

SKY RESPONSE TO THE CMA'S NOTICE OF POSSIBLE REMEDIES – ANTICIPATED ACQUISITION BY 21ST CENTURY FOX, INC OF SKY PLC (THE "TRANSACTION")

SECTION 1: EXECUTIVE SUMMARY

- 1.1 As will be explained in Sky's response to the CMA's Provisional Findings report¹ (the "**Provisional Findings**"), Sky considers that the CMA has made a number of legal and factual errors in the Provisional Findings. Correcting for these would demonstrate that the Transaction may not be expected to be adverse to the public interest on media plurality grounds. Nevertheless, even accepting the CMA's approach in the Provisional Findings on its face, Sky considers that the remedies proposed by 21st Century Fox ("**21CF**") – a combination of structural separation of Sky News governance and editorial decision making from the merged entity, underpinned by robust behavioural commitments – would be an effective and comprehensive solution to any potential concerns arising from the Transaction. The proposed remedies are directly related to and decisively eliminate the source of the CMA's provisional concerns – potential MFT influence over Sky News' editorial decision-making. They are straightforward to implement and monitor. They also represent the least intrusive effective solution of the alternatives being considered by the CMA, and therefore are the only proportionate option. The CMA can confidently recommend the proposed remedies as being fully effective at addressing its potential concerns, should these concerns be maintained in its final report.

SECTION 2: TO THE EXTENT THAT A REMEDY IS REQUIRED AT ALL, BEHAVIOURAL REMEDIES ARE THE MOST PROPORTIONATE EFFECTIVE REMEDY FOR THE CMA

Legal framework requires the CMA to select the most proportionate remedy

- 2.1 The CMA has provisionally found that the Transaction potentially raises media plurality concerns capable of having an adverse impact on the public interest. Sky respectfully does not agree with those Provisional Findings and will separately respond to the CMA.² To the extent that these provisional concerns are confirmed in the CMA's final findings, it is required to recommend to the Secretary of State possible actions to remedy, mitigate or prevent the media plurality concerns identified and any resulting adverse public interest effects potentially arising.³
- 2.2 As noted in the CMA's Notice of Possible Remedies⁴ (the "**Remedies Notice**"), by analogy with the approach set out in the CMA's Merger Remedies guidance,⁵ the CMA should ensure that the remedy it recommends to the Secretary of State is the least costly and intrusive remedy option out of all effective remedy options, and that no remedy is disproportionate to the adverse effects arising from the transaction.

¹ The CMA's Provisional Findings report in the *Anticipated acquisition by 21st Century Fox, Inc of Sky Plc*, dated 23 January 2018.

² Sky's response to the CMA's provisional findings will be set out in detail in the response to be provided to the CMA by 13 February 2018.

³ Article 6(4) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.

⁴ The CMA's Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups in the *Anticipated acquisition by 21st Century Fox, Inc of Sky Plc*, dated 23 January 2018.

⁵ Paragraph 1.7, 'Merger Remedies' (Competition Commission Guidelines (2008)) ("**CC8**"), reflected in paragraph 46 of the Remedies Notice.

The provisional concerns identified as potentially arising from the Transaction are limited in scope and the likelihood of them arising is uncertain

2.3 Even on the CMA's own terms, the concerns provisionally identified are subtle and uncertain to arise at all:

(a) The concerns posited are limited in scope:

- In light of the existence of internal and external safeguards that remain unaffected by the Transaction, the CMA acknowledges that *"increased influence by the MFT over Sky News is unlikely to manifest itself in full control over editorial output" and "the MFT could not attempt to exercise its increased control in an overt way"*; rather the CMA *"consider that the exercise of influence is likely to be more nuanced in practice...Coordination of editorial outlook could arise in relation to select matters which may not, unlike Brexit or the outcome of a general election, be those subject to such intense scrutiny"*; and are more likely to involve *"longer term and more subtle changes in position"*.⁶ The concern identified is therefore over the possibility of small changes in positioning on lower-profile issues (to the extent consistent with Broadcasting Code obligations), which are so subtle as to be indiscernible to an audience.
- In relation to influence over public opinion and the political agenda, the CMA noted that this is likely to be limited to influence over what people think about i.e. influencing the prominence of particular issues, rather than being able to shape people's opinions on an issue (unless they were already sympathetic to a viewpoint).⁷ Again, the internal and external safeguards relevant to TV broadcast news in general, and Sky News in particular, would prevent overt influence being exerted. The CMA describes this as a *"subtler approach involving story selection and prominence"* (emphasis added).⁸

