



BRIEFING PAPER

Number 7969, 12 October 2018

Media ownership: the proposed 21st Century Fox/Sky merger

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Summary

When can the Government intervene in media mergers?

Under part 3 of the *Enterprise Act 2002*, the Secretary of State for Digital, Culture, Media and Sport can intervene in broadcasting and cross media mergers where they give rise to the following public interest concerns:

- (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;
- (b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
- (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 proposed 21st Century Fox/Sky merger

In 2010, News Corporation tried to take over British Sky Broadcasting (now Sky plc). The bid was withdrawn in July 2011 after the discovery of phone-hacking by journalists at the *News of the World*.

[21st Century Fox](#) (21CF) was one of two companies formed from News Corporation in 2013 (the other company was [News Corp](#)). The Executive Chairman of 21CF is Rupert Murdoch. 21CF owns 39% of [Sky plc](#). The Chairman of Sky is James Murdoch.

In December 2016, 21CF announced plans to acquire the 61% share of Sky Plc which it does not already own. Critics claim that if the merger goes ahead it will be a “disaster” for media plurality. There are also concerns about the corporate behaviour of 21CF.

On 14 September 2017, Karen Bradley, the then Secretary of State, [announced](#) that she would be referring the merger to the Competition and Markets Authority (CMA) for a “phase 2” investigation. The grounds for the referral were public interest concerns about media plurality and a genuine commitment to broadcasting standards.

Formal referral to the CMA took place on 20 September 2017.

On 23 January 2018, the CMA [provisionally found](#) that the merger would not be in the public interest due to media plurality concerns, but not because of a lack of a genuine commitment to broadcasting standards.

The CMA sent its final report to Matt Hancock, the then Secretary of State, on 1 May 2018. The [report](#), published on 5 June 2018, found that the proposed merger could be expected to operate against the public interest with respect to media plurality. The CMA concluded - and recommended to the Secretary of State - that the most effective and proportionate remedy would be the divestiture of Sky News to Disney or another suitable buyer. In a Commons [statement](#) on 5 June, Matt Hancock said that he accepted the CMA’s findings and recommendation.

On 19 June 2018, the Government published updated undertakings offered by 21CF to divest Sky News to Disney, alongside new undertakings offered by Disney. In a [written statement](#) on the same day, Matt Hancock said that he proposed to accept the undertakings but that he was required to formally consult on them for 15 days. The [consultation notice](#) and [undertakings](#) are available from Gov.UK.

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On 12 July 2018, the Government published the responses received to the consultation. It also published its [notice of acceptance](#) of final undertakings given by 21CF and Walt Disney. In a [written statement](#), Jeremy Wright, the new Secretary of State, said that this marked the final stage of the public interest consideration of the proposed merger and that it was now a matter for Sky shareholders to decide whether to accept 21 CF's bid.

September 2018 auction

After an auction on 22 September 2018, Sky accepted a bid from Comcast. The Comcast bid equated to £17.28 per share, 21CF's was £15.67 per share.

On 26 September 2018, 21CF [announced](#) that it was disposing of its 39% stake in Sky.

1. Introduction

The primary responsibility for enforcing competition law rests with the independent competition authorities – the [Competition and Markets Authority](#) (CMA) and, at European level, the European Commission.

The Government has no role in the assessment of mergers and takeovers, except where, under part 3 of the *Enterprise Act 2002* (as amended) a merger gives rise to certain public interest considerations: national security, media plurality and the stability of the UK financial system. In these cases, the Secretary of State can make an assessment of a merger purely on the grounds that it runs counter to the public interest, without deferring to the Act's "substantial lessening of competition" test – or it may give regard to both tests in coming to a final decision. The Act allows for the Government to amend the list of public interest considerations and to add further categories.

In January 2011, statutory responsibility for all competition and policy issues relating to the media was transferred to the Secretary of State for Culture, Media and Sport.¹

The European Commission has jurisdiction over mergers which have a "Community dimension", determined by a turnover test similar to that applied by the UK competition authorities. As with UK law, the EU Merger Regulation, [Regulation 139/2004](#) (EUMR) establishes a substantive test to determine whether a merger should be permitted or not: specifically, that it would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, and thus be incompatible with the common market.

Article 21 of the EUMR recognises that Member States may take appropriate measures, including prohibiting proposed transactions, to protect other legitimate interests, such as media plurality.

Further information on competition law is available in the following Library Briefing Papers:

- [The UK competition regime](#) (SN 04814)
- [Mergers & takeovers: the public interest test](#) (SN 05374)

This Paper focuses on what UK law says on media mergers. The context is the proposed merger of 21st Century Fox and Sky Plc.

¹ [HC Deb 18 January 2011 c35-6WS](#); "Cable stripped of media brief after saying he 'declared war' on Murdoch", *Financial Times*, 22 December 2010

2. Media mergers and the public interest test

Section 375 of the *Communications Act 2003* amended the *Enterprise Act 2002* and inserted a public interest test in relation to media mergers.

In relation to newspaper mergers, under section 58 of the 2002 Act, the Secretary of State can intervene where they give rise to the following public interest concerns:

- the need for accurate presentation of news and free expression of opinion²
- the need for, where it is reasonable and practicable, a sufficient plurality of views in newspapers in the UK or a part of the UK³

In relation to broadcasting and cross media mergers, the Secretary of State can intervene where they give rise to the following public interest concerns:

- (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;
- (b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
- (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*⁴

Section 4 of [guidance](#) (March 2004) published by the then Department of Trade and Industry sets out the procedure for examining transactions raising media public interest considerations.

