

Rt Hon Ed Miliband MP
Member of Parliament for Doncaster North



HOUSE OF COMMONS
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Dear Sabrina

Fox/Sky proposed merger

Please find enclosed our submission on the new proposals made by 21st Century Fox and published by the CMA on the 3rd of April.

Yours sincerely,

Rt Hon Ed Miliband MP
Rt Hon Sir Vince Cable MP

Rt Hon Lord Falconer of Thoroton
Rt Hon Kenneth Clarke MP

RESPONSE TO RING-FENCING AND DIVESTMENT PROPOSALS

We are writing to the CMA to express our views on the new proposals made by 21st Century Fox and published by the CMA on the 3rd of April.

These proposals come after the submissions phase is over, after 21CF have put in previous proposals which we assume should be regarded either as abandoned or now secondary to the new proposals, and where despite the 11th hour nature of these proposals, they do not contain vital documents necessary to understand what is being proposed (eg articles of association of Newco, basic terms of the proposed divestiture to Disney). The CMA should be extremely wary of last minute proposals stitched together to deal with problems which Fox have up until now refused to acknowledge.

Summary of Our Views:

1. The ring-fencing proposals, which are worse than the proposal made by News Corporation in 2011, where Sky would only continue to own 39% of Sky News, are in reality not significantly different from behavioural remedies because they envisage the 100% owner of Sky News not exercising the rights in law and in practice which 100% ownership gives it. The CMA is rightly sceptical of behavioural remedies apart from in exceptional circumstances, and it should be deeply sceptical about these proposals.
2. The ring-fencing proposals envisage that funding, a wide range of support services, premises, studio facilities, sale of advertising on behalf of Sky News, satellite capacity, playout, uplink, DTT Transmission, Online Transmission, mobile distribution, provision of studio staff and other staff required for the making of programmes should all be provided by Sky. In practice the whole of the Sky News operation as buyer and seller will be dependent on agreements with Sky.
3. Under the ring-fencing proposals Sky News and Sky will be inextricably linked. Sky News' future success would depend completely on its relationship with Sky as supplier of all services, buyer of all products made by Sky News and as its 100% shareholder. In relation to behavioural remedies the approach of the CC Guidelines is to keep entities and their information flows separate (see para 32 of the CMA Notice of Possible remedies). This proposal does the reverse.
4. The antidote to this total dependency, under the ring-fencing proposal, is said to be the appointment of an independent board. Because Sky will own Sky News 100% and will provide every aspect of its business, the ability of Sky to exercise 'indirect influence' as set out in paragraph 42 of the Provisional Findings document will be very much greater than the current position with 61% other shareholders.
5. A company, and its directors, dependent to the extent that Sky News will be on Sky will not be in any position to resist the wishes of Sky, and will be keen to have good relations with its owner and controller, the Murdochs.

