 June, copies of which have been placed on the DCMS website. Both regulators are clear that the points raised in the consultation exercise do not require them

⁷⁵ HC Deb 30 June 2011 c1107

⁷⁶ HC Deb 30 June 2011 cc55-59WS

to change their previous advice to me. Nevertheless, there have been some constructive suggestions for strengthening the undertakings which I am minded to accept.

Editorial Independence

A number of changes have now been made to the undertakings to strengthen further the arrangements for editorial independence:

- Sky News' articles of association set out the definition of independent directors;
- Meetings of the board of Sky News about editorial or journalistic matters will only be quorate if an independent director with senior editorial and/or journalistic expertise is present. Similar arrangements apply to the corporate governance and editorial committee. This is a response to representations that these arrangements could be undermined if this director was often unavailable for meetings for whatever reason. The change will ensure that Sky News organises its business so as to ensure that there is always appropriate senior editorial and/or journalistic expertise at relevant meetings.
- The appointment of a monitoring trustee whose main role is to ensure that News Corp complies with the undertakings and make sure that News Corp does not do anything "that would prevent Newco [i.e. the spun off Sky News] being placed in an overall position of editorial, governance, commercial and financial independence in which it will contribute to plurality as Sky News did prior to the Transaction".

Business viability

Some representations were made about Sky News' continued financial viability. I consider that Sky News' financial viability is adequately secured through the carriage and brand licensing agreements. However, in the light of representations received in response to the consultation exercise, I am proposing to modify the undertakings to ensure that Sky continues to cross-promote Sky News on its channels to a level and in a manner comparable with such cross-promotion for the period of 12 months prior to the date on which the undertakings are accepted. This is important to ensure that Sky News continues to enjoy the same promotional support as the current business.

Also, the monitoring trustee will provide advice to me in my review of the key operational agreements requiring my approval to ensure that they are fair and reasonable.

Articles of Association

Because so many of the safeguards are contained in the articles of association, including the requirement that Sky News' services will abide by the principle of editorial independence and integrity in news reporting, the undertakings have been amended so that I have to approve them. Furthermore, News Corp has offered an additional undertaking not to attempt to cause Sky News to act in breach of its articles of association. A copy has been published along with the consultation document and the revised undertakings.

These are the main changes. All the changes are set out in the published revised undertakings, and a more detailed explanation of the reasons for the changes is included in the consultation document and OFT's report. In my view, they provide a further layer of very important safeguards. As amended, I believe that the undertakings will remedy, mitigate, or prevent the threats to plurality which were identified at the start of this process. I therefore propose to accept the undertakings in lieu of a reference to the Competition Commission.

I have today placed on my Department's website a revised version of the undertakings and an associated consultation document. There will now be a final consultation period starting today and ending at midday on Friday 8 July. During this time all interested parties will be able to express their views on the revised undertakings.

Once again I will seek the advice of Ofcom and the OFT on any responses to this consultation. As expert regulators they are best placed to thoroughly understand the issues and to offer comprehensive and impartial advice. Once I have considered these representations and the independent regulators' advice, I will reach a decision on whether I still consider that the undertakings should still be accepted in lieu of a reference to the Competition Commission. If, after the consultation, I remain of the view that the undertakings properly address the concerns about media plurality, I will accept them and not refer this merger to the Competition Commission.

I am required to publish the revised undertakings in lieu and an explanation as to why I have made the proposed changes, and I have done so. In the interests of transparency I have also published a number of other documents where there is no legal requirement upon me to do so. These are: the advice I have received from OFT and Ofcom; the Articles of Association of Sky News; and a summary of responses to the consultation process. The carriage agreement and the brand licence agreement have not been published given the nature and the extent of the commercially confidential material they contain. I hope that this openness will help strengthen public confidence in the process and decision.

Other issues raised in the consultation

During the consultation period, a number of issues were raised that were not material to the issue of media plurality.