Chapter 16 of the CMA's merger [guidance](#) sets out the procedure for public interest cases. A [quick guide](#) (March 2014) to the UK merger regime has also been published by the CMA.

² *Enterprise Act 2002* s58(2A)

³ *Enterprise Act 2002* s58(2B)

⁴ *Enterprise Act 2002* s58(2C)

3. Ofcom's "fit and proper person" assessment

[Ofcom](#), the communications regulator, is required to apply a separate statutory test to the holders of broadcasting licences.

The Broadcasting Acts of 1990 and 1996 impose a duty on Ofcom to ensure that broadcasting licences are held by "fit and proper persons".⁵ This duty is ongoing and does not apply just at the time of the grant of the licence. Ofcom can therefore remove a licence if it considers that person holding it is no longer fit and proper.

For the purposes of both Acts, the word 'person' can mean a corporate body.

In a May 2012 [set of FAQs](#) on the test, Ofcom said: "In considering whether any licensee is fit and proper Ofcom will take into account any relevant misconduct of those who manage and control the licensee".⁶

The FAQs note that in November 2010, Ofcom determined that Bang Media (London) Ltd and Bang Channels Ltd were not fit and proper persons to hold a licence: "This was because of serious and repeated breaches of their licences, which demonstrated a disregard for their licence obligations and for the regulatory regime as a whole".

In September 2012, Ofcom considered that "on the evidence currently available and having taken into account all the relevant factors, Sky is fit and proper to hold its broadcast licences".⁷ The full [decision notice](#) is available from Ofcom's website.

⁵ *Broadcasting Act 1990 s3(3) and Broadcasting Act 1996 s3(3)*

⁶ Ofcom, [Frequently asked Questions: 'Fit and Proper' in relation to broadcast licensees](#), 10 May 2012

⁷ ["Ofcom decision on fit and proper assessment of Sky"](#), Ofcom media release, 20 September 2012

4. The proposed 21CF/Sky merger

4.1 Background

[21st Century Fox](#) (21CF) was one of two companies formed from News Corporation in 2013. The other company was [News Corp](#). The Executive Chairman of 21CF is [Rupert Murdoch](#). The Chief Executive Officer of 21CF is [James Murdoch](#).

21CF owns 39% of [Sky plc](#). The Chairman of Sky is [James Murdoch](#).⁸ He was a former Chairman of British Sky Broadcasting (BSkyB).

The 2010-11 News Corporation BskyB bid forBSkyB

In 2010 News Corporation tried to take over British Sky Broadcasting - now Sky plc.⁹ The bid was withdrawn in July 2011 after the discovery of phone-hacking by journalists at the *News of the World*. James Murdoch was the Executive Chairman of News International and News Group Newspapers Limited.¹⁰

On 13 July 2011, following the phone-hacking revelations, the then Prime Minister gave details of a two-part public inquiry to be held. The first part would look at the "culture, practices and ethics of the press". The second part – which hasn't happened – would look at the extent of unlawful or improper conduct at the *News of the World* and other newspapers, and the original police investigation into these matters.¹¹

The Leveson report and media plurality

Lord Justice Leveson's [report](#) on part 1 was published in November 2012. Volume 3 of the report looked, among other things, at the measurement of media plurality. Lord Leveson said that Ofcom and the Government should work with the industry "to achieve as great a measure of consensus as is possible on the theory of how media plurality should be measured" before the deployment of any measurement system.¹² The result, following [consultation](#), was Ofcom's [Measurement framework for media plurality](#) (November 2015).

4.2 Details of proposed merger announced (December 2016)

On 9 December 2016, it was announced that 21CF had reached an agreement to acquire the 61% share of Sky Plc which it does not already own.¹³

⁸ ["James Murdoch returns as Sky chairman"](#), *Guardian*, 29 January 2016

⁹ For further discussion see the Library's Briefing Paper, [Media ownership & competition law: the BskyB bid in 2010-11](#) (9 June 2017)

¹⁰ For further detail on the phone hacking scandal see: Culture, Media and Sport Committee, [News International and Phone-hacking](#), HC 903-I 2010-12, May 2012;

¹¹ [HC Deb 13 July 2011 cc311-2](#). See also ["Phone hacking inquiry - draft terms of reference"](#), 10 Downing Street press notice, 13 July 2011

¹² [An inquiry into the culture, practices and ethics of the press](#), HC 780-III, November 2012, p1466

¹³ ["Recommended cash offer for Sky plc by 21st Century Fox, Inc"](#), Sky corporate announcement, 15 December 2016; ["21st Century Fox makes takeover bid for Sky"](#), Sky News, 12 December 2016

In response to an [Urgent Question](#) on 12 December 2016, Matt Hancock, the then Minister for Digital and Culture, noted that a proposed merger was subject to further discussion. If a deal was agreed, and once formal notification had been made to the competition authorities, the then Secretary of State, Karen Bradley, had powers to intervene on public interest grounds under the *Enterprise Act 2002*. In the meantime, she was “putting in place procedures to ensure that her decision-making process is scrupulously fair and impartial should a decision be necessary.”¹⁴

On 20 December 2016, after the terms of a deal had been agreed, Ed Miliband tabled an [Urgent Question](#) on whether the Government planned to refer the bid to the competition authorities. Karen Bradley said that formal notification of the bid had still not been made and she would not be taking any decisions on the bid until this happened.¹⁵

4.3 Secretary of State “minded to” intervene (3 March 2017)

On 3 March 2017, the European Commission confirmed that it had received formal notification of the proposed merger.