(b) The CMA's assessment demonstrates uncertainty as to whether these concerns will arise at all:

- The CMA states *"...as a result of the Transaction, Sky News and the newspapers owned by NewsCorp could take a similar approach on specific topics or issues, push certain stories or downplay others. We consider that these types of alignment have the potential to raise concerns with regards to a material reduction in plurality..."* (emphasis added)⁹
- The CMA identifies that *"the Transaction could raise concerns where there is potential for increased editorial alignment"* (emphasis added).¹⁰ This means that the CMA's concerns are founded on the possibility of any incremental alignment between Sky News and the NewsCorp newspapers.
- In relation to influence over public opinion and the political agenda, as noted above, the CMA identifies a subtle approach around story selection, which *"may influence what is thought about"* (emphasis added).¹¹

⁶ Paragraph 8.41 to 8.42, Provisional Findings.

⁷ Paragraph 11.21, Provisional Findings.

⁸ Paragraph 11.30, Provisional Findings.

⁹ Paragraph 7.95, Provisional Findings.

¹⁰ Paragraph 8.4, Provisional Findings.

¹¹ Paragraph 11.30, Provisional Findings.

- 2.4 As will be set out in more detail in Sky's response to the CMA's Provisional Findings, there are a number of important areas in which Sky considers that the CMA has erred in its legal and factual assessment of the evidence – notably, the CMA misdirects itself in applying the legal test of control and errs in its assessment of the level of control exercisable in practice, as well as in its consideration of the impact of the Transaction on the sufficiency of plurality and its evaluation of the increased influence of the merged entity on public opinion and the political agenda. Once these errors are corrected, Sky considers that the CMA would conclude that the Transaction may not to be expected to give rise to any material adverse impact on the public interest.
- 2.5 Nevertheless, the remainder of this response proceeds on the basis of the 'high watermark' of concerns as outlined by the CMA in the Provisional Findings. Sky considers that the remedies proposed by 21CF would be effective in addressing the concerns provisionally identified by the CMA, even if the CMA does not revise these findings further, as Sky will recommend in its response to the Provisional Findings.

In light of the small scale and uncertainty of the identified concerns arising, behavioural remedies are clearly an effective and proportionate solution

- 2.6 At paragraph 14 of the Remedies Notice, the CMA identifies three remedy approaches with the potential to be "*effective and proportionate in addressing the media plurality concerns...provisionally identified*". In decreasing order of intrusiveness, these are:
- (a) Prohibition of the Transaction;
 - (b) Other structural remedies;
 - (c) Behavioural remedies.
- 2.7 Sky agrees with the CMA that behavioural remedies would be an effective solution to the concerns provisionally identified. A behavioural solution is also the least intrusive, and therefore the only proportionate option, of the solutions identified by the CMA.
- 2.8 Prohibition of the Transaction would be the most intrusive option of all and therefore wholly disproportionate to the small scale of the concerns provisionally identified and the low likelihood of them arising at all post-merger, as described above. Sky News is a tiny part of the Sky Group (accounting for less than [3<] % of Group revenues in 2016/17). It is certainly not a material driver for 21CF's £11.7 billion acquisition offer for Sky. It would be inappropriate for marginal and tentative concerns relating to an extremely small part of the overall group to result in prohibition of the Transaction. This would result in denial of the opportunity for Sky's shareholders to vote on an offer which was unanimously recommended to them by Sky's Independent Committee and would represent significant value to shareholders, by way of 40% premium to the market value of Sky's shares prior to receiving the offer. It would also prevent the Sky business, its employees and investors from benefitting from being part of a larger organisation, which would support and accelerate the delivery of Sky's strategy and long-term growth.
- 2.9 In any event, prohibition of the Transaction is unnecessary given the existence of a less intrusive solution which would be effective and proportionate, as described further below.

SECTION 3: THE PROPOSED FIREWALL REMEDIES SUBMITTED BY 21CF WOULD BE AN EFFECTIVE AND PROPORTIONATE SOLUTION TO ANY CONCERNS FLOWING FROM THE TRANSACTION

- 3.1 Sky has had sight of the Proposed Firewall Remedies submitted to the CMA by 21CF and considers that this remedy package would be effective in addressing the CMA's concerns, as identified in the Provisional Findings.