A number of respondents raised competition issues. In addition to the fact that this could not be considered as part of the media plurality public interest test, these issues have already been considered by the European Commission which concluded on 21 December last year that the increased shareholding would not significantly impede effective competition.

Some respondents also argued that News Corp could not be relied upon to abide by the requirements set out in the undertakings, citing previous guarantees and assurances given by News in the past, and the current phone-hacking allegations against The News of the World.

I have taken the view that News has offered serious undertakings and discussed them in good faith. In all the circumstances, and given that the implementation of those undertakings will be overseen by the monitoring trustee and thereafter monitored, and if necessary enforced, by the OFT, I believe that there are sufficient safeguards to ensure compliance with the undertakings. Furthermore, the various agreements entered into pursuant to the undertakings will each be enforceable contracts. Therefore while the phone-hacking allegations are very serious they were not material to my consideration.

I would also like to draw attention to a point stressed by Ofcom in its report. Namely, that the undertakings must be assessed against the fact that the plurality concerns arose out of a change in the degree of control News Corporation has over Sky. The undertakings do not and should not seek to establish Sky News in a position where News Corporation has no relationship with it at all, because today News Corporation controls 37.19% of Sky's voting shares.

I am committed to maintaining the free and independent press for which this country is famous. I have sought and published independent advice throughout this process. I have listened carefully to points made in the consultation and amended the undertakings where appropriate. I have also gone for maximum transparency while taking reasonable account of commercial confidentiality considerations. I continue to believe that, if I allow this deal to proceed, Sky News will be able to continue its high-quality output and in fact will have greater protections for its operational and editorial independence than those that exist today.

As before, the Minister's statement was accompanied with a press notice, advice from the regulators, correspondence, and the revised undertakings themselves. The Minister also answered an urgent question later that same day in the House, when many Members raised concerns. Tom Watson MP, who had put down the question, suggested that "the Secretary of State has chosen to take these people at their word", despite abundant evidence that NewsCorp had "breached previous assurances on the takeover of *The Times*, *The Sunday Times*, *The Sun* and the *News of the World*." In response the Secretary of State said the following:

This is not an issue of trust. These undertakings are legally binding and legally enforceable. Moreover, one of the undertakings particularly addresses the concerns that I think are shared in many parts of the House about broadcasting impartiality, which is enshrined in the broadcasting code. Under the undertakings that I published on 3 March and am publishing again today, the code will form part of the company's articles of association.

Under the strengthened undertakings that I am publishing today, News Corps will not be allowed to attempt to get the new company to breach its own articles of association, so the editorial impartiality for which Sky News is valued will be better protected than it is for any other media organisations in this country.⁷⁷

5.2 NewsCorp's decision to withdraw the bid

Over the next few days a series of disclosures were published about the way in which the *News of the World* had allegedly obtained information in the period 2002 to 2006, not only by hacking the phones of celebrities, but by paying police officers and hacking the phones of members of the public – including Milly Dowler and her family,⁷⁸ and relatives of the 7/7 bombing victims.⁷⁹ At Prime Minister's Questions on 6 July the Leader of the Opposition asked if the Government would not refer the BSkyB bid to the Competition Commission; in response David Cameron argued that the way in which the bid had been assessed was entirely proper, while the issue of the paper's phone hacking was a separate matter:

On the issue of BSkyB, what we have done is follow, absolutely to the letter, the correct legal processes. That is what the Government have to do. My right hon. Friend the Secretary of State for Culture, Olympics, Media and Sport has a quasi-judicial role and he has to follow that. I note that the leader of the Labour party said yesterday that the issue of competition and plurality is "a separate issue" from the very important issue we are discussing today. What I would say is that these processes must be followed properly, including by Ofcom, and it is Ofcom that has the duty to make a recommendation about a "fit and proper person". Those are the right processes; this Government will behave in a proper way.⁸⁰

