MEDIA REFORM COALITION

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BY EMAIL ONLY

Anne Lambert
Competition and Markets Authority
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6 February 2018

Dear Ms Lambert

21st Century Fox, Inc. ("21CF") / Sky Plc merger inquiry – Response to notice of possible remedies

The Media Reform Coalition has submitted evidence in respect of the full scope of the Inquiry and has been engaged as an interested party throughout the process. However, our primary concern and expertise relates to the plurality grounds of the merger review. As such, we welcome the opportunity to comment on the possible remedies, having regard to the Inquiry's provisional findings that the merger may be expected to operate against the public interest on those grounds.

Whilst we agree with the broad thrust of these provisional findings, we are concerned that behavioural remedies will not mitigate the risks identified. These concerns were raised pre-emptively with the Secretary of State following the phase one review, and we enclose herewith a copy of that submission produced in collaboration with 38 Degrees.

In summary, there are three broad considerations which cast significant doubt over the efficacy of any behavioural remedies in this case:

1. **Behavioural remedies do not meet the extent of public interest concerns raised in both the Inquiry's provisional findings and in Ofcom's phase one report.**

In its phase one report, Ofcom's findings were unequivocal and significantly stronger than when it raised similar concerns in respect of News Corporation's proposed merger with BskyB in 2010. In 2017, Ofcom stated that

> *The transaction raises public interest concerns as a result of the risk of increased influence by members of the Murdoch Family Trust* [MFT] *over the UK news*

agenda and the political process, with its unique presence on radio, television, in print and online[1].

Whereas in 2010, Ofcom's stated view was that it

> *reasonably believes that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross media audiences.*[2]

In 2017, Ofcom's concerns were further underlined by new evidence pointing to the unusually wide reach of both Sky News and the *Sun*'s branded content on third party online platforms, including aggregators and social media.

The Inquiry's provisional findings suggest that the risks to the public interest posed by the transaction may be greater still than that considered by Ofcom in its phase one review. This is especially the case in respect of the cross-media picture:

> *We have provisionally concluded that the share of reference should be higher than the 10% estimated by Ofcom, and is likely to be between 10 to 14%, once all these adjustments are made.*[3]

Following Ofcom's 2010 public interest test report, behavioural remedies were considered inadequate and a structural remedy was agreed by the parties (prior to the bid being withdrawn in the wake of the phone hacking scandal at the former *News of the World*). In light of this, behavioural remedies would seem wholly inappropriate, inconsistent and insufficient to address the additional and more substantive public interest concerns raised by the present Inquiry.

2. The MFT has a well-documented history of breaches and non-compliance with respect to behavioural remedies.

The joint report enclosed draws attention to extensive evidence of breached undertakings by the MFT, especially in respect of independent editorial boards established at both *The Times/Sunday Times* and *Wall Street Journal* newspapers following their acquisition by News Corp. Former *Times* editor Harold Evans has recalled being sent "a stream of memos asking me to downplay or supress news that was bad for the government".[4] Andrew Neil, editor of the *Sunday Times* from 1983-94, has declared from his own experience that Murdoch "does not regard himself as Editor-in-Chief of *The Times* or *Sunday Times*, but he does regard himself as someone who should have more influence on these papers than anybody else".[5]

[1] Ofcom (2017). Public Interest Test for the Proposed Acquisition of Sky Plc by 21st Century Fox Inc. p. 4
[2] Ofcom (2010). Report on Public Interest Test of the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation. p. 15
[3] Competition and Markets Authority (2018).
[4] Evidence provided to the Leveson Inquiry.
[5] House of Lords (2008). The Ownership of the News – Volume II: Evidence. p. 339

In respect of the *Wall Street Journal*, a 'special committee' was established to oversee and enforce compliance with undertakings agreed with the Bancroft family in lieu of the News Corp take over. But in 2008, the managing editor of the *Journal* resigned without the prior knowledge of the committee, prompting a statement by the Committee accusing News Corp of breaking both "the letter and the spirit" of pre-transaction pledges.[6] As noted in our submission of 23 November, the available evidence suggests that the *Journal's* editorial output was significantly influenced by the MFT following the transaction and in spite of the behavioural remedies agreed.

