CMA/27/2017

# A report to the Secretary of State for Culture, Media and Sport in response to the European intervention notice issued on 16 March 2017 in relation to the anticipated acquisition by Twenty-First Century Fox, Inc of Sky PLC

## A report pursuant to Article 4(2)-(5) of the Enterprise Act 2002 (Protection of legitimate interests) Order 2003

20 June 2017

# Anticipated acquisition by Twenty-First Century Fox, Inc of Sky PLC

**ME/6668/17**

## BACKGROUND

1. This report is made following the European intervention notice (**the Notice**)[1] given to the Competition and Markets Authority (**CMA**) by the Secretary of State on 16 March 2017 pursuant to section 67(2) of the Enterprise Act 2002 (**the Act**). This report has been prepared pursuant to Article 4 (2)-(5) of the Enterprise Act 2002 (Protection of legitimate interests) Order 2003 (**the Order**).[2]

2. The Notice requires the CMA to investigate and report to the Secretary of State in accordance with Article 4 of the Order within the period ending on 20 June 2017.[3] Article 4(4) of the Order requires the CMA to report on whether it believes 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. European relevant merger situation is defined in section 68 of the Act.[4]

3. The Notice also requires the Office of Communications (**Ofcom**) to investigate and report in accordance with Article 4A of the Order, within the same period, on the public interest considerations set out in sections 58(2C)(a) and 58(2C)(c) of the Act.

4. This report sets out the reasons why the CMA believes 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. This report also summarises the representations that the CMA has received on public interest considerations.

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[1] https://www.gov.uk/government/publications/annotated-european-intervention-notice
[2] S.I. 2003/1592.
[3] The original deadline for the CMA's report was extended. See the note to the annotated Notice at footnote 1.
[4] See paragraph 13.

**ADVICE ON EUROPEAN RELEVANT MERGER SITUATION**

## Parties

5. Twenty-First Century Fox, Inc (**21CF**) is a Delaware corporation whose shares are listed and traded on the NASDAQ Global Select Market. 21CF is a diversified global media company with operations in three main industry segments: cable network programming, television and filmed entertainment. 21CF owns a global portfolio of cable and broadcasting networks and properties including FOX, Fox Networks Group, National Geographic and STAR, the film studio Twentieth Century Fox Film, and television production studio Twentieth Century Fox Television. In the UK, 21CF's principal activities involve the licensing and distribution of audio-visual works for theatrical exhibition, television and home entertainment viewing, and the wholesale supply of TV channels.

6. Sky plc (**Sky**) is a public company whose shares are listed on the London Stock Exchange. Sky is a multi-territory entertainment and communications company active through a number of subsidiaries. Sky retails subscription television services on a linear and on-demand basis to residential and commercial premises in the UK, Ireland, Germany, Austria and Italy. Sky also produces a range of TV channels that it makes available to retail subscribers on its own and third party TV platforms and supplies on a wholesale basis to other retailers. Sky's other businesses include: the production and licensing/distribution of audiovisual content; the sale of advertising on its own and partner channels via its advertising house 'Sky Media'; and the sale of communications services in the UK and Ireland.

7. Sky's portfolio of TV channels in the UK includes Sky News (a 24-hour international news channel),other retail pay TV services and on free-to-air TV. In addition to these news channels, Sky provides rolling news content in the form of bulletins and articles on its website, as well as on a range of mobile devices. Sky also owns and operates Sky News Radio, which supplies news to the Independent Radio News (IRN) network of radio stations in the UK.

## THE TRANSACTION

8. On 15 December 2016, pursuant to Rule 2.7 of the UK Takeover Code 21CF publicly announced its firm intention to make an offer to acquire the fully diluted share capital of Sky not already owned by 21CF and its affiliates (the **Transaction**).

9. As a result of the Transaction, 21CF proposes to increase its shareholding in (**Sky**) from approximately 39% to 100%.

# JURISDICTION

10. This Transaction falls for consideration under the EC Merger Regulation (the Merger Regulation).[5] As a result, the European Commission has sole jurisdiction to investigate the competition aspects of this Transaction.[6] The European Commission announced its decision clearing the Transaction on 7 April 2017. However, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation and compatible with the general principles and other provisions of Community law.[7] The second paragraph of Article 21(4) of the Merger Regulation states that plurality of the media shall be regarded as a legitimate interest.

11. Section 58 of the Act sets out the specified considerations that qualify as public interest considerations for the purposes of the Act. The public interest considerations relating to media plurality are set out in section 58(2C) of the Act. The considerations specified in the Notice are: (1) 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;[8] and (2) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attaintment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.[9]

12. The Secretary of State is entitled to intervene in relation to a European relevant merger situation where she believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.

