

Competition & Regulatory Newsletter

20 September - 3 October 2017 / Issue 20

Quick Links

[Main article](#)

[Other developments](#)

[Antitrust](#)

[General competition](#)

Secretary of State refers Fox/Sky merger to the CMA on public interest grounds

On 20 September 2017 the Secretary of State for Digital, Culture, Media and Sport, Karen Bradley (SoS), [referred](#) the proposed takeover of Sky plc by Twenty-First Century Fox, Inc. (Fox) to the Competition and Markets Authority (CMA) for a Phase II review on public interest grounds. Fox currently holds a 39 per cent stake in the broadcaster.

Background to the bid

Fox's takeover offer was originally [made](#) in December 2016 and was [recommended](#) by Sky's independent directors.

The bid came five years after News Corporation abandoned a bid to take over British Sky Broadcasting Group plc (BSkyB), which later became Sky. At the time, News Corporation held various media interests, including UK newspapers such as *The Sun*, *The Times*, *The Sunday Times* and the now-defunct *News of the World* and global broadcasters such as Fox. The bid came during the phone-hacking scandal in which several News Corporation newspapers were shown to have hacked the phones of various public figures. It was referred to the Competition Commission (CC) (predecessor to the CMA) and ultimately dropped amidst cross-party opposition. Following the collapse of its bid for BSkyB, News Corporation's broadcasting assets were spun off into Fox and its print operations into News Corp.

Merger control and regulatory review process

Fox notified the European Commission of the proposed takeover on 3 March 2017 and the Commission unconditionally [approved](#) the transaction on 7 April 2017, noting that it expected the takeover would lead to only a limited increase in Sky's market share for the acquisition of TV content and the wholesale supply of TV channels. The Commission concluded that the deal would raise no competition concerns in Europe.

While the Commission has exclusive jurisdiction to assess the impact of qualifying transactions on competition in the EEA, under Article 21 of the EU Merger Regulation (EUMR) Member States may take appropriate measures, including prohibiting transactions, to protect other legitimate interests. In the UK, the SoS

For further information on any competition related matter, please contact the [Competition Group](#) or your usual Slaughter and May contact.

[Main article](#)[Other developments](#)[Antitrust](#)[General competition](#)

is able to issue ‘intervention notices’ (for mergers considered under the UK merger rules) and ‘European intervention notices’ (for mergers considered by the European Commission), triggering a consideration of specified (non-competition) public interest issues.

On 16 March 2017 the SoS **issued** a European intervention notice specifying as the relevant public interest considerations the effect that the takeover would have on media plurality in the UK and the commitment of Fox and Sky to broadcasting standards. Under this procedure, the Office of Communications (Ofcom) is then required to prepare a report examining and providing advice on these two public interest considerations.

Ofcom’s report was **published** on 20 June 2017. It concluded that the transaction raised media plurality concerns, since it would give the Murdoch Family Trust “material influence” over the news agenda and political process in the UK, with its unique presence in radio, TV, print and online media, and that these concerns may justify a reference to the CMA. However, although Ofcom had concerns relating to Fox News’ corporate governance procedures, it did not consider that the merged entity would lack a genuine commitment to the attainment of broadcasting standards and found that a reference to the CMA was not justified on those grounds. It noted that Fox and Sky’s compliance with Ofcom’s Broadcasting Code was in line with comparable broadcasters. Ofcom also stated that the proposed undertakings offered by Fox to maintain the editorial independence of Sky News would mitigate the public interest concerns, although there may be areas in which the undertakings could be strengthened. It added that behavioural undertakings may be difficult to enforce.

On 29 June 2017 Ofcom also **published** a separate ‘Fit and Proper’ decision. This related to Ofcom’s on-going obligations under the Broadcasting Act to ensure that broadcasting licence holders are fit and proper, and found that Sky would remain so in the event of the merger.

The SoS **indicated** on 29 June 2017 that, consistent with Ofcom’s advice, she was “minded to” refer the deal to the CMA for a Phase II investigation on the media plurality ground only, and not to accept the undertakings in lieu of a reference that Fox had offered. However, in light of additional representations and further advice from Ofcom, on 12 September 2017 the SoS **gave** a second “minded-to” decision stating that she now planned to refer the merger on both the media plurality and broadcasting standards grounds. Although Ofcom had advised that a reference on the latter ground was not warranted, the SoS concluded that there were “non-fanciful concerns” relating to broadcasting standards that met the legal test for a Phase II reference. These included corporate governance failures at Fox and inadequate broadcast compliance procedures for Fox News in the UK. Following the expiry of the statutory consultation period, the SoS made a formal reference to the CMA on 20 September 2017.

The Phase II process

The CMA will now carry out a full and detailed investigation over a six-month period and report back to the SoS. It must reach a conclusion as to whether, based on the media plurality and broadcasting standards considerations, the proposed transaction operates or may be expected to operate against the public interest and, if so, what actions should be taken by the SoS in response. This could include requiring Fox and Sky to introduce remedies as a condition to allowing the acquisition to go ahead, or preventing the deal altogether. The SoS must have regard to the CMA’s report when reaching her final decision.

[Main article](#)[Other developments](#)[Antitrust](#)[General competition](#)

The threshold for a reference to Phase II is low: the SoS only needs to hold a reasonable belief that it may be the case that the transaction may operate or may be expected to operate against the public interest (i.e. where the risk is not purely fanciful). The CMA's in-depth probe will assess whether the specified public interest considerations may indeed be under threat.

