

Kevin Bakhurst
Group Director - Content Media Policy
Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

From: Joel Bamford
Project Director

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Dear Kevin

Agreed basis for the provision of information and assistance by Ofcom to the CMA in relation to the proposed Fox/Sky merger

1. I write further to the decision made by the Secretary of State for Digital, Culture, Media and Sport (the 'Secretary of State') on 20 September 2017 to refer the proposed acquisition by 21st Century Fox, Inc. ('Fox') of the shares in Sky plc ('Sky') that it does not already own (the 'Transaction') to the CMA for a Phase 2 merger investigation (the 'Investigation').
2. In light of the reference made by the Secretary of State, the purpose of this letter is to set out and confirm the agreed basis on which the Office of Communications ('Ofcom') will provide information and assistance to the Competition and Markets Authority ('CMA') under the Enterprise Act 2002 (the 'Act') and the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (the 'Order') during the CMA's Investigation, having due regard to Ofcom as the broadcast regulator and its role as a Phase 1 advisory body in relation to the Transaction.

Background

3. On 16 March 2017, the Secretary of State issued a European intervention notice in relation to the Transaction. The European intervention notice identified two public interest considerations set out in section 58(2C) of 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’; and
 - b. ‘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’.
4. On 20 June 2017, the Secretary of State received reports by Ofcom, addressing the two public interest considerations (the ‘Ofcom Report’), and the CMA, addressing whether a European relevant merger situation will be created by the Transaction.
5. Following letters from the Secretary of State to Ofcom on 7 August 2017 and 31 August 2017 requesting advice under section 106B of the Act (applied by Article 15 and Schedule 3, paragraph 1(1)(ma) of the Order), Ofcom provided the Secretary of State with advice on 25 August 2017 and 4 September 2017 in relation to a number of issues raised by the representations that the Secretary of State had received in relation to her decision on the referral of the Transaction to the CMA.
6. On 20 September 2017, the Secretary of State published letters to the merging parties and the CMA confirming her decision that both public interest considerations should be considered further by the CMA in a Phase 2 investigation.

Legal basis for Ofcom to provide the CMA with information and assistance

7. Section 105(3A) of the Act (applied by Article 15 and Schedule 3, paragraph 1(1)(m) of the Order) specifies that Ofcom shall give the CMA:
- a. such information in Ofcom’s possession as the CMA may reasonably require to enable the CMA to carry out its functions; and
 - b. any other assistance which the CMA may reasonably require for the purpose of assisting it in carrying out its functions and which it is within the power of Ofcom to give.
8. Section 105(4A) of the Act (applied by Article 15 and Schedule 3, paragraph 1(1)(m) of the Order) specifies that Ofcom shall give the CMA any information in its possession which has not been requested by the CMA but which, in the opinion of Ofcom, would be appropriate to give to the CMA for the purpose of assisting it in carrying out its functions.

9. The disclosure of any ‘specified information’ (as defined in section 238 of the Act) by Ofcom to the CMA under sections 105(3A) and 105(4A) of the Act in respect of the Transaction, and any use by the CMA of such information, shall only be to the extent permitted by law, including by reference to the provisions of Part 9 of the Act 2002, and any other provisions relating to the disclosure, handling and use of information (such as the Data Protection Act 1998) to the extent relevant.

Agreed framework for the provision of information and assistance by Ofcom in relation to the Investigation

10. Ofcom and the CMA have agreed, in light of and to give effect to the above provisions of the Act, that they will adopt the following protocol for the provision of relevant information and of factual and technical assistance by Ofcom as the broadcast regulator to the CMA. The purpose of Ofcom providing such information and assistance is to assist the CMA in carrying out its functions in relation to the Investigation, with due regard to Ofcom’s role as a Phase 1 advisory body to the Secretary of the State under the Act and the Order.
11. The CMA will make any requests for information or assistance, which may include providing factual and technical assistance at meetings with CMA staff and the inquiry group, from Ofcom under section 105(3A) of the Act in writing. Where it is practical and appropriate to do so, the CMA will seek to share a draft of any request for information or assistance with Ofcom in order to take into account any comments on the scope of the request and the deadline by which the information will be received or the assistance provided, before the request is finalised.
12. At this stage of the Investigation, the CMA and Ofcom agree that such information and assistance is likely to include:
 - a. The transfer by Ofcom of relevant information held on its file obtained for the purpose of preparing the Ofcom Report and responding to the Secretary of State during further correspondence prior to her decision to refer the Transaction to the CMA.
 - b. Relevant information and factual and technical assistance, including that provided at meetings with the CMA staff and inquiry group, relating to Ofcom’s role as the broadcast regulator in the UK and its role as a Phase 1 advisory body in relation to the transaction.
13. If, and to the extent that, Ofcom considers it appropriate having regard to its duty under Section 105(4A) to provide other information to the CMA, Ofcom shall write to the CMA indicating that it proposes to do so and will provide any such other information to the CMA in writing.

Transparency measures regarding the information and assistance provided by Ofcom to the CMA

14. The CMA is committed to its aims to be open and transparent about the work it does and how it engages with those directly involved in or affected by its work, while seeking (as appropriate) the confidentiality of information it obtains in the exercise of its functions.
15. In view of the significant public interest in relation to the Transaction and the Investigation, the CMA agrees with Ofcom that the CMA will publish (subject to considerations relating to the confidentiality of third party information) at an appropriate time during the Investigation the written requests made by the CMA to Ofcom and any written responses provided by Ofcom to the CMA.

Yours sincerely

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Joel Bamford
Project Director
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