On the same day, Karen Bradley [said](#) that she was “minded” to issue a European Intervention Notice (EIN) on two of the public interest grounds specified in section 58 of the 2002 Act i.e. media plurality and commitment to broadcasting standards.¹⁶ Before making a final decision, and in line with statutory guidance, she had invited further representations from the parties (to be provided by 8 March). She would make a final decision on whether to issue an EIN in the week beginning 13 March 2017.

The full “minded to” [letter](#) is available from the Gov.UK website.

On 6 March 2017, the Secretary of State gave further detail on her decision in an [oral statement](#) to the House. On the first public interest ground, media plurality, she said:

(...) My concern here is that the merger will bring under common or increased control a number of significant news sources, including Sky News and News Corporation’s newspaper titles. As a result, I have told the parties that I am minded to ask for a report from Ofcom on the impact of the merger on media plurality before considering the matter further.¹⁷

On the second public interest ground, commitment to broadcasting standards, she said:

(...) That ground relates to the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to attaining broadcasting standards objectives. As I have indicated to the parties to the merger, I am concerned about the nature of a number of

¹⁴ [HC Deb 12 December 2016 c512](#)

¹⁵ [HC Deb 20 December 2016 c1315](#)

¹⁶ [“Statement in response to the formal notification of the proposed merger between Sky and 21st Century Fox”](#), DCMS news release, 3 March 2017

¹⁷ [HC Deb 6 March 2017 c581](#)

breaches of broadcasting standards by 21st Century Fox, as well as the behaviour and corporate governance failures of News Corporation in the past. In the light of those matters, I am minded to intervene on this ground and to ask Ofcom to investigate them further.¹⁸

In response, Tom Watson, Shadow Secretary of State, said that the “company names may have changed since the previous bid for Sky was withdrawn in 2011, but we are still dealing with media plurality, misconduct and the Murdochs”.¹⁹ He asked whether Ofcom would conduct a “full fit and proper person test before the merger is approved” and whether it would be able to gather the necessary evidence.²⁰

The Secretary of State replied:

(...) On the evidence that Ofcom will look at, I make it clear that I am not ruling any evidence in or out. If I do decide to intervene, Ofcom will report to me on any matters it considers relevant. On the commitment to broadcasting standards, there is no exhaustive list of evidence—Ofcom can look at whatever it thinks right.

As I have said, Ofcom has sufficient powers and can investigate anything it thinks appropriate...Ofcom has a fit and proper person test for broadcasting licences. That test is different from the one that will be considered for the merger, but the same evidence may be relevant to both...²¹

4.4 Secretary of State issues European Intervention Notice (16 March 2017)

On 16 March 2017, Karen Bradley confirmed that she was issuing an EIN on the grounds of media plurality and commitment to broadcasting standards. The [EIN](#) is available from the Gov.UK site.

The Secretary of State’s decision required Ofcom to report on the public interest issues. The CMA was required to report on jurisdiction issues. The original deadline for the reports was 16 May 2017. This was extended to 20 June 2017 to take account of the general election.²²

21CF’s representation

The Secretary of State said that [representations](#) from 21CF contested the position taken in her “minded to” letter but that none of these had caused her to “dismiss the concerns” on public interest grounds.²³

21CF’s representation said it did “not accept that the Transaction “brings” under the control of the MFT [Murdoch Family Trust] “several”

¹⁸ [HC Deb 6 March 2017 cc581-2](#)

¹⁹ [HC Deb 6 March 2017 c582](#)

²⁰ [HC Deb 6 March 2017 c583](#)

²¹ [HC Deb 6 March 2017 c584](#)

²² [“Statement on the Sky / Fox merger media public interest consideration process”](#), DCMS news story, 21 April 2017

²³ [HC Deb 16 March 2017 c556](#)

of the leading providers of news in the UK".²⁴ It also said, among other things, that:

(...) the UK media is robustly plural and that plurality has increased in recent years...The robust plurality of the media is particularly relevant because the correct legal test is whether the Transaction would result in *insufficient* plurality, not a reduction in plurality...

(...) the Secretary of State and, if she seeks its advice, Ofcom, should engage fully with the transformation of news provision and consumption brought about by the internet and social media...

On broadcasting standards, 21CF said:

(...) 21CF is wholly committed to the broadcasting standards in each jurisdiction in which it operates, including to the objectives set out in the Communications Act 2003 in relation to its UK broadcasting licences. 21CF takes compliance with these rules very seriously and, like Sky, has never been sanctioned (unlike a number of other major broadcasters). Moreover, as you note in your letter, while assessing commitment to these objectives may involve consideration of past compliance, this should be a qualitative assessment, rather than a simplistic count of past infringements. Your letter, however, then appears to suggest that a purely numerical comparative assessment between Sky and 21CF entities (weighted by number of services) suffices to indicate a potential risk of deterioration of "Sky's compliance record". This is clearly not the case: such comparative analysis between 21CF and Sky is at best irrelevant and uninformative in the context of the identified PIC [public interest consideration]

More generally, with regard to the compliance issues relating to the newspaper business carried out by News UK (including the now defunct NoTW), 21CF takes compliance matters extremely seriously and is proud of the transformation of its corporate governance and of the arrangements it has put in place since that time. In fact, the level of scrutiny and controls we have imposed around the world were informed by the lessons learned in 2011...²⁵

"Fit and proper" as a new public interest consideration?