13. Under section 68 of the Act, a European relevant merger situation means a relevant merger situation: (a) which has been created or will be created if arrangements which are in progress or in contemplation are carried into effect; (b) by virtue of which a concentration with a Community dimension (within the meaning of the Merger Regulation), or a part of such a concentration, has arisen or will arise; and (c) in relation to which a reference was prevented from being made under section 22 or 33 (whether or not there

[5] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.
[6] Article 21(3) Merger Regulation.
[7] Article 21(4) Merger Regulation.
[8] Section 58(2C)(a) of the Act.
[9] Section 58(2C)(c) of the Act.

would otherwise have been a duty to make such a reference) by virtue of Community law or anything done under or in accordance with it.

## The Transaction would create a relevant merger situation under the Act

14. A merger must meet all three of the following criteria to constitute a relevant merger situation for the purposes of the Act:[10]

*a)* two or more enterprises must cease to be distinct, or there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct; and

*b)* either the value of UK turnover of the enterprise which is being acquired exceeds £70 million or the enterprises which cease to be distinct supply or acquire goods or services of any description and after the merger together supply or acquire at least 25 per cent of all those particular goods or services supplied in the UK or in a substantial part of it; and

*c)* either the merger must not yet have taken place[11]; or (subject to certain exceptions) the merger must have taken place not more than four months before the reference is made.

### *Enterprises ceasing to be distinct*

15. Enterprises will cease to be distinct for the purposes of the Act when they are brought under common ownership or control.[12] Section 26 of the Act sets out how common ownership or control is to be assessed. In particular, section 26(4) of the Act provides that a person or group of persons may be treated as bringing an enterprise under his or their control if being already able to control or materially to influence[13] the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the

[10] *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 3.1.3 onwards. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D). See also paragraph 4.1 onwards of the *Guidance on the CMA's jurisdiction and procedure*.

[11] This will be the case where enterprises have not yet ceased to be distinct but where arrangements are in progress or contemplation which, if carried into effect, will result in enterprises ceasing to be distinct.

[12] Section 26(1) of the Act.

[13] The *Guidance on the CMA's jurisdiction and procedure* (paragraphs 4.14 to 4.27) defines material influence as the lowest level of control that may give rise to a relevant merger situation, in which the acquirer has the ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target in this context means the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives. There are different sources of material influence, such as shareholding, Board representation, agreements or financial arrangement with a company that enable the acquirer materially to influence policy.

enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate.

16. At the present, 21CF owns approximately 39 per cent of Sky and, pursuant to a voting agreement between 21CF, Sky and affiliated entities, 21CF may not hold more than 37.19 per cent of all the votes that could in principle be cast at a shareholders Annual General Meeting of Sky.[14] The remainder of Sky's shares are publicly traded and widely held. There are currently no special rights attached to the shares held by 21CF. 21CF accounted for 43.99% of all votes cast at Sky's most recent annual general meeting (13 October 2016), and an average of 44.35% over the period 2012 – 2016.[15]

17. Sky's Board has 11 members. 21CF does not have the right to appoint directors to Sky's board but three of the current directors are affiliated with 21CF (James Murdoch, who chairs Sky's Board, Chase Carey and John Nallen). The Board appoints the CEO of Sky. The CEO in turn appoints senior management. Board decisions are by majority vote. Strategic decisions (notably those related to the budget and the business plan) in Sky are taken at the level of the Board of Directors on the basis of a majority of votes.

18. 21CF may therefore already exercise some degree of control over Sky. Based on the factors set out in the CMA's guidance, this may amount to 21CF having at least the ability materially to influence the policy of Sky,[16] but without having a controlling interest in Sky within the meaning of section 26 of the Act.[17]

19. Following the Transaction 21CF will own 100% of the issued shares of Sky thereby acquiring a controlling interest in Sky within the meaning of section 26 of the Act and 21CF and Sky would be brought under common ownership or common control within the meaning of section 26(4) of the Act. It follows that it is or may be the case that, as a result of the Transaction, two or more enterprises – in this instance 21CF and Sky - are ceasing to be distinct. 21CF accepts that the transaction will result in 21CF acquiring a controlling interest in Sky, and that two or more enterprises will thereby cease to be distinct.[18]

20. As mentioned below, some third parties submitted that the Transaction will also have the effect of increasing the control that the Murdoch Family Trust (**MFT**) is able to exercise over Sky.

