July/August 2018

UK Competition Law Newsletter

Highlights

— Secretary of State accepts undertakings in Fox/Sky

— CMA provisionally clears SSE Retail/Npower in Phase 2

— CMA publishes final report on market study into domestic heat networks

— High Court rejects jurisdictional challenge to power cables cartel damages claim

Fox/Sky

On 12 July, the newly appointed Secretary of State for Digital, Culture, Media and Sport (**DCMS**), Jeremy Wright MP, announced the acceptance of undertakings given by 21st Century Fox (**Fox**) and The Walt Disney Company (**Disney**) that Fox would divest Sky News to Disney as a condition of its acquisition of Sky, clearing the way for Fox's bid to be put to Sky's shareholders.

The Secretary of State's decision is the culmination of what he termed a "*scrupulously clear, fair and transparent process*" of review, and one that *The Financial Times* considered would be "*the first major test of UK media regulation since Theresa May became prime minister.*"[1] The decision, which has its genesis in a European Intervention Notice issued by the former Culture Secretary, Karen Bradley, on 16 March 2017, clears the way for Sky shareholders to consider competing offers for the company that have been made by Fox and Comcast, and which have both now satisfied their regulatory pre-conditions.

We consider the background to the investigation, the CMA's role in reviewing the transaction on media plurality grounds, and the Secretary of State's decision.

Background

On 15 December 2016, Fox made a public offer for the 61% of Sky that it did not already own. The Sky business includes Sky News, one

TIMELINE

15 December 2016
Fox announces its intention to acquire the shares in Sky not already owned by Fox and its affiliates.

3 March 2017
Fox notifies the European Commission of the proposed transaction.

16 March 2017
Secretary of State, Karen Bradley, issues European Intervention Notice.

7 April 2017
European Commission approves the transaction.

29 June 2017
Ofcom publishes report on media plurality and broadcasting standards.

14 September 2017
Secretary of State announces decision to refer Fox/Sky to CMA for Phase 2 investigation on grounds of media plurality and commitment to broadcasting standards.

14 June 2018
Secretary of State, Matt Hancock, publishes CMA Phase 2 report (issued on 1 May 2018).

12 July 2018
Secretary of State, Jeremy Wright, accepts undertakings relating to the divestment of Sky News.

[1] Financial Times, *Murdoch's Fox returns to Sky with post-Brexit vote approach*, 9 December 2016.

of only three providers of wholesale TV news, alongside the BBC and ITN, in the UK. The offer was pre-conditional on the UK Secretary of State's not intervening in the merger on public interest grounds, or intervening but allowing the transaction to proceed on terms satisfactory to Fox.

European Intervention Notice and Ofcom Review

As it met EU Merger Regulation (**EUMR**) jurisdictional thresholds, the transaction was notified to the European Commission on 3 March 2017. Even in respect of transactions that are subject to the Commission's exclusive jurisdiction, Member States are empowered under Article 21(4) of the EUMR to apply their respective national laws to protect "*legitimate interests*," which include media plurality. In the UK, this power is exercised by the Secretary of State under Chapter 2 of the Enterprise Act 2002 through the issuance of a European Intervention Notice, which triggers a Phase 1 review by Ofcom, the broadcasting regulator.

On 29 June 2017, Ofcom published its advice to the Secretary of State in respect of two public interest considerations: whether the transaction would "*result in insufficient plurality in the number of persons with control of media enterprises in the UK*;" and whether Fox and Sky would "*remain genuinely committed to broadcasting standards*." Ofcom advised that the Secretary of State refer the transaction to the CMA for a Phase 2 investigation in respect of media plurality, "*as a result of the risk of increased influence by members of the Murdoch Family Trust over the UK news agenda and the political process, with its unique presence on radio, television, in print and online*." While Ofcom found "*serious and disturbing*" allegations of harassment at Fox News, and considered there to be "*significant failings of corporate culture*," it found there to be no clear evidence that senior executives at Fox had been aware of these issues. Accordingly, Ofcom identified no grounds for a reference in respect of broadcasting standards.

On the same day, Ofcom published its decision on the distinct question as to whether, following the proposed merger, Sky would be a "*fit and proper person*" to hold a broadcasting licence. Ofcom concluded that although "*the behaviours alleged at Fox News amount to significant corporate failure, [...] 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*."

