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Date
24 July 2017

By email

Dear Sir

The Secretary of State's Announcement to Parliament on 20 July 2017 in relation to the possible referral of the 21st Century Fox bid for Sky plc ("Sky")

We are writing to set out Sky's views on the announcement of the Secretary of State for Digital, Culture, Media and Sport (the **Secretary of State**) to Parliament on 20 July 2017 and the subsequent discussion in the House.

As set out in our letter of 14 July, it is in the interests of Sky, its shareholders and its employees (and indeed in the wider public interest) that the merger review process operates efficiently and with due expedition. Prolonged uncertainty and the disruptive impact on Sky's business should be minimised. Sky notes the Secretary of State's comments in Parliament on 20 July about the merging parties' legitimate needs for a prompt decision and her acknowledgment that she is "*required to act without undue delay*".

After a thorough process, in which ample opportunity was afforded to all interested parties to provide evidence, Ofcom unequivocally advised that there are no broadcasting standards concerns justifying a reference. As the Secretary of State acknowledged in her statement to Parliament on 29 June (and again in her statement on 20 July), "*Ofcom is unequivocal*" in its conclusions on this issue. Sky welcomes the Secretary of State's confirmation on 20 July that in so far as commitment to broadcasting standards is concerned, as matters stand, "*there are no grounds on which I can refer*".

Notwithstanding Ofcom's clear conclusions, the Secretary of State chose to consult further. As the Secretary of State reiterated in Parliament on 20 July, any submissions in response to this

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consultation would need to contain new evidence (that is, evidence not already considered by Ofcom in its review) for her to change her mind.

While the Secretary of State has apparently received a substantial number of submissions in response to that consultation, from her answers to questions in Parliament on 20 July, it appears that a very large number were identical. The task of confirming that they are duplicative and contain no new or substantive evidence not already considered by Ofcom should therefore be one that can be conducted with relative speed. It would clearly be a matter of concern if due expedition in merger control assessment were compromised by multiple submissions containing no new evidence and simply repeating arguments already considered by Ofcom.

We are aware of the content of one submission in the consultation – that published by the Right Honourable Mr Miliband MP and others. That, too, adduces no new evidence. Rather, it proceeds on the basis that Ofcom's conclusions were legally flawed; a view repeated by the Right Honourable Mr Miliband MP in Parliament in response to the Secretary of State's statement on 20 July. That is not correct. Ofcom applied the correct legal framework applicable to the consideration of commitment to the broadcasting standards set out in s.319 of the Communications Act and enshrined in relevant Ofcom codes, including the Broadcasting Code. In doing so, Ofcom considered the most directly relevant evidence, namely both parties' existing broadcasting compliance records in both the UK and further afield, and concluded that those records did not indicate a lack of genuine commitment to the attainment of broadcasting standards.

Ofcom, moreover, did take account of the corporate governance and other issues to which Mr Miliband referred as part of its assessment of commitment to broadcasting standards. In relation to corporate governance matters, Ofcom concluded that: *"we do not consider that this evidence demonstrates that the merged entity would lack a genuine commitment to the attainment of broadcasting standards"*.

Whilst some respondents to the consultation may not agree with Ofcom's assessment, that is not a proper basis for the Secretary of State to disregard Ofcom's unequivocal advice.

Ofcom is of course the expert regulator in respect of broadcasting standards. It oversees the regime for awarding and overseeing all licences and for upholding the standards set out in s.319 of the Communications Act 2003. It is the main arbiter of those standards, as enshrined in a number of codes including Ofcom's Broadcasting Code. Ofcom's views on the second public interest consideration of commitment to broadcasting standards must therefore carry particular weight. In light of this, and of the unequivocal conclusions Ofcom reached, there is no basis for a reference on commitment to broadcasting standards grounds, and no cause for further delay in this merger review process.

We note the Secretary of State's confirmations that a final decision will be made *"in the coming weeks"* and that *"the Parliamentary timetable should not dictate the timetable of this quasi-judicial*



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process". In all the circumstances (including the nearly 8 months that have already elapsed), Sky urges the Secretary of State to make a final decision promptly and well before Parliament reconvenes in September.

Yours faithfully

Herbert Smith Freehills LLP

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