

[With excisions for confidentiality reasons as marked]

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**Advice by Ofcom to the Secretary of State pursuant to  
Section 106B of the Enterprise Act 2002**

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**Question 1**

*Does the application of section 58A(4) EA 2002 remove the need for there to be an assessment at this stage of the regulatory process of the level and degree of control that BSkyB may exercise over ITV? If so, on what basis? If not, what is the relevance of the level or degree of control and what conclusions has Ofcom drawn or does Ofcom draw in this case? (see paras 3.18- 3.26 of BSkyB's submissions of 2.5.07 to the Secretary of State)*

1. In considering the effect of Sky's acquisition of shares in ITV in relation to plurality issues in its report, Ofcom covered both the application of section 58A(4) and the level of Sky's acquisition of shares in ITV.
2. Ofcom's view, taking into account the level of Sky's shareholding was that, at this first stage the issue of whether Sky has the ability to influence ITV's editorial policy warranted a further second stage investigation. In reaching this view, Ofcom took account of the purpose behind the public interest consideration which is to avoid any one person controlling too much of the media through an ability to influence opinions and control the agenda. It also took account of the fact that there were very differing representations made on Sky's ability to influence ITV's editorial policy, as between Sky and all other third parties. Ofcom was also aware of the fact that the OFT had made a provisional finding that Sky may have material influence over ITV and was reporting its decision on the level of Sky's influence to the Secretary of State and that such decision would involve the OFT in a full consideration of the extent of influence that Sky may have on ITV.

**Question 2**

*What is the relevance of section 58A(5) to an assessment of the relevance of the public interest issues? Your report refers to that provision in the context of identifying*

*that News International may control Sky (paras 4.4 and 4.5), but not in relation to Sky's shareholding in ITV. Why is that so?*

3. As you recognise, Ofcom has considered the application of section 58A(5) in respect of the relationship between News International and Sky (see paragraph 4.4 and 4.5 of our report). The application of section 58A(5) to the relationship between Sky and ITV would in our view not change the analysis in our report.

### **Question 3**

*What weight if any should be attached to the 20:20 rule? We can see that the rule does not preclude the application of a public interest assessment under EA 2002, but is there any merit in the points advanced by Sky in paras 3.5-3.8 of its submission of 2.5.07?*

4. Ofcom's view on the relevance of the 20/20 rule is set out in paragraph 4.3 of its report. The 20/20 rule would prohibit the acquisition by Sky of a shareholding of 20% or more in ITV. However, as the Secretary of State recognises it does not mean that the acquisition by Sky of a shareholding of up to 20% in ITV should not be subject to the application of a public interest assessment under the EA 2002.
5. In relation to the merits of the submissions made by Sky on the application of the public interest assessment under the EA 2002 (paragraphs 3.5 to 3.8), these appear to be based on the fact that Parliament in enacting the 20/20 rule did not consider that a shareholding of 20% or less would give rise to plurality concerns. It argues that the 20/20 rule protects media plurality and allows the acquisition by Sky of a shareholding of up to 20% in ITV and this means that there is strong presumption that additional intervention by the Secretary of State would be "redundant" and "inappropriate". Sky relies on Parliamentary statements made in 1996; that is, on statements which related to the consideration of the 20/20 rule and which significantly predated the introduction of the public interest test. We do not therefore consider that they carry weight in this context. Indeed, it is clear from statements made in relation to consideration of the public interest test, including plurality, that it was intended to enable examination of any

concentration by reference to the particular facts (see for example Lord Puttnam referenced below).<sup>1</sup>

6. Our view is that Sky's submissions on the application of the plurality test assessment are misplaced. We do not agree that there is a presumption (strong or otherwise) that additional intervention by the Secretary of State would be redundant and inappropriate.
7. We have not in our advice considered the separate argument which Sky appears to be making in this context in relation to the issuance by the Secretary of State of a public interest intervention notice.

