ANTICIPATED ACQUISITION BY 21ST CENTURY FOX, INC OF SKY PLC

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups[1]

Introduction

1. On 20 September 2017, the then Secretary of State for Digital, Culture, Media and Sport, in exercise of her powers under article 5(3) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (the Order), referred the anticipated acquisition by 21st Century Fox, Inc (Fox) of the shares of Sky Plc (Sky) (together the Parties) that it does not already own (the Transaction) for further investigation and report by a group of Panel Members (the Inquiry Group) of the Competition and Markets Authority (CMA).[2]

2. In her Reference the then Secretary of State specified the following public interest considerations:

   (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 consideration);[3] 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 (the broadcasting standards consideration).[4]

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[1] CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17, 2014).
[2] Terms of Reference.
[3] Section 58(2C)(a) of the Act.
[4] Section 58(2C)(c) of the Act.

3. On the above Reference, the Inquiry Group is required to decide:

(a) whether arrangements are in progress or in contemplation which, if carried into effect will result in the creation of a European relevant merger situation[5]; and if so

(b) whether, taking account only of the media plurality consideration and the broadcasting standards consideration, the creation of that situation may be expected to operate against the public interest;[6] and if so

(c) whether (and if so what) action should be taken by the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which may be expected to result from the creation of the European relevant merger situation concerned.[7]

4. While the Inquiry Group is required to decide these questions the ultimate decision on these questions is for the Secretary of State, having regard to the decision of the Inquiry Group provided in its final report.[8]

5. In its notice of provisional findings notified to the Parties on 23 January 2018, the Inquiry Group provisionally concluded that the Transaction:

(a) may be expected to operate against the public interest taking account of the media plurality consideration; and

(b) may not be expected to operate against the public interest taking account of the broadcasting standards consideration.

6. The Inquiry Group's provisional findings and its reasons are set out in full in the provisional findings report, which will be published on the CMA website shortly.

7. This notice of possible remedies (Remedies Notice) sets out the actions which the Inquiry Group considers it might decide should be taken by the Secretary of State for the purpose of addressing the effects adverse to the public

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[5] Article 6(2) of the Order.

[6] Article 6(3) of the Order.

[7] Article 6(4) of the Order we are also required to decide whether the CMA should recommend the taking of action by the Secretary of State or others for such purpose and if so what should be recommended.

[8] Article 12 of the Order, in relation to the presence of a European relevant merger situation the Secretary of State is required to accept the decision of the final report.

interest arising from the media plurality concerns identified in the provisional findings report.[9]

Context

8. In considering its approach to possible remedies the Inquiry Group has taken account of the following contextual factors.

9. First, our provisional findings relate to media plurality rather than competition concerns. As such there is less by way of precedent, our merger remedies guidance is, in places, less applicable than in competition cases and we do not have specific guidance on remedies to address media plurality concerns. That said, other than where there are good reasons to take a contrary view, we have taken our general guidelines on remedies in merger cases[10] to be applicable.

10. Second, the media plurality concern is grounded in the control that the Murdoch Family Trust (MFT) and members of the Murdoch family already exercise over the editorial content of News Corp newspapers and the increased control that they will be able to exercise over Sky, in particular Sky News, if Fox acquires the remaining shares in Sky that it does not already own.

11. However, during the course of our investigation, on 14 December 2017, The Walt Disney Company announced that it was to acquire 21st Century Fox, after the spin-off of certain businesses, for $52.4 billion in stock (the Disney/Fox transaction).[11] The Disney/Fox transaction, if completed, would significantly weaken the link between the MFT and Sky which is at the root of our provisional concerns about media plurality.[12] Consequently, on the face of it, these concerns would fall away if the Disney/Fox transaction went ahead as announced.

12. The Disney/Fox transaction, though, will itself be subject to regulatory scrutiny, its terms may be varied as a result and it is unlikely to be completed until well after our Inquiry has concluded. It is therefore uncertain whether, when or how the transaction will be completed.

