



Department
for Culture
Media & Sport

DCMS Media Team
4th Floor
100 Parliament Street
London SW1A 2BQ

T: 0207 211 6000

www.gov.uk/dcms

Date: 3 March 2017

By Email

Jeffrey Palker
Executive Vice President, Deputy General Counsel
and Deputy Chief Compliance Officer
Twenty-First Century Fox, Inc.
1211 Avenue of the Americas
New York NY 10036
USA

James Conyers
Group General Counsel
Sky plc
Grant Way
Isleworth
TW7 5QD

Dear Mr Palker
Dear Mr Conyers

**TWENTY-FIRST CENTURY FOX, INC AND SKY PLC
EUROPEAN INTERVENTION NOTICE**

I refer to the proposed acquisition by Twenty-First Century Fox, Inc (“21CF”) of the entire issued and to be issued share capital of Sky plc (“Sky”) that it does not already own (“the merger”) which was formally notified to the European Commission on 3 March 2017.

In light of that notification, the Secretary of State for Culture, Media and Sport (“the Secretary of State”) is considering whether to issue a European Intervention Notice (“EIN”) in relation to the merger under section 67 of the Enterprise Act 2002 (“the Act”). She is currently minded to issue an EIN for the following reasons.

She considers that she has reasonable grounds for suspecting that the acquisition would result in the creation of a relevant merger situation as defined in section 23 of the Act, and also a concentration with a Community dimension for the purposes of Council Regulation 139/2004/EC¹ (“the EU Merger Regulation”). A reference of such a merger under section 33 of the Act would be prevented by Community law.

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

Article 21(4) of the EU Merger Regulation provides, however, that Member States may take appropriate measures to protect legitimate interests other than the competition considerations that are taken into account under that regulation.

The Secretary of State is considering whether to take such measures, and believes that it is or may be the case that the following public interest considerations specified in section 58 of the Act, are relevant to a consideration of the merger:

(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 (“the plurality ground”);

...

(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 (“the commitment to broadcasting standards ground”).

The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (“the 2003 Order”) provides that, when a EIN has been issued, the Secretary of State may require the Competition and Markets Authority (“the CMA”) and Ofcom to provide reports on certain issues relevant to the merger and the specified public interest considerations, and to summarise any representations received about the case.

The Secretary of State notes that the public interest considerations listed above represent important objectives and that a number of different issues may be relevant to determining the effects of the merger on those objectives. Some of those issues may require the gathering of further factual information, while others may raise technical matters in respect of which the CMA and/or Ofcom have relevant expertise.

At this stage, the Secretary of State considers that the two public interest considerations may be relevant to a consideration of the merger, and that the appropriate course is for her to receive reports from the CMA and Ofcom before deciding whether to make a reference under article 5 of the 2003 Order, i.e. for a more detailed consideration of these matters by the CMA.

Representations

The Department received a large number of representations from third parties since the proposed merger was announced in December, approximately 50 written submissions and approximately 8,700 made in connection with the Department’s consultation on the Leveson Inquiry and its implementation which referred to the merger. The majority of these third party representations provided a view on whether the merger should proceed and whether the Secretary of State should intervene, and were overwhelmingly in favour of intervention. The Media Reform Coalition in conjunction with Avaaz, provided a report on the likely impact of the proposed merger on plurality.² Aspects of this report appear to support some of the considerations (as set out below) that have informed the Secretary of State’s current provisional view.

In relation to these representations, for the avoidance of doubt, we wish to note that the Secretary of State in her quasi-judicial role of course recognises that she may only take account of information relevant to her consideration of the specified public interests and furthermore that public opinion is not, of itself, a reason for intervening.

² Justin Schlosberg, Consolidating Control: The Fox/Sky merger and news plurality in the UK, February 2017. Available at: <http://www.mediareform.org.uk/wp-content/uploads/2017/03/plurality-review-FINAL-4.pdf>.

