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Media & Sport

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By Email

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[REDACTED]

James Conyers
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[REDACTED]

Dear Mr Palker
Dear Mr Conyers

**TWENTY-FIRST CENTURY FOX, INC (“21CF”) AND SKY PLC (“Sky”)
PHASE 2 REFERRAL**

I refer to our letters of 29 June, 20 July, 12 September and 14 September 2017 concerning referral of the above merger to the Competition and Markets Authority (“CMA”) for a Phase 2 investigation under Article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (“2003 Order”).

I can now confirm that the Secretary of State for Digital, Culture, Media and Sport (“Secretary of State”) has decided to refer the merger to the CMA on the following grounds set out in section 58(2C) of the Enterprise Act 2002 (the “Act”):

(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 media 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 Secretary of State also confirms that she has decided not to accept the undertakings offered in lieu of referral on 21 June 2017.

The Secretary of State has today issued the enclosed letter and Terms of Reference to the CMA.

Media Plurality ground

The reasons for the Secretary of State’s decision to refer on grounds of media plurality are as set out in our letters of 29 June and 20 July 2017, subject to the points made below.

In response to her letter of 29 June, the Secretary of State received representations from Allen & Overy on behalf of 21CF and Herbert Smith Freehills on behalf of Sky, as well as representations from James and Lachlan Murdoch on behalf of 21CF in response to her minded-to position on the issue of media plurality and undertakings offered in lieu of referral.

In her letter of 20 July 2017, the Secretary of State set out that, notwithstanding these representations, she was still minded-to refer the merger on media plurality grounds. However, she indicated that she would take her final decision in respect of both grounds once all representations had been considered - at which point she would also provide a substantive response to your representations. To that end, the Secretary of State makes the following observations in respect of your representations on media plurality. Unless otherwise stated, the references to your representations are to Allen & Overy’s submission on behalf of 21CF dated 7 July 2017.

Control

The Secretary of State notes your concern that Ofcom, in its plurality assessment, treated 21CF, Sky and News Corp as a single entity and failed to assess actual levels of control or the effects of the merger on control over Sky.

The Secretary of State considered issues of control in her letter of 3 March 2017 (see page 3 of that letter) and stands by her view that the merger may result in the Murdoch Family Trust (“MFT”) obtaining control over Sky in the form of material influence, or alternatively, increasing its control over Sky. The Secretary of State agrees that in assessing plurality, account must be taken of the actual level of control exercised by one enterprise over another¹ and in this regard notes Ofcom’s assertion that it had adopted this approach (see paragraph 3.27 Public Interest Report²). Nevertheless, the Secretary of State would expect the CMA to investigate these matters fully as part of its Phase 2 investigation, including a more detailed assessment of the overall corporate structures for the MFT, 21CF and News Corp, and a detailed assessment of how MFT exercises control over Sky now and how this would change as a result of the transaction.

Sufficiency of plurality

The Secretary of State notes your contention that when assessing media plurality, Ofcom failed to address what you consider to be a fundamental legal question, namely whether the change brought about by the merger would result in insufficient plurality. Your representations question Ofcom’s assessment of sufficiency of plurality across UK media and argue that an

¹ *BSkyB and Virgin Media v Competition Commission and Secretary of State* [2010] EWCA Civ 2, see para 121

² *Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc* - Report submitted by Ofcom to the Secretary of State on 20th June 2017

adverse public interest finding cannot be based on concerns about increased influence arising from a merger without assessing whether this change would result in insufficient plurality.

The Secretary of State notes that your contention raises the question as to whether the statutory language of the media plurality ground, and particularly its reference to “sufficient plurality” requires some determination of the absolute level of plurality that is adequate. The CMA may wish to revisit this issue as part of its assessment. However, the Secretary of State notes the Competition Commission’s remarks in paragraph 5.15 of the Sky/ITV case³ that what is required in this regard is a qualitative assessment of sufficiency, including consideration of the implications of the level of control exercised for the range of information and views available.