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[9] The provisional findings report will be made available on the case page.
[10] Merger Remedies: CC8
[11] See The Walt Disney Company press release.
[12] The deal would result in the MFT owning less than 5% of Disney.

13. In framing our Remedies Notice we have been mindful of these uncertainties and their possible implications for both the choice of remedies to include here and the way in which they might be implemented.

Possible remedies on which views are sought

14. We have identified three remedy approaches that we think have the potential to be effective and proportionate in addressing the media plurality concerns that we have provisionally identified:

(a) prohibition of the Transaction;

(b) other structural remedies - spin-off or divestiture of Sky News;

(c) behavioural remedies – to insulate Sky News from the MFT's influence.

We discuss each of these approaches and various configurations and combinations of them in the context of our guidance, undertakings in lieu offered by News Corporation in 2011 and Fox in 2017 and the anticipated acquisition of Fox by Disney.

Prohibition of the Transaction

15. Prohibition of the Transaction would address the root cause of our concerns regarding media plurality as set out in our provisional findings, preserve the status quo and prevent the harm associated with the Transaction from arising. The CMA therefore takes the provisional view that prohibition of the Transaction would represent a comprehensive solution to all aspects of the provisional adverse public interest finding and that it poses relatively few risks, compared to other options, in terms of implementation or effectiveness.

16. One risk that has been put to us, however, is that prohibition of the Transaction could lead to the closure of Sky News. This risk could arise if Sky, possibly acting in response to the wishes of its shareholders, decided that it would be desirable to close Sky News, notwithstanding the value attached to the Sky News brand and content, as a means of ensuring regulatory clearance for the Transaction if that were to be revived subsequently.

17. The closure of Sky News is not something that the Inquiry Group would permit while our investigation is ongoing as it would be regarded as pre-emptive action under schedule 2 of the Order. We do not see why, based on our considerations, Sky would wish to close Sky News in the event of a decision by the Secretary of State to prohibit the Transaction as the continued operation of Sky News would be unlikely to represent an obstacle to the Disney/Fox transaction.

18. The Inquiry Group invites views as to:

(a) whether prohibition would be an effective remedy;

(b) whether other, less intrusive, remedies which are available to the Secretary of State would also be effective;

(c) whether there is a realistic prospect of Sky News being closed if the Transaction is prohibited and, if so, what steps could be taken to mitigate or remove the risk of this happening.

We discuss later (paragraph 42) in what circumstances, following a prohibition, the Transaction might be permitted if the Disney/Fox transaction proceeds.

Other structural remedies - spin-off or divestiture of Sky News

19. We next consider two further structural measures intended to reduce the extent to which the MFT could exert influence over Sky News, by altering its ownership structure. We start with the undertakings offered by News Corporation in 2011 which were described as spinning-off Sky News. We then consider full divestiture of Sky News.

Spinning-off Sky News

20. In 2011 News Corporation offered Undertakings in Lieu of a reference to the Competition Commission of its proposed acquisition of the remaining 60.9% of BSkyB that it did not own (the 2011 Undertakings).[13] These included the following elements:

(a) spinning-off Sky News as a new plc whose shares would be publicly traded and which would be a subsidiary of Sky;

(b) establishing a board for the new company comprising a majority of independent directors, one at least of whom should have senior journalistic or editorial experience, and chaired by an independent director whose approval would be needed for the appointment or removal of the Head of News or any material changes in their authority or reporting relationships;

[13] Undertakings in Lieu of a reference submitted by News Corporation, June 2011.

(c) adopting Articles of Association for the new company, approved by the Secretary of State, providing that it would abide by the requirements of the Ofcom Broadcasting Code;

(d) the transfer of the Sky News business to the new company and the spinning-off of shares in the new company to shareholders of Sky in the same proportions as their shareholdings in Sky (resulting in News Corporation having the equivalent shareholding in the new company as it had in Sky prior to the transaction (ie just under 40%);

(e) establishing an agreement between the new company and Sky for the provision of wholesale news services to Sky in exchange for a carriage fee, in a form approved by the Secretary of State, and with a term of 10 years;

(f) establishing a brand licensing agreement between Sky and the new company entitling the new company to use the Sky News brand for 14 years, extendable at the new company's option for a further three years, in a form approved by the Secretary of State;

(g) a series of operational agreements between Sky and the new company for the provision of advertising sales, services such as IT support as well as leasing agreements in respect of premises, studios and broadcasting facilities including satellite capacity and Digital Terrestrial Television (DTT) transmission.