The same day Austin Mitchell MP put down an EDM calling on the Government "to stop" the takeover,⁸¹ and many Members argued that the Government delay or pause the bid assessment in an emergency debate that afternoon on the paper's phone hacking.⁸² The next day, Thursday, the Prime Minister announced that there would be public inquiries into the police's investigation into the newspaper, and into wider issues relating to the media, while Rupert Murdoch announced the immediate closure of the *News of the World*. The paper published its last issue on Sunday July 10th and this was followed by NewsCorp formally withdrawing its undertakings in lieu on Monday July 11. This in turn led to the Secretary of State's announcement to the House a little while later that same day that he had decided to refer the bid to the Competition Commission.⁸³

⁷⁷ HC Deb 30 June 2011 c1108, c1107, c1108

⁷⁸ "Missing Milly Dowler's voicemail was hacked by News of the World", *Guardian*, 4 July 2011

⁷⁹ "Royal British Legion suspends NoW ties over 'hacking'", [BBC news](#), 6 July 2011

⁸⁰ HC Deb 6 July 2010 c1503

⁸¹ EDM 2040 of 2010-12, 6 July 2011

⁸² "MPs urge halt to Murdoch BSkyB move", *Financial Times*, 7 July 2011

⁸³ Prior to this the Secretary of State confirmed he had written to Ofcom and the OFT for their views on the impact of the scandal on the assessment of the bid; the letters were [published on the DCMS' site](#).

In his statement to the House the Secretary of State gave details of the two public inquiries to be launched:

The first will be a full, judge-led, public inquiry into the original police investigation. Witnesses will be questioned under oath and no stone will be left unturned. As the Prime Minister announced on Friday, that inquiry will need to answer the following questions. Why did the first police investigation fail? What exactly was going on at the News of the World, and what was going on at other newspapers? The bulk of the work of this inquiry can happen only after the police investigation has finished, but we will start what we can now.

The second will be a separate inquiry to look at the culture, practices and ethics of the British press. In particular, it will look at how our newspapers are regulated and make recommendations for the future. That inquiry should start as soon as possible, ideally this summer. As the Prime Minister said, a free press is an essential component of our democracy and our way of life, but press freedom does not mean that the press should be above the law and in announcing this inquiry the Prime Minister has invited views on the way the press should be regulated in the future.

He went on to give his reasons for referring the bid:

I know that colleagues on both sides of the House and the public at home feel very concerned at the prospect of the organisation that allegedly allowed these terrible things to happen being allowed to take control of what would become Britain's biggest media company.

I understand that in the last few minutes News Corporation has withdrawn its undertakings in lieu. On 25 January, I said I was minded to refer News Corporation's proposed merger with BSkyB to the Competition Commission in the absence of any specific undertakings in lieu. As a result of News Corporation's announcement this afternoon, I am now going to refer this to the Competition Commission with immediate effect and will be writing to it this afternoon ... Today's announcement will be an outcome that I am sure the whole House will welcome. It will mean that the Competition Commission will be able to give further full and exhaustive consideration of the merger, taking into account all relevant recent developments.⁸⁴

In response to the statement the then Leader of the Opposition, Ed Miliband, raised several questions about these inquiries, but on the specific issue of the BSkyB bid asked the Minister to "now assure us that on the basis of his new position, no decision will be made on the BSkyB bid until the criminal investigation into phone hacking is complete?"⁸⁵ Jo Swinson MP also raised this issue, and in answer to the Member, Mr Hunt said the following:

I have to inform my hon. Friend that I am not legally allowed to put a pause in the process until any criminal proceedings have come to a conclusion. However, I will take as much time as I need. I am very well aware of public concern on this issue. The Competition Commission will report in six months' time, and there will then be a subsequent period of intensive discussions. During that period I am very hopeful that we will properly resolve

⁸⁴ HC Deb 11 July 2011 cc 39-40. see also, DCMS press notice, [News Corp – BSkyB merger to be referred to Competition Commission](#), 11 July 2011

