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Date: 29 June 2017

By Email

Jeffrey Palker
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USA
[REDACTED]

James Conyers
Group General Counsel
Sky plc
Grant Way
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Dear Mr Palker
Dear Mr Conyers

**TWENTY-FIRST CENTURY FOX, INC AND SKY PLC
PHASE 2 REFERRAL**

I refer to the European Intervention Notice (“EIN”) issued on 16 March 2017 by the Secretary of State for Culture, Media and Sport (“Secretary of State”) in relation to the proposed acquisition by Twenty-First Century Fox, Inc (“21CF”) of the entire issued and to be issued share capital of Sky plc (“Sky”) that it does not already own (“the merger”).

As you are aware, the EIN required the Competition and Markets Authority (“CMA”) to report to the Secretary of State on jurisdictional matters and Ofcom to report on the following two media public interest considerations:

- (a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience (“the media plurality

ground”);

(c) 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 (“the commitment to broadcasting standards ground”).

Ofcom and the CMA were originally required to provide their respective reports by 16 May 2017. On 21 April 2017, this deadline was extended to 20 June 2017 in light of the announcement of the General Election. The Secretary of State has now received the reports and both the CMA report and a non-confidential version of the Ofcom report are enclosed.

In light of those reports, the Secretary of State is considering whether or not to make a reference to the CMA¹ under Article 5 of the Enterprise Act (Protection of Legitimate Interests) Order 2003 (“2003 Order”), i.e. for a more detailed, Phase 2 consideration of the merger by the CMA. For the reasons set out below, she is currently:

- minded to refer in respect of the media plurality ground; but
- minded not to refer in respect of the commitment to broadcasting standards ground.

In respect of media plurality, the Secretary of State considers that she has reasonable grounds for believing that it is or may be the case that:

- arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation - having considered the CMA report, and in accordance with Article 5(5) of the 2003 Order, the Secretary of State accepts the decision of the CMA on this point;
- the two media public interest considerations specified in the EIN are relevant to a consideration of the merger; and
- taking account only of the relevant public interest considerations, that the merger operates or may be expected to operate against the public interest in the need for there to be a sufficient plurality of persons with control of media enterprises.

The Secretary of State, does not consider, however, that she currently has reasonable grounds for believing that it is or may be the case, taking account only of the relevant public interest considerations, that the creation of the merger operates or may be expected to operate against the public interest in the need for persons carrying on or in control of media enterprises to have a genuine commitment to broadcasting standards.

Media plurality ground

In relation to the media plurality ground, the Secretary of State notes Ofcom’s advice and recommendation, namely that:

“The transaction raises public interest concerns as a result of the risk of increased influence by members of the Murdoch Family Trust over the UK news agenda and

¹ Specifically, to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013.

the political process, with its unique presence on radio, television, in print and online. We consider that these concerns may justify a reference by the Secretary of State to the Competition and Markets Authority.”²

Taking into account the evidence and analysis on which it was based, the Secretary of State considers this recommendation to be persuasive. She notes Ofcom’s key findings³ and considers that they raise serious public interest concerns warranting a Phase 2 referral in order to allow the CMA to investigate these matters further.

Commitment to broadcasting standards ground

In relation to the commitment to broadcasting standards ground, the Secretary of State notes Ofcom’s advice and recommendation, namely that:

“In light of Fox’s and Sky’s broadcast compliance records and taking account of our separate assessment of whether Sky remains fit and proper to hold broadcasting licences following the transaction, we do not consider that the merged entity would lack a genuine commitment to the attainment of broadcasting standards. Therefore, we consider that there are no broadcasting standards concerns that may justify a reference by the Secretary of State to the Competition and Markets Authority.”⁴

The Secretary of State also notes the key findings made by Ofcom on this ground.⁵

The Secretary of State finds it concerning that Fox News did not have adequate procedures in place to ensure compliance with broadcasting standards.⁶ She also notes that Ofcom’s findings in relation to corporate governance are linked at least in part to its assessment that Sky would remain fit and proper following the merger.⁷ In relation to its fit and proper assessment, Ofcom notes that its assessment is based on the evidence available to date and that it has an ongoing duty to be satisfied that broadcast licensees remain fit and proper that would require it to review the position if further evidence were to become available.⁸

Overall, however, the Secretary of State’s view is that on the basis of the evidence and conclusions in Ofcom’s report, she does not have reasonable grounds for referring on the commitment to broadcasting standards ground.

Undertakings in lieu

The Secretary of State notes that Ofcom has considered the extent to which undertakings put forward by 21CF would address the relevant public interest concerns. 21CF

² Ofcom, Public Interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc, Ofcom’s report the Secretary of State, 20 June 2017 (“Ofcom Public interest test report on Sky/Fox”), Advice and recommendation on the plurality consideration, p4.

³ Ofcom Public interest test report on Sky/Fox, Key findings on media Plurality, pp3-4.

⁴ Ofcom Public interest test report on Sky/Fox, Advice and recommendation on the broadcasting standards consideration, p5.

⁵ Ofcom Public interest test report on Sky/Fox, Key findings on broadcasting standards, pp4-5.

⁶ Ofcom Public interest test report on Sky/Fox, paras 1.12 and 10.41-10.44.

⁷ Ofcom Public interest test report on Sky/Fox, paras 1.13 and 10.49-10.51.