While some of Ofcom’s conclusions may have been couched in terms which referred to the risk of increased influence by members of the MFT over the UK news agenda and political process, the Secretary of State considers that the substance of Ofcom’s plurality analysis did adopt the approach advocated by the Competition Commission. This is reflected, for example, in Ofcom’s conclusion (at paragraph 2.38 of the Public Interest Report) that *“the transaction would bring under the material influence of the [MFT] important news providers on all four platforms, including the largest UK-wide newspaper group and one of only three major producers of television news”,* and that *“between them, these would account for a large share of the news consumed by the UK public”.*

In your representations concerning the extent of plurality, which are discussed below, the Secretary of State has noted your submission that the presence of 21CF and News Corp companies on four platforms (para 4.5 of the Allen & Overy submission) should be addressed by applying the the cross media share of references measurement metric. However, Ofcom’s concern here appears to be that, while providing a good basis for assessing cross-platform share, the share of reference metric does not capture influence. The Secretary of State does not consider it was unreasonable for Ofcom to focus on the increased cross-platform influence that may result from the merger, given the MFT’s strong position in the printed news market and its growing presence in online news. Nor is it unreasonable for the Secretary of State to take this into account in her referral decision.

Given the threshold that applies to the Secretary of State’s referral decision at Phase 2, this clearly gives rise to concerns warranting referral and the concerns you have raised are matters which the CMA will need to consider in further detail.

Extent of plurality

Your representation raised a variety of detailed technical questions concerning Ofcom’s assessment of the extent of plurality. You also suggest that, on a proper analysis, the combination of 21CF, Sky and News Corp would result in: *“only the moderate strengthening of Sky’s position as the third-largest provider”.* We have considered Ofcom’s advice and in particular the following observations made by Ofcom in the Public Interest Report about the combined effect of the merger:

- News Corp newspapers would be part of a group with a significantly larger share of reference than any other newspaper group (paragraph 6.13) and part of a group with the highest cross-platform reaches (paragraph 6.40);
- Sky News and the Sun may have reach through intermediaries that is not reflected in available data (paragraph 6.35)

³ Competition Commission, *Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc*, Report sent to Secretary of State (BERR) 14 December 2007

- ITN is essentially a wholesaler - so 21CF, Sky and News Corp may have a stronger voice for a given share of reference (paragraph 6.44-6.47)

The Secretary of State has considered very carefully the points made about the way in which Ofcom has assessed the extent of plurality. She believes that Ofcom's analysis about the reach and share of references of the merged entity, together with the increased influence of the MFT, are soundly argued and well evidenced. Your letter does raise some detailed technical points - for example whether the Metro or Evening Standard should be included in the analysis. These points do not, in the Secretary of State's view undermine the basis of Ofcom's assessment but are points that the CMA should revisit as part of its Phase 2 inquiry.

Treatment of online news

Your submission questioned Ofcom's broad conclusions that it is not yet possible to say that the growth in online news has led to a significant expansion in plurality, or that traditional news providers no longer retain significant influence. Your submission also raised questions about the way in which Ofcom had used certain data, such as data relating to multi-sourcing and the reach and share of the Sun website.

In the Secretary of State's view, the assessment of online impacts in the context of a media plurality assessment requires a degree of judgement, given the challenges of measuring and analysing the impact of online activity. The Secretary of State considers Ofcom's overall conclusions to be reasonable given the evidence set out in its report and the representations received. However, the CMA will want to take into account both the broader and more technical issues that you have raised as part of its Phase 2 investigations.

Influence

In relation to the influence of the MFT on the political process, you advance a range of arguments including that Ofcom relied on outdated evidence, particularly evidence submitted to the Leveson inquiry, and placed too little weight on more recent trends and evidence (including from the 2017 General Election, which you state suggests a weakening in press power).

The Secretary of State considers that Ofcom's conclusions in this part of its report are significantly a matter of judgement. She considers that Ofcom took into account a range of evidence (summarised in Annex 2 of Ofcom's Public Interest Report), including more recent evidence, and that its conclusions are reasonable in the light of all the evidence. However, as part of the Phase 2 inquiry the CMA will need to consider the potential effect of the merger on the ability of the MFT (and companies controlled by the MFT) to influence the wider political process.

Additional matters that may be relevant to the plurality assessment

The Secretary of State received a number of representations that included observations potentially relevant to the plurality assessment. These were not critical to the referral decision, i.e. because the Secretary State considered that a referral was warranted even without taking them into account. Nonetheless, the CMA may wish to consider these representations as part of its Phase 2 assessment. These included, in particular, the following submissions.

- Some representations noted that Sky has a significant and increasing share of the fixed and mobile broadband markets in the UK, and that this raised concerns that Sky could use this position to favour certain content providers, i.e. including 21CF's own content. This is an area that Ofcom did not consider in any detail. While this concern could be relevant to a competition

assessment, which is outside the scope of this referral, the CMA may wish to consider whether it could also be relevant to the plurality assessment (e.g. insofar as Sky's broadband business might be able to favour the news content of 21CF or other companies controlled by the MFT).

