RE: ANTICIPATED ACQUISITION BY TWENTY-FIRST CENTURY FOX, INC ("21CF") OF THE ENTIRE ISSUED AND TO BE ISSUED SHARE CAPITAL OF SKY PLC ("SKY"): PROPOSED EUROPEAN INTERVENTION NOTICE

ADVICE

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1. I have been asked by Avaaz to advise on certain issues arising out of a letter dated 3 March 2017 on behalf of the Secretary of State for Culture, Media and Sport ("**the DCMS Letter**"). The DCMS Letter concerns the anticipated acquisition by 21CF of that part of the entire share capital of Sky that it does not already own ("**the Acquisition**"). It explains that the Secretary of State is minded to issue a European Intervention Notice ("**EIN**") under section 67 of the Enterprise Act 2002 ("**the Act**") and article 3 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 as amended ("**the Order**").

2. I gave draft Advice to Avaaz on 5 March: this is the final version of the Advice, taking into account further points raised with me.

Background

3. Before I look at the questions I am asked to consider, I should, as briefly as possible, explain the somewhat complex statutory regime that applies.

4. For reasons that I do not need to set out, the Acquisition falls to be considered under the European Union Merger Regulation ("**EUMR**")[1]. That means that the authorities of the Member States may not themselves consider the competition aspects of the Acquisition: see Article 21(3) of the EUMR.

[1] Council Regulation 139/2004/EC

5. However, Article 21(4) of the EUMR provides that Member States may take action in relation to a merger in order to protect "*legitimate interests*". Some examples of legitimate interests are given, including "*plurality of the media*" and "*prudential rules*": but it is then provided that Member States may notify legitimate interests not on the list to the Commission, which is then bound to inform the Member State after 25 days whether it accepts that that interest is "legitimate": the Commission must consider whether the interest is compatible with the EUMR and other principles of EU law.

6. In UK domestic law, section 67 of the Act and the Order set out the procedure that applies for examination of the merger in the light of those legitimate interests. Essentially, this is done by adapting the regime under Part 3 of the Act which governs "normal" mergers subject to competition scrutiny in the UK, but giving key decision-making powers to the Secretary of State (who does not play a role in a "normal" Part 3 mergers where the only issues are ones of competition policy).

7. The first important point is that the Secretary of State has a wide power, under section 67(2), to issue an EIN whenever she considers that "*it is or may be the case the one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned*[2]". The EIN must state the public interest consideration(s) concerned: section 67(3)(a).

8. The second point is that there is a distinction between public interest considerations that are "finalised" and those that are not. Either may be specified in the EIN.

    a. By section 42(8), a "finalised" consideration is one that appears in section 58, either because it was in that section in the original Act or because it has since been added. As it now stands, section 58 includes the two public interest considerations mentioned in the DCMS Letter: that is to say both media plurality (section 58(2C)(a)) and the need for persons controlling media enterprises to have a genuine commitment in relation

[2] For reasons I need not explain, and which do not appear to be controversial, the Acquisition is a "relevant merger situation".

to broadcasting to the standards objectives set out in section 319 of the Communications Act 2003 ("**the CA03**") (section 58(2C)(c)).

b. However, the Secretary of State has power to add further public interest considerations to this list: and, importantly, she may do so during the consideration of an ongoing relevant merger situation: see section 58(3) and (4). That is what is meant, in section 67(3), by a public interest consideration that is not finalised: the Secretary of State can, in an EIN, specify a public interest consideration that is not (yet) in the section 58 list. In particular, that would enable her, if she so decided, to specify in the EIN a criterion related to fitness along the lines discussed below (which is not, yet, in section 58). But, if she does that, she must do what she can to ensure that the public interest consideration becomes finalised (i.e. added to the section 58 list): section 67(6). That means, in practice, that she must: -

i under domestic law, lay before Parliament an order adding that public interest consideration to the section 58 list (which order must be approved within 28 days by affirmative resolution of both Houses: section 124(7)); and

ii under EU law, obtain the approval of the Commission (see §5 above)[3].

9. It follows from the above that the short answer to the first question I am asked – whether the Secretary of State has power to raise broader public interest grounds than those currently set out in section 58 – is "yes".

