

## RE: PROPOSED ACQUISITION OF BSKYB BY NEWS CORPORATION

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### NOTE

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1. I have been asked by Avaaz to comment, in the present circumstances surrounding the proposed acquisition by News Corporation of the 61% of shares in BSKYB that it does not already own ("the merger situation"), on the advice apparently received by the Secretary of State that he has no power, in his consideration of the merger situation, to make a reference to the Competition Commission ("the CC") on the basis that there is an issue as to News Corporation's fitness to acquire complete control of BSKYB.
2. The basis on which the Secretary of State has acted in this matter to date has been a Notice<sup>1</sup> ("the original Notice") under section 67(2) and (3) of the Enterprise Act 2002 ("the EA02") issued by Dr Cable (the Secretary of State then dealing with the matter) in late 2010. The original Notice specified the public interest consideration which Dr Cable considered was or might be relevant to the merger situation (see section 67(3)(b) of the EA02). That specified consideration was media plurality (i.e. the matters set out in section 58(2C)(b) of the EA02, that is to say, in very

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<sup>1</sup> The term used in the EA02 is a "European Intervention Notice". That term is slightly misleading if it is taken to suggest that the notice involves some form of direct intervention by the EU institutions: in fact, the formulation of the Notice is a matter for the Secretary of State. The reason for the use of the term is simply that, in a merger such as this that is subject to the EU Merger Regulation (Council Regulation 139/2004), the specified interests must be "legitimate interests", other than effects on competition, set out in or approved under Art.21 of that Regulation. For reasons I discuss below, I do not consider that Art.21 would in fact restrict the Secretary of State's ability to specify fitness as a s.67(2) consideration.

broad brush terms, whether the merger would mean that there was no longer sufficient media diversity).

3. The effect of the form of Notice issued by Dr Cable is that the Secretary of State's consideration of the merger situation has been limited to consideration of its potential effect on media plurality, and, as matters stand, any possible reference to the Competition Commission ("CC") would likewise be limited to that issue.
4. According to press reports, the Secretary of State has been advised that he cannot now alter the original Notice, or issue a fresh Notice, under section 67(2) and (3) so as to permit himself, and on a reference the CC, to consider the question of News Corporation's fitness to have complete control of a very important commercial broadcaster such as BSkyB.
5. I see from a letter to OFCOM published on the DCMS website earlier today that the Secretary of State has asked OFCOM whether concerns as to News Corporation's fitness may affect the analysis of media plurality<sup>2</sup> or affect the credibility, sustainability or practicalities of undertakings offered by News Corporation in lieu of a reference to the CC. Those appear to be sensible questions to ask. But whatever OFCOM advise, at the end of the day, as matters stand under the original Notice, the Secretary of State (and the CC on a reference) would not be able to consider fitness except to the extent that it had a possible impact on media plurality or the credibility of undertakings offered, and cannot take decisions based directly on fitness concerns.

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<sup>2</sup> Although the chain of reasoning is not spelt out, it is likely to be somewhat convoluted: for example, it may be said that if News Corporation/BSkyB post-merger is found to be unfit that OFCOM could then use their powers to revoke BSkyB's broadcasting licences and that that would then affect media plurality.

6. The bottom line, as I understand it, is that the Secretary of State's advice is still that he is confined to the terms of the original Notice and cannot amend or replace that Notice.
7. In my view, that advice is far too cautious. I consider that, in fact, there are good grounds for saying that the Secretary of State would in the present circumstances have power to issue a replacement section 67(2) Notice containing the fitness question and therefore enabling both him (and on a reference the CC) to consider fitness directly in deciding whether to clear the proposed merger.
8. The factual basis on which I proceed is that:-
  - a. since the original Notice substantial and credible new information has come to light casting significant doubt on the fitness of News Corporation and/or individuals holding senior positions in News Corporation to have complete control of BSkyB;
  - b. the information in question was known to, or available to, News International at the time of the original Notice but not disclosed to Dr Cable or any other regulatory body; and
  - c. in consequence, that information was not, and could not reasonably have been, known to Dr Cable at the time of the original Notice.
9. I do not need to comment on the accuracy of any of the numerous serious allegations that have been made in the past week or so about the conduct of News International, a subsidiary of News Corporation, in relation to the *News of the World*: all I need say is that it appears that the factual basis I have assumed appears likely to be correct.

