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**Date: 12 September 2017**

**By Email**

Jeffrey Palker  
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James Conyers  
Group General Counsel  
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Dear Mr Palker  
Dear Mr Conyers

**TWENTY-FIRST CENTURY FOX, INC (“21CF”) AND SKY PLC (“Sky”)  
PHASE 2 REFERRAL: BROADCASTING STANDARDS GROUND**

I refer to our letter of 29 June 2017 concerning the issue of referral of the above merger to the Competition and Markets Authority (“CMA”) for a Phase 2 investigation, and in particular, to the issue of whether the merger should be referred on the commitment to broadcasting standards ground.

As you are aware, in that letter the (now) Secretary of State for Digital, Culture, Media and Sport (“Secretary of State”) was of the view at that time that, on the basis of the evidence and conclusions in Ofcom’s public interest test report<sup>1</sup>, she did not have reasonable grounds for referring on the commitment to broadcasting standards ground. The Secretary of State was therefore minded not to refer on that ground, but before taking a final view offered interested parties the opportunity to make written representations. She called for

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<sup>1</sup> Ofcom, Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc, Ofcom’s report to the Secretary of State, 20 June 2017 (“public interest test report”).

representations from the public “setting out any new and substantive evidence and any comment on Ofcom’s assessment”.

Having received and considered a large number of such third party representations, we assessed a small number of these (around 30) as being substantive. Some of these substantive representations set out potentially new evidence on the commitment to broadcasting standards ground and/or commented on Ofcom’s assessment of that ground.

Mindful that the Secretary of State’s decision is quasi-judicial, and that her decision must be based on a reasonable assessment of the relevant evidence, she sought further advice from Ofcom on a number of points arising from the representations. Our letter to Ofcom of 7 August 2017 seeking this further advice is enclosed (redacted to protect personal information), as is Ofcom’s response of 25 August 2017. On 31 August 2017, we sought further clarification on a number of points arising from Ofcom’s further advice, and Ofcom responded on 4 September 2017 (our further letter to Ofcom and its response is also enclosed, redacted to protect personal information).

In light of the representations received, and Ofcom’s further advice and clarifications, the Secretary of State is now minded to refer on the commitment to broadcasting standards ground for the reasons set out below.

### **Threshold for referral**

The legal threshold for a reference to the CMA is low. In particular, the Secretary of State has the power to make a reference if she believes<sup>2</sup> there to be a risk (which is not purely fanciful) that the merger might operate against the public interest. The public interest in this context is the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003<sup>3</sup>.

In its public interest test report, Ofcom stated that it considered there were no broadcasting standards concerns that may justify a reference by the Secretary of State to the CMA.<sup>4</sup> In its letter of 25 August 2017<sup>5</sup> and as clarified in its further letter of 4 September<sup>6</sup>, Ofcom’s position, on the basis of all the evidence including the third party representations, is that there are non-fanciful concerns in relation to the merger. While Ofcom’s view is that these do not justify a reference, it also acknowledged that, given the existence of non-fanciful concerns, the Secretary of State has a discretion as to whether or not to refer on this ground.

### **Non-fanciful concerns and the exercise of the Secretary of State’s discretion to refer**

The Secretary of State believes that there are non-fanciful concerns in relation to the merger on commitment to broadcasting standards grounds which warrant the exercise of her discretion to refer to the CMA for a further, Phase 2 investigation.

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<sup>2</sup> Her belief must be reasonably and objectively justified by relevant facts.

<sup>3</sup> Section 58(2C)(c) Enterprise Act 2002.

<sup>4</sup> Ofcom, Public interest test report, Advice and recommendation on the broadcasting standards consideration, page 5.

<sup>5</sup> See page 6.

<sup>6</sup> See Question 1, pages 1-2.

## **21CF's failure to have in place procedures for broadcast compliance in the UK for Fox News**

In the public interest report<sup>7</sup>, Ofcom noted its concerns that 21CF did not initially have adequate compliance procedures in place for the broadcast of Fox News in the UK and took action to improve its approach to compliance only after Ofcom expressed concerns. Ofcom's concerns appeared to be assuaged by the fact that Fox News introduced compliance procedures sufficient to meet the requirements of its licence, and that Fox News would have an ongoing obligation to comply with the Broadcasting Code and its licence conditions.

The Secretary of State asked Ofcom to advise her in the light of representations which contended that Ofcom had not afforded sufficient weight to 21CF's failure to put in place adequate compliance procedures, and that this was directly relevant to whether the merged entity would have a genuine commitment to broadcasting standards.

