

OFFICE OF FAIR TRADING

A report to the Secretary of State for Culture, Olympics, Media and Sport in response to the European intervention notice issued on 4 November 2010 in relation to the anticipated acquisition by News Corporation of British Sky Broadcasting Group plc

A report pursuant to Article 4(2)-(5) of the Enterprise Act 2002 (Protection of legitimate interests) Order 2003

30 December 2010

BACKGROUND AND ADVICE

1. This report is made following the European intervention notice (the Notice) given to the Office of Fair Trading (OFT) by the Secretary of State on 4 November 2010 pursuant to section 67(2) of the Enterprise Act 2002 (the Act).¹ This report has been prepared pursuant to Article 4 (2)-(5) of the Enterprise Act 2002 (Protection of legitimate interests) Order 2003² (the Order).
2. The Notice required the OFT to investigate and report to the Secretary of State in accordance with Article 4 of the Order within the period ending on 31 December 2010. Article 4 of the Order requires the OFT to provide advice to the Secretary of State on the considerations relevant to the making of a reference under section 33 of the Act which are also relevant to the Secretary of State's decision as to whether to make a reference under Article 5 of the Order. Specifically, the OFT is required to provide a decision as to whether it believes that it is, or may be, the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation as defined in section 68 of the Act.
3. The Notice also required the Office of Communications (Ofcom) to investigate and report in accordance with Article 4A of the Order, within the same period on the sufficiency of plurality of persons with control of media enterprises.
4. This report sets out the reasons why the OFT believes that the Secretary of State has jurisdiction and is able to exercise the power to make a reference to the Competition Commission (the CC) under Article 5(3) of the Order to address any media plurality concerns arising from the merger provided that the Secretary of State believes that the conditions set out in Article 5(3) of the Order are satisfied.

THE PARTIES

5. **News Corporation (News Corp)** is a global media company active in: (1) filmed entertainment; (2) television; (3) cable network programming; (4) direct broadcast satellite television; (5) integrated marketing services; (6) newspapers and information services; (7) book publishing; and (8) other activities such as digital media

¹ Although the Notice was originally given on behalf of the Secretary of State for Business, Innovation and Skills, following the transfer of all responsibility for competition issues relating to media, broadcasting, digital and telecoms sectors to the Secretary of State for Culture, Olympics, Media and Sport on 21 December 2010, this report is submitted to him.

² S.I. 2003/1592.

properties and outdoor display advertising. In the UK, it owns several daily and weekly newspapers (those are The Sun, The News of the World and The Times) and 39.14 per cent of British Sky Broadcasting Group plc (BSkyB).

6. The target is **BSkyB**. The acquisition will be effected through an offer to acquire the entire issued and to be issued share capital of BSkyB not already owned by News Corp. BSkyB's activities in the UK include: (1) the creation and retail and wholesale distribution of 'linear' TV channels; (2) the retail distribution of BSkyB's and third parties' 'audiovisual' content; (3) the provision of retail telephony and broadband services; (4) the provision of conditional access, access control and electronic program guide services to broadcasters and interactive service providers; (5) the sale of advertising and sponsorship on BSkyB and third parties' channels and websites; (6) interactive services on BSkyB's platform; and (7) the provision of fixed-odds betting services.

THE TRANSACTION

7. News Corp intends to acquire BSkyB through an offer for the entire issued and to be issued share capital of BSkyB not already owned by News Corp.

JURISDICTION

Introduction

8. This transaction falls for consideration under the EC Merger Regulation.³ As a result, the European Commission has sole jurisdiction to investigate the competition aspects of this transaction.⁴ However, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation and compatible with the general principles and other provisions of Community law.⁵ The second paragraph of Article 21(4) Merger Regulation states that plurality of the media shall be regarded as a legitimate interest.
9. Under section 58 of the Act, 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 is specified as a public interest consideration. The Secretary of State is therefore entitled to intervene in relation to a European relevant merger situation where he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.
10. Under section 68 of the Act, a European relevant merger situation means a relevant merger situation: (a) which will be created if arrangements which are in progress or in contemplation are carried into effect; (b) by virtue of which a concentration with a Community dimension (within the meaning of the Merger Regulation), or a part of such a concentration, will arise; and (c) in relation to which a reference was prevented from being made under section 33 (whether or not there would otherwise have been a duty to make such a reference) by virtue of Community law or anything done under or in accordance with it.
11. The OFT sets out below why it believes that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation.

³ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the Merger Regulation).

⁴ Article 21(3) Merger Regulation.

⁵ Article 21(4) Merger Regulation.