Issues of control

The Murdoch Family Trust (“MFT”) currently has a c.39% shareholding in News Corporation, which owns several UK newspapers. In addition, Rupert Murdoch and Lachlan Murdoch are Executive Co-Chairmen and James Murdoch is a director of News Corporation. As a result, the MFT has a degree of influence over News Corporation, potentially giving it control in the form of material influence.³

The MFT also has a c.39% shareholding in 21CF which in turn currently has a c.39% shareholding in Sky. As a result, the MFT currently has a c.15% shareholding in Sky which, among other things, owns Sky News. In addition, Rupert Murdoch and Lachlan Murdoch are Executive Co-Chairmen and James Murdoch is the CEO and a director of 21CF.

It is likely, therefore, that the MFT already has a degree of influence over Sky, which may or may not give it control in the form of material influence. The merger, however, may be expected to increase the extent of the MFT’s influence over Sky as it will increase its shareholding in Sky from c.15% to c.39%. Therefore, the merger may result in the MFT obtaining control over Sky in the form of material influence, or alternatively in the MFT increasing its control over Sky.

The parties have noted that the degree of common ownership across News Corporation and Sky would be less than that which existed prior to the News Corporation bid for Sky in 2010 (“the 2010 bid”).⁴ However, the public interest considerations fall to be assessed on the basis of the circumstances now prevailing.

In short, the merger may be expected to increase the MFT’s influence over Sky, which owns Sky News, in circumstances where it may already have material influence over News Corporation, which owns *The Sun*, *The Times* and *The Sunday Times*.

The Secretary of State therefore considers that the public interest considerations listed above may be relevant to the merger, and that News Corporation and the MFT’s influence over it may be relevant to those considerations.

The plurality ground

The plurality ground is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. Ofcom defines plurality as: *“ensuring there is a diversity in the viewpoints that are available and consumed, across and within media enterprises; and preventing any one media owner, or voice, having too much influence over public opinion and the political agenda”*.⁵

Plurality falls to be considered by reference to different audiences in the UK. On the basis of Ofcom’s report on the 2010 bid,⁶ the relevant audiences may include UK audiences for cross-media news and current affairs.

The Secretary of State considers the plurality ground may be relevant to the merger because it may increase the MFT’s ability to exercise influence over Sky News, in circumstances where it

³ As set out in section 26(3) of the Act.

⁴ Allen & Overy LLP, Preliminary Briefing to DCMS, 20 December 2016 (“Allen & Overy Preliminary Briefing”), paras 1.7 and 4.5 to 4.6.

⁵ Ofcom, Measurement framework for media plurality: Ofcom’s advice to the Secretary of State for Culture Media and Sport, 5 November 2015 (“Ofcom Measurement Framework”), para 1.2. Available at:

https://www.ofcom.org.uk/data/assets/pdf_file/0024/84174/measurement_framework_for_media_plurality_statement.pdf

⁶ Ofcom, Report on the public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation, 31 December 2010 (“Ofcom Report on BSkyB/News Corporation”), para 1.15. Available at: https://www.ofcom.org.uk/data/assets/pdf_file/0017/81413/public-interest-test-report.pdf

may already have the ability to exert significant influence over, in particular, *The Sun*, *The Times* and *The Sunday Times*. To inform this view, the Secretary of State considered a range of publicly available information, including information obtained from Ofcom⁷ that is referred to below.

These outlets are all significant providers of news and current affairs in the UK. Sky News is the fifth most used news source across all platforms, while *The Sun* is the most read print newspaper⁸. The combined print and online daily readership of *The Sun* and *The Times* is estimated to be on average around 6.3 million per day between April 2014 and March 2015.⁹ It is therefore possible that the merger could reduce the diversity of viewpoints across news providers and/or increase the MFT's ability to influence public opinion and the political agenda.

However, properly assessing the impact of the merger on plurality may require a number of considerations to be taken into account. Ofcom has developed and published a framework for measuring plurality following a call for inputs and public consultation. Ofcom explained¹⁰:

"1.17 Our measurement framework consists of three categories of quantitative metrics as well as qualitative contextual factors. The quantitative measures illustrate the availability of news sources, the consumption of those sources and provide proxies to help assess the impact, or influence, that these sources may have ...

