RESPONSE TO THE PROPOSED UNDERTAKINGS IN RELATION TO MEDIA PLURALITY RAISED BY THE PROPOSED MERGER BETWEEN 21ST CENTURY FOX AND SKY

We are grateful for this opportunity to comment on the consultation by the DCMS on the proposed acquisition by 21st Century Fox of the shares in Sky that it does not already own. We agree with the Secretary of State and the CMA that the merger may be expected to operate against the public interest on the grounds of plurality. We continue to believe that prohibition of the merger would have been the simplest and most effective course of action to prevent the risks to plurality.

We believe that since it is the chosen course, the proposed divestiture of Sky News must be made to work effectively to address the plurality risks. We believe progress has been made in the design and conditions of the divestiture, but we continue to have significant concerns that we believe need to be addressed.

Design of Divestiture Process

We have a fundamental concern with the design of the divestiture process. It allows Fox to purchase all of Sky and only subsequently, within a period of three months, divest Sky News to Disney. We believe this is the wrong approach.

It is acknowledged by the CMA that there are risks that while the purchase of Sky by Fox completes, Disney either for regulatory reasons or because of a change of mind on their part does not complete the purchase of Sky News. We acknowledge, with the CMA, that these risks are small, but we cannot be certain how small they are. The risks of Fox not being taken over by Disney or Comcast also currently appear small, but we cannot be certain either how small.

The eventuality of the Sky News deal not completing and Fox not being taken over would be extremely problematic. It could mean that for an indefinite period, possibly in perpetuity, the MFT would have control over Sky News, the precise risk that the remedies were designed to avoid.

The process of appointing a divestiture trustee to then seek a buyer for Sky News does not provide comfort to us. The chances of success of the trustee are uncertain, as is the time period for any sale. Such a search for a buyer also seems to pose an extremely risky and uncertain future for Sky News. If an appropriate buyer is not found, it is completely unclear from the CMA recommendations or the undertakings, what would then happen. Unless and until a buyer was found, the Murdochs' would retain ownership of Sky News, which could, at least in theory, be permanent.

If there was no way to avoid this risk, then the proposed structure of the divestment might make sense. But we believe this risk is wholly avoidable without undue costs. The way to achieve this is by making the final completion of the Fox purchase of Sky conditional on the simultaneous divestiture of Sky News to Disney. Such a stipulation would, we believe allow the necessary regulatory clearances for the sale of Sky News to Disney to be sought, but enable certainty that both transactions complete —the purchase of Sky by Fox and Sky News by Disney. This is our first proposed amendment to the undertakings which we label (i) ((Each subsequent adjustment will be marked by a Roman numeral and sequentially numbered for ease of reference).

We would urge the Secretary of State to give proper consideration to this proposal. It would be deeply unsatisfactory –and his responsibility---if such an eventuality as we pose, the Murdochs having indefinite ownership of Sky News, were to come to pass. It is wholly avoidable if our proposal is adopted. We see no proper reason why it should not be. Inconvenience for the Murdochs or Disney is not an adequate reason.

We now turn to the other adjustments to the undertakings we believe are necessary, through a consideration of the three other scenarios that might come to pass in this process. In each we consider whether the threat to plurality from Murdoch influence over Sky News has been adequately prevented and what further steps are necessary. Inevitably we cannot be certain which of the scenarios canvassed in the letter will transpire and therefore any necessary adjustments to the divestiture conditions demanded by each of the scenarios must be applied generally.

Scenario 1: Disney purchases Fox, including Sky

In this scenario, the divestiture of Sky News to Disney becomes one part of a wider purchase of the rest of Sky. As the CMA noted in January, although the MFT will own less than 5% of Disney's stock it will nonetheless be its second largest shareholder. This means that there are continuing risks of Murdoch influence over Sky News, unless proper safeguards are in place.