- Another representation noted that Sky's position as an Internet Service Provider provides it with access to large amounts of personal data relating to, for example, online browsing and purchasing, and suggested that these could potentially be used to target content (including advertising) with political content or with the potential to influence political opinion. While the Secretary of State has insufficient information to draw any conclusions on this concern, she raises it as an issue that the CMA may wish to consider.
- Some submissions contended that the 21CF board is not independent in any meaningful sense, including as a result of the fact that independent directors have served on the board for long periods of time and/or have long-standing connections with members of the MFT and/or other companies under the control of the MFT. The Secretary of State understands that there are best practice standards regarding the appointment of and designation of independent non-executive directors and the CMA may wish to consider the extent to which these are complied with. It was also contended that the distinction between non-voting Class A shares and voting Class B shares increases the MFT's ability to influence 21CF (and News Corporation) and creates a culture in which the directors and executives are not accountable to the majority (by value) of shareholders. The Secretary of State has drawn no conclusions on these matters, but notes that they could be of potential relevance to the issue of internal plurality and also to any assessment of the likely effectiveness of any undertakings or remedies that the CMA may need to consider as part of its Phase 2 assessment.
- In her letter of 12 September 2017 relating to the commitment to broadcasting standards ground, the Secretary of State noted that a number of representations had alleged that in other jurisdictions 21CF had broadcast statements that were biased, divisive or grossly inaccurate, and also adopted a highly partisan approach to news and current affairs. While the Secretary of State was unable to conclude on whether these issues raised concerns in respect of broadcasting standards compliance, she noted Ofcom's advice (see paragraph 7.9 of Ofcom's Public Interest Report) that these matters may be relevant to an assessment of the media plurality ground. It is likely that the CMA will, therefore, want to consider the relevance of these matters in the media plurality context.

Commitment to Broadcasting Standards

As confirmed in our letter of 14 September 2017, having received your respective responses of 13 September 2017, the Secretary of State notes that while you disagreed with her minded-to decision on the commitment to broadcasting standards ground, you did not wish to make any representations in relation to it. As a result, we can confirm the reasons for the Secretary of State's decision to refer on grounds of commitment to broadcasting standards are as set out in our letter of 12 September 2017, and the Secretary of State expects the CMA will want to consider all the issues raised in that letter in detail (including points relevant to those issues that were raised in representations from third parties and in the Secretary of State's correspondence with Ofcom).

Undertakings in lieu

Should the CMA determine that effects adverse to the public interest may be expected to result from the merger, it will be open to the parties to offer undertakings designed to address any such effects. The decision as to whether or not to offer undertakings is one for the parties – they cannot be required. However, were they to be offered, the CMA would need to assess the potential effectiveness of any remedy based on such undertakings.

In the event that undertakings were offered, the CMA will need to make its own assessment of the issues discussed by Ofcom in respect of the undertakings offered to it by the parties earlier in this process (paragraphs 11.16 to 11.23 of the Public Interest Report). Among other things, Ofcom stated that it “*would have significant concerns that an undertaking based on structural separation [i.e. of Sky News from 21CF] may lead to the risk of the scale of Sky News decreasing over time, given the inherent difficulties in sustaining a loss-making unit outside of the Sky corporate structure*”. That would be a significant concern and the CMA may need to investigate that issue in further detail should that issue become relevant to its assessment.

Similarly, if undertakings were offered the CMA may also wish to have regard to the terms of the undertakings offered by News Corporation in relation to its proposed merger with BSkyB in 2010/11, and the process followed in relation to those undertakings (documents relating to which have been published). The Secretary of State at the time received advice from Ofcom and the OFT in respect of the terms of the proposed undertakings, which were also the subject of a public consultation. As a result, a revised set of undertakings were published that the Secretary of State considered were “more robust” than those initially offered by the parties.

The Secretary of State has also received representations relating to the possibility that she might accept undertakings offered by the parties. These raised a number of points said to be of relevance. Among other things, concerns were raised relating to the effectiveness of undertakings offered and agreed in respect of previous media mergers involving the MFT, such as News International’s purchase of *The Times* and *Sunday Times* in 1981 and News Corporation’s purchase of the *Wall Street Journal* and *Dow Jones* in 2007, including because there are said to be a number of ways in which the MFT are able to influence editorial content. The Secretary of State has not reached any view on the relevance or merits of these points, but they are matters that the CMA may need to consider in the first instance were consideration of remedies to prove necessary.

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

Yours sincerely,

[REDACTED]

[REDACTED]
Deputy Director for Media

Department for Digital, Culture, Media and Sport