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BY EMAIL ONLY

DCMS Media Team
Department for Culture, Media and Sport
100 Parliament Street
London
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22 June 2018

Dear Madam/Sir:

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

We welcome the Secretary of State's statement of 19 June announcing revised undertakings offered by both Disney and 21CF in lieu of the proposed transaction.

Throughout this extended review, the Media Reform Coalition – in collaboration with partner organisations - has produced evidence of the risks the deal poses to the public interest on plurality grounds. In the former Secretary of State's initial letter to the merging parties advising them of her 'minded to' decision to issue a European Intervention Notice, our submission was cited as having partly informed her provisional view. Our subsequent submission during phase one of the merger review was heavily cited in Ofcom's Public Interest Test report, especially as regards the wholesale and inter-media agenda influence of news outlets controlled by the Murdoch Family Trust (MFT). These critical issues were flagged in Ofcom's key findings which raised substantial concerns about the public interest risks of the deal on plurality grounds.

The provisional findings of the Competition and Markets Authority (CMA) underlined these concerns and went further. They acknowledged, for instance, our submission that Sky News accounts for a proportion of wholesale news provision to Global and Bauer radio stations and that, as a result, Ofcom's analysis of cross-platform market share (the 'share of references') had underestimated the combined market share that would effectively be attributable to the MFT post transaction.

In principle, we agree with the CMA's assessment and the Secretary of State's view that full divestment of Sky News is the only practicable remedy that could mitigate the public interest

concerns raised. However, as the CMA's report makes clear, the devil is in the detail of how the remedy is designed and implemented. The principal threat to the public interest posed by the merger stems from the risk that the transaction will extend the potential reach and influence of the MFT over Sky News. We are concerned that, as they stand, the undertakings do not contain sufficient protections to fully mitigate this risk. In broad terms, these concerns fall within three areas:

- 1. The absence of cast iron guarantees that would place limits on the MFT's potential influence over Disney in the event that the proposed merger between Disney and Fox completes.**
- 2. The absence of any role ascribed to the CMA in the appointment of the Monitoring Trustee (with obligation to oversee divestiture of Sky News to Disney) or in any decision to vary or terminate the undertaking agreements in the event of a 'material change in circumstance'**
- 3. The lack of appropriate arms-length constraints in the brand licensing agreement between Sky and Sky News**

With respect to the corresponding documents published as part of this consultation, we have specific concerns as follows:

Disney Undertakings

The divestment of Sky News to Disney carries a potential risk that the MFT may be in a position, post-merger, to extend their influence over Sky News, over time, through their interest in Disney. With this in mind, paragraph 3.2 of the undertakings specify restrictions on executive appointments as follows:

Disney shall not employ any member of the Murdoch Family as an officer or senior manager at Newco [the umbrella company formed by the carve out of Sky News from Sky] 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.

We submit that it would be intrinsically difficult to distinguish between senior roles within a parent company (executive or non-executive) on the basis of whether they "would allow that person to exercise influence or control over Sky News". We therefore consider it essential that this clause is *strengthened* to explicitly prohibit appointments of any member of the MFT or Associated Person (as defined in the agreement) to any executive or non-executive roles within any parent company of Newco, and to specify that this restriction will remain in place for at least 15 years (the period over which Disney has committed to maintain Sky News).

In a similar vein we are concerned that the undertakings place no limit on the MFT shareholding within Disney during the 15 year period. The proposed merger between Disney

and Fox will position the MFT as the second largest shareholder within Disney. We agree with the CMA that, although significant, the MFT's prospective shareholding will be under 5% and not sufficient to allow its members to exert material influence or control over the Disney board and, by extension, Sky News. We also acknowledge that it is unlikely the MFT will be able to secure a similar controlling stake in Disney compared to what it currently holds in 21CF. We are nevertheless concerned that, over time, the MFT may be able to increase its leverage over Disney. We therefore consider it essential that the undertakings proscribe the MFT from purchasing additional shares, shareholder votes, or entering into block shareholder agreements within Disney for a period of at least 15 years.

21CF Undertakings

Sections 9 and 10 of this agreement govern the appointment and functions of the Monitoring Trustee, who is to be responsible for overseeing 21CF's compliance with the undertakings in respect of divesting Sky News to Disney. This role is critical to ensure the effectiveness of the remedy, particularly insofar as the Monitoring Trustee will have responsibility to ensure the appointed Newco board members meet the criteria for Independent Directors as specified in the agreement.

Some of these criteria are straightforward, including the bar on recent former employees of 21CF, News Corp, any member of the Murdoch Family or Group of Interconnected Bodies Corporates as 21CF. Some, however, are necessarily more woolly and open to interpretation, including reference to 'close family ties', 'significant links' and 'material business relationships'. These terms imply that it is permissible for Independent Directors to have, or have had in the recent past, *some* degree of family ties, links or business relationships with members of the MFT. Indeed, it would not be reasonable or necessary to rule out any such connections in order for the remedy to be deemed effective.

