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Date: 7 August 2017

By Email

Sharon White
Chief Executive
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Dear Ms White

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

1. I refer to the report, "Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc" (the "Public Interest Report"), submitted by Ofcom to the Secretary of State for Digital, Culture, Media and Sport ("Secretary of State") on 20 June 2017 in relation to the above merger.
2. The Public Interest Report gave advice and recommendations in relation to two media public interest considerations specified in the European Intervention Notice ("EIN") issued on 16 March 2017; the media plurality ground and the commitment to broadcasting standards ground. Following the receipt of the Public Interest Report (as well as the report from the Competition and Markets Authority ("CMA") on jurisdictional matters) the Secretary of State must decide whether or not to make a reference to the CMA under Article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests Order 2002 ("2003 Order")), i.e. for a more detailed, Phase 2 consideration of the merger by the CMA.
3. As you will be aware, on 29 June 2017, the Secretary of State announced that, taking into account Ofcom's assessment of the public interest considerations as set out in the Public Interest Report and the CMA's report on jurisdiction, she was minded to refer the merger to the CMA for a Phase 2 investigation on the media plurality ground, minded not to accept undertakings in lieu of referral offered by the parties to the merger and was minded not to refer on the commitment to broadcasting standards ground. The

[REDACTED]

Secretary of State then allowed a period of time, until Friday 14 July 2017, for the parties to make representations on the media plurality minded-to decision, and also for the public to make representations, in particular on the minded-to decision relating to the commitment to broadcasting standards ground. She called for representations from the public “setting out any new and substantial evidence and any comment on Ofcom’s assessment”.

4. We have now assessed the large number of third party representations made in relation to the referral decision and assess a small number these (around 30) as substantive. Some of these substantive representations set out potentially new evidence on the question of the commitment to broadcasting standards ground in particular and on Ofcom’s assessment of that ground.
5. The Secretary of State is mindful that the nature of her referral decision is a quasi-judicial one, and needs to be based on all the relevant evidence and a reasonable assessment of that evidence. To ensure she is making a fully informed decision, and in accordance with section 106B(2) of the Enterprise Act 2002¹, the Secretary of State is requesting advice from Ofcom on a number of issues raised by the further representations (copies of which are enclosed²).
6. The Secretary of State requests that Ofcom should advise generally on the substantive representations received. In particular, however, the Secretary of State requests Ofcom’s advice on the matters set out below as well as overall advice as to whether, in light of the sum of the further representations made, there are non-fanciful concerns in relation to the broadcasting standards ground that may justify a reference to the CMA for a Phase 2 investigation.
7. Some of these matters relate to your assessment of whether Sky would remain fit and proper to hold its broadcast licences following the merger³ (“Fit and Proper Assessment”), which the Secretary of State understands is entirely a matter for Ofcom. The Secretary of State notes, however, that a number of your findings on the issue of commitment to broadcasting standards in the Public Interest Report, particularly in relation to corporate governance issues, rely upon your findings on fitness and propriety. Therefore, we mention matters in relation to your assessment of fitness and propriety only insofar as they impact upon your findings on the commitment to broadcasting standards ground.
8. In this regard, however, we note that the Secretary of State has received representations alleging serious flaws in Ofcom’s Fit and Proper Assessment, and has been copied into representations made directly to Ofcom asking it to reopen that assessment. The Secretary of State requests that Ofcom, in considering those representations, advise on the implications of the matters raised, if any, on its

¹ As applied by Article 15, and paras 1(1)(ma) and (13A) of Schedule 3 to the 2003 Order.

² In accordance with section 241(3) of the Act, we enclose copies of relevant substantive representations received in relation to the referral decision.

³ Ofcom, Decision under section 3(3) of the Broadcasting Act 1990 and section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited, 20 June 2017.

assessment of, or recommendations made in relation to, the commitment to broadcasting standards ground.

Threshold for assessing commitment to broadcasting standards

9. A number of representations argue that Ofcom, in partly relying on its conclusion reached in its Fit and Proper Assessment when assessing the commitment to broadcasting standards ground, effectively applied the same high threshold that it used in the Fit and Proper context, to its assessment of the commitment to broadcasting standards ground, where a lower, referral threshold applies.
10. The Secretary of State takes no view on the high threshold applied as part of the Fit and Proper Assessment; that is a matter for Ofcom⁴. The Secretary of State does note, however, that the threshold applying to her referral decision is a low one⁵. While this threshold is mentioned in paragraph 1.2 of the Public Interest Report, it is not specifically referred to in the context of the recommendations made in relation to the commitment to broadcasting standards ground or in the analysis of failures of corporate governance at paragraphs 10.49 - 10.51 of the Report.
11. The Secretary of State, therefore, requests Ofcom's advice on this issue. In particular, the Secretary of State would like Ofcom to explain its reasoning on the points relevant to this ground by reference to the applicable low threshold and advise whether or not the concerns raised affect its assessment of, or recommendations made in relation to, the commitment to broadcasting standards ground.

Ofcom's consideration of corporate governance

12. A number of representations raise concerns about Ofcom's approach to its assessment of corporate governance issues more generally (i.e. aside from the threshold point discussed above). The Secretary of State requests Ofcom's advice on these aspects of the representations, including in particular the following points:
 - Some representations argue that Ofcom's assessment of corporate governance at 21CF focused on how senior executives responded as and when they became aware of misconduct, whereas effective corporate governance requires robust processes to be in place to prevent misconduct from arising and to ensure that any misconduct is quickly escalated to senior management where appropriate. The Secretary of State agrees that effective corporate governance arrangements should achieve these objectives and asks Ofcom to advise on this basis (to the extent such considerations are relevant to the broadcasting standards ground). Some of the representations further contend that these objectives have not been achieved by the new corporate

⁴ Under sections 3(3) of the Broadcasting Acts 1990 and 1996, Ofcom is under an ongoing duty to remain satisfied that broadcast licensees are fit and proper.