During her [oral statement](#), Karen Bradley said that she had received representations from Ed Miliband, Tom Watson and others on adding "fit and proper" as a new public interest consideration in the *Enterprise Act 2002*. Her view was that:

(...) The grounds set out in the Enterprise Act that allow for intervention in media mergers are aimed at ensuring plurality of the media...It is a view I fully and unequivocally endorse. However, I am also clear that the question of whether someone is fit and proper to hold a broadcasting licence is a different requirement, and one that, quite rightly, sits with Ofcom, the independent regulator.²⁶

²⁴ [Letter](#) from Jeffrey Palker (Executive Vice President, Deputy General Counsel and Deputy Chief Compliance Officer Twenty First Century Fox, Inc) to Deputy Director, Head of Media Policy, DCMS, 8 March 2017, p2

²⁵ [Ibid](#), p2

²⁶ [HC Deb 16 March 2017 c557](#)

The Secretary of State also said that Ofcom had announced that it would be making its own “fit and proper” assessment (the assessment described in section 3 above) at the same time as considering the public interest test.

Tom Watson welcomed Ofcom’s announcement but asked whether it would have enough time to make its fit and proper assessment.²⁷ Karen Bradley said that Ofcom had assured her that it had the “time, resources and ability to gather the evidence that it needs”.²⁸

4.5 Ofcom’s role

On 16 March 2017, Ofcom published a [guidance note](#) on the process and timetable for its report on the public interest considerations. An invitation to comment (ITC) [document](#) was also published.

The plurality public interest consideration

According to the ITC document, Ofcom’s provisional view was that it should apply the reasoning set out in its [Measurement framework for media plurality](#) (November 2015). The ITC document therefore stated:

1.5 Subject to responses to this invitation to comment (ITC), we therefore provisionally consider news and current affairs to be the relevant genres to consider. Specifically, we will consider:

- availability;
- consumption;
- impact; and
- contextual factors.

1.6 **Availability metrics** measure the number of news providers available at the point of consumption. Both the number of different news sources available on each media platform and across all media are relevant.

1.7 **Consumption metrics** measure the number of people using news sources and the frequency and/or time that they spend consuming it. Metrics capable of quantifying cross-media consumption are particularly important. Sector-specific consumption metrics should also be used.

1.8 **Impact metrics** help inform how news content can influence the formation of people’s opinions. While measuring the impact and influence of news sources on consumers is complex, proxies for impact can be used. Proxies to consider include personal importance, impartiality, reliability, trust and the extent to which a news source helps people make up their minds about issues in the news

1.9 **Contextual factors**: are an integral part of our measurement framework which help to interpret the quantitative data. Contextual factors may include but are not limited to:

- governance models;
- funding models;

²⁷ [HC Deb 16 March 2017 c558](#)

²⁸ [HC Deb 16 March 2017 c559](#)

- potential power or editorial control exercised by owners, proprietors or senior executives;
- internal plurality (i.e. the range of internal voices and opinions within an organisation);
- market trends and potential future developments, including changes to news consumption online and via social media; and
- regulation and oversight (including relevant statutory obligations such as the due impartiality requirements within Ofcom's Broadcasting Code)

1.10 We are seeking views on all the issues set out above and any other issues you think we should consider in relation to the impact of this particular change of control of Sky on the plurality public interest consideration.²⁹

The broadcast standards public interest consideration

The ITC document noted that Ofcom had not previously been asked to consider a merger in which the Secretary of State had intervened in relation to the broadcast standards public interest consideration. The standards objectives, set out in section 319 of the *Communications Act 2003*, require:

- that persons under the age of eighteen are protected;
- that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services;
- that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with;
- that news included in television and radio services is reported with due accuracy;
- that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;
- that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;
- that the product placement requirements referred to in section 321(3A) are met in relation to programmes included in a television programme service (other than advertisements)
- that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services;
- that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;

²⁹ Ofcom, [Invitation to comment for public interest test on the proposed acquisition of Sky plc by Twenty-First Century Fox, Inc.](#), 16 March 2017

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- that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with;
- that the unsuitable sponsorship of programmes included in television and radio services is prevented;
- that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and
- that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred³⁰

The ITC document stated that “Subject to responses to this invitation to comment, we provisionally consider that all genres of content and all the broadcast standards objectives concerned are relevant to this public interest consideration”.³¹

Ofcom’s fit and proper person assessment

As noted in section 4.4 above, Ofcom was also considering Sky’s fitness to hold broadcasting licences in the event of a change of control.