#### **Question 4**

*To what extent is there any force in BSkyB's criticisms of the procedure and analysis undertaken by Ofcom as identified in paragraphs 3.28 and 3.29 of the Sky submissions of 2.5.07?*

8. We are satisfied that our process has been conducted in a way that is appropriate and fair.
9. Nor do we accept the criticisms made by Sky in paragraphs 3.28 and 3.29.
10. Firstly, Sky states that Ofcom fails to clarify what standard of "sufficient plurality" it has applied or the statutory justification for it. We reject this contention.
11. Our approach to the assessment of the sufficiency of plurality is set out clearly in our report. As explained therein, the assessment is based on consideration of both the number of persons with control of media enterprises serving the relevant audiences, and their audience shares. This is in accordance with the requirements of the Act and the associated DTI Guidance. The statutory framework does not establish a quantitative test for use in determining whether the number of persons with control of media enterprises is sufficient. Rather, it requires Ofcom to provide advice to the Secretary of State, based on its judgment

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<sup>1</sup> Lord Puttnam said: "*What we need therefore is the ability to identify...concentrations as and when they occur, examine them in an analytical, fact-based way and ask whether they assess our definition of "unacceptable"*". 5 June 2003, column 1432

as to whether, as a result of the relevant merger situation, the level of media plurality may no longer be sufficient.

12. Secondly, Sky maintains that the Ofcom report does not identify “Transaction-specific causes of concern, whereas Ofcom was required to advise the Secretary of State on the **effects** of the Transaction on the [public interest consideration]”. We do not accept this view.
13. The findings set out in our Report are based directly on consideration of the effects of the relevant merger situation. See the answer to question 1 above. See also for example, paragraphs 4.19 and 4.20 of our report which states that the relevant merger situation “brings together the second and third largest providers of news on television”, and “establishes an ownership link between the second largest provider of TV news and News International, the largest UK supplier of national newspapers”.
14. Thirdly, Sky contends that “Ofcom’s conclusions are justified on the basis that they tally with representations received (paragraph 3.7) whilst it is incumbent on Ofcom to give reasons why such representations give rise to such concerns”. This misrepresents Ofcom’s position.
15. Ofcom’s conclusions in paragraph 3.7 were based on a number of factors, one of which was representations received from third parties. It is entirely appropriate for Ofcom to take into account third party submissions in considering the public interest issue.
16. Finally, Sky argues in paragraph 3.28(d) that it is not relevant to consider the role of Sky and ITN as providers of news production services to others, because in exercising this role they are not acting as media enterprises, which are the subject of the plurality test.
17. As is clear from the report (paragraph 4.33), Ofcom having identified plurality concerns in relation to the audiences for cross-media and national TV news, went on to consider the role of Sky and ITN as news providers and for the reasons set out in the report took the view that this factor might exacerbate the plurality concerns that it had identified.

**Question 5**

*Do you consider that the undertakings suggested by Sky would or would not address the public interest considerations raised in your report?*

18. Ofcom does not consider that the undertakings suggested by Sky would address the public interest considerations raised in our report for the reasons set out below.

19. In summary, Sky states that it is prepared to undertake:

- [redacted for confidentiality reasons]

20. [redacted for confidentiality reasons] In accordance with the OFT's guidance on accepting undertakings in lieu of a reference, we have considered whether these undertakings are sufficiently clear cut and capable of ready implementation in advising whether they would address the public interest considerations raised in our report. We note that in this regard, the OFT's guidance provides that cases in which the effectiveness or proportionality of the proposed undertakings in lieu may be questioned, it is unlikely that the clear cut criteria would be met and in these circumstances, acceptance of undertakings would not be appropriate.<sup>2</sup>

21. Our view is that the undertakings suggested by Sky are not dependable because they are neither clear cut nor capable of being readily implemented. [redacted for confidentiality reasons]

22. [redacted for confidentiality reasons]

23. We do not consider that the parameters of this suggested undertaking are clear cut. [redacted for confidentiality reasons]

24. Nor do we consider that the suggested undertaking lends itself to a proportionate and workable arrangement to monitor its performance. [redacted for confidentiality reasons]

25. In the context of the nature of the relationship between media ownership and editorial decisions and for all the reasons set out above, Ofcom's view is that the [redacted for confidentiality reasons] undertakings proposed by Sky would not

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<sup>2</sup> Paragraphs 8.3 and 8.4, of the OFT's Mergers Substantive Assessment Guidance.

be sufficient to address the plurality concerns identified in our report with regard to Sky's potential influence over the editorial judgments of ITV.

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