10. The basis of the Secretary of State's view that he cannot respond to these developments by issuing a replacement European Intervention Notice is, I would have thought<sup>3</sup>, section 67(5) of the EA02. That subsection provides that: "*No more than one ... notice shall be given under [section 67(2)] in relation to the same relevant merger situation.*"
11. One can readily see that if, having set up an investigation into a certain public interest issue or set of issues, a Secretary of State could later decide to add further public interest issues and require those to be investigated, then there would be a serious risk of the merger control process being used oppressively. Section 67(5) is in my view designed to remove that risk, i.e. to prevent the Secretary of State from "moving the goalposts" during an investigation of a merger.
12. However, it is difficult to believe that Parliament could have intended a situation to arise in which: -
  - a. a party to a merger situation could first fail to disclose information suggesting serious wrongdoing and plainly relevant to a possible public interest consideration (fitness), so that a European Intervention Notice is issued without reference to that public interest consideration, and
  - b. that same party could then rely on section 67(5) to stop the Secretary of State issuing a further European Intervention Notice allowing that public interest consideration to be considered.

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<sup>3</sup> I can see no reason under Art.21 of the EU Merger Regulation (which I discuss further below) that would prevent him from acting now and note that (unlike Art.9 of that Regulation) Art.21 contains no provision requiring the Member State to act within a particular time period.

13. In such a situation, far from being able to complain about "moving the goalposts" if additional considerations were added, it does not seem to me that the party concerned would be able to claim that it had suffered any unfairness.
14. It therefore seems to me that any Court is likely to be ready to adopt an approach to the construction of section 67(5) that avoids that section being used to achieve a situation that Parliament could not have intended.
15. In my view, there are at least two approaches by which that could be achieved.
16. The first is say that in circumstances such as the present, the substantial and significant new information now available to the Secretary of State means that the merger situation is not, now, the "*same merger situation*" for the purposes of section 67(5) as the merger situation considered at the time of the original Notice.
17. The second is to say that, in the circumstances, it is now clear that the original Notice is so fundamentally flawed as a result of News Corporation's failure to disclose relevant facts and Dr Cable's consequent (and understandable) failure to realise that there was a serious potential fitness issue that the original Notice is void or ineffective and does not count, for the purposes of section 67(5), as a valid Notice under section 67(2).
18. Although I cannot claim that the position is certain, I can say that in my view, given the factual context set out above, any attempt by News Corporation to challenge a decision by the Secretary of State to issue a further Notice allowing him and the CC to consider fitness would be more likely than not to fail, notwithstanding section 67(5) of the EA02.

19. Finally, I should note that any decision to specify fitness as a relevant consideration would need to overcome two further hurdles.

- a. The first hurdle is that a decision to issue such a notice would require an order under section 58(3) of the EA02<sup>4</sup> and could be defeated by a vote by either House of Parliament under the negative resolution procedure. Although that is a political not a legal question, the tenor of press comment is that that hurdle would not be difficult to overcome.
- b. The second is that he would need to obtain the European Commission's approval under Article 21 of the EU Merger Regulation. The European Commission would need to be satisfied that a "fitness" test is a "legitimate interest" of the United Kingdom and is compatible with EU law. I do not however see any reason why a suitably drawn "fitness" test, which could be confined to control of large broadcasters, would be incompatible with EU law, and note that since fitness is a requirement of holders of broadcasting licences under the Broadcasting Act 1990 (a requirement which I assume the European Commission regards as consistent with EU law) it is hard to see why there should be any further difficulty in imposing a fitness test in relation to mergers that involve taking control of the holder of such a licence. Further, fitness of controllers of large commercial broadcasters seems to me to be a "legitimate interest" falling under Article 21: indeed, one would have thought it must be better to consider fitness in advance rather than to wait until control has been acquired and then go through a process of licence revocation.

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<sup>4</sup> Adding fitness to the list of possible public interest considerations in section 58 of the EA02

20. I should make it clear that I am not saying that the Secretary of State is *bound* now to issue a replacement Notice allowing fitness to be examined as a public interest consideration. His discretion is a wide one. However, in the present circumstances, the view that he definitely *cannot* lawfully do so seems to me to be far too cautious.
  
21. I am happy for this Note to be circulated as Avaaz sees fit. Given that possibility, I should make it clear for the record that the view set out above is mine alone and should not to be attributed to my Chambers or any other member of my Chambers.

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BSKYB BY NEWS CORPORATION**

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**NOTE**

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