⁸ Ofcom, Decision under section 3(3) of the Broadcasting Act 1990 and section 3(3) of the Broadcasting Act 1993: Licences held by British Sky Broadcasting Limited, paras 9, 63, 70 and 72.

subsequently formally submitted undertakings in largely the same terms⁹ and has asked, without prejudice to 21CF's position that the merger does not operate against the public interest, the Secretary of State to consider these undertakings in the event that she is minded to refer the merger.

The undertakings offered seek to address the plurality concerns raised in Ofcom's report by ensuring the editorial independence of Sky News and so establishing internal plurality within the merged entity. In relation the proposed undertakings, Ofcom concluded as follows:

*"We consider that the proposed undertakings offered by Fox to maintain the editorial independence of Sky News mitigate the media plurality concerns. We recognise that behavioural undertakings can be difficult to monitor and enforce and that there are areas in which the proposed undertakings could be strengthened. The Secretary of State may accept the proposed undertakings if she considers that they are appropriate to prevent, remedy or mitigate the adverse effects arising from the plurality concerns."*¹⁰

The decision as to whether or not to accept undertakings in lieu of a reference is entirely a matter for the Secretary of State and it is for her to decide whether any undertakings offered are appropriate.¹¹ The decision falls to be taken at the point at which she has the power to, and otherwise intends to make, a reference.¹² Given, however, that the Secretary of State is presently minded to refer the merger on the media plurality ground, and that Ofcom has expressed an opinion on the potential effectiveness of the undertakings, the Secretary of State has come to an initial view on whether she would be willing to accept the undertakings in the event that she intends to refer to merger.

The Secretary of State has considered the undertakings 21CF has offered and has taken into account Ofcom's comments. She is presently minded not to accept the undertakings that have been offered, in particular for two reasons.

First, Ofcom's view was that the proposed undertakings would only mitigate the public interest concerns. While it is open to the Secretary of State to accept UILs on the basis that they would mitigate concerns, given the importance of media plurality to the democratic process and the serious nature of the issues raised in Ofcom's report, the Secretary of State would be reluctant to accept undertakings in lieu of a reference which did not fully remedy the public interest concerns identified.

Second, the remedies offered by 21CF are behavioural in nature. As noted by Ofcom, behavioural remedies can be difficult to enforce. Indeed, the CMA's guidance on undertakings in lieu states that the CMA *"is highly unlikely to accept behavioural remedies at phase 1"*.¹³ The reason for this is that the CMA considers that undertakings in lieu are appropriate *"only where the competition concerns raised by the merger and the remedies proposed to address them are clear cut, and those remedies are effective and capable of*

⁹ The only difference being that various reporting or information requirements which were previously stated as being to Ofcom/Secretary of State or to CMA/Ofcom are now solely to the Secretary of State or the CMA. Updated Sky News Editorial Guidelines have also been appended to the formally submitted UILs.

¹⁰ Ofcom Public interest test report on Sky/Fox, Overall advice and recommendation to the Secretary of State, p6.

¹¹ In accordance with paragraph 3(2) of Schedule 2 to the 2003 Order.

¹² See paragraph 3(1) of Schedule 2 to the 2003 Order.

¹³ See Competition and Market Authority, Mergers: CMA Guidance on the CMA's jurisdiction and procedure, CMA2, January 2014 ("CMA Merger Guidance"), para 8.4.

*ready implementation*¹⁴. Whilst that guidance is stated in terms of competition concerns, the Secretary of State considers that the position where a merger raises concerns about the sufficiency of plurality of persons with control of media enterprises is analogous, and that many of the principles applied by the CMA in the competition context are also applicable in the media plurality context.

For these reasons, and in particular the concerns the Secretary of State has over the nature and effectiveness of the undertakings, the Secretary of State is not presently minded to accept the undertakings that have been offered.

Conclusion

The Secretary of State makes no final determination on these matters, but in light of them, is minded to refer the merger on the basis that she believes that it is or may be the case that the merger operates or may be expected to operate against the public interest in the need for there to be a sufficient plurality of persons with control of media enterprises, and is minded not to accept the undertakings offered by 21CF in lieu of such a referral.

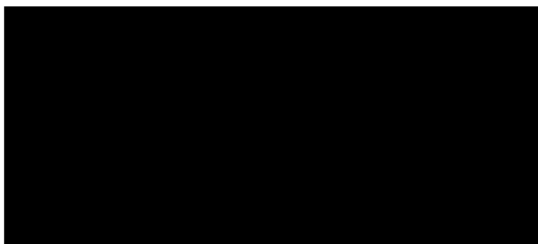
Before taking her final decision on these issues, however, and in accordance with section 104(2) of the Enterprise Act 2002¹⁵, the Secretary of State is giving you the opportunity to provide representations in writing. Any such representations should be sent to [REDACTED] via email ([REDACTED]) by 5.00pm on Friday 14 July.

In addition, while again the Secretary of State makes no final determination on these matters, in light of them she is minded not to refer the merger on the commitment to broadcasting standards ground. The Secretary of State will be offering interested parties the opportunity to make written representations to the same timetable.

The Secretary of State will then consider any relevant representations from you or interested third parties on these matters before taking her final decision on referral.

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

Yours sincerely,



Deputy Director, Head of Media Policy
Department for Culture, Media and Sport

Encl.

¹⁴ CMA Merger Guidance, para 8.3.

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