In its letter of 25 August, Ofcom stated that they had afforded this issue sufficient weight, and had considered it in the round along with other evidence: the fact that compliance procedures of other 21CF licensees were satisfactory, changes to management of Fox News, Fox News' compliance history, and the fact that the regulatory framework provided broadcast licensees with an incentive to comply. Ofcom subsequently stated in its letter of 4 September that it considered 21CF's failure to put in place adequate compliance procedures to constitute a non-fanciful concern, but noted that new, satisfactory procedures had since been put in place.

The Secretary of State agrees with Ofcom that 21CF's failure to put in place adequate UK compliance procedures in respect of Fox News raises non-fanciful concerns about 21CF's commitment to broadcasting standards. While the Secretary of State notes that Ofcom considered that, looked at in the round alongside other evidence, this non-fanciful concern did not warrant referral, the wider evidence cited by Ofcom does not assuage the Secretary of State's concerns.

It appears that 21CF failed to put in place adequate compliance procedures for Fox News despite this being a condition of its UK broadcast licence. The Secretary of State considers this to have been a serious failure in compliance which is directly relevant to the parties' commitment to broadcasting standards, in particular (given that the failure related to a news channel) to the requirements of impartiality and accuracy in news broadcasting.

The fact that 21CF belatedly put in place such procedures does not entirely remove the Secretary of State's concerns. The mere existence of compliance arrangements is not sufficient in itself, not least because any arrangements need to be applied diligently if effective compliance is to be secured. In order to apply compliance arrangements effectively, a company must have an internal culture that takes compliance issues seriously, i.e. a commitment to attaining broadcasting standards objectives. 21CF's failure to put in place UK compliance procedures for Fox News calls that into question, as it is potentially indicative of an approach under which compliance issues are addressed only after having been identified externally.

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<sup>7</sup> See paragraphs 10.43-10.44.

Nor are the Secretary of State's concerns removed by the existence of the *ex post* compliance regime referred to by Ofcom, i.e. the fact that broadcast licensees are required to comply with the Broadcasting Code and that Ofcom has the power to take action in respect of breaches. Ofcom is correct to say that the regime provides licensees with an incentive to comply, but it seems clear from the inclusion of the broadcasting standards ground in the Enterprise Act 2002 and the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 that Parliament intended there to be a meaningful *ex ante* control, i.e. in addition to the *ex post* regime. Specifically, it is clear that Parliament intended the issue of whether an acquiring party would have a "genuine commitment" to attaining broadcasting standards objectives to be relevant to the *ex ante* scrutiny of mergers that may be carried out on public interest grounds.

The Secretary of State notes that Ofcom gave weight to the fact that 21CF had a good history of broadcast compliance. The Secretary of State agrees that this is a relevant consideration, but makes two observations. First, as just noted, the statutory language refers to the need for a "genuine commitment" to attaining broadcasting standards, rather than merely to past compliance. Second, a number of interested third parties suggested that the compliance record of 21CF channels, and specifically of Fox News, needed to be placed in its broader context. While Ofcom has the power to investigate potential breaches of the Broadcasting Code on its own initiative, in practice the large majority of breach findings result from complaints made by viewers. The UK audience of Fox News was very small and likely to contain viewers who were sympathetic to the style and content of its programming (channels with larger audiences are likely to be watched by a more diverse range of viewers). As a result, UK viewers of Fox News may have been relatively unlikely to submit complaints. If that were correct, then Ofcom's largely quantitative approach to assessing compliance may not provide a reliable indicator of the number of actual breaches. While Ofcom has undertaken some pro-active qualitative monitoring of Fox News' content, specifically around the 2017 election and in relation to specific representations put to it, these assessments have been *ad hoc* rather than systematic.

Overall, therefore, the Secretary of State does not consider that Ofcom's findings in respect of the past UK compliance record of 21CF are sufficient to remove the concerns raised by the fact that 21CF failed to have in place adequate UK compliance procedures for Fox News.

The Secretary of State considers that this matter could usefully be considered further by the CMA as part of a more detailed Phase 2 review.

The Secretary of State understands that 21CF ceased broadcasting Fox News in the UK on 29 August 2017. She considers that this has little, if any, impact on her concerns; the fact is that 21CF was responsible for ensuring adequate compliance procedures were in place for Fox News and failed to do so, and that 21CF would control Sky and be responsible for Sky News should the merger take place.