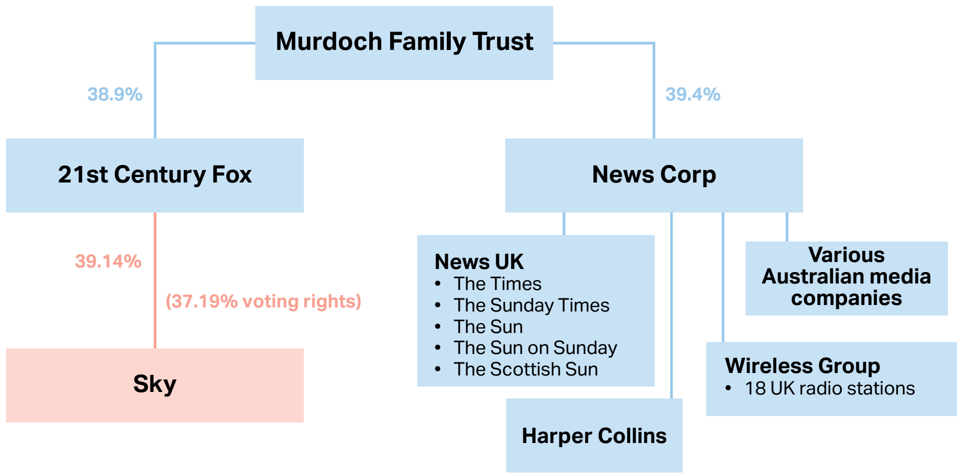
Ofcom's decision in respect of the "*fit and proper person*" test was the subject of judicial review by the Avaaz Foundation, which argued that Ofcom had erred in law, acted irrationally, failed to take account of earlier findings in respect of James Murdoch, and that its assessment of Fox's purported governance failings in connection with allegations of inappropriate conduct was inadequate. The High Court rejected these allegations, dealing with the grounds of challenge "*more shortly*" than usual because the issues had been rendered academic by the time of the hearing.

The CMA's Report

Karen Bradley, then Culture Secretary, stated initially that she would refer the transaction to the CMA only on media plurality grounds, in accordance with Ofcom's advice. In September 2017, however, she decided to refer the transaction to the CMA for a Phase 2 review to assess the commitment of Fox and Sky to broadcasting standards as well as the impact of the transaction on media plurality. The CMA's review was limited to these two questions of public interest.

With respect to media plurality, the CMA examined whether the Murdoch Family (via the Murdoch Family Trust (**MFT**)) would, by virtue of the transaction, exercise a heightened degree of control over the UK's news media and, if so, whether such control would raise public interest concerns. The figure below provides an overview of the MFT's media holdings, showing its interest in Fox (and, through Fox, Sky and Sky News) and a similar stake in News Corp, which controls UK newspapers including *The Times* and *The Sun*.

The CMA used as its analytical starting point Ofcom's definition of media plurality: *first*, ensuring diversity in the viewpoints available and consumed across and within media enterprises; and, *secondly*, preventing any one media owner having too much influence over public opinion and the political agenda. The CMA went on to identify a number of concerns.



— ***The transaction could reduce the independence of Sky News.*** The CMA was concerned that the transaction could allow the MFT to exert its influence (even indirectly) to increase the editorial alignment between the positions and story selection of Sky News and News Corp titles following the transaction, resulting in a single media owner having too much influence over public opinion. For example, the CMA considered that the MFT could, via Fox, have a greater ability to set the strategic direction, commercial objectives, and budget of Sky News, and more easily influence the appointment of senior staff.

— ***Increased editorial alignment would materially reduce the diversity of viewpoints consumed by the public.*** The CMA found that the combined titles of Sky News and News Corp reached 31% of adults in the UK and accounted for at least 10% of total news consumption. The merged entity would on these metrics be the third most significant news source behind the BBC and ITN, with significantly higher reach and consumption than the fourth largest provider. The CMA further found that around a third of the combined group's customers consumed only between one and three sources of news, and so were relatively reliant on each individual news source.

— ***Increased alignment would also increase the MFT's influence over public opinion and the political agenda.*** The CMA considered that the MFT's already significant influence through its News Corp titles would be strengthened post-transaction by the abilities to select the same stories and issues to be presented on Sky News, leverage Sky News' highly trusted position, and access different customer groups. The combined group's unmatched cross-platform presence across newspapers, TV, online and radio would provide the MFT with a "*unique position from which to influence the news agenda.*"

— ***No other provider could mitigate or moderate the MFT's increased influence.*** The BBC and ITN have no newspaper presence and face limitations in their ability to counter positions put forward by News Corp and Sky News – the BBC is under particular pressure to provide impartial news coverage, and there is a commercial need for ITN to reflect the preferred approaches of ITV, Channel 4, and Channel 5. The CMA found that other providers were unlikely to achieve the same reach and share of consumption as News Corp/Sky News.