21. The then Secretary of State was minded to accept these undertakings but in the event the bid for Sky was withdrawn.

22. We are considering whether a remedy along the lines of the 2011 Undertakings would address effectively the concerns we have identified in our provisional findings and invite views as to whether they would do so and on the issues set out in paragraph 27.

Full divestiture of Sky News

23. The 2011 Undertakings envisaged that News Corporation would retain the same stake in a spun-off Sky News as it previously held in Sky. We now also invite views on whether full divestiture of Sky News would address effectively the concerns that we have provisionally found.

24. In evaluating possible divestitures involving Sky News the Inquiry Group will consider the risks associated with a divestiture including in particular the risks of divesting assets which do not constitute a standalone business. The Inquiry

Group will have regard to the following critical elements of the design of divestiture remedies:

(a) the scope of the divestiture package;

(b) the availability of a suitable purchaser; and

(c) the need to conduct an effective divestiture process

The scope of the divestiture package

25. This remedy would separate Sky News from the rest of Sky and require the Parties to divest most or all of their stake in the new company.

26. A challenge to the effectiveness of this remedy is that Sky News has never operated as a standalone business, separate from Sky and relies, for example, on Sky centrally provided services for management accounting, IT and HR support. In addition, Sky News airtime is sold by the Sky sales house, Sky Media. This potentially reduces its commercial resilience and ability to operate independently from the Parties, even if functionally separate. Unless a purchaser with equivalent resources was available, the newsgathering and dissemination functions of Sky News would have to be carved out of Sky and packaged with other assets or service agreements to render the divested entity viable.

27. The Inquiry Group invites views on the scope of the divestiture package that would be required to address the concerns we have identified in our provisional findings. In particular we invite views on the following:

(a) under what conditions, if any, would a divestiture of Sky News be effective in addressing the public interest concerns we have provisionally identified?

(b) would it be necessary or appropriate to require Fox to divest its entire stake in Sky News? Or would it be sufficient to retain the 'status quo' by allowing it to retain 39%? Would owning a 39% share of Sky News give Fox (and therefore the MFT) a greater degree of control than it currently derives from holding a 39% share of Sky because Sky News would be a less commercially resilient entity than Sky itself?

(c) in the 2011 Undertakings it was envisaged that Sky would provide the new company with a wide range of support services, premises and studio facilities on the Osterley campus and, to the extent they were transferrable, the benefit of agreements with wholesale customers of Sky such as Virgin Media (see paragraph (g)). In addition, under the carriage

agreement, Sky would be the new entity's single largest customer for wholesale news services. In these circumstances and irrespective of the new company's ownership structure, could Sky and thus ultimately the MFT still exert influence over Sky News such that media plurality concerns would remain?

(d) subject to the answers to these previous questions what further or different arrangements would be necessary to prevent the MFT exercising control over Sky News? Would it, for example, be necessary to require the physical relocation of Sky News away from the Osterley campus?

(e) would it be necessary to oblige Sky to contract with the new entity for the provision of broadcast news services as was proposed in 2011 (see paragraph (e))? Or might this give Sky too much leverage over the new company as its only, or at least its largest, customer? If so, how might this be reduced?

(f) would it be necessary to divest the Sky name and any other relevant intellectual property together with the Sky News assets and if so for how long? Were the terms and time period envisaged in 2011 adequate (see paragraph (f))?

(g) even if the new entity was permitted to use the Sky News name, would its contribution to media plurality decline if it was organisationally separate from Sky?

(h) should the Sky News digital news gathering and news distribution functions be treated together with the TV operations or should different arrangements be made for them?