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[14] See the European Commission decision on M.8354 Fox/Sky, of 7 April 2017 (the European Commission decision), paragraph 13.
[15] See paragraph 15 of the European Commission decision.
[16] It is not necessary for the purposes of this report for the CMA to conclude whether the current level of control capable of being exercised by 21CF over Sky amounts to material influence or de facto control over policy.
[17] See paragraph 3.2.5 of *Merger Assessment Guidelines.* See also paragraph 4.12 and 4.13 of the *Guidance on the CMA's jurisdiction and procedure.*
[18] See response of 21CF, of 4 April, to CMA's information request dated 27 March 2017.

21. MFT holds a shareholding of approximately 38.9% in 21CF. Currently the ability of MFT[19] to exercise influence over Sky arises through the exercise by 21CF of its voting rights at Sky shareholders' meetings. This is constrained: (a) by the other shareholders of 21CF and (b) by the other shareholders of Sky, who hold approximately 61% of Sky. After the Transaction, the ability of MFT to exercise influence over Sky through the Sky shareholders meeting is constrained only by the other shareholders of 21CF. An effect[20] of the European relevant merger situation is therefore that it causes a change in the actual extent of the control exercised and exercisable by MFT over Sky. As this is a consequence of the Transaction, and can be examined as such, it is unnecessary for the CMA to take a view separately on whether the level of control which MFT exercises over Sky will increase within the meaning of section 26 of the Act as a result of the Transaction.

***Turnover threshold***

22. The turnover test under the Act is met because the UK turnover of Sky is greater than £70 million.

***Arrangements in progress or contemplation***

23. 21CF has publicly announced pursuant to Rule 2.7 of the UK Takeover Code its firm intention to make an offer to acquire the fully diluted share capital of Sky not already owned by 21CF and its affiliates. As at the date of this report, 21CF has not completed the acquisition of the remaining shares of Sky. Accordingly, arrangements are in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct.

***Conclusion on relevant merger situation***

24. As a result of the Transaction, and in light of the findings set out above, the CMA believes 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 relevant merger situation.

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[19] This does not include any interests held by any persons who might be considered to be associated persons of MFT within the meaning of section 127 of the Act.
[20] Pursuant to the Notice, Ofcom must consider and report on the implications of this effect on the public interest.
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## Concentration with a Community Dimension

25. The European Commission in its decision of 7 April 2017[21] concluded that 21CF does not currently exercise decisive influence over Sky within the meaning of the Merger Regulation (whether on a *de jure* or on a *de facto* basis) but would acquire decisive influence over Sky as a result of the Transaction, thereby giving rise to a concentration. The European Commission also concluded that the relevant turnover thresholds were satisfied. As a result, the European Commission concluded that the acquisition by 21CF of Sky constitutes a concentration with a Community dimension.

26. The CMA therefore believes that as a result of this Transaction, 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 concentration with a Community dimension.

27. In relation to those arrangements, a reference would be prevented from being made under section 33 of the Act by virtue of EU law since the European Commission has asserted its exclusive jurisdiction based on Article 21(3) of the Merger Regulation.

## Conclusion on European relevant merger situation

28. For the reasons above, the CMA believes that it is or may be the case that the Transaction constitutes arrangements in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and that a concentration with a Community dimension will thereby arise. Accordingly, the Transaction will give rise to a European relevant merger situation within the meaning of section 68(2) of the Act.

## SUMMARY OF REPRESENTATIONS ON PUBLIC INTEREST

29. Under Article 4(3)(b) of the Order, the CMA's report may contain a summary of any representations about the case which have been received by the CMA and which relate to any public interest consideration mentioned in the European intervention notice concerned (other than a media public interest consideration) and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under Article 5.

[21] See paragraphs 9, 12 and 26 of the European Commission decision.

30. Under Article 4(5) of the Order the CMA may also include advice and recommendations which relate to any public interest consideration mentioned in the European intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under Article 5.

31. Following receipt of the Notice, the CMA has consulted and invited comments on jurisdictional matters only, since the Secretary of State has requested Ofcom to report on the issues relating to media plurality. In response to the CMA's consultation, one third party made representations directly to the CMA. Ofcom shared with the CMA submissions from two other third parties.

32. The submissions of the third parties were not directly relevant to the jurisdictional question that the CMA was asked by the Secretary of State to assess.

33. Two third parties submitted that MFT exercises control over both 21CF and News Corporation and that the Transaction will increase the control of MFT, through 21CF, over Sky.

## ADVICE TO THE SECRETARY OF STATE

34. The CMA believes 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 for the purposes of section 68(2) of the Act and Article 4(4) of the Order.

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**20 June 2017**