## **Corporate governance failures**

In its public interest report<sup>8</sup>, Ofcom stated that, as set out in its separate assessment of whether 21CF was fit and proper to hold a broadcasting licence, and in light of its conclusions on that issue, it did not consider that evidence concerning failures of corporate governance at News of the World, News Corporation and Fox News in the US demonstrated that the merged entity would lack a genuine commitment to the attainment of broadcasting standards. In its fit and proper assessment, Ofcom noted that 21CF had put in place new corporate governance arrangements in 2012.<sup>9</sup>

The Secretary of State asked Ofcom to advise her further on this issue in the light of representations received from third parties. Among other things, the Secretary of State received representations noting that, even after 21CF put in place new corporate governance arrangements in 2012, it took more than four years for the 21CF board to recognise problems of sexual harassment that only came to light after a Fox News anchor had sought external redress in court. These representations called into question whether the new corporate governance arrangements introduced in 2012 were in fact operating effectively.

In its letter of 25 August 2017, Ofcom described these concerns as being of only indirect relevance to the broadcasting standards ground. In its letter of 4 September 2017 which clarified its position, Ofcom identified the alleged corporate failings as raising non-fanciful concerns, but noted that they did not take place in the broadcasting standards context.

The Secretary of State agrees with Ofcom that in the present context she is concerned with whether 21CF will have a genuine commitment to attaining broadcasting standards objectives. If one could be sure that any concerns about the effectiveness of 21CF's corporate governance arrangements or corporate culture only arose in other areas, and were not capable of affecting compliance in the broadcasting standards context, then such concerns would fall outside the scope of the relevant statutory test.

However, at present the Secretary of State has non-fanciful concerns that this might not be the case. In particular, it is difficult to be sure that any wider failings of corporate governance at 21CF are incapable of affecting broadcasting standards compliance in circumstances where, as discussed above, 21CF failed to put in place adequate compliance procedures for the broadcast of Fox News in the UK. The representations raise concerns that the various actual and alleged failings might have been a product of a corporate culture that does not prioritise the need for regulatory compliance. In the light of these concerns, the Secretary of State considers that this issue could usefully be considered in further detail by the CMA.

Finally, and as this issue was raised by a number of interested third parties, the Secretary of State received representations that 21CF had broadcast statements that were biased, divisive and/or grossly inaccurate in a number of international jurisdictions, including in particular in the US and Australia, and concerns were raised that 21CF's highly partisan approach in other jurisdictions may be adopted by 21CF in relation to Sky News and other

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<sup>8</sup> See paragraphs 10.49-10.51.

<sup>9</sup> 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, paragraph 55.

Sky programming in the UK. The Secretary of State asked for Ofcom's advice on these issues and the implications for the broadcasting standards ground. Ofcom, in its response of 25 August 2017 noted that it had given most weight to jurisdictions having broadcast regimes similar to the UK and that a partisan approach to news and current affairs in other jurisdictions that did not amount to a breach of regulatory standards may be relevant to the plurality public interest consideration. In light of Ofcom's advice, the Secretary of State is not able to reach a view on whether these issues raise non-fanciful concerns in relation to the broadcasting standards ground. While the Secretary of State agrees that a genuine commitment to broadcasting standards relates to the broad requirements of the Broadcasting Code, she also considers that it is important that broadcasters which do look to include controversial viewpoints within their programming, or which may in other jurisdictions adopt a partisan approach, should at the same time have a genuine commitment to attaining broadcasting standards objectives in the UK, including in particular the requirements as to impartiality and accuracy. Should the Secretary of State go on to refer the merger to the CMA on the commitment to broadcasting standards ground, the CMA may wish to consider these matters in conducting its Phase 2 investigation.

## Conclusion

The Secretary of State is not making a final determination, but in light of the matters set out above she is minded to refer the merger to the CMA on the broadcasting standards ground, i.e. as well as on the plurality ground.

Before taking her final decision, however, and in accordance with section 104(2) of the Enterprise Act 2002<sup>10</sup>, the Secretary of State is giving you the opportunity to provide representations in writing. Any such representations should be sent [REDACTED] via email [REDACTED] by 5.00pm on Tuesday 26 September 2017.

The Secretary of State will consider any representations that you choose to make on these matters before taking her final decision.

I am copying this letter to [REDACTED] at Allen & Overy and [REDACTED] at Herbert Smith Freehills.

Yours sincerely,

[REDACTED]

Director – Broadcasting, Media and Creative Industries  
Department for Digital, Culture, Media and Sport

Encl.

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<sup>10</sup> As applied by Article 15 and paragraphs 1(1)(l) and 1(12) of Schedule 3 to the 2003 Order.