Identification of a suitable purchaser

28. The Inquiry Group will wish to satisfy itself that any prospective purchaser of the divestiture package:

(a) is independent of the MFT and interconnected companies;

(b) has the necessary skills and resources; and

(c) will not create fresh competition or public interest concerns on the basis of media plurality or a lack of genuine commitment to the attainment of the broadcasting standards objectives in the UK.

29. We invite views as to whether:

(a) there are particular factors over and above those set out in paragraph 28 to which we should have regard in determining the suitability of a potential purchaser; and

(b) a purchaser with suitable resources and experience which would not give rise to further public interest or competition concerns is likely to be available.

Effective divestiture process

30. The Inquiry Group will consider the appropriate timescale for achieving a divestiture and what procedural safeguards may be required to minimise the risks associated with this remedy option.

31. We invite views on:

(a) whether, and if so in what circumstances, it would be necessary to require an upfront buyer[14] such that any divestiture(s) is/are contractually committed before the Transaction is allowed to complete;

(b) how long the Parties should be allowed to achieve an effective disposal if no upfront buyer is required;

(c) whether the Parties should be required to appoint a divestiture trustee and/or a monitoring trustee to oversee any divestiture(s) and to ensure that the assets to be divested is/are maintained during the course of the process.

Behavioural remedies

32. Behavioural remedies are designed to regulate the ongoing conduct of parties. Our Guidelines identify several kinds of behavioural measures including 'Firewall' remedies. Their aim is to keep entities and their information separate from one another and this is generally achieved by restricting information flows and use of shared services, physically separating premises and staff, and regulating transfers of management and any permitted interactions between relevant staff.[15] Since the aim of any behavioural remedies would be to limit the ability of the MFT to exercise

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[14] Where the CMA is in doubt as to the viability or attractiveness to purchasers of a proposed divestiture package, or believes there may be only a limited pool of suitable purchasers, it may require the merger parties to obtain a suitable purchaser that is contractually committed to the trans-action before permitting a proposed merger to proceed. CC8: Merger Remedies, CC Guidelines, paragraph 3.19.

[15] CC8: Merger Remedies, CC Guidelines, paragraph 4.20.

increased influence over Sky News, Firewall measures might be particularly relevant here.

Undertakings in lieu offered by Fox in 2017

33. We begin our consideration of behavioural remedies by describing the undertakings offered, in effect to Ofcom, in lieu of a reference of this Transaction (Proposed Undertakings).[16] These built upon the resolution that was passed by the Fox board on 20 April 2017 whose aim was to reduce the control that the Fox board could exert over Sky News' editorial content.[17]

34. We then invite views as to whether the Proposed Undertakings would be adequate to address the media plurality concerns we have provisionally identified or whether other measures would be necessary to ensure that a remedy package based on behavioural remedies would be effective.

35. The key features of the Proposed Undertakings, several of which could be characterised as Firewall remedies, were:

(a) a commitment to maintain Sky's current compliance arrangements, with any changes being subject to Ofcom approval;

(b) a commitment to maintain the Sky News service for a period of at least five years and to maintain current levels of investment (in real terms) in Sky News for that period;

(c) the establishment of a Sky News Editorial Board, of which a majority would be independent members;

(d) responsibility for the appointment and removal of the Head of Sky News and oversight of Sky News' compliance with the Sky News Editorial Guidelines lies with the Sky News Editorial Board;

(e) the Head of Sky News will retain editorial control over the selection of news stories and any political comment and opinion broadcast on Sky News;

(f) a commitment that employees and officers of Fox, or members of the Fox board that are trustees or beneficiaries of the MFT, will not attempt to influence the editorial choices of the Head of Sky News; and

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16 See Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc, Ofcom's report to the secretary of state, Annex 1.

17 See Fox initial submission, paragraph 2.25.

(g) the Sky News Editorial Board will report annually to Ofcom on any attempts to influence the Head of Sky News by persons outside the Sky News editorial function and a summary of this report will be included in the Fox annual report.