1.18 ... All forms of media including print, radio, TV and online are included ...

1.19 It is not possible to measure plurality using a single metric. Different industry measurement systems with different methodologies make comparisons between them challenging. Although using a cross-media metric can provide a coherent view of consumption, as with any consumer research there are limitations to this approach. As such, no one metric can be used in isolation and as such measures should be used in combination in order to get the best quantitative assessment.

1.20 Furthermore, there are also aspects of the market that cannot be measured in a quantitative manner at all. These aspects relate to the differences between news sources and the organisations that produce them. These include the range of regulatory regimes across media platforms, the editorial control exercised by key individuals within organisations, differing governance models and the existence (or lack) of internal plurality. Qualitative contextual factors are therefore an integral part of the framework."

Given the prominence of the news outlets involved and the potential complexity of the plurality assessment, the Secretary of State considers that it would be appropriate for her to receive a report from Ofcom on the impact of the merger on media plurality before deciding whether it is necessary for the plurality ground to be considered in more detail by the CMA.

The parties have contended that common ownership of news outlets would be at a lower level after the merger than at various points in the past, such as prior to the 2010 bid or in 2007 when the Competition Commission considered the Sky's acquisition of a minority shareholding in ITV.¹¹

⁷ Ofcom provided information which is now published in its News consumption in the UK: Research Report, 15 December 2015 and reissued 1 February 2017 ("Ofcom 2015 News Consumption Research Report"). Available at:

https://www.ofcom.org.uk/data/assets/pdf_file/0020/77222/news_consumption_in_the_uk_2015_research_report.pdf

⁸ Ofcom 2015 News Consumption Research Report, Figure 2.6.

⁹ Ofcom 2015 News Consumption Research Report, Figure 5.5.

¹⁰ Ofcom Measurement Framework.

¹¹ Allen & Overy Preliminary Briefing, paras 1.7(a), 4.5 and 4.7.

However, the Secretary of State considers the correct approach to assessing plurality to be the one adopted by Ofcom and the Competition Commission in previous plurality cases, namely that the sufficiency of plurality should be assessed *“by reference to the current levels of plurality, having regard to any change in plurality that arises as a result of the acquisition”*.¹²

This approach is appropriate in part because, as the parties themselves have noted, the past few years have seen changes to the way in which news is consumed, in particular as a result of the growth of online news sources, aggregators and the increased role played by social media. The parties contend that this has brought about a ‘remarkable’ increase in plurality.¹³

However, Ofcom has stated that caution must be exercised when considering the impact of these developments.¹⁴ For example, while consumers may be using social media to consume their news, the originators of news are for the most part the traditional newspaper and broadcaster providers with access to journalist resources. Social media may therefore be extending the reach of traditional providers such as *The Sun*, *The Times* and *Sky News*. As a result, precisely how the merger might affect media plurality in the light of these developments is something that could usefully be considered and reported on by Ofcom.

As well as considering the number and range of views across media enterprises (external plurality), it is also appropriate to consider the range of views within media enterprises (internal plurality).

The specific concern here is that the MFT’s increased shareholding in Sky may increase its ability to exercise influence over Sky News. The parties have submitted that Sky has not previously exerted influence over Sky News’ agenda, but that in itself provides no guarantee that 21CF or the MFT will not exert influence over Sky News in the future.

The parties contend that the requirements of impartiality in the Broadcasting Code provide a significant constraint on the ability of owners to exert control over the output of Sky News.¹⁵ However, while Ofcom considered these requirements to be relevant, in its report on the 2010 bid Ofcom concluded that they did not adequately address all potential concerns in particular because they *“would not necessarily prevent an individual with control of a media organisation from influencing the news agenda through the selection or omission of stories”*.¹⁶

The Secretary of State considers that the extent to which the MFT could or would be likely to influence Sky News is another issue that could usefully be investigated and reported on by Ofcom, in particular given the need for a qualitative assessment and perhaps further factual inquiries.

