



Department for
Digital, Culture
Media & Sport

DCMS Media Team
4th Floor
100 Parliament Street
London SW1A 2BQ

T: 0207 211 6000

www.gov.uk/dcms

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By Email

Sharon White
Chief Executive
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Dear Sharon,

Proposed merger of 21st Century Fox, Inc and Sky plc

I refer to our letter of 7 August 2017 concerning the above merger and the request by the Secretary of State for Digital, Culture, Media and Sport for further advice from Ofcom under s.106B(2) of the Enterprise Act 2002, and to your response of 25 August 2017.

Having considered your response there are a number of issues on which the Secretary of State requires further clarification, as set out below.

Issue 1: the legal threshold

As you state in your letter, the legal threshold for a reference to the Competition and Markets Authority is low. In particular, the Secretary of State has the power to make a reference if she believes¹ there to be a risk (which is not purely fanciful) that the merger might operate against the public interest² – specifically in this context the public interest in the need for persons carrying on media enterprises, and those with control of such enterprises, to have a genuine commitment to attaining the broadcast standards objectives set out in section 319 of the Communications Act 2003. Where this “non-fanciful” threshold is met the Secretary of State has a discretion as to whether or not to make a reference, i.e. she is not under a duty to refer.

¹ Her belief must be reasonably and objectively justified by relevant facts.

² *OFT v IBA Health* [2004] EWCA Civ 142, paragraphs 43 to 49.

[REDACTED]

On page 1 of your letter you stated: “You have also asked us to advise ... as to whether, in light of the sum of the further representations, there are non-fanciful concerns in relation to the broadcast standards consideration that may justify a reference for a further investigation. Our advice is set out below. **We consider that there are not sufficient concerns that may justify a reference** ... We recognise, of course, that the Enterprise Act confers on you discretion to apply a different judgment” (emphasis added).

On page 6 of your letter you stated: “our judgment as the broadcast regulator is that **while there are non-fanciful concerns**, we do not consider that these are such as may justify a reference in relation to the broadcast standards public interest consideration” (emphasis added).

Question 1: Considering all the relevant evidence, including your review of the further relevant representations, is Ofcom’s view that:

- (a) the legal threshold for a reference is **not met** (i.e. there are no non-fanciful concerns in relation to the commitment to broadcasting standards ground) such that the Secretary of State has no power to make a reference in relation to that ground; or
- (b) the legal threshold for a reference is **met** (i.e. there are non-fanciful concerns in relation to the commitment to broadcasting standards ground) such that the Secretary of State has the power to make a reference in relation to that ground, but Ofcom considers that she should exercise her discretion so as not to make a reference.

In confirming Ofcom’s view, please specifically identify the non-fanciful concerns referred to on page 6 of your letter.

Issue 2: the new corporate governance arrangements

At paragraph 12 of our letter of 7 August 2017, we noted that some representations had contended that the new corporate governance arrangements put in place by 21st Century Fox in 2012 appeared not to have prevented misconduct from arising or to have ensured that any misconduct was quickly escalated to senior management where appropriate.

For example, in its submission of [REDACTED] stated that Ofcom should investigate thoroughly how the 2012 arrangements had worked in practice, given that “it still took a full 4 years for the Board to recognise that there was a massive problem of widespread sexual harassment ... [and] the problems emerged only because a high-profile anchor sought external redress in court”.

Question 2: To what extent did Ofcom investigate how the new arrangements put in place in 2012 have worked in practice, including how effectively they have operated? What evidence did Ofcom consider on this point, and what (if any) conclusions did it reach (and why)?

Issue 3: quantitative assessment of breaches

At paragraph 14 of our letter of 7 August 2017, we noted that some representations had contended that it was not sufficient for Ofcom to rely on a substantially quantitative

[REDACTED]

assessment of broadcasting standards breaches by 21st Century Fox (and Fox News in particular) given that its UK audience is small and likely to be sympathetic to the views expressed (and therefore unlikely to make complaints).

We are aware that (as you state in your letter) you have also carried out some qualitative assessments. On page 4 of your letter you have also stated: *“We have considered broadcasting compliance primarily by reference to complaints and we believe this to be an effective and proportionate approach”*.

Question 3: Please explain the basis for this conclusion, i.e. why you consider this approach to be effective and proportionate.

Timeframe for response

We are grateful for your continued advice on this matter, and the timely way in which you have responded to our previous requests. As you know the Secretary of State is under a requirement to act as promptly as reasonably practicable in her consideration of this matter. With that in mind, and as this request relates to points of clarification on the advice you have already provided, we would appreciate a response by midday on Monday 4 September 2017.

Yours sincerely,

[REDACTED]

[REDACTED]

Department for Digital, Culture Media and Sport