10. Third, once the EIN is issued, that will then set in stone the public interest consideration(s) that the Secretary of State, the Competition and Markets

[3] Note that under art.5(6) and (7) of the Order, the Secretary of State must in deciding whether to make a reference to the CMA disregard any public interest that has not been finalised by 24 weeks after the EIN: but she is entitled to delay any reference decision to the end of that period if she considers there to be a realistic prospect that it will be finalised before then. That means that there should be ample time between the EIN and the cut-off point for a reference for the Commission to decide whether to approve the new "legitimate interest", bearing in mind the Commission's 25 day deadline.

Authority ("**CMA**") and OFCOM will then look at. Under section 67(5) of the Act, "*No more than one … notice shall be given under [section 67(2)] in relation to the same relevant merger situation.*"[4] So it is critical, if the authorities are to consider the impact of the Acquisition on a particular public interest consideration, that that consideration be specified in the EIN[5].

11. Fourth, the next steps after the issue of an EIN are (in summary) -

    a. under articles 4 and 4A of the Order, an initial investigation by the CMA (as well as OFCOM, in the case of the media plurality and standards objectives public interest considerations, or any other public interest consideration considered by the Secretary of State to be concerned with broadcasting or newspapers: articles 4A(1) and 1(2));

    b. a decision by the Secretary of State, having obtained reports from the CMA and, where appropriate, OFCOM, to make a reference of the matter to the CMA: she may do so if she believes it may be the case that the Acquisition may be expected to operate against the specified public interest(s): see article 5. It may be noted that at that stage the decision-maker within the CMA is the CMA panel consisting of a group of independent persons (essentially the same type of person who used to serve on panels of the former Competition Commission;

    c. the CMA panel then reports to the SOS on whether the Acquisition may in fact be expected to operate against the specified public interest(s)

[4] In a Note I prepared for Avaaz on 11 July 2011, I advised that in the exceptional circumstances then obtaining there were powerful grounds for arguing that a further EIN specifying a new public interest consideration could be issued towards the end of the procedure: but those were highly exceptional circumstances (emergence of dramatic new evidence during the course of the procedure) that would be unlikely to re-occur.

[5] S.67(4) provides that the Secretary of State may, in a case where more than one public interest consideration arises, decide not to mention such of those considerations as he considers appropriate. However, that power does not, in my view, give the Secretary of State *carte blanche* not to mention a public interest consideration in the EIN merely because she has specified another one in the EIN. On the contrary, the Secretary of State is required to take account of the fact that failure to specify a public interest consideration in the EIN means that the authorities (save in extraordinary circumstances such as those recorded in my note of July 2011) cannot then, at any later stage, look at that consideration. Rather, it seems to me that the purpose of s.67(4) is to permit the Secretary of State to refrain from specifying public interest consideration A if she considers that public interest consideration B, which she proposes to specify, effectively covers the concerns that are the subject of consideration A. But, as I explain below, that is not a conclusion that in my view she could reasonably come to here.

(articles 6-8), and the Secretary of State then takes the final decision as to whether it does so and what remedy should be imposed: article 12. It may be noted that at that stage OFCOM play no formal role even in relation to public interest considerations that are concerned with broadcasting: but, in practice, OFCOM are likely to make detailed and thorough representations on such issues to the CMA panel, which is likely to place very great weight on what they say.

Whether the "standards objectives" public interest consideration is sufficient to deal with concerns about fitness

12. For the reasons set out in the DCMS Letter, it appears clear that the effect of the Acquisition would be that the influence of Murdoch Family Trust ("**MFT**") over Sky would be considerably enhanced. Rupert and James Murdoch exercise a high degree of control over the MFT.

13. Many of Avaaz's concerns are summarised in a letter from Ed Miliband MP and others OFCOM dated 9 February 2017 ("**the Miliband Letter**"), which I have seen. In essence, they centre on the fact that James Murdoch was CEO and Chairman of News International during the period of criminal and other reprehensible conduct at that organisation including phone-hacking, other breaches of privacy, perverting the course of justice, and making corrupt payments. More widely, Avaaz is concerned that the Leveson Report and other material show a disturbing record of inadequate corporate governance, lack of accountability and undesirable conduct.