4.6 European Commission view (7 April 2017)

On 7 April 2017, the European Commission [ruled](#) that the merger would “raise no competition concerns in Europe”.³² However the Commission noted that its findings were only concerned with the competition aspects of the proposed merger and that its clearance decision was “without prejudice to the UK’s ongoing media plurality review of the proposed transaction.”³³

4.7 Secretary of State “minded to” refer bid for phase 2 investigation (29 June 2017)

Ofcom and the CMA submitted their reports³⁴ to the Secretary of State by the deadline of 20 June 2017.³⁵

In an [oral statement](#) to the Commons on 29 June 2017, Karen Bradley said that she was “minded” to refer the proposed merger to the CMA for a [phase 2 investigation](#).³⁶ This was on the basis of media plurality concerns raised in Ofcom’s report:

³⁰ s319(2) of the *Communications Act 2003*

³¹ Ofcom, [Invitation to comment for public interest test on the proposed acquisition of Sky plc by Twenty-First Century Fox, Inc](#), para 1.14

³² [“Mergers: Commission clears 21st Century Fox’s proposed acquisition of Sky under EU merger rules”](#), European Commission press release, 7 April 2017

³³ *Ibid*

³⁴ Ofcom, [Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc](#), 20 June 2017; CMA, [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](#), 20 June 2017

³⁵ [“Statement on the proposed Sky plc / 21st Century Fox Inc. merger”](#), DCMS press release, 20 June 2017

³⁶ [HC Deb 29 June 2017 c762](#); Further detail on Phase 2 investigations is available in the CMA’s merger [guidance](#) (January 2014)

(...) The reasoning and evidence on which Ofcom's recommendation is based are persuasive. The proposed entity would have the third largest total reach of any news provider—lower only than the BBC and ITN—and would, uniquely, span news coverage on television, radio, in newspapers and online.

Ofcom's report states that the proposed transaction would give the Murdoch Family Trust material influence over news providers with a significant presence across all key platforms. This potentially raises public interest concerns because, in Ofcom's view, the transaction may increase the ability of members of the Murdoch Family Trust to influence the overall news agenda and their ability to influence the political process, and it may also result in the perception of increased influence. These are clear grounds to warrant a referral to a phase 2 investigation, so that is what I am minded to do...³⁷

The Secretary of State was not minded to refer the bid on the grounds of commitment to broadcasting standards:

(...) Ofcom's approach sought to measure commitment to broadcasting standards by reference to breaches of regulatory codes. It found that Fox's compliance with the UK's Broadcasting Code is in line with comparable broadcasters. Nor did Fox's compliance record in relation to overseas broadcast jurisdictions—where Ofcom's analysis focused largely on the EU—give cause for concern.

I also asked Ofcom to consider the effect of any failure of corporate governance on this public interest consideration. Ofcom did this in the context of its separate assessment of whether Fox and Sky would remain fit and proper to hold broadcast licences following the transaction. It concluded that behaviours alleged at Fox News in the US amount to significant corporate failures. However, these did not, in its view, demonstrate that the merged company would lack a genuine commitment to broadcasting standards. In reaching a view, I have to be guided only by the evidence before me. As such—based on the Ofcom report—I am currently minded not to refer to a phase 2 investigation in relation to a genuine commitment to broadcasting standards.³⁸

Ofcom's report is available from its [website](#). The key findings on media plurality are set out on pp3-4. The key findings on broadcasting standards are given on pp4-5.

The Secretary of State also said she was minded to reject 21CF's [undertakings in lieu](#) (UIL) for "remedying, mitigating or preventing the effects adverse to the public interest which may be expected to result from the Transaction".³⁹

Further representations were invited on the Secretary of State's "minded to" positions. She would then make a final decision. The deadline for representations was 14 July 2017.

Ofcom's fit and proper person assessment

At the end of her statement, the Secretary of State said that Ofcom's "fit and proper person" assessment would also be published on

³⁷ [HC Deb 29 June 2017 cc762-3](#)

³⁸ [HC Deb 29 June 2017 c763](#)

³⁹ [HC Deb 29 June 2017 c764](#)

29 June. She said that the issue of who should hold broadcasting licences was a matter for Ofcom and that she would not be commenting on the assessment.⁴⁰

Ofcom's [assessment](#) is available from its website and found that Sky would remain a fit and proper licence holder in the event of the merger:

In summary the behaviours alleged at Fox News amount to significant corporate failure, however the overall evidence available to date does not provide a reasonable basis to conclude that if Sky were 100% owned and controlled by Fox, it would not be fit and proper to hold broadcast licences [para 10]

In his response to Karen Bradley's statement, Tom Watson said that if James Murdoch could pass a fit proper person test, this "says more about the rules than it does about Mr Murdoch".⁴¹

4.8 Secretary of State's update (12 September 2017)

In an [update](#) to the Commons on 12 September 2017, the Secretary of State confirmed her intention to refer the merger for a phase 2 investigation on the grounds of media plurality. In addition, she was now "minded" to refer the merger on the grounds of "genuine commitment to broadcasting standards". This followed representations reviewed during the summer as well as advice from Ofcom. The Secretary of State explained the "technical reasons" for her decision:

Questions were raised about the threshold for referral. The legal threshold for a reference to the CMA is low. I have the power to make a reference if I believe that there is a risk that is not purely fanciful that the merger might operate against the specified public interests. In its original report, Ofcom stated that

"we consider that there are no broadcasting standards concerns that may justify a reference".

At the time, Ofcom appeared to be unequivocal. Following the additional representations, Ofcom has further clarified that

"while we consider there are non-fanciful concerns, we do not consider that these are such as may justify a reference in relation to the broadcast standards public interest consideration."