⁸⁵ HC Deb 11 July 2011 c41

the "fit and proper person" issue, because I am aware of how important it is to Members of all parties.⁸⁶

On 13 July the Prime Minister gave details of the two-part public inquiry to be held: first, into the 'culture, practices and ethics of the press', and, second, in the light of the ongoing criminal proceedings, into the extent of unlawful or improper conduct at the *News of the World* and other newspapers, and the original police investigation into these matters.⁸⁷ In addition the House debated and resolved a motion, moved by the Leader of the Opposition, Ed Miliband, that in the public interest NewsCorp should withdraw their bid.⁸⁸

The debate was pre-empted by the company's announcement that it had, in fact, withdrawn its bid, subject to resubmitting it at a later stage. The company's deputy chairman, Chase Carey, stated that, "we believed that the proposed acquisition of BSkyB by News Corporation would benefit both companies but it has become clear that it is too difficult to progress in this climate."⁸⁹ Speaking during the Commons debate some hours later, the then Leader of the House, Sir George Young, made the following comments:

It was simply unrealistic to expect the public and politicians to separate all this from News Corporation's proposed takeover of BSkyB. That is why both the Prime Minister and the Deputy Prime Minister were right when they said earlier this week that News Corporation should withdraw its bid. Any hon. Member who was running the company right now, with all its problems, difficulties and the mess it is in would want to get their house in order first, before thinking about the next corporate move. That is why it was entirely right for News Corporation to withdraw its bid today. The whole House will welcome that decision.⁹⁰

Legally News Corp could have made another bid in 6 months time – the minimum time period for resubmitting a bid set by the Takeover Panel for mergers and takeovers in the UK. However, the *Financial Times* reported that "people close to the company doubted the political climate would cool so quickly."⁹¹ In an editorial the paper suggested that dropping the bid was "the only sensible [option] open to Mr Murdoch", but went on to make the case for a wider review of the way the media is regulated in this country:

This newspaper welcomes the bid's abandonment on broader public interest grounds. We have long argued that a News Corp takeover of Sky raises troubling questions about UK media plurality. It would give News Corp, which already owns 37 per cent of newspaper circulation, around 35 per cent of the television market (including the public sector BBC). Such an extension of cross-media ownership would change the landscape permanently.

⁸⁶ HC Deb 11 July 2011 c50

⁸⁷ HC Deb 13 July 2011 cc311-2. See also, 10 Downing Street press notice, [Phone hacking inquiry - draft terms of reference](#), 13 July 2011.

⁸⁸ HC Deb 13 July 2011 cc390-423

⁸⁹ News Corporation press release, *News Corporation Withdraws Proposed Offer for British Sky Broadcasting Group PLC*, 13 July 2011

⁹⁰ HC Deb 13 July 2011 c395

⁹¹ "NewsCorp scraps bid for BSkyB", *Financial Times*, 14 July 2010; see also, "Will Murdoch reach for BSkyB again? Don't bet on it", [Guardian](#), 13 July 2010

Moreover, the regulatory framework itself is deficient. The UK's laws on media ownership are not fit for purpose. Although they prohibit newspaper groups from owning the country's main commercial broadcaster, ITV, no such injunctions apply to Sky or Channel 5, even though BSkyB's revenue is three times that of ITV's and growing much faster. The rules regarding media plurality are unclear. Mr Murdoch's withdrawal may not be the end of the story. News Corp could be forced by the media regulator, Ofcom, to reduce its stake if the hacking allegations against it are proven. But if not, News Corp may renew its overtures. This is why the government must seize the opportunity created by its withdrawal to reform media ownership rules.⁹²

On 20 July the Prime Minister made a statement to the House, giving a further update on the public inquiry to be led by Lord Justice Leveson, and the other issues arising from the phone hacking investigation, as well as answering questions on the BSkyB bid.⁹³ In a debate on public confidence in the media and police which followed Mr Cameron's statement, the Prime Minister discussed a number of possible changes to competition law and media mergers which might be made in light of Lord Justice Leveson's findings:

[A further] challenge is how we address the vexed issue of media power. We need competition policy to be properly enforced. We need a sensible look at the relevance of plurality and cross-media ownership. Above all, we need to ensure that no one voice—not News Corporation, not the BBC—becomes too powerful ...