In our view, the Secretary of State must address the MFT's potential influence over Disney and, through it, Sky News, by strengthening the proposed restrictions on Murdoch family members assuming roles in Disney, by adding a prohibition on the MFT building a bigger stake in Disney and by specifically demanding an undertaking from the MFT not to interfere in Sky News editorial policy through their shareholding.

(ii) Murdoch family member roles in Disney

Paragraph 18.132 of the CMA's report to the Secretary of State says that "Disney told us that no member of the Murdoch family will be offered a position on the board or a senior management position of any Disney company if it was successful in completing its acquisition of Fox."

Paragraph 3.2 of Disney's undertaking offers something narrower, saying that "Disney shall not employ any member of the Murdoch Family as an officer or senior manager at Newco or at any direct or indirect parent company of Newco (including, without limitation, the Walt Disney Company), and shall not appoint any member of the Murdoch Family or any Associated Person to any position that would allow that person to exercise influence or control over Sky News."

The difference is that Disney's proposal to the CMA would have excluded the appointment of Murdoch family members as non-executive directors of Disney, but such appointments will be possible in its later undertaking. Non-executive directors of a key shareholder like the MFT are capable of exercising significant influence over executive directors and other staff of Disney.

To address this risk as well as merely reflect what Disney said to the CMA, paragraph 3.2 of its undertaking must be amended to prohibit the appointment of any member of the MFT or Associated Person to any executive or non-executive role in any Disney company.

(iii) MFT stake in Disney

We are also concerned about the potential for the MFT to increase its holding in and influence over Disney over time. Disney's undertaking should therefore include a prohibition on the MFT acquiring additional shares, shareholder votes, or entering into block shareholder arrangements within Disney, for at least the next 15 years.

(iv) Non-Interference by the MFT in Sky News

We are concerned that even if condition (ii) is met, the Murdochs through the MFT could seek to exercise influence over Sky News informally through their position as the second largest shareholder. We believe as a further condition, and in light of the likely MFT shareholding in Disney, there should be specific prohibition in the undertakings against editorial interference by the MFT in the editorial output, policy or strategy of Sky News.

Scenario 2: Disney owns Sky News, with Fox and Sky controlled by another company, other than the MFT.

In this scenario, Disney completes its purchase of Sky News, but another company, eg Comcast, purchases Fox and therefore Sky.

We believe there are risks in this scenario about the likely interest of Disney in a stand-alone Sky News, notwithstanding what they have said to the CMA. This is inherent in the process that has been designed, and we do not see an obvious way of mitigating this risk. To mitigate Murdoch influence over Disney in this scenario, conditions (ii), (iii) and (iv) are necessary.

In addition, we also believe that there needs to be the maximum possible protection when it comes to any decision of Disney to seek to sell Sky News in these circumstances. In particular, we propose the following adjustment to the undertakings:

(v) There must be a role for the CMA as well as the Secretary of State in determining the appropriateness of any purchaser should Disney decide to sell. At the very least, the Secretary of State should have to seek the advice of the CMA on such a purchaser.

(vi) In the context of a wish by Disney to sell Sky News, the Brand Licensing Agreement at paragraph 7 of the Agreement allows Sky to terminate the Sky News Brand Licence

Agreement should Sky News be transferred to a company outside of Disney or Fox without their consent. This could prevent another purchaser taking ownership of Sky News, even if they are deemed suitable by the Secretary of State. We believe it is unacceptable to give any kind of veto power to Sky over the ownership of Sky News and this clause should be omitted.

Scenario 3: Disney owns Sky News and the MFT retain control of Fox and Sky

This is a problematic scenario because of the concerns about plurality that led to the CMA's conclusions about the way the proposed Fox/Sky transaction runs counter to the public interest. Control of Sky, as repeatedly acknowledged by the CMA in its consideration of various remedies, gives potential channels of influence over Sky News.