3. Given the nature of proprietorial influence over editorial output in news organisations, behavioural remedies are likely to be even more difficult to monitor and enforce compared to other transactions

The *Wall Street Journal* example referred to above underlines the inherent difficulties in monitoring and enforcing behavioural remedies. In its recent analysis of past remedies, the Competition and Markets Authority [CMA] has remarked that "even clearly specified behavioural remedies may be subject to significant risks of ineffective monitoring and enforcement."[7]

This is especially the case within news organisations where editorial influence by proprietors may not always be exercised in a manner that is explicit or overt. In its assessment of initial undertakings offered by the merging parties during the phase one inquiry, Ofcom noted that

> *It can be difficult to ensure the effectiveness of behavioural undertakings, due to the challenges around effective monitoring and enforcement. This is particularly the case where any breach may be subtle.*[8]

In his 2012 Report into the Ethics and Practices of the Press, Lord Justice Leveson commented extensively on the "subtle and intuitive" lobbying skills exhibited by some media executives[9] and one former senior employee of News Corp remarked on a culture of "anticipatory compliance" established within the company.[10]

Given the constraints imposed by the Broadcasting Code, it is highly likely that any attempt at editorial interference by proprietors will be more subtle, informal and opaque compared to what may be expected within newspapers.

It is equally clear, and acknowledged by the Inquiry, that the Broadcasting Code on its own does not offer complete protection against the editorialising of news under the influence of proprietors. The examples of both *The Times* and *Wall Street Journal* are

[6] Wall Street Journal (2008, 29 April). Special Committee's Statement.
[7] Competition and Markets Authority (2017). Understanding Past Merger Remedies. p. 21
[8] Ofcom (2010). p. 104
[9] Leveson, B. (2012). An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary.
[10] Dover, B. (2008). *Rupert's Adventures in China.* Penguin UK, p. 149.

therefore instructive as regards the potential influence that members of the MFT may seek to exert over Sky News post transaction.

Notwithstanding the above, we agree with concerns raised in respect of structural remedies aimed at separating Sky News from the merged entity. Given that Sky News is a loss-making entity that already relies substantially on resource and infrastructural support from Sky, a structural remedy is unlikely to prove practical or sustainable in the long term.

We also agree that the proposed transaction between Disney and Fox – should it complete broadly on the heads of terms agreed – *may* assuage some of the concerns raised in respect of the present transaction. However, this is contingent on the MFT's influence and control over Disney being subject to formal restrictions. As has already been mooted, it is highly possible that at least one member of the MFT will seek a senior board appointment within Disney post-transaction.[11]

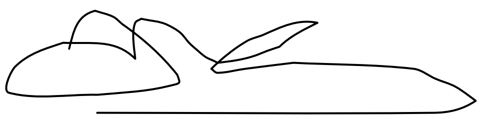
It is also entirely conceivable that the MFT may, over time, seek to increase their influence over the company either via shareholdings or block vote agreements. In October 2015, James Murdoch remarked that "having [a minority shareholding] of an unconsolidated asset is not an end state that is natural for us".[12] It should not therefore be assumed that the agreed 5% shareholding in Disney to be taken by the MFT amounts to "an end state".

To conclude, on the basis of the evidence and analysis above, **we do not believe that behavioural or structural remedies would be practical or effective in mitigating the public interest risks posed by the transaction**. To that end, evidence leads us to conclude that a complete prohibition of the transaction would best serve the public interest.

Should the proposed transaction between Disney and Fox complete on the terms agreed, then these risks will fall away *only in the event of conditional undertakings aimed at limiting both the shareholding and executive power of the MFT in Disney*. Specifically, such **undertakings should prohibit members of the MFT from either increasing their stake in the company above the 5 percent threshold, or taking up appointments to the Disney board.**

Should you require anything further on this, or the joint report enclosed, please do not hesitate to contact us.

Yours Sincerely



Dr Justin Schlosberg
Chair, Media Reform Coalition

[11] Garrahan, M. et al. (2017, 5 December). James Murdoch tipped for Disney role in Fox deal. *FT.com*
[12] Quoted in Sweeney, M. (2015, 21 October). James Murdoch points to Fox plans for Sky UK. *TheGuardian.com*