36. Although Ofcom acknowledged that the Proposed Undertakings could mitigate the risks it had identified, it noted a number of potential problems with them. These included that aside from the initial appointments to the Sky News Editorial Board, which were to be made by the outgoing Sky independent directors, appointments would be made by a sub-committee of the Fox board. Further, it noted that on an ongoing basis the Sky News Editorial Board will not be made up entirely of independent members but rather that they would comprise the majority of members.

37. More generally, Ofcom noted that it can be difficult to ensure the effectiveness of behavioural undertakings, due to the challenges around effective monitoring and enforcement. This, it said, was particularly the case where any breach may be subtle. It said that it had received a number of responses to its invitation to comment raising concerns about the perceived ineffectiveness of past commitments in the context of commitments given in relation to the acquisition of The Times and The Sunday Times in 1981 and the acquisition of Dow Jones in 2007 by News Corporation.

Further variants

38. We noted the various reservations expressed by Ofcom and others in respect of the Proposed Undertakings and considered ways of varying them to make them more effective in addressing our provisional concerns about media plurality. We set out below questions concerning measures which could potentially further reduce the extent of the MFT's influence over Sky News:

(a) in the light of Ofcom's observations regarding the difficulty of monitoring and enforcing behavioural remedies, and the subtle ways in which influence can be exerted, could any package of behavioural measures constitute an effective remedy?

(b) if behavioural remedies such as those proposed by Fox were to be adopted, would having independent directors comprising a majority of the membership of an editorial board, but allowing participation of non-independent directors (eg Fox executives), be sufficient to maintain Sky News' editorial independence? If not, what editorial board composition would be needed to achieve this?

(c) how should independent editorial board members, including its chair, be selected and what would qualify them for appointment?

(d) should the selection of independent editorial board members or the Chair be subject to regulatory oversight, for example the approval of Ofcom?

(e) what matters should fall for decision by the Sky News Editorial Board? In addition to the responsibility for the appointment and dismissal of the Head of Sky News as proposed by the Parties, should they include his or her remuneration package and duties? Should they extend to broader editorial issues such as the composition of the programme schedule and the mix of programming?

(f) would it be practicable or desirable to require Fox to vary the composition of and extend the remit of the Sky News Editorial Board still further? This could include a board composed entirely of independent directors, appointed with the approval of, say, Ofcom, and a remit including some business functions;

(g) for how long should Fox's commitment to maintain Sky News and the current level of investment in it extend? Should this be five years, as proposed by Fox? Should this commitment be time limited at all, or should it instead be subject to the Parties seeking a review on the grounds of a material change in circumstances?

Remedies we are not minded to pursue

39. We considered other remedy options which we are currently not minded to pursue further. These were:

(a) divestiture of News UK assets: We considered that reducing the number of media enterprises over which the MFT exercised control by requiring the divestment of News UK newspaper titles could potentially be effective in addressing our concerns but that this is likely to be disproportionate as it would involve applying a remedy to an entity (News Corp) that was not party to the Transaction;

(b) changes to the Ofcom Broadcasting Code: We could not identify changes to the Code which would address our concerns effectively and proportionately.

Other remedy options

40. The Inquiry Group will consider any other effective and practicable remedies that the Parties, or any interested third parties, may propose in order to address the adverse public interest finding.

41. We have considered recommending no remedial action to the Secretary of State on the grounds that while we have provisionally identified public interest issues arising from the impact of the Transaction on media plurality our concerns could fall away if the Disney/Fox transaction were to proceed to completion. At this stage we cannot, however, be sufficiently confident that the Disney/Fox transaction will proceed, and if it does, that it would obviate the need for a remedy or do so within a reasonable time period but discuss below remedy implementation options which may nonetheless address this issue.

Other considerations

42. Although we believe that the acquisition of Fox by Disney, because it would significantly weaken the link between Sky News and the MFT, could address the concerns set out in our provisional findings, we cannot be sufficiently confident at this stage whether, when, or how the Disney/Fox transaction will complete. We have therefore considered how it might be possible to deal with this uncertainty in framing a remedies implementation plan.

