

4 September 2017

The Secretary of State  
DCMS  
4<sup>th</sup> Floor,  
100 Parliament Street  
London  
SW1A 2BQ

Sharon White  
Chief Executive

Direct Telephone [REDACTED]  
Direct Facsimile [REDACTED]



### Proposed merger of 21st Century Fox, Inc and Sky plc

Thank you for your letter of 31 August 2017 requesting further clarification from Ofcom in accordance with s.106B(2) of the Enterprise Act 2002 on our letter dated 25 August 2017.

#### Question 1

You asked whether, considering all the relevant evidence, including our review of the further relevant representations, it is Ofcom's view that:

(a) the legal threshold for a reference is not met (i.e. there are no non-fanciful concerns in relation to the commitment to broadcasting standards ground) such that the Secretary of State has no power to make a reference in relation to that ground; or

(b) the legal threshold for a reference is met (i.e. there are non-fanciful concerns in relation to the commitment to broadcasting standards ground) such that the Secretary of State has the power to make a reference in relation to that ground, but Ofcom considers that she should exercise her discretion so as not to make a reference.

You asked Ofcom specifically to identify the non-fanciful concerns referred to on page 6 of our letter.

As you recognise, we noted in page 6 of our letter that we did consider there are non-fanciful concerns in relation to the merger. Our advice, as the broadcast regulator, was 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. In reaching this view, we placed particular weight on the incentives established by the existence of the statutory framework for broadcast standards regulation, involving an upfront commitment to compliance through licencing requirements and ex post protection of the public interest in broadcasting standards through a sanctions regime, and considered this together with the parties' history of compliance<sup>1</sup>. We also recognised that the Secretary of

<sup>1</sup> Ofcom's role in the case is to report on the effect of the public interest considerations on the case, giving advice and recommendations on any media public interest consideration you specified which is or may be relevant to the Secretary of State's decision as to whether to make a reference.

State has discretion as to whether to judge that there are any non-fanciful concerns and - if there are - whether these warrant a reference, taking appropriate account of our advice.

The non-fanciful concerns are those we identified as concerns in our letter: Fox News lacked adequate procedures for broadcast compliance in the UK – but new, satisfactory procedures were put in place. And there were alleged corporate failings, which did not take place in a broadcasting standards context. However, in considering these concerns in relation to the broadcast standards consideration, our approach is that something in the nature of the corporate governance concern has to give rise to an identifiable risk in terms of UK broadcast standards compliance.

Our previous letter also addressed a number of programme items drawn to the Secretary of State's attention and we have reported that none of them raised issues which would warrant opening an investigation. However, we did not consider we could reach a view on wider issues raised by the Seth Rich case, given the developing nature of the story, and noted that our fit and proper assessment is an ongoing duty and would take account of any relevant evidence that emerges.

## **Question 2**

In relation to Fox's corporate governance arrangements, you asked to what extent Ofcom investigated how the new arrangements put in place in 2012 have worked in practice, including how effectively they have operated? What evidence did Ofcom consider on this point, and what (if any) conclusions did it reach (and why)?

As you noted in your letter to us of 7 August 2017, many of the representations made to you on Fox's corporate governance relate to Ofcom's assessment of whether Sky would remain fit and proper to hold its broadcast licences following the merger. You asked us to comment insofar as those matters impact upon our findings on the commitment to broadcasting standards. As set out above, our approach in doing so is that something in the nature of a non-broadcasting corporate governance concern has to give rise to an identifiable risk in terms of broadcast standards compliance.

A statutory regime exists for securing broadcast standards compliance including sanctions, establishing a framework which incentivises an upfront commitment to compliance through licensing requirements and provides ongoing ex post protection for the public interest in the attainment of broadcast standards.

We considered Fox's general corporate governance arrangements and its history, and the representations put to us by third parties making allegations of non-broadcast failures of corporate governance. However, in advising you on the broadcasting standards public interest consideration, we considered it right to focus principally on broadcast standards compliance procedures. We looked at the broadcast standards procedures and the compliance history of all the licensed Fox subsidiaries. When we found procedures which we considered to be inadequate, at Fox News, we asked a series of detailed questions of Fox, which included questions about how (practically) the procedures would apply, and we secured the establishment of arrangements which we considered demonstrated a commitment to the attainment of broadcast standards.

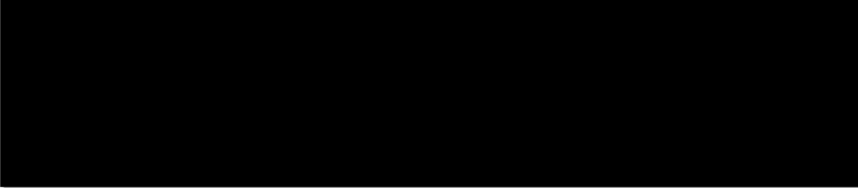


### Question 3

You noted our conclusion that: "We have considered broadcasting compliance primarily by reference to complaints and we believe this to be an effective and proportionate approach". You asked us to explain the basis for this, i.e. why we consider this approach to be effective and proportionate.

As set out in our letter to you, we do undertake targeted monitoring of services and in fact we monitored Fox News during the 2017 UK election period. The compliance record considered in our report to you captured this period of monitoring. In other words, we did what the representations to you suggested we should do.

In our letter to you, we also included an assessment of the analysis of recent output by Fox News in the UK put to you in representations as examples of problematic content which had not generated complaints at the time. As you will have seen from our letter (Annex 1) and for the reasons set out there, none of the 10 instances raised any issues which we would consider warrant us opening an investigation. In other words, we consider that complaints effectively identified problematic content and that the concerns raised by representations that we may have missed relevant evidence by adopting this approach were not borne out.



**Sharon White**