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Response to consultation: Sky/Fox Merger – Proposed Undertakings by 21st Century Fox, Inc (21CF) and the Walt Disney Company (Disney)

Summary

This response makes recommendations in respect of the proposed remedies in three areas:

1. Process of securing the divestiture of Sky News.
2. Improvements to the proposed Undertakings-in-Lieu.
3. Improvements to the proposed Brand Licence Agreement.

Finally, part two of this response outlines how the Secretary of State's quasi-judicial role in scrutinizing this transaction has been potentially jeopardized by the actions of successive Secretaries of State, and what actions are urgently needed to address this.

Part One: Recommendations to the remedies proposed

Process of securing the divestiture of Sky News

The proposal that the divestiture process takes place after the 21CF deal for Sky is complete is complex and could create uncertainty. There is no guarantee, for example, that should the Disney deal for 21CF and purchase of Newco fall through after the divestiture has taken place, that an alternative buyer for Newco will be found.

We recommend that the transaction should only be permitted to proceed on the basis that it completes in the same timeframe that the divestiture process completes. It should be a condition of the Secretary of State's approval for the transaction that the divestiture process is completed simultaneously.

This approach would protect the public from the risk of the divestiture process failing in any way.

Improvements to the proposed Undertakings-in-Lieu

Murdoch appointments to Disney

Firstly, the Disney Undertakings as they stand do not contain any prohibition on members of the Murdoch family from taking up positions in Disney, should Disney successfully acquire the 21CF assets it seeks, except for the prohibition on Murdoch family appointments as

“officer or senior manager” at Newco, Disney, any other parent company, or “any position that would allow that person to exercise influence... over Sky News”¹:

“Disney shall not employ any member of the Murdoch Family as an officer or senior manager at Newco or at any direct or indirect parent company of Newco (including, without limitation, the Walt Disney Company), and shall not appoint any member of the Murdoch Family or any Associated Person to any position that would allow that person to exercise influence or control over Sky News.”

There is no legitimate reason to specify a prohibition only on the ranks of “officer or senior manager”. These ranks are not defined in the Undertakings.

Instead, to guarantee the independence of Sky News under Disney, no member of the Murdoch family should be permitted to take any role within Disney or any subsidiary for the 15-year divestiture period.

This possibility would not arise should another suitable buyer be found, and only arises due to the unique circumstances of Disney’s offer for 21CF assets at the same time as it is putting itself forward as an alternative suitable buyer.

Murdoch shareholding in Disney

Secondly, there is no prohibition specified on the Murdochs from increasing their future shareholding in Disney (should that transaction proceed). There should be an explicit cap of 5% shareholding for the duration of the 15-year divestiture period.

Appointment of the monitoring trustee

1. Paragraph 9.1 of the proposed 21CF Undertakings² states that the Monitoring Trustee appointed to oversee the divestiture process of Sky News to Newco should be proposed by 21CF. The Secretary of State may accept or reject any prospective appointee (9.4).

There is no good reason for 21CF being permitted to appoint the individual responsible for ensuring that the divestiture is processed satisfactorily. It is effectively a regulatory role and 21CF should be excluded from the appointment process. At the most, 21CF’s role should be limited to a consultative one.

The power of the Secretary of State to veto any prospective appointment does little to mitigate against these concerns. Only the CMA is equipped with the necessary expertise to oversee this appointment. It has already investigated this transaction and proposed the specific Undertakings which the Trustee is appointed to oversee. Therefore, it would be appropriate for the CMA to be responsible for the selection and appointment of the Trustee.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717477/21CF - Sky - Disney Undertakings Redacted.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717477/21CF_-_Sky_-_Disney_Undertakings_Redacted.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717523/21CF - Sky - 21CF Undertakings Redacted.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717523/21CF_-_Sky_-_21CF_Undertakings_Redacted.pdf)

2. Paragraph 14 of the 21CF Undertakings gives the Secretary of State the power to change or terminate the Undertakings if there is “a material change in circumstances”.

This would be inconsistent with the merger scrutiny process, which explicitly requires the Secretary of State to order an investigation from the CMA before making his or her own public interest finding (section 54, Enterprise Act 2002³), and proposing any subsequent Undertakings in the first instance. There is no good reason for permitting the Secretary of State to unilaterally waive or alter the proposed Undertakings, possibly against the wishes of the CMA, because in his opinion there is a “material change of circumstance”.

Before the Secretary of State makes any such decision, he should be required to publicly consult the CMA.

3. Paragraph 20 of the 21CF Undertakings states that the Secretary of State may divest Sky News to a different company should, in his opinion, an alternative suitable purchaser comes forward. It was right that the CMA made a recommendation in their report as to the suitability of Disney as a purchaser. The Secretary of State should be required to once again publicly consult the CMA before agreeing divestiture to any other purchaser.
4. Finally, should it be necessary to appoint a Divestiture Trustee (as per paragraph 21), this appointment is (similarly to the Monitoring Trustee) approved by the Secretary of State alone. The Secretary also has sole authority to terminate their appointment (paragraph 21.6(c)). Once again, there is no legitimate reason to exclude the expert regulator, the CMA, in any such decision. The Secretary should be required to publicly consult them before making any such decision.