Notwithstanding this, it is essential that the Monitoring Trustee is sufficiently independent to make a credible judgement as to what qualifies in practice as *close* family ties or *significant* links or *material* business relationships. At present, however, paragraph 9 of the 21CF Undertakings invests exclusive power of appointments in 21CF, with approval from the Secretary of State. We consider it essential that this clause is amended in order to afford some degree of regulatory oversight in relation to the appointment of the Monitoring Trustee. In particular, the CMA should have a clearly defined advisory role in either nominating or approving the appointment. It is imperative that such decisions should as far as possible be taken out of the political arena, to ensure independence from undue pressure on the Executive.

We are similarly concerned that the revised undertakings do not allow any role for the CMA in determining whether or not the undertakings could be varied or terminated in response to a 'material change in circumstances'. Whilst we accept it is appropriate and proper for the Secretary of State to retain some decision-making power, it is essential that any such decision is informed by both a public consultation and regulatory advice, and that the requirement of such should be inscribed in the undertakings agreement.

Similar provisions should be included in the event that Sky News is divested to a company other than Disney. In particular, the CMA must be assigned an advisory role in the appointment of the Divestiture Trustee in such circumstance, as well as in the determination of whether or not a nominated buyer constitutes a suitable alternative to Disney.

Brand Licensing Agreement

Paragraph 6(a) of this agreement effectively allows the Licensor to require certain changes from the Licensee if their “acts or omissions have materially adversely affected, or will materially adversely affect, the goodwill in the Trade Marks”. It is clarified 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. But this qualification is insufficient to preserve the editorial independence of Sky News. It is perfectly conceivable, for instance, that a negative story about any member of the MFT may be considered to have ‘materially adversely affected or will materially adversely affect the goodwill in the Trade Marks’ given that the licensor will effectively fall under the control of the MFT post transaction. For the avoidance of doubt, and in keeping with the criteria of remedy effectiveness set out by the Secretary of State, this clause must be expanded to cover any and all editorial decisions.

Similarly paragraph 14(h) gives power to the Licensor to update or make changes to the specified criteria for governing the quality/manner of use in respect of the license. Notwithstanding the caveat that such changes cannot be made ‘arbitrarily or unreasonably’, this clause opens a potentially wide remit for the Licensor to impose editorial constraints on Sky News. It is not in keeping with the important principle of maintaining an arms-length distance between Sky News and 21CF, given the former’s dependence on the funding commitment offered by the latter. Nor is it, in our view, necessary to ensure the effectiveness of the remedy going forward. We therefore submit that this sub-clause should be omitted from the Brand Licensing Agreement.

Similarly, we are concerned that the ‘review meetings’ provided for in section 16 constitute a breach of the arms-length principle. Notwithstanding the caveat that such meetings shall not “affect any editorial decisions of Licensee”, there is a risk that they could give rise to editorial direction or influence being exercised implicitly and understood by the licensee without the need for explicit instructions or directives. Furthermore, this clause is again not needed in our view in order to ensure the effectiveness of the remedy.

Summary

In light of the concerns raised above, the revised undertakings can and must be amended further in the following respects:

- a. Paragraph 3.2 of the Disney Undertakings must be strengthened to explicitly prohibit appointments of any member of the MFT or Associated Person (as defined in the agreement) to any executive or non-executive roles within any parent company of Newco, and to specify that this restriction will remain in place for at least 15 years.

- b. A clause must be added to the Disney Undertakings which effectively proscribes the MFT from purchasing additional shares, shareholder votes, or entering into block shareholder arrangements within Disney, for a period of at least 15 years from the effective date.
- c. Section 9 of the 21CF Undertakings must be amended to include a specified advisory role for the CMA in the process of appointment for the Monitoring Trustee.
- d. Paragraph 14.2 of the 21CF Undertakings must be amended to include a specified advisory role for the CMA in determining whether the undertakings should be varied or terminated in response to a material change in circumstance.
- e. Paragraph 20.1 of the 21CF Undertakings must be amended to include a specified advisory role for the CMA in determining whether an alternative purchaser is suitable to ensure the effectiveness of the remedy.
- f. Section 21 of the 21CF Undertakings must be amended to include a specified advisory role for the CMA in the appointment of a Divestiture Trustee.
- g. Paragraph 6(a) of the Brand Licensing Agreement must be amended to exclude any editorial decisions in consideration of whether the Licensee's acts or omissions have adversely affected, or may adversely affect the Goodwill in the Trade Marks.
- h. Paragraph 14(h) and section 16 should be removed from this agreement to ensure that an arms-length distance is preserved between the Licensee and Licensor.

Without all of these suggested changes, we have substantial reservations as to whether the revised undertakings meet the Secretary of State's criterion of ensuring that Sky News remains "able to take its editorial decisions independently, free from any potential outside influence".

Yours Sincerely

Dr Justin Schlosberg

For and on behalf of the *Media Reform Coalition*