The existence of non-fanciful concerns means that, as a matter of law, the threshold for a reference on the broadcasting standards ground is met. In the light of all the representations and Ofcom's additional advice, I believe that those concerns are sufficient to warrant the exercise of my discretion to refer.⁴²

She then outlined specific concerns:

The first concern, which was raised in Ofcom's public interest report, was that Fox did not have adequate compliance procedures in place for the broadcast of Fox News in the UK and that it took action to improve its approach to compliance only after Ofcom expressed concerns. Ofcom has confirmed it considers that to raise concerns that are non-fanciful but not

⁴⁰ [HC Deb 29 June 2017 c765](#)

⁴¹ [HC Deb 29 June 2017 c765](#)

⁴² [HC Deb 12 September 2017 cc653-4](#)

sufficiently serious to warrant referral. I consider that those non-fanciful concerns warrant further consideration. The fact that Fox belatedly established such procedures does not ease my concerns, and nor does Fox's compliance history.

Ofcom was reassured by the existence of the compliance regime, which provides licensees with an incentive to comply. However, it is clear to me that Parliament intended the scrutiny of whether an acquiring party has a "genuine commitment" to attaining broadcasting standards objectives to happen before a merger takes place. Third parties also raised concerns about what they termed the "Foxification" of Fox-owned news outlets internationally. On the evidence before me, I am not able to conclude that that raises non-fanciful concerns. However, I consider it important that entities that adopt controversial or partisan approaches to news and current affairs in other jurisdictions should, at the same time, have a genuine commitment to broadcasting standards here. Those are matters the CMA may wish to consider in the event of a referral.

I turn to the question of corporate governance failures. Ofcom states in its latest correspondence that such failures raise non-fanciful concerns in relation to the broadcasting standards ground. However, it again concludes that those concerns do not warrant a reference. I agree that corporate governance issues at Fox raise non-fanciful concerns, but in my view it would be appropriate for those concerns to be considered further by the CMA. I agree with the view that, in this context, my proper concern is whether Fox will have a genuine commitment to attaining broadcasting standards objectives. However, I am not confident that weaknesses in Fox's corporate governance arrangements are incapable of affecting compliance in the broadcasting standards context. I have outstanding non-fanciful concerns about these matters, and I am of the view that they should be considered further by the CMA.⁴³

The correspondence between the DCMS and Ofcom on the above issues is available from the Gov.UK [website](#).

21CF and Sky were given 10 working days to make further representations. The Secretary of State would then make a final decision on whether to refer the merger to the CMA for a phase 2 investigation.

4.9 Secretary of State's announcement that the merger to be referred to the CMA (14 September 2017)

In a [press release](#) of 14 September 2017, the Secretary of State said that she had received letters on behalf of 21CF and Sky stating that they disagreed with her minded-to decision but would not be making any further substantive representations. She would therefore be referring the merger to the CMA for a phase 2 investigation.⁴⁴

⁴³ [HC Deb 12 September 2017 c654](#)

⁴⁴ ["Statement from the Culture Secretary on proposed Sky plc / 21st Century Fox Inc. merger"](#), DCMS press release, 14 September 2017

4.10 Formal referral of the merger (20 September 2017)

Formal referral to the CMA took place on 20 September 2017. The [terms of reference](#), the DMCS' [referral letter](#), and the [final decision letter](#) to the parties, are all available online.

The CMA published an [issues statement](#) on 10 October 2017. This sets out the scope of its investigation and outlines initial theories on what might adversely affect the two public interest considerations: media plurality in the UK and a genuine commitment to broadcasting standards.

There is also a [webpage](#) explaining how a phase 2 inquiry works and when the public can get involved.

4.11 CMA's provisional findings (23 January 2018)

On 23 January 2018, the CMA [provisionally found](#) that the merger would not be in the public interest due to media plurality concerns, but not because of a lack of a genuine commitment to broadcasting standards. A [press release](#) summarised the findings:

Media plurality

Media plurality goes to the heart of the UK's democratic process and as such is given protection in law.

The CMA has provisionally found that if the deal went ahead, as currently proposed, it is likely to operate against the public interest. It would lead to the Murdoch Family Trust (MFT), which controls Fox and News Corporation (News Corp), increasing its control over Sky, so that it would have too much control over news providers in the UK across all media platforms (TV, Radio, Online and Newspapers), and therefore too much influence over public opinion and the political agenda.

The MFT's news outlets are watched, read or heard by nearly a third of the UK's population, and have a combined share of the public's news consumption that is significantly greater than all other news providers, except the BBC and ITN.

Due to its control of News Corp, the Murdoch family already has significant influence over public opinion and full ownership of Sky by Fox would strengthen this even further.

While there are a range of other news outlets serving UK audiences, the CMA has provisionally found that they would not be sufficient to moderate or mitigate the increased influence of the MFT if the deal went ahead.

Broadcasting standards

The CMA's investigation also examined a range of evidence to understand whether Fox, Sky and the MFT have a genuine commitment to broadcasting standards in the UK. Here, it has provisionally found that Fox taking full control of Sky is not likely to operate against the public interest.

Its investigation has provisionally concluded that, overall, Fox has a genuine commitment to broadcasting standards in the UK. It is an

established broadcaster here, having held licences for over 20 years. The CMA took account of the policies and procedures Fox has in place to ensure broadcasting standards are met.

It found that while there were issues with the compliance arrangements at Fox News when it was broadcasting its unedited simulcast international feed into the UK, this did not outweigh the detailed and effective policies and procedures that Fox has in place in relation to its UK focused channels.