Improvements to the Brand Licence Agreement

1. Paragraph 7 of the Agreement⁴ allows Sky to terminate the Sky News Brand Licence Agreement should Sky News be transferred to a company outside of Disney or 21CF. This would prevent any other purchaser coming to take ownership of Sky News, even if they are deemed suitable by the Secretary of State, once the divestiture is complete. Given that paragraph 6 of Disney’s proposed Undertakings prohibits Disney from selling Sky News in any case, there is no good reason for this clause to be included, and it appears to achieve no more than insert an unnecessary loophole through which the licence could be revoked.

The Agreement goes on to set out several provisions which may allow licensor influence over licensee, which is the specific risk that these Undertakings were designed to address.

³ <https://www.legislation.gov.uk/ukpga/2002/40/section/54>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717675/Brand_Licence_Agreement_Redacted.pdf

2. Paragraph 6(a) of the Agreement allows the licensor to require certain actions from the licensee if their “acts or omissions have materially adversely affected... the goodwill in the Trade Marks”. The clarification that “editorial decisions of Licensee concerning any negative story about the Licensor or any company within the Sky Group” cannot be cited to invoke this clause is inadequate. All editorial decisions should be covered by this clause, and the phrase “materially adversely affected” should be defined to set out precisely what concerns this clause is intended to protect against.
3. Paragraph 14(g) sets out a required list of services which the licensee must provide. Each of those specific services are appropriate, but the paragraph 14(h) allows the licensor to update that list at will. This represents a clear line of interference from the licensor to the licensee. The licensor’s power to require further services should be replaced by a provision to recommend further services, which the licensee may freely accept or reject.
4. Equally, paragraph 15 also allows for a channel of interference from licensor to licensee; requiring the licensee to comply with any changes to the “Brand Guidelines”. Again, the licensee should be free to accept or reject any proposed changes from the licensor.
5. Finally, paragraph 16 explicitly allows the licensor to call in the licensee for “review meetings” to discuss conduct where the licensor believes the licensee is not acting consistently with the licence agreement. There are no clear definitions set out for this provision, which allows a further line of interference. After consultation with the CMA, this provision ought to be clearly defined with boundaries over how it may be appropriately invoked, or removed altogether.

Part Two: How the process has been compromised

The current and previous Secretaries of State have not taken reasonable and proportionate steps in relation to consideration of this merger, and have therefore potentially jeopardized their quasi-judicial role.

Cancellation of Part Two of the Leveson Inquiry: making such a decision while transaction was incomplete

1. The Secretary of State potentially compromised his quasi-judicial role in this merger by making an announcement that he would cancel the second part of the Leveson Inquiry on March 1st 2018⁵. This was while the Competition and Markets Authority phase two investigation was ongoing, and as such, at a critical point during the merger.
2. Among the Leveson Inquiry Part Two's Terms of Reference⁶ are:
 3. *To inquire into the extent of unlawful or improper conduct within News International, other newspaper organisations and, as appropriate, other organisations within the media, and by those responsible for holding personal data.*
 4. *To inquire into the way in which any relevant police force investigated allegations or evidence of unlawful conduct by persons within or connected with News International, the review by the Metropolitan Police of their initial investigation, and the conduct of the prosecuting authorities.*
 6. *To inquire into the extent of corporate governance and management failures at News International and other newspaper organisations, and the role, if any, of politicians, public servants and others in relation to any failure to investigate wrongdoing at News International*
3. The Executive Chairman of News International at the time of the voicemail interception ("phone hacking") scandal was James Murdoch, who is also the Chief Executive Officer of 21st Century Fox and the Chairman of Sky. This makes him among the most prominent individuals in the proposed merger. His former role at News International means he also bore ultimate responsibility for many of the failures which the Leveson Inquiry Terms of Reference (above) were designed to address. Other members of the Murdoch family, as owners of News International and through their stake in 21CF through the Murdoch Family Trust, would be put under intense scrutiny in the second half of the Leveson Inquiry, while also having clear interests in the proposed merger proceeding.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684678/GOVERNMENT_RESPONSE_TO_THE_CONSULTATION_ON_THE_LEVESON_INQUIRY_AND_ITS_IMPLEMENTATION.pdf

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<http://webarchive.nationalarchives.gov.uk/20140122144942tf/http://www.levesoninquiry.org.uk/about/terms-of-reference/>

4. Given the circumstances therefore, the only way the Secretary of State could have legitimately fulfilled his statutory duties in a quasi-judicial role in respect of the merger scrutiny process would have been to defer any decision to cancel the second half of the Leveson Inquiry until the conclusion of the merger deal.
5. In order to protect the integrity of the scrutiny process as it completes, the Secretary of State should reverse his decision to cancel the Leveson Inquiry, and either proceed (which would not represent an interference, as it had previously been agreed to proceed), or delay any decision until the conclusion of the merger.