Let me make three suggestions on media plurality and power. One: it is right that there are good and proper legal processes for considering media mergers, but we should ask whether politicians should be abstracted from them altogether. Two: it is right that there is a plurality test, but we should ask whether that test should be ongoing, rather than just considered at the time of takeover. Three: plurality is difficult to measure, especially in the modern internet age, but we should not rule out the idea of limits, and it is right that the inquiry should look at this issue.

At this point in the debate Mr Cameron was asked by Andrew Tyrie MP if he agreed that "that we need to think carefully before tearing up the main provisions of the Enterprise Act 2002, which keeps Ministers out of decisions on takeovers and mergers?" The Prime Minister replied:

I certainly agree with that. Indeed, I think that there might be a case, when it comes to media mergers, for trying further to remove politicians. In regard to all the issues that have been raised so many times today, that might be one way of putting all this beyond reproach.⁹⁴

Contributions to the debate tended to focus on other issues, though in his speech the then Chair of the Culture, Media & Sport Committee, John Whittingdale, raised concerns about the Prime Minister's suggestion for removing Ministers from the decision-making process on media mergers:

I urge a slight note of caution on my right hon. Friend the Prime Minister when he says that he is contemplating whether

⁹² "Editorial : Murdoch bows to parliament's will", *Financial Times*, 14 July 2011

⁹³ HC Deb 20 July 2011 cc918-921

⁹⁴ HC Deb 20 July 2011 cc967-8

politicians should be entirely removed from the process of assessing whether newspaper, press or media acquisitions or mergers should take place. There is a public interest test, and it is elected and accountable politicians who, ultimately, should determine the public interest. If politicians are entirely removed from the process, you have people who are unelected and unaccountable, and I am not sure that that is wholly desirable. However, I am sure that that is something that the review will wish to examine in due course.⁹⁵

Concerns about the public interest test were also raised in the Lords when the Prime Minister's statement was repeated. Speaking for the Government Lord Strathclyde acknowledged that the Government would be considering how the *Enterprise Act* might be reformed:

[Under section 58 of the Act] there are currently three specified areas in which they can use their discretion: national security, the media-including plurality, broadcasting standards, the accurate presentation of news in newspapers-and the stability of the UK financial system. That there might be a gap within these public interest tests has recently been thrown up. We might also want a review when these are triggered. We slightly feel that we should await the outcome of part one of the Leveson inquiry. However, I can confirm that any changes can be made through secondary legislation and ... that the Government would be very happy to work between the parties to see which is the best way forward.⁹⁶

5.3 Ofcom and the public interest test

It may be helpful to say a little about the separate statutory test that the communications regulator Ofcom is required to apply to any holder of a broadcasting licence.

Part I of the *Broadcasting Act 1990* deals with independent television services including the licensing of service providers; section 3(3) of the Act, as amended, states:

(3) Ofcom

(a) shall not grant a licence to any person unless they are satisfied that he is a fit and proper person to hold it; and

(b) shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence;

The *Broadcasting Act 1996* is concerned with digital television broadcasting and deals with licensing. Section 3 of the 1996 Act uses exactly the same wording in respect of the 'fit and proper person requirement'. For the purposes of both Acts, the word 'person' is taken to mean not just individuals but a body of persons corporate or unincorporated.⁹⁷

The *Communications Act 2003* sets out the powers and duties of Ofcom.⁹⁸ Ofcom is responsible for the licensing of television licensable

⁹⁵ HC Deb 20 July 2011 c982

⁹⁶ HL Deb 20 July 2011 c1404

⁹⁷ A point confirmed by the Secretary of State in relation to BSkyB's licence, in DCMS questions in February 2012 ([HC Deb 9 February 2012 c466](#)).