The commitment to broadcasting standards ground

In relation to the commitment to broadcasting standards ground, paragraph 7.24 of the statutory guidance on public interest interventions (“the Guidance”)¹⁷ sets out the sort of matters that the Secretary of State may take into account. These include past compliance with broadcasting standards in the UK, which would be a qualitative assessment rather than focussing simply on

¹² Ofcom Report on B SkyB/News Corporation, para 1.14; Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc, 14 December 2007, para 5.15. Available at: <http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/files/file43218.pdf>

¹³ Allen & Overy Preliminary Briefing, paras 4.24.

¹⁴ Ofcom Report on B SkyB/News Corporation, para 1.47.

¹⁵ Allen & Overy Preliminary Briefing, paras and 4.16 to 4.19.

¹⁶ Ofcom Report on B SkyB/News Corporation, paras 5.83.

¹⁷ Department for Trade and Industry, Enterprise Act 2002: Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004. Available at: <http://webarchive.nationalarchives.gov.uk/20100512144753/http://www.bis.gov.uk/files/file14331.pdf>

the number of infringements, as well as the record of any non-broadcasting media enterprise's compliance with standards applicable to those media enterprises, including those imposed under self-regulatory regimes.

The Secretary of State has therefore taken into account data provided by Ofcom detailing breaches of the Broadcasting Code, or other Ofcom codes or licence conditions for services operated by both Sky and 21CF and their subsidiaries over the last ten years (enclosed).¹⁸

These data show that over the last ten years and relative to the number of services that they operate in the UK, the number of breaches for 21CF is proportionately higher than for Sky, a lower proportion of cases were resolved¹⁹ for 21CF than for Sky and 21CF had a higher proportion of breaches involving editorial related matters as compared to Sky. This suggests that 21CF might be less effective than Sky at ensuring compliance with broadcasting standards, and therefore raises a concern that Sky's compliance record may potentially deteriorate following the merger.

The Secretary of State recognises that there could be a number of reasons for 21CF's compliance record: it might reflect on the culture or corporate governance at 21CF, alternatively it could simply be attributable to the circumstances of the individual breaches. Given that Ofcom is the regulatory body with responsibility for enforcing the Broadcasting Code, other Ofcom codes and broadcast licence conditions, the Secretary of State considers that it would be helpful for her to receive a report from Ofcom on this issue.

In addition, the extent to which 21CF and the individuals who will have control of Sky and/or who will be responsible for carrying on the business of Sky following the merger have a good record of compliance more generally (i.e. with the rules and standards applicable in the other markets in which they have operated) may also be relevant to this ground.

The Secretary of State has taken into account that 21CF is the successor company to News Corporation, which owned the News of the World ("NoTW") at a time when illegal activities relating to the phone hacking scandal were carried out. The report of the Culture, Media and Sport Committee on News International and Phone Hacking of 30 April 2012 highlighted a number of very serious failings and raised wider concerns about the culture within News Corporation at the time, saying that there were huge failings of corporate governance at the NoTW and its parent, News Corporation.²⁰

In addition, James Murdoch, as CEO of 21CF, would have responsibilities relating to Sky News following the merger as well as an increased level of control or influence over Sky. Ofcom has previously reviewed James Murdoch's role in the events relating to the phone hacking scandal. It found that while there was no reasonable basis to find that he knew of widespread wrongdoing or criminality at NoTW, "*his conduct ... repeatedly fell short of the exercise of responsibility to be expected of him as CEO and chairman*".²¹ His failures were essentially failures of corporate governance.

¹⁸ Ofcom, A list of all breaches of licence conditions and Ofcom's codes and rules over the last 10 years against each of the licensees and VOD service providers owned by Sky plc subsidiaries and by 21st Century Fox subsidiaries ("Ofcom data on breaches"), enclosed.