Cancellation of Part Two of the Leveson Inquiry: nature of the decision

6. Furthermore, the decision to cancel the Leveson Inquiry before it concluded was;
 - a. A rejection of the views of the public, as respondents to the Government's own consultation were in favour of completing the Inquiry by 221,396 to 115,322⁷;
 - b. A rejection of the views of working journalists (National Union of Journalists⁸) & victims of newspaper abuse & intrusion (Hacked Off⁹);
 - c. The breaking of commitments given to parliament and the victims of press abuse¹⁰;
 - d. Rejection of the views of the Chair of the Inquiry who called for it to complete.¹¹
7. Therefore, on any reasonable consideration of the circumstances, it was not only inappropriate to reach a "decision" on the Inquiry, but the content of that decision demonstrates further bias in favour of James Murdoch and the Murdoch family in general.
8. As above, the only appropriate remedy to this bias is to either complete the Inquiry, or suspend its completion until the scrutiny process has completed.

Failure to refer the merger over appropriate grounds

9. A number of representations were made to the previous Secretary of State Karen Bradley in March 2017 that the merger proposal should be referred to Ofcom on appropriate grounds¹², which the Secretary of State may lay before Parliament under

⁷ Approximate figures for total respondents, based on the Government's consultation outcome paper: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684678/GOVERNMENT_RESPONSE_TO_THE_CONSULTATION_ON_THE_LEVESON_INQUIRY_AND_ITS_IMPLEMENTATION.pdf

⁸ <https://www.nuj.org.uk/news/leveson-part-2-is-unfinished-business-says-nuj-general/>

⁹ <http://hackinginquiry.org/wp-content/uploads/2017/01/HO-Consultation-Submission-10.1.17.pdf>

¹⁰ <https://hackinginquiry.org/wp-content/uploads/2016/07/Conservative-commitments-to-incentives-Table-1-1.pdf>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684967/DCMS_and_Home_Office_Correspondence_with_Sir_Brian_Leveson.pdf

¹² <https://hansard.parliament.uk/Commons/2017-03-06/debates/045187F9-4209-47B1-B7B9-BA1AD6473DCE/Sky21stCenturyFoxProposedMerger>

section 58(2D)¹³ of the Enterprise Act 2002 (as amended by the Communications Act 2004). These were grounds of satisfactory corporate governance standards.

10. The Secretary of State failed to make the appropriate referral. This left Ofcom, and later the CMA, unable to consider the bid on the vital public interest grounds of having satisfactory corporate governance standards. While it was right that commitment to broadcasting standards and plurality were considered, the threat to the public interest of the abject corporate governance record of 21CF and News International under the ownership of the Murdochs was left unaddressed.

Failure to adopt the Leveson recommendation in respect of lobbying during media mergers

11. Failure to implement recommendation 92, which requires lobbying in the course of the merger scrutiny process to be disclosed, provides further reason for the victims of press abuse and the wider public to distrust the course the Secretary of State has taken.
12. The Secretary of State should implement recommendation 92 as soon as possible.

¹³ <https://www.legislation.gov.uk/ukpga/2002/40/section/58>

Appendix: List of recommendations

Part One

1. The merger's approval should be subject to the divestiture completing simultaneously.
2. Members of the Murdoch family should be prohibited from taking any position at the Walt Disney Company or any subsidiaries of that Company (assuming Disney becomes the "suitable purchaser" for Newco) for the 15-year divestiture period.
3. Members of the Murdoch family, as individuals and through the Murdoch Family Trust, should be prohibited from purchasing any more than a 5% shareholding in the Walt Disney Company.
4. The Competition and Markets Authority should be responsible for the appointment of the Monitoring Trustee.
5. The Secretary of State should be required to consult the CMA before any decision to terminate or vary the Undertakings.
6. The Secretary should be required to consult the CMA before accepting any other company (other than Disney) as a suitable purchaser for Newco.
7. The Secretary should be required to consult the CMA before appointing the Divestiture Trustee (should one be needed).
8. The Brand Licence Agreement should not allow Sky to revoke the license for Sky News, for the 15-year period, in cases that Sky News is purchased by another suitable purchaser.
9. All editorial decisions should be protected from interference through paragraph 6(a) of the Agreement.
10. The licensor should not be permitted to require additional services from the licensee to those already agreed in paragraph 14.
11. The licensor should not be permitted to require actions of the licensee to meet changes to the Brand Guidelines.
12. Clarity is needed over the licensor's power to call the licensee in for "review meetings", or that power should be removed altogether.

Part Two

13. The Government should reverse its decision to cancel the Leveson Inquiry.
14. The Government should implement Leveson's recommendations 85 – 92 and, urgently, address #92 in respect of this particular merger.