6. The ring-fencing proposal does not deal with the editorial control the Murdochs have been able to influence over all their other media outlets through simply making their views known publicly, with the legitimate expectation of the signal this will send to Murdoch employees.
7. The ring-fencing proposals, whilst it requires the Board of Sky News to be made up solely of independent directors is ambiguous as to whether it prevents the shareholders (Sky/Fox) from appointing such directors (see para 3.1 of the proposed undertakings). The undertakings may allow Sky/Fox to appoint two directors and they can dismiss directors (under company law) so on the face of it Sky/Fox may have the power to obtain a majority of appointed directors over time.
8. In any case, the ring-fencing proposal does not achieve an effective antidote to the risk to plurality identified in the provisional findings because it envisages an independent board but in respect of a company totally captive to its 100% owner, who is also buyer and seller of services and product. It would be rejected in any other circumstances by the CMA. It should certainly be rejected in this case, where the giver of the undertakings has failed to establish it has complied with undertakings given in the past.
9. In a situation where the two parties who are being held separate are so close commercially, effective monitoring is effectively impossible.
10. In relation to the divestiture proposal, in principle true divestiture of Sky without continuing material involvement by the Murdochs would be a solution to the plurality threat identified in the Provisional Findings. However, we do not find the proposal to divest Sky News with Fox retaining the rest of Sky a convincing answer to the concerns about plurality.
11. This is, first, because, of the ongoing relationship between Sky and Sky News once the proposed divestiture has occurred. If Sky News is completely or substantially dependent on Sky for funding and services and selling of product and the only financial return and wider return from Sky News is for the benefit of Sky, as it appears from the proposals, then in practice Disney may be no more than the nominal owner of Sky News with Sky calling all the shots. There is also the question of who precisely is funding the operational costs of Sky News, where Fox appears to be play a continuing role, although is not possible to tell what the precise position is from the undertakings and other information provided by Sky.
12. Second, if the intention is that Disney also acquire the rest of Sky, and that occurs, we cannot be certain about the extent to which the Murdochs' will continue through their shareholding in Disney or otherwise to influence or control Sky News. This would need to be explored. It may be their influence would be less than it is currently (ie owning 39% of Sky) and non-threatening to plurality but that can only be properly established once the precise outcome of the Disney bid is known.
13. Third, if the Disney bid for Sky failed then Sky News would stand alone in Disney with Disney having no commercial interest in Sky News. This is a risky future for Sky News

with risks to plurality. One scenario would see Sky News withering on the vine with Disney, which in itself poses significant risk to plurality, with a further risk coming from Sky/Fox potentially setting up a new UK News Channel (Fox UK). Alternatively, Fox could exercise continuing control over Sky News through its ownership of the rest of Sky, or they might even attempt to recover ownership of Sky News in an agreement with Disney. In any case, this would represent a threat to plurality.

14. The right course for the CMA on remedies is to reject ring-fencing and partial divestiture to Disney as ineffective and impose a prohibition on the purchase of the remaining shares in Sky by 21CF. Once the result of the current bidding process is known, and if and only if the Disney bid for Fox is certain to complete, including after successful resolution of any regulatory obstacles, 21CF may then apply to the CMA for the Prohibition to be lifted, on the basis they can argue that Disney taking complete ownership of the whole of Sky would deal with the plurality risks. We reserve our position on any such application until we see its contents, including the nature of any Fox ownership of Disney and possible Board role for Murdoch family members.

Below, we examine both of Fox's proposals in more detail.

Ring-fencing:

15. The ring-fencing proposal is far weaker than the 2011 undertakings, which entailed carving out Sky News into a separate, publicly traded company in which News Corp would retain only a 39% stake. This proposal involves Sky News becoming 100% owned by Fox. No set of internal safeguards can represent a stronger bar on influence than dilution of ownership or outright divestment, because they can never address the fundamental fact that ownership confers considerable influence in the ways outlined below. This is particularly the case where Sky News would not only be 100% owned by Sky but would be entirely dependent on Sky for services and as its main customer and as the provider of its premises and as the provider of its manpower and as the provider of all its finance.
16. A question facing the CMA is therefore whether to accept a weaker proposal than the one that was ultimately discarded in 2011. We contend that given what has been revealed since 2011 and the powerful CMA provisional findings, it would be inconceivable for the CMA settle for a remedy which is weaker than 2011.
17. In considering this weaker proposal, we also believe that the questions raised in paragraph 27 of the CMA remedies document about the 2011 remedy are highly relevant. For example, the CMA asks a critical question at 27c: "Sky would be the new entity's single largest customer for wholesale news services." In these circumstances and irrespective of the new company's ownership structure, could Sky and thus ultimately the MFT still exert influence over Sky News such that media plurality concerns would remain?
18. The CMA canvassed the possibility that, even with 39% ownership by Fox, the dependence in respect of funding, arrangements for the sale of advertising, and services

and facilities without which Sky News would be unable to operate, could leave Sky News vulnerable to influence. We believe these are correct concerns unanswered by the Fox proposal, and significantly accentuated by the 100% ownership by Fox. Sky News will be wholly dependent for its resources, brand, promotion and much of its facilities on Sky and Fox.

