

[GB] Ofcom findings on proposed Fox/Sky merger published

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On 29 June 2017, Ofcom's findings on the proposed acquisition of Sky plc by Twenty-First Century Fox, Inc. were published. The Secretary of State for the Department for Digital, Culture, Media and Sport has yet to make a final decision on whether to approve the merger, which would include accepting undertakings from Sky and Fox or, alternatively, to request that the Competition and Markets Authority (CMA) instigate a Phase 2 investigation as to whether the merger is in the public's interest.

Fox already owns 39% of Sky and last year it offered to buy the balance of Sky's shares. Sky is a European broadcaster providing TV and broadband services across Europe, with an estimated 22 million customers. On 16 March 2017, the British government issued a European Intervention Notice (EIN) concerning the proposed merger. The EIN stated that an investigation would be completed to examine whether there were any media plurality concerns and also whether the parties would have "commitment to broadcasting standards" if the companies were to merge. The EIN triggered two reports from Ofcom about media plurality and the two companies' commitment to broadcasting standards. The Secretary of State's authority to permit a media merger derives from the Enterprise Act 2002 whereby a quasi-judicial process is exercised.

Ofcom's report considered that any merger between Fox and Sky would cause plurality issues.

After the BBC and ITN, the proposed merged entity would have the third largest reach of any news provider and would span news coverage on television, radio, newspapers and online.

Ofcom considered that the merger would give the Murdoch Family Trust (the primary owner of Fox) influence over news providers and a significant presence across all key media platforms. As such, the Secretary of State was minded to refer the proposed merger to a Phase 2 Investigation. However, Ofcom considered that there were no concerns about either Sky or Fox's commitment to broadcasting standards; as such, there was no requirement to justify referring the matter to the CMA. Ofcom considered Fox's compliance record in the United Kingdom and the European Union comparable to other broadcasters' records.

Ofcom was also asked to consider the effect any failure of corporate governance would have on the public interest consideration; both companies were separately assessed. Ofcom considered that the alleged conduct of Fox News in the United States amounted to “significant corporate failures”- this concerned the company’s handling of alleged sexual and racial harassment by staff. However, it deemed that this did not mean that a merged company would show any lack of commitment to broadcasting standards.

The Enterprise Act allows for a Phase 2 investigation to be averted if the parties propose undertakings. The decision on whether to accept undertakings remains with the Secretary of State alone. The parties’ undertakings, unusually, formed part of their representations contained in Ofcom’s report on plurality. The main undertaking offered is that Fox maintains the editorial independence of Sky News by establishing a separate editorial board with a majority of independent members to oversee the appointment of the Head of Sky News and any changes to Sky News Editorial Guidelines. Furthermore, there was a commitment to maintain Sky branded news for five years, with spending at least at similar to current levels.

Ofcom considered in their report that these undertakings would help mitigate any plurality issues, but suggested that the remedies could be further strengthened. The Secretary of State has to determine whether the undertakings are sufficient to avert a Phase 2 investigation. So far, the Secretary of State has indicated that she is not minded to accept the proposed undertakings. The Secretary of State is also noting guidance from the CMA.

The European Commission approved the merger in April by deciding that Fox and Sky are active in different markets (see IRIS 2017-6/4). However, despite the Commission’s approval, Article 21 of the EU Merger Regulations allows the states to block mergers at a national level, so the final decision remains with the UK government.

Ofcom, Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc, 29 June 2017

https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf

Ofcom, Decision: Licences held by British Sky Broadcasting Limited (Fit and Proper Assessment), 29 June 2017

https://www.ofcom.org.uk/data/assets/pdf_file/0013/103621/decision-fit-proper.pdf