The CMA also provisionally found that Sky has a good record in this regard, consistently complying with broadcasting regulation. It also has comprehensive and effective policies and procedures in place to ensure broadcasting standards are met.

Its investigation took account of the fact that before 2012 there were serious shortcomings at the MFT controlled newspaper the News of the World, which had failed to comply with both press standards and the law.

However, News Corp has subsequently put in place processes and procedures to address these. The CMA has provisionally found that, since then, its newspapers' record of compliance with press standards does not raise concerns.

The investigation also considered the recent allegations of sexual harassment against Fox News employees in the United States.

While these are serious, the CMA has provisionally found that these are not directly related to the attainment of broadcasting standards and do not call into question Fox's or the MFT's commitment to broadcasting standards in the UK.⁴⁵

Further detail on the CMA's provisional findings is available in:

- [Summary of provisional findings](#)
- [Provisional findings report](#)
- [Appendices and glossary](#)

A [public remedies notice](#) set out a series of potential options for addressing the CMA's media plurality concerns.

The original deadline for the CMA's final report was 6 March 2018 but this was [extended](#) by eight weeks to 1 May 2018. This was because of the "exceptional volume of substantive submissions, the need to hold a large number of hearings and the novelty and complexity of the investigation required to address the statutory questions".

4.12 CMA's final report published (5 June 2018)

On 1 May 2018, the CMA sent its final report to Matt Hancock, the then Secretary of State. In a [written statement](#), Mr Hancock explained that he had 30 working days to make a decision on the merger and publish the report.⁴⁶

⁴⁵ ["CMA provisionally finds Fox/Sky deal not in the public interest"](#), CMA press release, 23 January 2018

⁴⁶ Matt Hancock Written Statement (HCWS662), [Update on process - Fox-Sky merger](#), 1 May 2018

The CMA's findings

On 5 June 2018, the Secretary of State published the CMA's [final report](#). This found that the proposed merger could be expected to operate against the public interest with respect to media plurality. It was not expected to operate against the public interest consideration relating to a genuine commitment to broadcasting standards.⁴⁷

Proposed remedies

Having concluded that the merger could be expected to operate against the public interest with respect to media plurality, the CMA looked at remedies that the Secretary of State could take. In assessing these, the CMA said that it was "mindful of the importance of media plurality to the democratic process and the context in which any remedy would need to be effective, including that Sky News would depend on Fox, as its parent company, post Transaction for both financial and operational support".⁴⁸

The CMA considered three remedies⁴⁹ put forward by Fox:

- a firewall remedy, consisting of behavioural commitments designed to insulate Sky News from influence (Firewall);
- a ring-fencing remedy involving the establishment of Sky News as a separate legal entity (Newco), 100% owned by Fox, along with behavioural commitments designed to insulate Sky News from influence (Ringfencing); and
- a divestiture of Sky News (Newco) to Disney.

The CMA concluded - and recommended to the Secretary of State - that the most effective and proportionate remedy would be the divestiture of Sky News to Disney or to another suitable buyer:

167. Our analysis showed that both the Firewall and the Ring-fencing remedies suffered from material risks stemming from the ongoing ownership and commercial relationships between Fox and Sky News; Sky News' lack of financial independence; as well as fundamental problems with monitoring and enforcement. We considered that both remedies could at best mitigate only some of the effects adverse to the public interest that we identified. As a consequence, we concluded that neither of these remedies would be effective.

168. We then considered the two structural remedies, divestiture and prohibition. We concluded that divestiture of Sky News to a suitable upfront purchaser independent of the MFT would be an effective remedy. It would sever the ownership links between Fox and Sky News and remove any control of the MFT over Sky News in a timely manner. It would also require no ongoing monitoring and enforcement. We concluded that Disney would be a suitable upfront purchaser. We also concluded that prohibition of the Transaction would also be effective as it would prevent the effects adverse to the public interest that we identified from arising, by preventing the change of ownership and control. By focusing on

⁴⁷ CMA, [21st Century Fox, Inc and Sky Plc: A report on the anticipated acquisition by 21st Century Fox, Inc of Sky Plc](#), 1 May 2018, paras 1 and 2

⁴⁸ Ibid, para 162

⁴⁹ The remedies are included in [Appendices](#) to the CMA's report

the ownership of Sky News, both measures would address at their source the adverse effects we identified and would not require ongoing monitoring, enforcement or other intervention on behalf of the Secretary of State, or the CMA in order to safeguard this outcome.

169. While both a divestiture of Sky News to Disney (or to another suitable upfront purchaser) and prohibition would be effective solutions to address the effects adverse to the public interest that we identified, we concluded that a divestiture to Disney would provide greater certainty over the continuation and availability of Sky News than prohibition. This is an additional benefit in terms of media plurality, which has been the focus of our concerns.

170. Having considered the effectiveness of remedy options we then considered the proportionality of the effective remedy options.

171. We concluded that divestiture of Sky News to Disney (or to another suitable upfront purchaser) would be a proportionate solution to the effects adverse to the public interest that we identified. It is no more onerous than required, while providing additional certainty as to the future provision of Sky News. It also has an acceptable risk profile. If it were not possible to secure a divestiture to Disney (or another suitable upfront purchaser, should divestiture to Disney fall through), we concluded that prohibition would be the only effective and proportionate remedy.