⁵ Under Article 5 of the 2003 Order, the question for the Secretary of State is whether she has reasonable grounds for believing that it is or may be the case that the merger operates or may be expected to operate against the public interest. This test has been interpreted by the Courts as setting a low threshold, and one which requires a belief that is reasonably and objectively justified by relevant facts, and one that is more than fanciful, but which does not require the belief to be held on the balance of probabilities (i.e. greater than 50%) (*Office of Fair Trading and Others v IBA Health Limited* [2004] EWCA Civ 142).

governance arrangements put in place by 21CF in 2012 (i.e. taking into account events since then).

- Some representations argue that Ofcom's conclusions in its 2012 fit and proper assessment⁶ relied on the fact that the Murdoch family had only a relatively small indirect shareholding in Sky and that (by then) James Murdoch no longer had an executive position in the company⁷. The representations assert that this would not be the case after the merger but that this change in position was not addressed in Ofcom's reasoning.
- In relation to Ofcom's examination of corporate governance failings related to the phone hacking scandal, a number of representations contend that Ofcom has not considered all the evidence. The representations state that, in relation to these matters, the Fit and Proper Assessment relies on the 2012 fit and proper assessment (where Ofcom found that Sky remained fit and proper), and in doing so concludes that no new material evidence directly touching James and Rupert Murdoch had come to light since 2012. However, representations contend that relevant evidence emerged after this date including the various trials into News International staff, the continuing civil action on claims related to phone hacking and the findings of the House of Commons Committee of Privileges report on the conduct of News International employees.

13. The Secretary of State asks Ofcom to explain its reasoning in respect of each of these points and their implications, if any, for whether the threshold for a reference is met in respect of the commitment to broadcasting standards ground.

Ofcom's consideration of broadcasting compliance

14. A number of representations comment on Ofcom's approach to its assessment of broadcasting standards breaches in the UK and other jurisdictions. The Secretary of State requests Ofcom's advice on these aspects of the representations, including in particular the following points:
 - Some of the representations contend that it was insufficient for Ofcom to rely on a substantially quantitative assessment of breaches by 21CF (and Fox News in particular) based primarily on a complaints-based system. This is because, they argue, the UK audience is small and likely to be sympathetic to the views expressed. So, on this logic, the number of complaints is likely to be minimal and not reflective of the number of actual breaches (i.e. including breaches that were not subject to a complaint). Rather, it is contended that Ofcom also needs to look proactively at content and should have qualitatively assessed the evidence submitted to it. Some representations also question whether Ofcom afforded sufficient weight to the failure of Fox News to have in place adequate procedures to ensure compliance with the Broadcasting Code, and argue that this is directly relevant to the question of whether there is a genuine commitment to broadcasting standards.

⁶ Ofcom, Decision under section 3(3) of the Broadcasting Act 1990 and section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited, 20 September 2012.

⁷ See, for example, paragraphs 41 to 47 of the 2012 fit and proper assessment.

- Some representations contend that Ofcom did not adequately take into account 21CF's approach to broadcasting in international jurisdictions - for example the US and Australia - and has only undertaken an assessment based on the number of breaches and has been overly reliant on evidence gathered by Fox rather than that from regulators. The representations cite examples of alleged biased, divisive and grossly inaccurate reporting. They also raise the question of whether a partisan approach to news and current affairs reporting in other contexts (for example in the US and Australia), even if not in breach of regulatory standards, augurs an approach that may be taken by Sky News in the UK, where Ofcom recognises that the regulatory regime does not fully protect against partiality, and whether this has any implications regarding the likelihood of the parties complying with the spirit of broadcasting standards.

15. The Secretary of State asks Ofcom to explain its reasoning in respect of each of these points and their implications, if any, for whether the threshold for a reference is met in respect of the commitment to broadcasting standards ground.

New evidence

16. A number of representations appear to contain new substantive evidence. The Secretary of State notes in particular the following apparent new evidence:

- Representations which contain analysis of recent output by Fox News in the UK raising a number of potentially new accusations about Fox News's commitment to accuracy and fairness in broadcasting.
- Representations about the various litigation relating to corporate governance failings at another Murdoch-controlled company, News America Marketing (NAM) which may be relevant to issues of corporate governance concerns.
- Further evidence submitted to Ofcom (and copied to the Secretary of State) [REDACTED] in relation to claims against 21CF. A representation made to the Secretary of State relates to the accusations of false reporting as referred to in this evidence.

17. The Secretary of State therefore asks Ofcom to advise on any evidence contained in the representations that it has not already considered. In particular she asks Ofcom to advise whether and, if so, how such evidence affects its analysis and the implications, if any, for whether the threshold for a reference is met in respect of the commitment to broadcasting standards ground.

Conclusion

18. In providing your advice on the further representations and on the particular points set out above, the Secretary of State requests that you address directly (with reasons) the ultimate question of whether or not, in light of all of the evidence, there are broadcasting standards concerns that may justify a reference to the CMA based on the referral threshold.



19. The Secretary of State would be grateful if you would provide your response to her request for advice as soon as possible and, mindful of absences over the summer, asks that the advice be provided no later than 25 August 2017.

Yours sincerely,



Department for Digital, Culture, Media and Sport