19. This is reinforced by an examination of the precise proposals. We note that the operational agreements between Fox and Sky News envisaged by Fox's draft undertakings are in all cases phrased as 'up to' a certain number of years: an advertising sales agreement "for a term of up to [5] years"; a lease of land and buildings "for a period of up to [15] years"; broadcast and technical services agreements, including an EPG services agreement, "for a term of up to [10] years (or such shorter time as required by Newco)" (paragraphs 8.1 (i)-(iv)). The agreement is relatively short in the case of advertising and the phrasing leaves open the possibility that all the agreements concluded could ultimately be much shorter. That would give Fox significant ongoing leverage over Sky News. No overt editorial instruction would be necessary, merely a tugging of the financial and operational leash Sky News would be operating on.
20. Whatever the content of the agreements concluded between Fox and Sky News, Fox would have latitude in deciding whether, how far, and in what spirit to honour those agreements. In extremis, Fox could choose to dishonour operational agreements and force Sky News to resort to arbitration if it calculated that the signal sent to Sky News by so disrupting it was worth the cost to Fox. The CMA cannot assume that in such cases, a motive of desire to editorially influence Sky would be obvious, or at any rate provable.
21. Fox commits (in paragraph 6.1) to maintain operational net investment "at a level not materially different" to the present for 10 years, with a further 5 years offered, conditional on a series of riders including "market conditions". Given the challenging media environment which Fox has repeatedly emphasised, this makes Sky News wholly dependent on the goodwill of Fox for the additional investment that will be desired, and may be required, to compete effectively. This gives obvious and substantial leverage to Fox over the Sky News Board which could be used to influence the channel's direction. That editorial direction could easily be dressed up in the language of a 'commercial strategy', e.g. more focus on controversy and opinion, more focus on appealing to certain demographics.
22. The CMA remedies document at paragraph 32 is absolutely clear about how firewall remedies are supposed to be operate: "Their aim is to keep entities and their information separate from one another and this is generally achieved by restricting information flows and use of shared services, physically separating premises and staff, and regulating transfers of management and any permitted interactions between relevant staff."
23. By this standard, the firewall proposed by Fox is wholly inadequate. Paragraph 7 of the Fox proposals is clear about the continued shared use of services, there is no proposal to physically separate premises and staff and the regulation of transfers of management is proposed to last only two years.

24. As for interactions between staff, we note that the latest Fox remedies document is silent on the relationship between the Head of Sky and the Head of Sky News. We remind the Panel that at its last hearing Fox said: "Day to day reporting by the Head of Sky News would remain with a senior executive at Sky." The relationship between senior Sky executives and the Head of Sky News will, in any case, be extremely difficult to monitor and is a clear channel of influence.
25. The supposed answer to the clear contravention of the guidelines put forward for firewall remedies by the CMA in its own remedies document is the independent Board. However, this is not an answer because of the clear imbalance of power between that Board and Fox.
26. Whoever the independent directors are, they will be operating in a context where Sky News is wholly dependent on Sky and Fox for its resources, facilities, brand, promotion, and ultimate success. In these circumstances, the directors would be negligent in their responsibilities if they did not seek to operate in such a way that won approval from the parent company and complete owner because this is the best way to safeguard the long-term future of Sky News. Therefore the independent Board cannot be an effective antidote to the concerns about plurality.
27. In paragraph 42 of the CMA provisional findings, it identified five ways that indirect influence could be exerted by Fox in ways which were damaging to plurality. We contend that all of them remain relevant. Fox has control over resources and through the reliance of Sky News and its directors on the parent company, Fox, it can exert control over strategic direction, seek synergies with its other businesses and influence appointments.
28. As regards the last of the sources of influence in paragraph 42, around instructions to staff, Fox seeks to convince the Panel that signed undertakings by Rupert Murdoch and his sons can provide reassurance that there will be no interference in editorial output. But consistent with the arguments we have previously made to the Panel and as explicitly set out by Lord Justice Leveson, this fails to deal with the reality that it is not direct interference that is the primary means of control but the unspoken power of Mr Murdoch.
29. Our whole point, unanswered anywhere by Fox because it is unanswerable on the basis of the Murdoch record, is that influence over Sky News need not be exerted overtly or through explicit instruction. Rupert Murdoch is free to express his views on any topic, publicly. In this way, his views on editorial priorities, political perspectives and so on can be made abundantly clear, on an ongoing basis, to everyone at Sky News without him having to directly communicate with them.
30. The Sky News Board and Sky News employees will know that, irrespective of the undertakings reluctantly extracted from Fox, this attitude of Mr Murdoch likely abides. They will also be aware of his attitude to previous undertakings he has given to preserve editorial independence. They will clearly be able to infer the dim view that Mr Murdoch