14. Avaaz is concerned that the question of whether James Murdoch, and by extension the MFT, should, in the light of those concerns, be permitted to acquire control or significant influence over Sky, and in particular Sky News, may not be adequately encompassed under the "standards objectives" public interest consideration discussed in the DCMS Letter.

15. In my view, Avaaz is right to be concerned.

16. The "standards objectives" public interest consideration is set out in section 58(2C)(c) of the Act. It is "*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 [CA03]*".

17. The standards objectives set out in section 319 of the CA03 are: -

> *(a) that persons under the age of eighteen are protected;*
>
> *(b) 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;*
>
> *(c) that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with;*
>
> *(d) that news included in television and radio services is reported with due accuracy;*
>
> *(e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;*
>
> *(f) 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;*
>
> *(g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services;*
>
> *(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;*
>
> *(i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with;*
>
> *(j) that the unsuitable sponsorship of programmes included in television and radio services is prevented;*
>
> *(k) that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and*
>
> *(l) 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 occurred.*

18. The question of whether an enterprise controlled, or influenced by, Rupert or James Murdoch or the MFT would have a genuine commitment to meeting those standards is clearly important. A number of concerns expressed about, in particular, the extent to which Rupert Murdoch seeks to promote his own political views through media outlets controlled by him, and could be in a position to do so in relation to Sky News, could plainly be addressed under that head.

19. However, the central feature of the standards objectives set out in section 319 is that they are all concerned with the content of programming (including the content of advertising). None of them are concerned, as such, with the standard of conduct of journalists. But the concerns expressed in the Miliband Letter and the more general concerns about inadequate corporate governance, lack of accountability and undesirable conduct, are not about the likely content of Sky News programming. So, even if it were clearly established that the increase in the MFT's influence over Sky gave rise to a substantial risk of similar failures of corporate governance or similar lapses in journalistic conduct in relation to Sky News, it is unclear that such a finding would have any relevance to the "standards objectives" public interest consideration: that is because such lapses would have no necessary impact on the issues set out in section 319 CA03 such as partiality, offensive material, or inaccuracy in broadcast material.

20. In my view, therefore, if the concerns set out in the Miliband Letter are to be considered by the CMA, OFCOM and the Secretary of State, it is essential that the EIN include not just the "standards objectives" public consideration set out in section 58(2C)(c) of the Act, but also an additional public interest consideration such as, for example, "the need for persons carrying on media enterprises, and for those with control of such enterprises, to be persons who are likely to maintain high standards of corporate governance, accountability, and conduct".

21. That concern is all the greater because, as I explained above, it is in practice likely to be impossible to add a public interest consideration to the EIM once it is issued. However, it is always possible to cease consideration of a public consideration if, on examination, it becomes clear that there is little in it. That strongly suggests that if there is any doubt at the EIN stage as to whether a public interest consideration should be included, the Secretary of State should err in favour of inclusion: over-inclusion can easily be corrected later, but under-inclusion is almost impossible to correct.

22. I note that the DCMS Letter, at pages 6-7, records OFCOMS's past concerns in relation to James Murdoch's failures of corporate governance, and goes on to state that the Secretary of State considers that OFCOM should report further on those matters in relation to the "standards objectives" ground. However, for the reasons

I have set out, the "standards objectives" ground is inadequate to cover Avaaz's concerns, including those expressed in the Miliband Letter: so, unless the Secretary of State is able at this stage confidently to dismiss those concerns as unfounded (which would seem to be difficult given her analysis of OFCOM's past concerns), I do not see how she could properly proceed on the basis that it is enough at this stage to specify the "standards objectives" ground in the EIN but not to specify a wider ground covering the potential impact of those concerns as to corporate governance not only on the content of programming but also on the conduct of Sky in areas such as privacy, relationship with officials, and proper journalistic conduct more generally.

23. Adding a public interest consideration along those lines would, as I have explained, need a statutory instrument under section 58(3) of the Act. But, as I have also explained, there is no legal difficulty about doing so: the public interest consideration can be fixed now and the statutory instrument approved later. As to the requirement to obtain the consent of the Commission, there is no reason why a fitness criterion would contravene EU law or in any way be inconsistent with the scheme of the EUMR (which sets up a one-stop shop for determination of competition issues, but not for other issues). Moreover, at first sight it is at least arguable that a criterion of fitness is a type of "prudential rule" for which the Commission's consent is not necessary (see §5 above).