The transaction would create a relevant merger situation under the Act

12. A merger must meet all three of the following criteria to constitute a relevant merger situation for the purposes of the Act.⁶

- two or more enterprises must cease to be distinct, or there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct; and
- either the value of UK turnover of the enterprise which is being acquired exceeds £70 million or the enterprises which cease to be distinct supply or acquire goods or services of any description and after the merger together supply or acquire at least 25 per cent of all those particular goods or services supplied in the UK or in a substantial part of it; and
- either the merger must not yet have taken place; or (subject to certain exceptions) the merger must have taken place not more than four months before the reference is made.

13. Taking each of these criterion in turn.

Enterprises ceasing to be distinct

14. Based on the information submitted by News Corp, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation. These arrangements are the steps News Corp is taking to acquire BSKyB and which, if successful, will bring two or more enterprises (being each of News Corp and BSKyB) under common control.

15. At present, News Corp already owns 39.14 per cent of BSKyB and may therefore already exercise some degree of control⁷ over BSKyB for the purposes of the Act. However, section 26(4) of the Act provides that a person or group of persons may be treated as bringing an enterprise under his or their control if being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate.

⁶ See *Merger Assessment Guidelines* (OFT1254), paragraph 3.1.3.

⁷ That is, the ability to control or materially to influence the policy of BSKyB, but without having a controlling interest in BSKyB. See paragraph 3.2.5 of the *Merger Assessment Guidelines* (OFT1254).

16. The transaction would result in News Corp acquiring a controlling interest in BSkyB.⁸ Regardless of whether News Corp was able previously to control or materially to influence the policy of BSkyB, section 26(4) means that the transaction would result in a change in the level of control so as to enable BSkyB to be treated as being brought under News Corp's control for the purposes of the Act.

Turnover threshold

17. The turnover test under the Act is met because the UK turnover of BSkyB is greater than £70 million.

Four-month time limit

18. The third criterion is, at present, met because News Corp has not completed the acquisition of the remaining shares of BSkyB. However, following the approval of the proposed acquisition by the European Commission (see paragraph 20 below), News Corp is permitted to acquire a controlling interest in BSkyB. As such, if at any stage, News Corp were to acquire shares in BSkyB above 50 per cent of its issued share capital, then the power to make a reference under the Act would last for four months from the date of such an acquisition.
19. As a result of the above, arrangements are in progress or in contemplation which if carried into effect would result in the creation of a relevant merger situation.

Transaction with Community dimension

20. The European Commission concluded on 21 December 2010 that the transaction constitutes a concentration with Community dimension, but that it would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.⁹
21. As a result of this transaction, arrangements are in progress by virtue of which a concentration with a Community dimension (within the meaning of the Merger Regulation) will arise.
22. In relation to those arrangements, a reference would be prevented from being made since the European Commission has asserted its

⁸ A 'controlling interest' generally means a shareholding of more than 50 per cent of the voting rights in a company. See paragraph 3.2.14 of the *Merger Assessment Guidelines* (OFT1254).

⁹ Case No. COMP/M.5932. Decision not yet published. See IP/10/1767.

exclusive jurisdiction based on Article 21(3) of the Merger Regulation.¹⁰

Conclusion on jurisdiction

23. As a result of the reasons above, the OFT believes that there are arrangements in progress or in contemplation which, if carried into effect, will create a European relevant merger situation within the meaning of section 68(2) of the Act.

SUMMARY OF THIRD PARTY REPRESENTATIONS

24. Under Article 4 of the Order, the OFT's report may contain a summary of any representations about the case which have been received by the OFT and which relate to media plurality and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under Article 5. The OFT may also include advice and recommendations which relate to media plurality and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under Article 5.
25. Following receipt of the Notice, the OFT has consulted and invited comments on jurisdictional matters only, since the Secretary of State has requested Ofcom to report on the issues relating to media plurality.¹¹ In response to the OFT's consultation, two third parties made representations.
26. These representations were not directly relevant for this report since they addressed competition issues. These representations were provided to the European Commission for consideration in its assessment.¹²
27. No representations were received that the Secretary of State does not have jurisdiction to intervene in this case.

CONCLUSION

28. The OFT advises the Secretary of State that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation for the purposes of section 68(2) of the Act. Therefore, the OFT believes

¹⁰ As stated above. See paragraph 20 above.

¹¹ See further section 44A of the Act and 4A of the Order.

¹² The representations received also urged the OFT to request that the European Commission refer the case to the UK for a competition assessment pursuant to Article 9 Merger Regulation. In the context of these submissions, representations on why this transaction gives rise to a relevant merger situation were made. These are substantially aligned with the OFT's views as stated above (see paragraphs 12-19).

that the Secretary of State has jurisdiction to make a reference to the CC under Article 5(3) of the Order to address any media plurality concerns if the Secretary of State believes that the conditions set out in Article 5(3) of the Order are satisfied.

**Sheldon Mills
Director, Mergers
Office of Fair Trading
30 December 2010**