

From: Nicholas Scola [REDACTED]
Sent: 07 February 2011 18:02
To: Bavasso, Antonio:CO (LN)
Cc: Stephen.Unger: [REDACTED] clive.carter: [REDACTED] Sheldon Mills;
jpalker: [REDACTED] Andrea.Appella: [REDACTED] Darbon, Cerry:CO (LN); Long,
Dominic:CO (LN)
Subject: Restricted - News / Sky - request for information (2)
Categories: Copied to Virtual File
Attachments: Restricted - News Sky - questions for News 7 February 2011.pdf
FolderLibrary: CO
FolderNumber: 12977143
MatterInformation: MATTER_ID:0000367|CLIENT_ID:0012561

Dear Antonio,

As promised earlier today, I attach a further information request to News.

You will see that the questions are significantly more focused than those we submitted to you on 1 February. We would therefore be grateful if you could provide as much information as possible on these key points.

We would request responses to the questions by 6pm tomorrow.

Kind regards

Nick

Nicholas Scola | Assistant Director - Legal, Mergers | Office of Fair Trading
Fleetbank House | 2-6 Salisbury Square | London EC4Y 8JX | T: [REDACTED]

.....
All communications sent to or from the OFT are subject to recording and/or monitoring in accordance with relevant legislation. This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you are not an intended recipient, please notify administrator@oft.gsi.gov.uk immediately.

The Office of Fair Trading
Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX Switchboard (020) 7211 8000 Web Site: <http://www.oft.gov.uk>

This footnote also confirms that this email message has been swept for the presence of computer viruses.
.....

The original of this email was scanned for viruses by the Government Secure Intranet virus scanning service supplied by Cable&Wireless Worldwide in partnership with MessageLabs. (CCTM Certificate Number 2009/09/0052.) On leaving the GSi this email was certified virus free.
Communications via the GSi may be automatically logged, monitored and/or recorded for legal purposes.

PROPOSED ACQUISITION BY NEWS CORP OF BSKYB
QUESTIONS RE UNDERTAKINGS IN LIEU PROPOSAL (2)

7 FEBRUARY 2011

1. Introduction

- 1.1. The OFT sets out below questions it has in relation to the undertakings in lieu offered by News Corporation (News) in relation to its proposed acquisition of the remaining shares in BSkyB Group plc (Sky) (the UIL).
- 1.2. The questions below are based on the draft text UIL offer submitted to the Secretary of State, the memorandum explaining the UIL offer of Allen & Overy of 18 January 2011 and the presentation and commentary provided by News to the OFT at the meeting on 31 January 2011. They take into account the responses to the questions News provided in relation to the OFT's questions of 1 February 2011 and Ofcom's questions of 3 February 2011.
- 1.3. These further questions are designed to assist the OFT in preparing its advice to the Secretary of State under section 93 Enterprise Act 2002 and in particular responding to the request in the Secretary of State's letter of 27 January 2011 to the Chief Executive of the OFT, that the OFT discover whether the UIL would be practically and financially viable.
- 1.4. The OFT requests a response to these questions by **6pm on 8 February 2011**.

2. Questions for News

- 2.1. **Non-solicitation** – News states that neither Sky nor News will be a direct competitor of the spun-off Sky News business and therefore a non-solicitation clause is unnecessary. However, what would prevent News launching a neighbouring channel, such a current affairs channel, from which it might acquire staff from Newco? Would News be willing to give a short non-solicitation clause in respect of the employees transferred to Newco?

RESTRICTED – CONFIDENTIAL

- 2.2. Enforcement** – at present, the Secretary of State is reliant in terms of the success of the UIL on (a) News' incentives in relation to the continuation of Newco and (b) on Newco's contractual rights under the carriage agreement and brand license agreement vis-à-vis News. Would News be willing to offer commitments to the Secretary of State within the UIL that it would not terminate the carriage agreement and brand license agreement without the prior written consent of the OFT (such consent to be given only in the event that the OFT was satisfied there had been a material breach of the agreement that had not been cured)?
- 2.3. Brand licensing agreement** – at present, paragraph 4.3 of the UIL requires that the form of the carriage agreement must be approved by the Secretary of State before the UIL are accepted (the 'Effective Date'). Given the importance of the brand licensing agreement, would News be willing for a similar approval mechanism to be adopted in relation to the brand licensing agreement?
- 2.4. Corporate governance – Articles** – although News is clearly not in a position to change the Articles of Newco itself, would News be willing to give an undertaking that it would vote against a change to the Article of Association designed to remove the superior governance provisions and board design detailed in paragraph 3.1(ii) – (iv) of the UIL?
- 2.5. Corporate governance – Board** – please comment on whether Newco might struggle to attract suitable talent for its board given the significantly contracted focus of its activities compared to Sky.
- 2.6. Corporate governance – Board** – the proposed UIL require that the majority of the board shall comprise 'non executive directors determined by that board to be independent'. What is meant by 'independent' in this context? How would such a requirement be enshrined in Newco going forward?
- 2.7. Corporate governance - Board** – how would the initial board members of Newco be determined?

RESTRICTED – CONFIDENTIAL

- 2.8. Corporate governance – chairman of the board** – please confirm whether there would be any requirement for the chairman of the board to be independent.¹
- 2.9. Corporate governance – material transactions** – the UIL do not contain a definition of ‘material transactions’? Should this term be defined (so as to include at least the carriage agreement and the brand licensing agreement).
- 2.10. Enumeration of assets** – would News be prepared to split out in greater detail (in the form of a Schedule used, eg, in the Form RM) the assets and people to be transferred / not transferred? The OFT considers this would be beneficial given that Sky News is not a distinct enterprise (in the way that most divestment businesses are in a UIL context).
- 2.11. Operational agreements** – would News be willing to state in the UIL that it will provide the operational agreements detailed in paragraph 5 of the UIL, with termination rights for Newco, and pricing at cost price [REDACTED] included in the contracts, so that the uncertainty in the UIL as presently drafted is removed?
- 2.12. Licensing agreement:** [REDACTED]
- 2.13. Dispute resolution mechanism** – would News be prepared to agree to the inclusion within the UIL of a dispute resolution mechanism in relation to the agreements between News and Newco in order to assist in the resolution of any commercial disagreements between News and Newco (and therefore enhance the viability of Newco by avoiding protracted and expensive legal disputes with News)?

¹ We note your reply to Ofcom's question 11 that "the decision as to who should be the chairman of the board of NewCo will ultimately rest with the board of NewCo and that decision will be taken by the board as a whole which will include a majority of independent directors".

RESTRICTED – CONFIDENTIAL

Would News be willing to agree to the inclusion of some form of monitoring mechanism in relation to the observance of the contractual commitments (see question 2.2).

- 2.14. **Listing** – would be the effect on Newco of it being de-listed from the AIM market?
- 2.15. **Apps** – please provide further details of the proposed exclusive rights to be granted by Newco to News in relation to tablet apps. What remuneration will Newco receive from these rights? Will these rights be in the carriage agreement?
- 2.16. **Re-acquisition** – please confirm whether News would be willing to give a commitment in the UIL not to acquire further shares in Newco such as to take its shareholding level beyond 39.1 per cent.
- 2.17. **Affiliate** – please explain why Sky should not be treated as an affiliate of News until the Closing Date, given News' existing shareholding in Sky.
- 2.18. **Financial projections** – technical services and operational agreements: How long would the restrictions on price to cost plus [REDACTED] run for?