

BY EMAIL ONLY

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Dear [REDACTED]

Proposed acquisition by Twenty-First Century Fox, Inc. (21CF) of the remaining shares in Sky plc (Sky)

I am writing with regard to a report by Bloomberg on 14 July 2017, which purports to be based on a statement from a DCMS spokesman that the Secretary of State does not now intend to make a final decision on reference to the CMA before the Parliamentary recess.

21CF recognises the importance of the Secretary of State's final decision on reference and her desire to keep Parliament informed to the maximum possible extent.

As acknowledged by the Secretary of State in her statement to Parliament on 29 June 2017, in reaching her final decision on reference, she must "*set aside wider political considerations going beyond the scope of the legislation*". In her quasi-judicial function, even in the absence of statutory deadlines, the Secretary of State must be guided by the overriding objective of ensuring that the case is dealt with expeditiously and fairly. Statutory guidance on the operation of the public interest provisions relating to media mergers recognises the need to prevent "*undue uncertainty*".

This point has been explicitly acknowledged by the Government, with Lord Keen of Elie QC stating in his letter of 30 June 2017 to Lord McNally that "*the timetable for future decisions by the Secretary of State in this matter are driven by an obligation to act promptly as part of the quasi-judicial process and whilst it is always desirable to make announcements when Parliament is sitting it may not be possible in every case.*"

In accordance with section 104(2) of the Enterprise Act 2002 (the **Enterprise Act**) the Secretary of State has consulted with 21CF and Sky about her proposed action before taking her final decision. 21CF, as the party most directly affected by the regulatory process, submitted its full response to the Secretary of State's "minded to" decision on Friday 7 July 2017 (seven days before the deadline) in order to facilitate the expeditious running of the case (in particular given the review timetable has already been extended significantly as a result of the general election).

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In addition to the statutory requirement of consultation with the parties, the Secretary of State has also chosen to give third parties an opportunity to make further representations, subject to the clear instructions set out in her statement to Parliament on 29 June 2017 that “*Parties responding to the consultation should not simply duplicate any representations previously made to Ofcom. Instead, responses should be limited to setting out any new and substantial evidence and any comment on Ofcom’s assessment*”. This opportunity offered by the Secretary of State should not now be used to delay the process unnecessarily.

Ofcom has already consulted widely with the public, receiving 51,155 responses (of which 42 were identified as detailed responses), and has met with a range of interested parties. Ofcom has considered the representations in detail and has had the benefit of a six-week extension of its original deadline to report as a result of the general election. Ofcom has provided clear and detailed advice to allow the Secretary of State to make a decision on reference. Indeed, since providing its advice to the Secretary of State, Ofcom has publicly stated that it “*carried out detailed, evidence-based assessments, examining both broadcasting standards and media plurality aspects of the proposed takeover.*”

No doubt a number of parties will have submitted their responses by the 14 July deadline. In particular, Ed Miliband MP has published a letter sent to the Secretary of State and co-authored by Sir Vince Cable MP, Kenneth Clarke MP and the Lord Falconer of Thoroton (the **Miliband Letter**) that urges the Secretary of State to refer the transaction in relation to the broadcasting standards public interest consideration (the **Broadcasting Standards PIC**).

In relation to the Broadcasting Standards PIC, Ofcom is in a unique position. Its advice to the Secretary of State is formally not binding under the Enterprise Act, but Ofcom is also the expert regulator **in charge** of awarding and overseeing all broadcast licences, and concluded in its report that “*there are no broadcasting standards concerns that may justify a reference by the Secretary of State to the Competition and Markets Authority*” (para. 1.13). As acknowledged by the Secretary of State in her statement to Parliament on 29 June 2017, “*Ofcom is unequivocal*” on this issue.

A reversal of the Secretary of State’s decision that she is minded not to make a CMA reference in relation to the Broadcasting Standards PIC would be irrational. Bowing to the political pressure of the Miliband Letter would constitute the most blatant form of political interference, and would critically undermine the integrity of the quasi-judicial nature of the Secretary of State’s role in this process.

In considering the Miliband Letter – and any other third party representations on the Broadcasting Standards PIC – 21CF would urge the Secretary of State to have regard to the clear instructions mentioned above, which require responses to “*be limited to setting out any new and substantial evidence and any comment on Ofcom’s assessment*”. The Miliband Letter presents no new, let alone substantial, evidence in relation to the Broadcasting Standards PIC. The only novelty is that, given Ofcom’s disagreement with his view, he has reversed his previous support for Ofcom as an independent regulator and now calls them a “*weak regulator*” and Ofcom’s fit and proper decision “*appallingly weak*”.¹ As you will recall, one of the co-authors of the letter – Sir Vince Cable – was reported to have stated “*I have declared war on Mr Murdoch*”² when he was Secretary of State in charge of ruling on News Corporation’s proposed acquisition of Sky in 2010 and **before** receiving the initial Ofcom report at the time, thereby displaying one of the most egregious examples of bias in decision making in recent years.

21CF trusts that the Secretary of State will dismiss these flagrant political attempts to interfere in the regulatory process and its timing, which are in stark contrast to the respect for the independence of Ofcom that the authors of the letter had until recently promulgated. By doing so, 21CF is confident that the Secretary of State should be able to reach a final decision on a reference to the CMA in the coming days,

¹ https://twitter.com/Ed_Miliband?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

² <http://www.telegraph.co.uk/news/politics/liberaldemocrats/8217253/Vince-Cable-I-have-declared-war-on-Rupert-Murdoch.html>

thereby avoiding any further delay to the timetable for concluding the regulatory review of the proposed transaction.

Yours sincerely,



Partner