The CMA concluded that the transaction would result in an insufficient plurality of persons with control of the media and would, on the balance of probabilities, operate against the public interest. In making its assessment, the CMA noted that concerns relating to media plurality "*may arise at lower levels of concentration than would be considered problematic in the context of a competition assessment*". This is due to the fact that media plurality (i) "*goes to the heart of our democratic process*" such that parliament has attached "*considerable importance*" to its preservation, (ii) is not subject to continual regulatory scrutiny, and (iii) once lost, may be difficult or impossible to restore.

With respect to broadcasting standards, the CMA examined Sky's and Fox's past compliance in the UK (including, in Sky's case, benchmarked against comparable UK broadcasters) and elsewhere, as well as their and News Corp's wider regulatory compliance and corporate governance. The CMA considered that Sky, Fox, and the MFT had a genuine commitment to adhering to broadcasting standards objectives.

Remedy Recommendation

To address its media plurality concerns, the CMA considered three remedy approaches: prohibition of the transaction; structural remedies (the spin-off or divestiture of Sky News); and behavioural remedies (to "*insulate Sky News from the MFT's influence*"). The CMA concluded that the most proportionate effective remedy would be the divestiture of Sky News to Disney or another suitable purchaser independent of the MFT. The CMA found that prohibition would have been a more intrusive (and so less proportionate) remedy than divestiture. The CMA also considered the possibility that prohibition could ultimately lead to the closure of Sky News as a means to ensuring clearance of a subsequent Fox/Sky acquisition attempt, which would also result in a loss of media plurality.

The CMA, in considering divestiture, noted that the sharing of resources between Sky and Sky News, as well as the fact that the Sky News business was loss-making, "*would necessitate the identification of a suitable, well-resourced and committed purchaser.*" The CMA therefore examined Disney's incentives and ability to maintain the business. The CMA determined that Disney – which has significant experience in news broadcasting through its ownership of ABC News in the US, but does not broadcast news in Europe – would be a suitable purchaser. Although the CMA did not require a financial commitment from Disney, the undertakings given by Disney and Fox provide that Fox would make funds available to ensure that operational investment would be maintained at levels comparable to those prior to the transaction. The CMA noted Disney's offer to acquire Fox, which would remove media plurality concerns over Sky, but could not assume that this transaction would complete.

The Secretary of State's Decision

In a statement of 4 June 2018, the Secretary of State accepted the substantive findings of the CMA, but considered that there were "*some important issues on the draft undertakings*" that required further discussion with the parties. At the same time, the Secretary of State announced his conclusion that the rival bid for Sky by Comcast would not raise public interest concerns. These undertakings were published on 19 June 2018 and finalised, with minor amendments following public consultation, on 12 July 2018.

Conclusion

The case demonstrates the difficulties faced by the CMA in seeking to measure "*sufficient*" media plurality using a set of analytical tools very different to those used in exercising its competition law functions. The CMA's wide-ranging analysis had regard for quantitative evidence of the influence of media sources over public opinion and the political agenda, as measured by readership or viewing figures, as well as a variety of qualitative factors. These included the effect on plurality of an ability to exercise influence across various platforms, the disproportionate influence of "*more trusted*" news providers on public opinion, the nature of a news provider's audience (and whether combining multiple providers might increase the demographic scope of a provider's audience), and the interaction of various platforms – TV, online, print, and radio – in setting the news agenda. In examining, in particular, the MFT, the CMA set out what it considered to be evidence of the Trust's influence on the political agenda, including through the findings of the Leveson Inquiry, data on direct contact between NewsCorp representatives and minsters, and qualitative evidence from those involved in political decision making.

The transaction attracted significant public and political attention. The CMA and the DCMS received a large number of comments from prominent commentators, NGOs, and parliamentarians. As well as the complexity and novelty of the substantive analysis outlined above, the case had many unique features, including the prominent individuals and businesses concerned, and the number of parties involved. It also highlights the interplay between competition law and political considerations, which is likely to become an increasingly prominent feature of merger review in the UK under the national security and investment regime proposed by the Government on 24 July 2018.[2]

Judgments, Decisions, and News

Court Judgments

ASDA, Arcadia and others v MasterCard. On 5 July, in a joint appeal from three different first instance judgments, the Court of Appeal ruled that multilateral interchange fees ("MIFs") charged by MasterCard and Visa to UK retailers on debit and credit card transactions had an adverse impact on competition. The defendants have an opportunity to persuade the CAT that the MIFs should benefit from exemption. If the MIFs cannot be justified, UK retailers will be able to pursue their various follow on damages claims.