24. It might be said that OFCOM's licensing powers provide a sufficient guarantee of fitness and propriety. Sky holds a television licensable content service ("**TLCS**") licence from OFCOM under section 235 of the CA03. However, I would make the following observations: -

    a. Though OFCOM rightly state in their letter dated 22 February 2017 in response to the Miliband Letter that they have a duty to be satisfied on an ongoing basis that licensees are fit and proper persons, it is important to note that, although OFCOM have power to <u>refuse</u> an application for a TCLS licence from someone who is not fit or proper (see section 3(3)(a) of the Broadcasting Act 1990 and section 235(3)(a) of the CA03), they have no power to <u>withdraw</u> a licence from an existing licensee such as

Sky on the basis that it is now owned or controlled by someone who is not fit or proper[6].

b. It is true that OFCOM have a range of licensing powers, including the power to vary licences to include further conditions and ultimately to revoke licences for breach of licensing conditions or of directions given by OFCOM under their licensing powers. However, all those powers essentially arise after problems have arisen: they do not provide any basis for OFCOM to prevent a change in ownership or management of an existing licensee on the basis that there are substantial concerns as to the fitness of the new owner or manager. The critical point here is that the whole purpose of a merger control regime is to prevent problems arising as the result of an acquisition: so it is not usually regarded as an adequate response to the prospect of such problems arising to point out that mechanisms exist to impose penalties or take other remedial action if they do arise. In short, the need for *ex ante* control is not removed by the possibility of *ex post* regulatory action: or, to put the same point more colloquially, it is better to shut the stable door before, rather than after, the horse has bolted.

c. It is also true that Sky's TLCS licence contains provisions[7] relating to the handling of complaints about "fairness complaints", which term includes complaints as to unwarranted interferences with privacy in connection with the making of TV programmes (see section 110 of the Broadcasting Act 1996). The head "unwarranted interferences with privacy" covers many of the matters raised in the Miliband Letter. However, though OFCOM certainly have a number of powers to investigate and deal with such complaints, those powers are, again, exercisable only once a problem has occurred: OFCOM have no licensing powers to withdraw a license on the basis that there is reasonable cause to believe that new owners or

[6] That is despite the fact that s.3(3)(b) of the Broadcasting Act 1990 provides that OFCOM "shall do all that they can to secure that, if they cease to be so satisfied [ie satisfied as to fitness/propriety] in the case of any person holding a licence, that person does not remain the holder of the licence": indeed, that phraseology makes it clear that, as such, ceasing to be fit and proper is not, in itself, a ground for revocation.

[7] See paragraph 19 of the standard OFCOM TLCS Licence.

managers have a record that gives substantial cause for concern that unwarranted breaches of privacy will occur in future.

The authorities' powers

25. I am also asked about the ability of the authorities properly to assess the public interest considerations that Avaaaz seeks to address.

26. As far as legal powers are concerned, paragraph 1(1)(o) and (15) of Schedule 3 to the Order "carries over" the provisions of section 109 of the Act to the investigations following an EIN: section 109 gives the CMA power to require the production of documents, the provision of information, and the attendance of witnesses to give evidence. These are wide powers, which as far as I can see are likely to be effective.

27. However, it is important to note that those powers are enjoyed by the CMA and not by OFCOM: that means that, if any issue or disclosure or evidence arises, OFCOM will need to persuade the CMA to exercise its powers. Assuming, as is likely, a good working relationship between the CMA and OFCOM, that should not pose an insuperable problem.

Conclusion

28. In my view, therefore:

    a. the Secretary of State has power to add a further public interest consideration relating to fitness to the EIN;

    b. a further such public interest consideration will, in my view, be likely to be needed to deal with the concerns as to corporate governance and journalistic conduct set out in the Miliband Letter – and if not added now, will be very difficult or impossible to add later; and

    c. the authorities (essentially, the CMA) are likely to have sufficient powers to investigate, but it is impossible to be certain at this stage.

29. I would of course be happy to advise further if required.

30. I am happy for this Advice to be circulated as Avaaz sees fit. Given that possibility, I should make it clear for the record that the views set out above are mine alone and should not to be attributed to my Chambers or any other member of my Chambers.

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