Interventions on public interest grounds are rare, and consequently Phase II reviews on public interest grounds are very unusual. The CMA has never carried out a Phase II review on broadcasting standards grounds, and there has only been **one** such review on media plurality grounds. This was in 2007 and related to BSkyB's acquisition of shares in ITV plc. As this transaction was subject to the UK, rather than the EU, merger control rules, the SoS's reference to the CC was both on competition and public interest grounds. The CC **concluded** that the transaction may not be expected to operate against the media plurality consideration, but it found that the transaction would result in a significant lessening of competition within the UK TV market. The SoS **made** an adverse public interest finding based on the findings on competition impact and agreed with the remedies recommended by the CC that BSkyB be required to reduce its shareholding in ITV to under 7.5 per cent and give undertakings that it would not seek or accept representation on ITV's Board.

The enquiry into Fox's proposed takeover of Sky represents the first Phase II review to be carried out solely on public interest grounds. The CMA has **published** an administrative timetable which sets out how the enquiry will progress. Provisional findings are due to be issued during the week commencing 18 December 2017.

Other developments

Antitrust

European Commission fines Scania €880 million for participating in trucks cartel

On 27 September 2017 the European Commission **announced** a fine of more than €880 million on Swedish heavy truck maker Scania for participating in a trucks cartel which spanned 14 years (from 1997 until 2011). The Commission found that Scania had engaged in the cartel by coordinating prices of medium and heavy trucks in the EEA, the timing for the introduction of new emissions technologies and the passing on to customers of the costs of the emissions technologies. Scania's fine brings the truck cartel's total fines to a record €3.8 billion, which is more than double the previous record (i.e. €1.4 billion imposed in 2012 in the TV and computer monitors cartel).

The other cartel members reached a settlement decision with the Commission in July 2016. Volvo/Renault, Daimler, Iveco and DAF together received fines totalling €2.92 billion, which were subject to leniency and settlement discounts. MAN received full immunity from fines for bringing the cartel to the attention of the Commission. As Scania did not agree to settle it was investigated under the full cartel procedure. Scania had not made a leniency application and was also not eligible to benefit from the standard 10 per cent settlement reduction.

[Main article](#)
[Other developments](#)
[Antitrust](#)
[General competition](#)

Scania has **confirmed** that it intends to appeal the Commission decision, stating that it “*strongly contests all the findings and allegations*” and will appeal against the decision “*in its entirety*”.

CMA announces suspended prison sentence, curfew order and disqualification for UK company director

A former director of concrete manufacturer Stanton Bonna Concrete was **given** a two-year suspended prison sentence and made the subject of a six-month curfew order for his role in price fixing and market sharing arrangements in the supply of precast concrete drainage products.

Barry Cooper was also disqualified from acting as a company director for seven years. Mr Cooper was arrested in 2013 at the start of an investigation by the Office of Fair Trading, the CMA’s predecessor. In March 2016 he pleaded guilty to one count under section 188 of the Enterprise Act 2002, the criminal cartel offence. The CMA continued the criminal investigation but decided, in June 2017, that there was insufficient evidence to charge any further individuals with the offence.

In April 2016 the CMA also **launched** a civil probe into whether businesses in the sector have infringed the prohibition on anti-competitive arrangements (under Chapter I of the Competition Act 1998). This investigation continues. The CMA is expected to decide whether to proceed with the investigation later this month.

General competition

European Commission announces proposal for Regulation to establish an EU framework for screening foreign direct investments

On 13 September 2017 the European Commission published a **proposal** for a Regulation which establishes an EU framework for screening foreign direct investments (FDIs) into the EU. According to the Commission such a framework is necessary to protect legitimate interests of the EU and its Member States with regard to FDIs that raise concerns for security or public order.

The proposed Regulation would not require Member States to implement an FDI screening mechanism. Rather, it proposes a framework with “some basic requirements” (such as the possibility of a judicial redress of decisions, non-discrimination between different third countries and transparency) for those Member States which already have such a mechanism (currently 12 of the 28 Member States) or would wish to put one in place. It also proposes a cooperation mechanism whereby Member States would inform other Member States and the Commission about any FDI that is undergoing screening within the framework of their national screening mechanisms. Moreover, the Commission would be able to carry out a screening on grounds of security and public order, in cases where an FDI may affect projects or programmes of EU interest. Member States would be allowed to raise concerns as regards an FDI in another Member State and to provide comments, whereas the Commission could issue non-binding opinions.

Speaking at the European Policy Centre on 26 September 2017, European Commissioner for Competition Margrethe Vestager **referenced** the proposed framework and its interaction with EU merger control rules.

Quick Links

- [Main article](#)
- [Other developments](#)
 - [Antitrust](#)
 - [General competition](#)

Subject to certain safeguards, the EU merger control regime already permits Member States to review FDIs even where the competition aspects of the transaction are subject to the Commission's exclusive review under the EUMR. Vestager emphasised that the proposed framework will not affect EU competition rules on mergers, which will continue to apply "*to every company, wherever it comes from*".

Brussels

T +32 (0)2 737 94 00

London

T +44 (0)20 7600 1200

Hong Kong

T +852 2521 0551

Beijing

T +86 10 5965 0600

© Slaughter and May 2017

This material is for general information only and is not intended to provide legal advice. For further information, please speak to your usual Slaughter and May contact.