Secretary of State's statement

In a [statement](#) to the Commons on 5 June 2018, Matt Hancock accepted the CMA's finding that the proposed merger was not in the public interest due to media plurality concerns. He also accepted the CMA's recommendation that the most effective and proportionate remedy was for Sky News to be divested to Disney or an alternative suitable buyer, with an agreement to ensure that it is funded for at least 10 years.⁵⁰ Mr Hancock said that he aimed to publish a consultation on Fox's undertakings within two weeks.

In the same statement of 5 June, the Secretary of State informed the House that Comcast's proposed acquisition of Sky did not raise any public interest concerns and that he would therefore not be issuing an intervention notice.⁵¹

4.13 Consultation on divesting Sky News to Disney (19 June 2018)

On 19 June 2018, the Government published updated undertakings offered by Fox to divest Sky News to Disney, alongside new undertakings offered by Disney. In a [written statement](#) on the same day, Matt Hancock said that that he proposed to accept the undertakings but that he was required to formally consult on them for 15 days:

These undertakings are offered on improved terms and will include:

⁵⁰ [HC Deb 5 June 2018 cc194-5](#)

⁵¹ [HC Deb 5 June 2018 c194](#)

- a commitment from Disney to operate and maintain a Sky News branded news service for 15 years rather than 10 years
- a restriction on Disney from selling Sky News for 15 years without the consent of the Secretary of State
- an extension of the funding commitment from 21st Century Fox from 10 years to 15 years
- an increase in the total funds available to Sky News, to at least £100m per year, with operating costs protected in real terms
- a formal commitment from Disney to preserve the editorial independence of Sky News

In my view, these revised undertakings meet the criteria that I set out to the House on 5 June and will help to ensure that Sky News remains financially viable over the long term; is able to operate as a major UK-based news provider; and is able to take its editorial decisions independently, free from any potential outside influence.

Under the legislation, I am required to consult formally for 15 days on the undertakings, which I propose to accept. Views as to whether these proposals are sufficient to remedy the adverse plurality public interest concerns raised by this merger are sought by 5pm on Wednesday 4 July 2018.⁵²

The [consultation notice](#) and [undertakings](#) are available from Gov.UK.

4.14 Public interest consideration of the merger ends (12 July 2018)

On 12 July 2018, the Government published the responses received to the June 2018 consultation. It also published its [notice of acceptance](#) of final undertakings given by 21CF and Walt Disney. In a [written statement](#), Jeremy Wright, the new Secretary of State, said that this marked the final stage of the public interest consideration of the proposed merger and that it was now a matter for Sky shareholders to decide whether to accept 21 CF's bid:

Having taken over as the Secretary of State with responsibility for media public interest cases, I have reviewed the process regarding the proposed merger between 21st Century Fox (21CF) and Sky Plc (Sky). I am content that DCMS and the relevant parties have ensured a scrupulously clear, fair and transparent process and I can now therefore inform the House of the final decisions made by my predecessor as Secretary of State. These decisions were made in a quasi-judicial capacity.

On 5 June, Official Report, column 194, the previous Secretary of State made a statement to the House in which he set out his decision in relation to the proposed merger.

He announced that, having considered the Competition and Markets Authority's (CMA) report, he agreed with their findings on the public interest grounds and their finding that undertakings to divest Sky News to The Walt Disney Company (Disney) or to an alternative suitable buyer could potentially remedy the public interest concerns identified.

⁵² Matt Hancock Written Statement (HCWS775), [Media matters](#), 19 June 2018

Following the completion of discussions with the parties, on 19 June he published a consultation on the undertakings offered by 21 CF along with new undertakings offered by Disney for the divestment of Sky News to Disney and several associated documents.

We received five responses to the consultation, which closed on 4 July...

Having considered the responses to the consultation, the previous Secretary of State agreed with the parties a clarificatory change to Disney's undertakings and changes to the associated brand licensing agreement. In response to specific concerns raised by respondents, he also agreed that where appropriate the Secretary of State will consult with the CMA in relation to these undertakings and will publish the formal written advice given by the CMA. I am content to confirm this position.

The final version of the undertakings have been published along with the other relevant documents on the DCMS website.

The publication of the undertakings marks the final stage of the public interest consideration of this case. It is right that Ofcom, the CMA and my Department have taken such care in ensuring the bid is properly and effectively scrutinised. It is now a matter for the Sky shareholders to decide whether to accept 21 CF's bid.⁵³

The responses to the consultation, the final undertakings by 21CF and Walt Disney, and associated documents, are available from [Gov.UK](https://www.gov.uk).

⁵³ Jeremy Wright Written Statement (HCWS852), [Media matters](#), 12 July 2018

5. Sky accepts Comcast bid (September 2018)

After an auction on 22 September 2018, Sky accepted a bid from Comcast. The Comcast bid equated to £17.28 per share, 21CF's was £15.67 per share.⁵⁴ As the *Guardian*'s Jim Waterson observed:

(...) Comcast's victory...means that almost two years of government scrutiny of whether Murdoch should be allowed to take control of Sky were ultimately for nothing...⁵⁵

On 26 September 2018, 21CF [announced](#) that it was disposing of its 39% stake in Sky.

⁵⁴ Takeover Panel, [Statement \(No 2018/16\) on Sky plc](#), 22 September 2018

⁵⁵ Jim Waterson, ["Rupert Murdoch's Sky reign to end as Fox sells all shares to Comcast"](#), *Guardian*, 26 September 2018

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