Vattenfall v Prysmian and NKT. On 4 July, the High Court dismissed jurisdictional challenges brought by Prysmian and NKT following a cartel damages claim by Vattenfall AB. The defendants sought to have the claim struck out on the basis that non-UK domiciled defendants could not be sued in the High Court and that their UK-based subsidiaries should not have been recognized as "*anchor defendants*" since neither of them was an addressee of the Commission's infringement decision, neither sold the cartelized products to the claimant directly and therefore neither "*knowingly implemented*" the cartel. The court cited examples of modest indirect supply by the companies (among other factors) as arguably amounting to implementation of the cartel, and found that the claim had a "*reasonable prospect of success*."

Antitrust/Market Studies

Parcel Delivery Services Market Investigation. On 13 August, Ofcom opened an investigation under the Competition Act 1998 in relation to suspected market sharing and customer allocation arrangements between operators in the business parcel delivery sector.

Market Review Into Card-Acquiring Services. On 24 July, the Payment Systems Regulator (PSR) published draft terms of reference for a market review into the supply of payment card-acquiring services in the UK. The PSR expressed concerns that the reductions made by acquiring banks from the interchange fee caps introduced by the Interchange Fee Regulation had not been passed on to smaller merchants. It also expressed concern over a general lack of transparency surrounding fees. The PSR intends to issue final terms of reference by the end of the year.

Heat Networks Market Study. On 23 July, the CMA published its final report on its market study into domestic heat networks. The CMA found that due to a lack of information about potential heating solutions, frequency and access to bills and possibilities for consumer redress, some consumers were not receiving adequate value for money from their providers. Amongst other concerns, the CMA found that the ability of consumers to switch to an alternative heating network was very limited. The CMA has recommended that the heat network sector be regulated by an appointed public sector regulator as well as the introduction of new "principles-based" guidance.

Consultancy Market Investigation. On 18 July, the CMA published its provisional findings in its market investigation into investment consultancy services and fiduciary management services. In particular, the CMA has concerns with the low level of engagement by customers of pension schemes in monitoring their providers, and the difficulties they face in evaluating the quality of providers. The CMA has also expressed concern over the incumbency advantage of management firms, and the fact that investment consultants typically steered customers towards their own fiduciary management providers. The CMA will

[2] *See* https://www.clearygottlieb.com/-/media/files/alert-memos-2018/uk-government-proposes-national-security-and-investment-regime.pdf.

consult on its provisional findings before issuing its final report.

Investment Platforms Market Study. On 16 July, the Financial Conduct Authority (FCA) published its interim report on its market study into the market for investment platforms. The FCA found that there were barriers to switching platforms – particularly because of a lack of clear information available to consumers. The FCA has proposed monitoring developments during the implementation of MiFID II and left open the possibility of introducing new guidance if necessary. The FCA is due to publish its final conclusions in the first part of 2019.

Merger Developments

PHASE 2 INVESTIGATIONS

Motor Fuel Group/MRH. On 31 August, the CMA announced that it would refer the acquisition by Motor Fuel Group of MRH for a Phase 2 investigation unless acceptable undertakings in lieu of reference are offered. The CMA has identified concerns at 29 locations where Motor Fuel Group and MRH are close competitors and where the acquisition could result in price rises for motorists.

SSE Retail/Npower. On 30 August, the CMA provisionally cleared the merger between SSE Retail and Npower. The CMA provisionally found that the merger was not expected to result in a substantial lessening of competition in the supply of electricity and gas to domestic customers in the UK. The CMA considered that the merger would not impact the setting of standard variable tariffs, the most common tariff in the UK.

Menzies Aviation (UK)/Airline Services. On 14 August, the CMA announced that it would refer the completed acquisition by Menzies Aviation of part of Airline Services for a Phase 2 investigation. The companies both supply UK airlines and airports with support services such as ground handling and de-icing of aircraft. The CMA has found the parties are close competitors at London Gatwick and Manchester airports and the merger could reduce competition leading to higher prices and lower quality services.

