DEPARTMENT FOR DIGITAL, CULTURE, MEDIA AND SPORT
NOTICE OF ACCEPTANCE OF FINAL UNDERTAKINGS GIVEN BY 21st CENTURY FOX, INC AND THE WALT DISNEY COMPANY PURSUANT TO PARAGRAPH 9 OF SCHEDULE 2 OF THE ENTERPRISE ACT 2002 (PROTECTION OF LEGITIMATE INTERESTS) ORDER 2003

Background

1. On 15 December 2016, 21st Century Fox, Inc, ("21CF") announced its intention to acquire the fully diluted share capital of Sky plc ("Sky") not already owned by 21CF and its affiliates, increasing its existing shareholding from approximately 39% ("the proposed merger"). Given the nature of the proposed merger, any competition concerns arising in relation to the merger fell to be considered by the European Commission and were approved by the Commission on 7 April 2017.[1]

2. On 16 March 2017, the then Secretary of State for Culture, Media and Sport, Karen Bradley, issued a European intervention notice under section 67(2) of the Enterprise Act 2002 ("the Act") to the Competition and Markets Authority ("CMA") on the basis that the following public interest considerations were relevant to a consideration of the proposed merger:

- the need, in relation to every different audience in the United Kingdom (UK), for there to be a sufficient plurality of persons with control of the media enterprises serving that audience (the "plurality ground"); and

- 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").

3. The then Secretary of State subsequently announced on 20 September 2017 her decision to refer the transaction to the CMA for a more detailed, Phase 2 investigation under Article 5(3) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 ("2003 Order") on both plurality and commitment to broadcasting standards grounds.

4. On 1 May 2018, the then Secretary of State for Digital, Culture, Media and Sport, Matt Hancock, received the report submitted by the CMA on the public interest considerations raised by the proposed merger. Having considered the CMA's report, on 5 June 2018, the Secretary of State wrote to 21CF and Sky issuing his public interest decisions in relation to the proposed merger. His decision was that the merger may be expected to operate against the public interest on grounds of media plurality but that the merger may not be expected to operate against the public interest on grounds of the parties' commitment to broadcasting standards.

Consideration Undertakings

5. The then Secretary of State, Matt Hancock, was required to consider, in accordance with article 12(6) and (7) of the 2003 Order, what action would be reasonable and practicable

[1] Case M.8354 *Fox/Sky*, Commission decision of 7 April 2017. Available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8354

to remedy, mitigate or prevent adverse public interest effects which might be expected to result from the proposed merger. Having considered the CMA's assessment of different remedy options, he found, in line with the CMA's conclusions, that the divestiture of Sky News to The Walt Disney Company ("Disney") or to another suitable purchaser could potentially remedy the adverse public interest effects in an effective and proportionate manner. However, he was clear that would only be the case if the divestiture remedy was designed in a way that ensures its long-term effectiveness.

6. Following the successful conclusion of discussions between DCMS officials, 21CF and Disney, and the resolution of the concerns raised about the divestiture remedy proposal, the then Secretary of State issued a statutory consultation on 19 June, seeking views on the proposed separate undertakings offered by 21CF and Disney and published several associated documents alongside these undertakings: the Divestment Agreement, the NewCo Articles of Association, the Brand Licensing Agreement and Sky News Editorial Guidelines.

Consideration of Consultation Responses

7. In total, the Department for Digital, Culture, Media and Sport ("DCMS") received five responses to the consultation:

- Media Reform Coalition ("MRC");
- Prospect;
- Avaaz;
- Hacked Off; and
- Joint submission from Ed Miliband MP, Ken Clarke MP, Sir Vince Cable MP and Lord Falconer ("Miliband et al")

8. These responses have been published on the DCMS website.

9. On 6 July 2018, the then Secretary of State, Matt Hancock, considered the points raised by these consultation responses. After further discussion with the parties, he decided on 9 July 2018, to accept the undertakings in the form as published today alongside this Notice[2].

10. There has been one clarificatory change to the Disney undertakings to make clear that the reference to "an officer or senior manager" at clause 3.2 includes all types of directors, including non-executive directors.

11. There have also been changes to the Brand Licensing Agreement, the form of which must be agreed by the Secretary of State under the undertakings. The first is to make clear that Sky cannot invoke the provisions of clause 6(a) in relation any editorial decisions of Sky News concerning any negative story about any member of the Murdoch Family or any Associated Person, in addition to such stories about Sky or any company within the Sky Group. Definitions of "Associated Person", "Murdoch Family" and "Subsidiary" equivalent to those included in the Disney undertakings have been added to support this change. Secondly, clause 14(h) of the Brand Licence Agreement, which allowed Sky to amend requirements related to the presentation of Sky News service without consent has now been deleted.

[2] The final undertakings and associated documents are available on Gov.uk at the following link: https://www.gov.uk/government/consultations/sky-fox-merger-proposed-undertakings-by-21st-century-fox-inc-and-the-walt-disney-company

12. There have been no material changes to the undertakings which were consulted on.

13. In light of representations received, the then Secretary of State also notified the parties that he intends to notify Parliament in all cases where the Secretary of State is required to exercise any powers in relation to these undertakings and that DCMS will consult with the CMA in relation to the exercise of powers under the undertakings and will publish the written advice given by the CMA. On 9 July, 2018 Jeremy Wright was appointed, and replaced Matt Hancock, as Secretary of State for Digital, Culture, Media and Sport and he has confirmed that he will honour this commitment.