⁹⁸ The *Broadcasting Act 1990* set up the Independent television Commission (ITC) on 1 January 1991. The ITC was replaced on 29 December 2003 by Ofcom

content services and requires licence-holders to be ‘fit and proper persons’. In performing this function section 3(1) of the Act imposes a general duty on Ofcom to “further the interests of citizens in relation to communications matters”, and “to further the interests of consumers in relevant markets, where appropriate by promoting competition.” It is worth underlining that these provisions mean that Ofcom has a continuous duty to ensure that any holder of a broadcasting licence is “fit and proper”, and may launch an investigation into this question at any time of its choosing.⁹⁹

At the time of the phone hacking controversy, on 8 July 2011, just following the announcement that the *News of the World* would be closed down, the chief executive of Ofcom, Ed Richards, wrote an open letter to John Whittingdale, chairman of the DCMS committee and made the following comments about the ‘fit and proper’ test:

Ofcom has a duty under the Broadcasting Acts to continue on an ongoing basis to be satisfied that any person (which will include controlling directors and shareholders) holding a broadcasting licence remains fit and proper to hold those licences. In considering whether any licensee remains a “fit and proper person” to hold broadcasting licences Ofcom will consider any relevant conduct of those who manage and control such a licence.

It is not for Ofcom to investigate matters which properly lie in the hands of other authorities, such as the police and the criminal or civil courts, and clearly we cannot and should not act whilst allegations are unsubstantiated. It would be unfortunate if action by Ofcom at this moment in time prejudiced any ongoing processes by the proper authorities or failed to take into account relevant information that was subsequently disclosed which may be relevant to a thorough and proper assessment.

However, as you would expect, we are monitoring the situation closely and in particular the investigations by the relevant authorities into alleged unlawful activities in regard to any evidence or findings of any relevant conduct.

In this regard, we are writing to the relevant authorities to highlight our duties in relation to ‘Fit and Proper’ and indicating that we would like to be kept abreast of the timescales of their investigations and of any further information which may assist us in the discharge of our own duties.¹⁰⁰

In his statement to the House on 11 July on his decision to refer the BSkyB bid, Mr Hunt underlined the fact that Ofcom “is at liberty to investigate the “fit and proper” issue in the Broadcasting Act 1990 at any time.” The Secretary of State went on to add that as part of the Commission’s inquiry, Ofcom would “have to investigate that issue to see whether it is relevant to the potential acceptance of any undertakings subsequent to a Competition Commission inquiry. Those issues will therefore be looked at thoroughly and carefully.”¹⁰¹

⁹⁹ For more details see, Ofcom, [Frequently asked Questions: ‘Fit and Proper’ in relation to broadcast licensees](#), May 2012

¹⁰⁰ [Letter from Ed Richards, chief executive of Ofcom, to John Whittingdale MP, 8 July 2011](#)

¹⁰¹ HC Deb 11 July 2011 c48

In an opinion piece in the *Guardian* prior to NewsCorp's decision to withdraw their bid, Eleanor Steyn, media lawyer with London solicitors Michael Simkins LLP, suggested that Ofcom would actually find it quite difficult to use this test to revoke BSkyB's broadcasting licence:

It seems to me that there are two problems with Ofcom taking action against BSkyB using this rule. Firstly, the provision has been used more in relation to what appears onscreen and in relation to breaches of other licence conditions.

Secondly, the licence holder is BSkyB, not News International. Basic principles of corporate liability mean that it is difficult to pin what is done by executives of a company on the company itself, let alone pinning it on another group company. You would need to look at, among other things, the extent of crossover in terms of board membership between BSkyB and News International.