- 3.2 First, the remedy package is a comprehensive solution, comprising both structural and behavioural elements. The remedy package would firmly establish structural separation of the governance and editorial decision-making of Sky News via the introduction of a wholly independent Sky News Editorial Board. By establishing a further structural barrier, in addition to the 21CF Board itself, the remedy would eliminate potential MFT influence over Sky News' editorial decisions. This structural barrier is further buttressed by behavioural undertakings from 21CF committing to prevent any such influence being exerted in the first place, together guaranteeing Sky News' editorial independence.
- 3.3 Second, the CMA can be confident that the remedy package will be effective, as it is directly related to and comprehensively eliminates the source of the CMA's concern – the potential for the MFT to exert editorial influence over Sky News post-merger. The reasons for this are as follows:
- (a) As a baseline, it crystallises the existing strong internal safeguards at Sky, which have been effective in protecting Sky News' editorial independence to date, through:
- Protecting the Sky News Editorial Guidelines (which delineate Sky News' current editorial policy and its commitment to due accuracy and impartiality across all Sky News platforms) and preventing any change to them without prior approval of the Sky News Editorial Board and the Secretary of State (or appropriate alternative);¹²
 - Ensuring that editorial decisions, including decisions on editorial strategy, such as programming strategy, will remain solely within the remit of the Head of Sky News and the Sky News staff, as is the case pre-merger and is appropriate and practical in the context of a 24-hour rolling news service;¹³
 - Ensuring that the appointment and removal of the Head of Sky News and his or her remuneration package remains a matter separated from the 21CF Board and senior management, safeguarded within the remit of the fully independent Sky News Editorial Board;
 - Guaranteeing the maintenance of similar pre-merger levels of net operational investment in Sky News.¹⁴
- (b) It builds on the existing strong internal Sky News safeguards through a number of enhancements, originally tabled with Ofcom at Phase I, which included (i) a Sky News Editorial Board to oversee and guarantee Sky News' editorial independence, (ii) an explicit commitment that no employee or officer of 21CF or a member of the 21CF Board who is also a trustee or beneficiary of the MFT will influence or attempt to influence Sky News' editorial decision-making and (iii) a transparent mechanism through which any attempts at editorial influence by the MFT can be reported and escalated internally, publicly, as well as to the Secretary of State or an appropriate regulator. In its Phase I Public Interest Report ("**Ofcom PIT Report**"), Ofcom acknowledged that the undertakings tabled at that time would mitigate their concerns and advised the Secretary of State she could accept them in lieu of reference to the CMA. In particular, Ofcom made the following comments in its

¹² Section 4 and Paragraph 3.3(iv) of the Proposed Firewall Remedies.

¹³ Per the definition of the 'Head of Sky News' on p.5 of the Proposed Firewall Remedies and per Paragraph 4.2(i) of the Proposed Firewall Remedies.

¹⁴ Paragraph 2.2 of the Proposed Firewall Remedies.

Phase I Public Interest Report in explaining how the undertakings would address its concerns:

- On sufficiency of plurality concerns: *“The proposed undertakings would insulate the Head of Sky News (and therefore the Sky News editorial position) from other bodies within the merged entity. This insulation may mitigate concerns relating to the strength of voice of the merged entity since it would not be in a position to speak with one voice.”¹⁵*
- On political influence concerns: *“The undertakings also contain an explicit provision whereby Fox will ensure that employees of Fox and members of the Board of Fox which are trustees or beneficiaries of the Murdoch Family Trust will not attempt to influence the editorial position of Sky News. This commitment provides comfort that members of the Murdoch Family Trust cannot use the threat of negative coverage in Sky News as a means of furthering their own political agenda.”¹⁶*
- On the comparison to The Times/Dow Jones undertakings:
 - *“We have received a number of submissions about the perceived ineffectiveness of past commitments made by the selling party in the context of acquisitions of The Times and Dow Jones. No evidence has been put to us that the commitments in either case were actually breached. We consider that the proposed undertakings in the current transaction are more robust than what was made binding in the case of The Times and Dow Jones. In particular, the proposed undertakings are enforceable by the Secretary of State (as opposed to enforcement by the selling party in the context of Dow Jones) and include an explicit reporting obligation in relation to attempts to influence the editorial stance of the Head of Sky News.”¹⁷*
 - *“The proposed undertakings provide for transparency by clear lines of reporting to Ofcom and public reporting thus allowing for more effective monitoring than in previous cases. Further, the undertakings are enforceable directly by the Secretary of State rather than by parties whose interests may not be aligned with the public interest in particular cases. We therefore consider that the proposed undertakings are more robust than what was made binding in those two cases.”¹⁸*

(c) The Proposed Firewall Remedies enhance both the existing internal safeguards and the undertakings tabled with Ofcom in Phase I, by introducing further measures which address effectively the potential areas for improvement noted by Ofcom in its Phase I report, plus the questions raised by the CMA in its Remedies Notice. Notably:

- The Sky News Editorial Board will comprise only independent members.¹⁹ This would decisively separate governance of Sky News and its editorial decision-making from the rest of the merged entity and the MFT, thereby eliminating any residual risk of potential MFT influence over Sky News’ editorial decisions.