Detailed observations on points raised by respondents

14. Detailed comments made by respondents largely fall into the following categories, and the response of the then Secretary of State, Matt Hancock, on each of these is as follows:

A. Non-completion risk

15. Concerns were raised by respondents about the possible risks of allowing 21CF to complete its acquisition before the divestment of Sky News to Disney and the risks to Sky News if Disney cannot complete for regulatory or other reasons.

16. The risks highlighted by Hacked Off, Avaaz and Miliband et al identify concerns that were formally set out by DCMS to 21CF during discussions on the undertakings. However, requiring that the divestment of Sky News be carried out in parallel with the completion of 21CF's acquisition of Sky would be impractical given that 21CF cannot effect such an action until it completes the acquisition of Sky. It is also of note that the CMA's advice on divestment was based on the divestment process being completed within three months of the completion of 21CF's acquisition of Sky and provided its advice on this basis.

17. The undertakings contain additional protections to address non-completion risks, including provisions allowing the long-stop date to be extended, which avoids Disney's purchase of Sky News being timed out by any unforeseen delays. In addition, in light of representations made by Disney, it is considered unlikely that Disney's acquisition of Sky News will be affected by the European Commission's consideration of the competition issues raised by Disney's stated bid for 21CF. Significant safeguards are also provided by the totality of the divestment trustee arrangements; these ensure a sale to an alternative suitable purchaser in the very unlikely event that the sale of Sky News to Disney falls through.

18. Additionally, in the event that divestiture to Disney or another suitable purchaser cannot be achieved, and the undertakings have not, are not or will not be fulfilled, in accordance with paragraph 10 of Schedule 2 to the 2003 Order, the Secretary of State may take further action, including doing anything permitted by the extensive powers in Schedule 8 to the Act, to deal with any ongoing adverse public interest effects.

B. Murdoch influence via Disney risk

19. Hacked Off, the MRC and Miliband et al commented that under the undertakings offered, the Murdoch Family Trust ("MFT") may be able to use its less than 5% stake in Disney (should Disney acquire 21CF) to exercise influence over the editorial policy of Sky News after its divestment to Disney.

20. A restriction on the MFT shareholding is considered neither necessary nor appropriate. In the unlikely event that this shareholding increased from less than 5% to a level of material influence, it would be possible at that point to consider any effects on media plurality as the gaining of material influence would create a new relevant merger situation. In addition, in any event, the undertakings prevent MFT members taking senior roles in Disney. Furthermore, there are already significant restrictions in Clause 4.2 of the 21CF undertakings and in the Sky News Editorial Guidelines, as well as more robust provisions to support whistleblowers. Clause 8.1 of the Disney undertakings also place requirements on Disney to protect the independence of Sky News.

21. In response to points raised on the definition of "officers or senior manager" in the Disney undertakings, the undertakings were always intended to apply to non-executive directors; however in the light of the consultation responses, the definition now includes clarificatory text which provides in this context that "officer" does indeed include both executive and non-executive directors.

C. Risks linked to the appointment and oversight of the Monitoring Trustee or (if needed) a Divestment Trustee

22. Hacked-Off, Avaaz, Miliband et al and the MRC all highlighted the lack of a formal role for the CMA in the appointment of the monitoring trustee/divestment trustee, future variations of the undertakings including over a subsequent sale of Sky News by Disney. The then Secretary of State confirmed that he will seek and have regard to the advice of the CMA when exercising his powers under these undertakings.

D. Murdoch Family Trust influence via brand licencing risk

23. Hacked Off, the MRC, Avaaz and Miliband et al raised a number of concerns about the potential for Sky (post sale to 21CF) to interfere with Sky News editorial decisions through the exercise of rights under the Brand Licence agreement In response to points raised regarding whether provisions in the Brand Licence Agreement allowing Sky to amend or terminate the brand licence could be used by Sky/21CF to interfere with editorial decisions taken by Sky News, an amendment has been made to the Brand Licensing Agreement to make clear that the provision in Clause 6(1) to covers any member of the Murdoch Family or any associated person. In addition, clause 14(h) of the brand licensing agreement which seemingly allowed Sky to amend requirements related to the presentation of Sky News service without consent has now been deleted. The effect of this is that future changes, for example to account for new technology, must be made by agreement between Sky News and Sky.

24. However, it is not considered to be the case that Sky's ability to terminate the brand license should be limited in the way the respondents propose. Disney would still be required to operate the service for 15 years and the funding envelope and advertising guarantee would remain in place. Furthermore, it is not considered to be the case that the requirement for Sky News to comply with the Brand Licence Agreement enables Sky to require Sky News to take a particular editorial line. In addition, clause 16 of the Brand Licence Agreement provides that if Sky has reasonable concerns that Sky News is in breach of the licence, it can request a review meeting. The arrangements for the parties to discuss potential issues are not considered to be in any way problematic, in particular given the provisions of clause 16 expressly provide that they should not affect any editorial decisions.

Conclusion

25. Under paragraph 9 of Schedule 2 to the 2003 Order, the then Secretary of State, Matt Hancock, accepted the final undertakings as given by 21CF and Disney on Monday, 9 July 2018. This Notice confirms that the reference has now been finally determined and the final undertakings come into force accordingly.

26. This Notice and a non-confidential version of the final undertakings that have been accepted will be published on the DCMS website.

Department for Digital, Culture, Media and Sport
12 July 2018