¹⁹ This is explained in Ofcom data on breaches, p1: "*Breach' refers to when an Ofcom investigation has found that the broadcaster has failed to comply with the Broadcasting Code, or other Ofcom codes or licence conditions. This decision will be published in full in the Broadcast and On Demand Bulletin. 'Resolved' refers to when a breach of the relevant rules or licence conditions did occur, but the broadcaster took immediate and appropriate steps to remedy the breach. In these cases, Ofcom may consider it appropriate not to record a breach, but to determine that the case is 'resolved.'*"

²⁰ Culture, Media and Sport Committee, Eleventh Report Session 2010-2012: News International and Phone Hacking HC901-1, 30 April 2012, in particular para 215. Available at: <https://www.publications.parliament.uk/pa/cm201012/cmselect/cmcmds/903/903i.pdf>

²¹ Ofcom, Decision under section 3(3) of the Broadcasting Act 1990 and section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited, 20 September 2012, para 34. Available at: https://www.ofcom.org.uk/data/assets/pdf_file/0022/32485/bskyb-final.pdf

The Secretary of State recognises that some time has passed since these activities took place, and also that the findings related specifically to failings within NoTW, which no longer exists. Nonetheless, the identified failures of corporate governance were serious, and the Secretary of State considers that it would be appropriate for Ofcom to consider and report on the implications, if any, of these matters for the commitment to broadcasting standards ground.

The statutory guidance and exceptional circumstances

The parties have noted that the Secretary of State's policy, as set out in the Guidance, is that she will consider intervening only in contexts where media ownership rules have been removed by the Communications Act 2003, unless exceptional circumstances arise.²²

The Secretary of State is of the view that the merger may give rise to serious public interest concerns and that there are exceptional circumstances in this case.

In relation to plurality, the merger may bring under the control of the MFT several of the leading providers of news in the UK. The situation is the same as, or at least is analogous to one of the examples of exceptional circumstances listed in paragraph 8.8 of the Guidance, namely where a merger would bring a large number of news channels under single control.

In relation to broadcasting standards, one of the issues on which Ofcom would be expected to report is the extent to which past failings of corporate governance at News Corporation, now 21CF, have been satisfactorily remedied. However, the Secretary of State considers that such an assessment is warranted because of the seriousness of those failings. This situation is analogous to one of the other examples of exceptional circumstances in paragraph 8.8 of the Guidance, namely where a merger might result in a local radio station being owned by a company which *"has not shown a genuine commitment to broadcasting standards in other media or countries"*.

In any event, paragraph 1.7 makes clear that the Guidance is not a substitute for the provisions of the Act and expressly states that *"whilst the guidance is intended to provide an indication of ... the approach the Secretary of State is likely to adopt in considering cases, each transaction will be looked at on its merits on a case-by-case basis"*.

Currently, the Secretary of State considers that a EIN is justified in the light of the particular circumstances of the case on the basis that, for all the reasons given above, the merger could potentially produce effects that would be adverse to the public interest. The Secretary of State is therefore currently minded to decide that the appropriate course is for her to receive reports from the CMA and Ofcom before deciding whether further consideration of these matters is required.

Conclusion

The Secretary of State makes no final determination on these matters, but in light of them, is minded to intervene on the basis that she believes that it is or may be the case that the public interest in plurality ground and the public interest in the commitment to broadcasting standards ground is relevant to a consideration of the merger.

Before taking her final decision, however, the Secretary of State is giving you the opportunity to provide representations in writing. Any such representations should be sent to myself via email [REDACTED] by 5.00pm on Wednesday 8 March. The Secretary of State will

²² Guidance, section 8.

Department for Culture, Media & Sport

then consider any relevant representations made before taking her final decision on whether to issue an EIN in respect of the merger.

I am copying this letter to [REDACTED] at Allen & Overy and [REDACTED] at Herbert Smith Freehills.

Yours sincerely,

[REDACTED]
Deputy Director, Head of Media Policy
Department for Culture, Media and Sport