would be likely to take of employees of his straying from the editorial line he expects across his news outlets.

31. Fox's ring-fencing proposal would also leave a number of other means open to Fox to send clear 'signals' to Sky News about the rewards of compliance with the editorial approach Fox would want from Sky News and the costs of non-compliance. For example, by hiring to editorial, management or board positions at Fox or at News Corp, or any of their subsidiaries, those at Sky News (including independent board members, the Head of Sky News, and journalists) who are deemed by Mr Murdoch to have done a 'good job', where that inevitably to a large degree means having done their job in a manner congruent with Mr Murdoch's interests and views.
32. We also believe that there is greater scope than appears for Fox to influence the composition of the proposed Board of Sky News. Shareholders enjoy the right under company law to remove directors. At no point in the undertakings is this right rescinded, so it must be assumed that the shareholders of Sky News, namely Sky/Fox, would have the right to remove the independent directors. Essentially, this gives significant power to Sky/Fox over the independent directors, something of which the independent directors will be conscious.
33. There also appears to be an ambiguity in the terms of para 3.1 of the undertaking about appointments. It envisages the initial Board being made up of 5 independent directors, including 2 additional directors selected by the existing 3 Sky independent directors. The undertaking allows there to be a maximum of 7 on the board. It is unclear whether that allows Sky News' shareholders to appoint two further directors who would have to be independent in the sense defined in the undertakings - effectively no ongoing or recent relationship with 21CF or MFT. The right of the board to choose new directors appears to apply only *if required* to bring the number of directors to 5 - see 3.1 (ii) A III. It appears therefore that when the number of directors is above the minimum complement of 5 and any of the directors came up for replacement, they would not be necessarily be replaced by directors nominated by the remaining directors but potentially by Sky/Fox. If that is correct, it could mean that from the time that 2 of the original directors were replaced, Sky/Fox-appointed directors, as opposed to remaining director-appointed directors, could be in a majority. This needs to be explored. And requires sight of the Articles of Association of Newco. It shows why the CMA should be very wary of being bounced into considering proposed undertakings at speed, without the other interested participants having an adequate opportunity to comment.
34. Fox seeks to persuade the Panel that a new "monitoring trustee" reporting to the Secretary can help to allay concerns. We do not find this convincing. The structural arrangements regarding resources and ownership are such that the directors of Sky News will have little option but to act in a way congruent with the Murdochs' interests. A harmful diminution of plurality can therefore take place quite consistently with the undertakings set out by Fox, and a certification by the trustee that they have not been breached. Fundamentally, a trustee cannot make up for the inadequacy of the remedies being proposed.

35. On the basis of the analysis set out above we do not believe the ring-fencing remedy deals in a remotely convincing way with the concerns about plurality expressed by the Panel. We urge the Panel to follow the logic of its own provisional findings on the threat to plurality from this merger, which are not answered by these last minute proposals.