The majority of Ofcom's previous licence revocations have been in relation to what one might call "babe channels". It doesn't revoke licences very often, although Ofcom did revoke the licences of Bang Media Ltd and Bang Channels Ltd last year. However, that was a pretty extreme case in which the licence-holders had not paid a £150,000 fine which Ofcom had imposed and there were 48 separate breaches of Ofcom's Broadcasting Code by Bang over a 19-month period. Even after Bang's services were removed from the Sky EPG and from broadcast on the Freeview platform, Bang continued to broadcast material in breach of a direction from Ofcom that it should cease broadcasting immediately, and even told viewers how to circumvent the restrictions by reconfiguring their set top boxes.

What is on the screen, together with compliance with other licence conditions, has been Ofcom's main concern to date. To my knowledge, the "fit and proper" provision has never yet been interpreted on the basis of whether or not someone in charge of a company which owns a broadcaster has or may have committed a criminal offence ...

In my view, if Ofcom did try and revoke licences for the Sky channels then BSkyB would have relatively strong grounds for challenging it. It's difficult to impute the behaviour of a small number of individuals to a whole company, and, to repeat, there are two separate companies here. The licences are not held by News International but BSkyB.¹⁰²

On the withdrawal of BSkyB's bid, and the resignation the next day of Rebecca Brookes (News International's chief executive) and Les Hinton (CEO of Dow Jones & Company) from the company, attention shifted from the attempt by NewsCorp to takeover BSkyB to the related issues of phone-hacking, the actions of the Metropolitan Police, and the appointment of Andy Coulson, one-time editor of the *News of the World*, as David Cameron's director of communications.

Some mention was made of the 'fit and proper test' by Members during the debate on public confidence in the media and police on 20 July. Simon Hughes MP argued that "the existing legislation needs to be improved because the way in which a fit and proper person test—either corporate or individual—is formed is not clear, so it is difficult to apply":

¹⁰² ["Can Ofcom revoke BSkyB's licence under the 'fit and proper' requirement?"](#), *Guardian*, 6 July 2011

My hon. Friend [Duncan Hames MP] asks me whether the test is assiduously applied over the period for which a licence is held. In theory it is, because Ofcom will say that it does that, but it is not obvious that there is a process of regular review. In addition, things can change, such as if people commit criminal offences, so we need a more transparent process.¹⁰³

Don Foster MP also suggested that the fit and proper persons test should be reconsidered: “if we have real concerns about corporate governance, we should be able to test whether a corporation—an owning organisation—is fit and proper to own, for example, BSkyB or parts of it. I think that we should consider whether News Corporation is fit and proper to own not only more shares in BSkyB, but its existing 39% of shares.”¹⁰⁴ Winding up the debate for the Opposition the shadow Culture Secretary Ivan Lewis supported Mr Foster’s argument: “As the right hon. Member for Bath (Mr Foster) said, public interest must include not simply plurality but also market power. In future, the application of a fit and proper person test should be as much about corporate governance as about criminal conduct.”¹⁰⁵ The Secretary of State, Jeremy Hunt, also touched on this issue, responding to the points raised by Mr Hughes:

Among a number of important points, my right hon. Friend the Member for Bermondsey and Old Southwark talked about the “fit and proper person” test. I can confirm that Ofcom applies that test continuously and assiduously. It ruled on a company called Bang Media in November 2010. But I accept that one of the lessons of what has happened in recent weeks is the need for more transparency about how the test is applied, so that the public can have confidence in how it operates.¹⁰⁶

Over the next few months there was much less debate over this issue, and in September 2012 Ofcom published its decision, in which it found that the company, now renamed Sky, did, indeed meet the fit and proper test.¹⁰⁷

¹⁰³ HC Deb 20 July 2011 c993

¹⁰⁴ HC Deb 20 July 2011 c1010

¹⁰⁵ HC Deb 20 July 2011 c1042

¹⁰⁶ HC Deb 20 July 2011 c1046

¹⁰⁷ Ofcom press notice, [Ofcom decision on fit and proper assessment of Sky](#), 20 September 2012. See also, [“Sky is a fit and proper broadcaster, rules Ofcom”](#), *Guardian*, 20 September 2012.

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