We believe these risks are inherent to such a scenario. But we believe the risks can be mitigated depending on the strength of the conditions applied to block such influence. In our view, in such a scenario, the following amendments and additions to the undertakings are required. Conditions ii), iii) and iv) from scenario 1 would be required to prevent direct Murdoch influence over Sky News through Disney. In addition:

(vii) The brand licensing agreement is a particular problem in this scenario. It provides wide scope for influence to be exercised by the MFT through Sky over Sky News. In particular, we suggest the following changes to this agreement:

(a) paragraph 6a should expressly state that no editorial decision can be cited to invoke the clause allowing the Licensor to require certain changes from the Licensee if their "acts or omissions have materially or adversely affected, or will materially adversely affect, the goodwill in the Trade Marks". The current stipulation that negative stories about the Licensor or any company within the Sky Group cannot be used to trigger this clause carries with it the necessary implication that any other story on Sky News can be used to trigger the clause and interfere editorially.

(b) paragraph 14(h) gives power to the Licensor to update or make changes to the specified criteria for governing the quality/manner of use in respect of the license. This represents broad authority for intervention in the style and content of Sky News and gives extraordinary control to Sky over the output of Sky News. The only constraint is that changes cannot be made 'arbitrarily or unreasonably' but in practice this amounts to no constraint at all. This clause should either be omitted from the Brand Licensing Agreement or amended to allow Sky to suggest changes which Sky News is free to accept or reject.

viii) In this scenario, the question of the oversight of the undertakings is particularly important, given the Murdochs' ability to exercise influence over the political process. Paragraph 9.1 of the proposed 21CF Undertakings states that the Monitoring Trustee appointed to oversee the divestiture process of Sky News to Newco should be proposed by 21CF. The Secretary of State may accept or reject any prospective appointee (9.4).

There is no good reason for 21CF being permitted to appoint the individual responsible for ensuring that the undertakings are met. It is effectively a regulatory role and 21CF should be excluded from the appointment process. At the most, 21CF's role should be limited to being a consultative one. The power of the Secretary of State to veto any prospective appointment does little to mitigate against these concerns. Only the CMA is equipped with the necessary expertise to oversee this appointment. It has already investigated this transaction and proposed the specific undertakings which the Trustee is appointed to oversee. Therefore, it would be appropriate for the CMA to be responsible for the selection and appointment of the Trustee, or at the very least, the CMA should be publicly consulted on their appointment.

We also believe that whenever a public authority needs to be engaged in relation to the undertakings it is essential that it is the CMA and not just the Secretary of State who plays such a role. In no circumstances should the Secretary of State be able to make decisions about the undertakings without first having taken advice from the CMA, which should be published. In particular following a judgement by the monitoring trustee that the undertakings have been broken, the Secretary of State must receive advice from the CMA about whether to bring proceedings and that advice must also be published.

We believe that in this scenario, the real danger is that Disney has little interest in a stand-alone Sky News and Sky has significant interest in exercising influence. Disney has given assurances that even in these circumstances it will be an engaged owner. It is particularly important the monitoring trustee plays a close scrutinising role should this eventuality arise.

In addition to the suggestion on the monitoring trustee above, we suggest the following adjustment to the undertakings: Agreement to the divestment trustee, if such a post stands (see i), by the Secretary of State should take place after advice from the CMA on the appropriateness of the individual proposed. The CMA must also have a role in advising the Secretary of State if s/he receives a request from the Fox or Disney to vary the undertakings in response to a 'material change of circumstances'. Before any decision is made their advice to the Secretary of State should be published.

Conclusion

The Secretary of State has accepted that there is a risk to plurality and the public interest from Murdoch control of Sky News. There is considerable uncertainty about the ultimate ownership arrangements of Sky News and Sky should the Fox/Sky transaction be allowed, particularly given the competing bids for Fox.

In determining the precise undertakings, the Secretary of State must ensure the risk to plurality is prevented in all scenarios. We urge the Secretary of State to adopt the adjustments to the undertakings (i – viii) set out in this letter. We believe they are essential to safeguard the public interest and the risks to plurality from this transaction.