¹⁵ Para 11.18, Ofcom PIT Report.

¹⁶ Para 11.19, Ofcom PIT Report.

¹⁷ Para 2.58, Ofcom PIT Report,.

¹⁸ Para 11.21, Ofcom PIT Report.

¹⁹ Paragraph 3.1(i) of the Proposed Firewall Remedies.

- The Sky News Editorial Board members will also be expert members i.e. they will be required to have experience in the UK media sector and the Chair will have senior editorial and/or journalistic experience,²⁰ thereby removing any potential concerns that board-members may not have the requisite expertise to fulfil their functions.
- The Sky News Editorial Board will initially comprise two existing Sky independent directors and a third member nominated by the existing Sky independent directors, who has senior editorial and/or journalistic experience.²¹ The Sky independent directors have confirmed, in principle, that they would be willing to assume this role.
- Subsequent appointments to the Sky News Editorial Board would be entrusted to the 21CF Nominating and Corporate Governance Committee (“**NCGC**”), which also comprises only independent directors.²² This process has been supplemented in the Proposed Firewall Remedies with an additional safeguard, namely that appointments by the NCGC will be conditional on approval by the Secretary of State (or other appropriate alternative) to confirm that the individual meets the relevant criteria of an ‘Independent Expert Board Member’. This removes any (misplaced) concern that appointments by the NCGC might nevertheless be influenced by the MFT.

3.4 Thirdly, the implementation risk associated with the remedy package is extremely low. The remedy package is straightforward to implement and monitor. The structure can be established immediately upon closing, with independent directors who are already familiar with Sky and the Sky News business and can ensure continuity post completion of the Transaction. It is also self-policing with transparent escalation and reporting mechanisms both internally, as well as externally via publication in the 21CF Annual Report of any record of attempted MFT influence over Sky News and provision of the record to the Secretary of State (or appropriate alternative). Whilst there are a limited number of matters which are identified for prior approval of the Secretary of State (or other appropriate alternative), these matters should be straightforward to assess, e.g. compliance with the specified criteria for an Independent Expert Board Member of the Sky News Editorial Board and therefore this role should not be unduly burdensome.

3.5 Finally, Sky notes that the remedy package also includes an event-based sunset clause. This is appropriate and proportionate in light of the signed acquisition agreement between 21CF and Disney for certain 21CF assets, including its ownership stake in Sky. Sky agrees with the CMA that such an acquisition would remove the CMA’s provisional concerns about potential undue MFT influence arising from the present Transaction.²³ Prohibition of the Fox/Sky transaction completing unless and until the Disney/Fox transaction completes²⁴ would be akin to prohibition of the Fox/Sky transaction and therefore wholly disproportionate for the reasons set out at paragraph 2.8 above.

3.6 The Proposed Firewall Remedies are also a proportionate solution, as they are directly related to and targeted specifically at the concerns outlined by the CMA in its Provisional Findings i.e., insulating Sky News from any potential MFT influence, and are no more

²⁰ Paragraphs 3.1(i) and 3.1(ii), and the definition of ‘Independent Expert Board Member’ on pp.5-6 of the Proposed Firewall Remedies.

²¹ Paragraph 3.1(i)(A) of the Proposed Firewall Remedies.

²² Paragraph 3.1(i)(B) of the Proposed Firewall Remedies.

²³ Paragraph 11, CMA Remedies Notice.

²⁴ As proposed as an option at paragraph 45(c) of the Remedies Notice.

intrusive than necessary to effectively address those concerns, which (as noted above) are small-scale and uncertain in nature.

- 3.7 In conclusion, Sky considers that the Proposed Firewall Remedies comprehensively and effectively address the CMA's provisional concerns, as set out in the Provisional Findings, as they decisively remove the avenues for potential MFT influence over the editorial decision-making of Sky News, and are reinforced by transparent reporting and escalation processes to a wholly independent Editorial Board, publicly via the 21CF Annual Report and to the Secretary of State (or appropriate alternative), should any such attempts be made. The package can be implemented immediately upon closing and would be straightforward to monitor going forward. Moreover, it is the most proportionate effective solution out of the range of options that the CMA outlines in its Remedies Notice, and therefore it is the only appropriate option for the CMA to recommend to the Secretary of State.

Sky

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