Vanilla Group/Washstation . On 10 August 2018, the CMA published provisional findings in its Phase 2 investigation into the completed acquisition by Vanilla Group Ltd of Washstation Ltd. The CMA has provisionally concluded that the merger has resulted, or may be expected to result, in a substantial lessening of competition in the market for the supply of managed laundry services to higher education customers in the UK.

Experian Limited/Credit Laser Holdings. On 31 July, the CMA referred the acquisition by Experian of Credit Laser Holdings for a Phase 2 investigation. The CMA found that the parties were two of the largest credit-score checking services in the UK, and that the merged entity might be less likely to innovate in providing credit check services to consumers.

Ausurus Group/Metal & Waste Recycling. On 19 July, the CMA published supplementary provisional findings that the transaction between two recycled metal processors would not result in a substantial lessening of competition in the market for the purchase of ferrous and non-ferrous metal in London. The supplementary provisional findings reversed the CMA's earlier findings, as a result of additional evidence gathered following the publication of provisional findings on 4 June.

PHASE 1 CLEARANCE DECISIONS

Restore plc/TNT UK Limited merger inquiry. On 16 August the CMA announced the clearance of the acquisition by Restore plc of certain businesses of TNT UK Limited. The CMA found that the parties were not close competitors and that TNT did not impose a strong competitive restraint on Restore. The CMA found that a sufficient number of records management services providers would continue to exist and compete with the combined entity post-merger.

Moneysupermarket.com Financial Group Limited/Decision Technologies Limited. On 7 August, the CMA announced the clearance of the anticipated acquisition by Moneysupermarket.com of Decision Technologies Limited and its subsidiaries. Moneysupermarket.com is a price comparison website specialising in financial services, including mortgages, credit cards and loans. Decision Technologies Limited provides comparison services in the broadband, mobile phone and television industries.

ION Investment Group/Fidessa. On 3 August, the CMA announced the clearance of the acquisition by ION Investment Group Limited of Fidessa Group plc. ION supplies sell-side front office trading software for fixed income financial products and exchange traded derivatives, while Fidessa supplies sell-side front office trading software for equities and derivatives.

Gardner Aerospace Holdings/Northern Aerospace. On 20 July, the CMA announced the clearance of the acquisition by Gardner Aerospace Holdings of Northern Aerospace on competition grounds. The parties produce fuselage and wing components, including for military applications. The Secretary of State for Business, Energy and Industrial Strategy had issued a public interest intervention notice on 17 June on national security grounds, requiring the CMA to prepare a report on the competition and national security aspects of the proposed transaction. The report was delivered on 14 July, and the Secretary of State announced his decision not to refer the merger to Phase 2 on public interest grounds on 19 July.

Bain/Cordenons. On 19 July, the CMA announced the clearance of the acquisition by Bain Capital Investors LLC of Gruppo Cordenons S.p.A. Bain is an internationally active private equity house. Gruppo Cordenons is a producer of fine and speciality paper products based in Italy.

ATG Media/Lot-tissimo. On 12 July, the CMA announced the clearance of the acquisition by ATG Media Holdings of S.P.H. Softwarepartner GMBH & Co KG (trading as Lot-tissimo). The Parties both provide live online bidding auction platform services to auction houses and bidders. While ATG is active in the UK, USA, and Canada, Lot-tissimo is primarily active outside of the UK (in Germany, Austria, Switzerland and five other European countries). Given Lot-tissimo's limited UK presence, the CMA found no competition concerns.

Arla Foods/Yeo Valley Farmers. On 11 July, the CMA announced the clearance of the acquisition by Arla Foods Limited of Yeo Valley Dairies Limited. The parties supply organic milk and organic butter. The CMA found that the parties did not materially compete in the supply of own-brand organic milk or butter and that, where they supplies branded organic milk, they would continue to compete with other suppliers post-merger.

Flogas/Countrywide LPG. On 9 July, the CMA announced the clearance of the acquisition by Flogas Consumer Limited of the LPG supply business of Countrywide Farmers plc. Flogas and Countrywide each supply LPG to consumers for heating, and to businesses for various applications.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision due date
John Swire & Sons Limited/ Simadan Group	26 October
J Sainsbury PLC/ Asda Group Ltd	19 October (but fast track process requested)
Post Office Limited/ Payzone UK Limited	19 October
Stars UK/Sky Betting and Gaming	18 October
Hempel Holdings/JWO	28 September
Castle Water Holdings/ Invicta Water Limited	19 September

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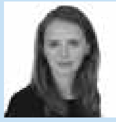

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