Divestment to Disney

36. The proposition of divestment of Sky News to Disney appears to envisage similar arrangements as under ring fencing but with the difference that it is Disney not Sky that owns 100% of Sky News.

37. On the face of it, this removes some of the potential Murdoch sources of influence identified above. Because Fox does not own Sky News, some of the sense of obligation of the independent directors in their decision-making to Sky, Fox and therefore the Murdochs is potentially removed.

38. However, there remain substantial concerns about the precise links between Sky News, Sky, Fox and the Murdochs. It appears that Sky News will remain significantly dependent on Sky for facilities, advertising, funding and brand. They represent a risk to plurality, if Sky, and the Murdochs, can call the shots. Under clause 5.2 of the draft undertakings in relation to divestment Fox undertake to pay Sky News an unspecified annual sum. It's unclear how the sum is to be calculated, and how it relates to Disney's continuing obligation to maintain investment in Sky News. If the reality is that Fox would be the funder of the 'financial envelope' as implied by 5.2 then Disney might be the formal owner of Sky News but meaningful control would rest with Fox, without the current counterweight of 61% independent shareholders.

39. The Panel will also wish to consider this proposal in the context of the two possible eventualities regarding the wider Disney/Fox deal. If this deal completes, we believe there are outstanding questions regarding the level of Murdoch ownership and influence, including potential board membership at Disney. We do not believe it would be prudent, without knowing the precise detail of those arrangements, to sign a blank cheque for a Disney purchase of Sky News.

40. There also remains the possibility that, for one reason or another, Disney's deal with Fox could fail to conclude. It could be blocked by US regulators, or Fox could pull out. Were this to happen, Disney would be left owning Sky News but not the rest of Sky. Yet as Sky itself has said in its evidence to the CMA, the commercial value to Sky of Sky News is that the latter is a form of marketing and positive branding for the former. Clearly without the rest of Sky, much of the rationale for Disney owning Sky News would fall away. This seems to be a significant risk for the future of Sky News as a stand-alone entity within the Disney empire. This is in itself a threat to plurality.

41. In these circumstances, Fox could also be well placed to start, from scratch, a new news service to seek to increase its influence over public opinion and the political process in the UK. The financial resources Fox would be able to invest in such a service both on TV

and online would be considerable, particularly in virtue of its ownership of a profitable asset like Sky.

42. The alternative under the scenario of the Disney deal failing is that Sky News comes under greater Murdoch control because of Fox's role in financing Sky News, as specified in paragraph 38 above. If the Disney deal fell away, it might even be the case that Fox could seek to re-acquire Sky News since Disney will have little interest in the stand-alone company. The undertakings are not clear on this point.
43. We believe the right course to deal with the plurality issues is for Sky News to remain a part of Sky and for Fox's bid for Sky to be prohibited until the outcome of the Disney bid becomes known. Should the Disney/Fox deal be certain to complete, having overcome regulatory and commercial hurdles, Fox and Disney will be in a position to show the CMA and the Secretary of State the extent of the Murdoch family's influence at Disney, the size of their shareholding, the number of board seats they occupy, and the employment of any members of the Murdoch family in executive roles at Disney. The CMA will then be able to determine whether after Disney took complete ownership of Sky, the Murdoch family would have too much influence over the ultimate controller of Sky News. If the answer is no, the prohibition could then be lifted.

3. Conclusion

At the start of its inquiry the CMA was threatened with the closure of Sky News if this bid did not complete. This is no longer a remotely credible threat. In the light of bids from both Disney for Fox and Comcast for Sky, it is clear that there are credible alternatives to Fox gaining 100% ownership of Sky.

Given the strength of its findings on plurality and the risks identified of all the potential remedies proposed, we believe the right and prudent and thing for the CMA to do is to prohibit this merger. We also believe prohibition is the proportionate response. It represents the best, least costly way of protecting plurality in our media landscape.