43. We have identified the following potential approaches:

   (a) a recommendation to the Secretary of State to introduce remedies – which could include prohibition of the Transaction - that will fall away subject to verification that the Disney/Fox transaction when completed is on substantially the same terms as are currently envisaged. This would in effect be an ‘event-based’ sunset clause;

   (b) a recommendation to the Secretary of State to introduce remedies – which could include prohibition of the Transaction - whose longevity would depend on a review following a request from the Parties to the Secretary of State to vary or revoke them on the grounds that there has been a material change of circumstances since the CMA’s investigation (most obviously the purchase of Fox by Disney).

44. In addition, while it would be very unusual, we considered whether there was merit in a variant of these implementation options which would entail requiring the MFT to divest Fox assets to Disney rather than, as envisaged here, monitoring whether the Disney/Fox transaction goes ahead. This might have

advantages in terms of allowing the CMA some control over the sale process but would raise concerns about practicability and proportionality, particularly in terms of managing the overlap with other regulatory bodies. Consequently, we have not included it here. Nonetheless, as part of our consideration of a possible event-based sunset clause (see paragraph (a)) we would welcome views on the extent to which divestiture of the relevant Fox/Sky assets – as part of the Disney/Fox transaction or otherwise - would in practice address our provisional concerns about media plurality.

45. We invite views on the effectiveness and proportionality of the two approaches set out in paragraph 43 and how they might interact with the different remedy options under consideration. In particular we would welcome views on the following:

(a) would, in respect in particular of an event-based sunset clause (see paragraph (a)), the Disney/Fox transaction as currently envisaged sufficiently reduce the link between the MFT and Sky News to address our concerns? Although the MFT will own less than 5% of Disney's stock it will nonetheless be its second largest shareholder.[18] Further, although no announcement has been made, an investor with such a large stake might seek board representation. Would the appointment of a Murdoch family member either to the Disney board or to a senior executive position in Disney mean the Disney/Fox transaction was less likely to extinguish our media plurality concerns?

(b) should, as the final arrangements for the Disney/Fox transaction may differ from those currently envisaged, any event-based sunset clause reference certain criteria for the final arrangements which would have to be fulfilled in order to trigger the sunset clause, for example the size of the MFT's stake in the merged business?

(c) should Fox be prohibited from acquiring the stake in Sky that it currently does not own unless and until the Disney/Fox transaction has completed? (We are aware of the Rules of the Takeover Code which provide that a new offer may not be made for a period of time after the original offer lapsing, except with the consent of the Panel). Alternatively, can we have sufficient confidence that a package of remedial measures can be assembled that will address our concerns unless and until the Disney/Fox transaction completes?

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[18] Los Angeles Times, 14 December 2017.

(d) how and to what extent should the design of the remedies package reflect the fact that it may turn out to be a temporary measure until the Disney/Fox transaction completes? Should, in other words, the package be comprised of less or more intrusive measures, or measures which would be less complex to design and monitor and/or easier to reverse?

(e) should the Inquiry Group consider a long-stop remedy that would be triggered in the event that the final terms of the Disney/Fox transaction were not such as to address our concerns? How might this be designed?

Cost of remedies and proportionality

46. As set out in our guidance, in order to be reasonable and proportionate the Inquiry Group will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The Inquiry Group will also seek to ensure that no remedy is disproportionate in relation to the adverse public interest effects. Between two remedies that the Inquiry Group considers equally effective, it will choose that which imposes the least cost or restriction.

47. The Inquiry Group invites views on what costs are likely to arise in implementing each remedy option.

Next steps

48. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the Inquiry Group to consider, by 6 February 2018 (see Note (i)).

49. A copy of this notice will be posted on the CMA website.

Anne Lambert
Inquiry Group Chair
23 January 2018

Note

(i) This notice of possible actions to remedy, mitigate or prevent the media plurality concern identified or any resulting adverse effects is given having regard to the provisional findings announced on 23 January 2018. The main parties have until 13 February 2018 to respond to the provisional findings. The CMA's findings may alter in response to comments it receives on its provisional findings, in which case the CMA may consider other possible remedies, if appropriate.