Fox/Sky Merger Investigation

Issues Statement Submissions form

1. Thank you for taking the time to make a submission in response to the Statement of Issues for the CMA's Fox/Sky merger investigation on media plurality and broadcasting standards, published on our website on Tuesday 10 October 2017.

2. This form is designed to help with your submission (although it is not compulsory to use). It sets out the key issues where we are seeking views and evidence, based on the Issues Statement. However, you may find additional useful information in the issues statement.

3. Please note:

- You can choose which questions to respond to, but we ask all respondents to provide a small amount of background information at the start of this form. The boxes will 'expand' to accommodate long responses if required.

- Please provide evidence in support of your submission – this can be attached to the email/enclosed with your response.

- We may publish all or some of your submission to our Statement of Issues, or a summary of it. Please indicate any confidential material included in your submission (including whether you wish to be anonymous) and provide a non-confidential (redacted) version of your submission giving reasons for your requests for confidentiality.

- The CMA may use the information you provide for the purposes of facilitating the exercise of any of its statutory functions. This may include the publication or disclosure of the information. Prior to publication or disclosure, in accordance with its statutory duties under Part 9 of the Enterprise Act 2002, the CMA will have regard to (among other considerations) the need to exclude, so far as is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if disclosed, would or might, in our opinion, significantly harm the individual's interests or, as the case may be, the legitimate business interests of that business (confidential information).

4. If you have any questions please visit the Fox/Sky merger investigation page.

5. Please download and save this form before completing it. Please submit your response by **5pm on Tuesday 24 October 2017**, either by:

- Email to: FoxSky.Submissions@cma.gsi.gov.uk.
- Or by post to: Project Manager
  Fox/Sky merger inquiry
  Competition and Markets Authority
  Victoria House
  Southampton Row
  London WC1B 4AD

Your details

(Fields marked * are required)

Title*	Professor

Forename	Jonathan

Surname*	Hardy

Email*	[✂]

What is your role / profession*	Professor of Media and Communications, University of East London

Are you representing yourself or an organisation?*	Myself

If you are representing yourself rather than an organisation would you be content for us to include your name if we publish your response?*	Yes

If you are representing an organisation:

(a) What is the organisation's name?*	
(b) Please could you briefly explain the role of your organisation, including the sectors in which it operates or has most interest?*	
This is an individual submission but I am also Secretary of the Campaign for Press and Broadcasting Freedom and so this submission is intended to be a supplement to the CPBF submission.	

Public interest consideration – media plurality in the UK

With respect to media plurality the CMA is assessing whether there will be a sufficient plurality of persons with control of the media enterprises serving audiences in the UK following the Transaction. We are therefore looking for views and evidence on the current level of media plurality in the UK, whether and the extent to which the Transaction reduces that level of media plurality, and whether the remaining level of plurality of persons with control of media enterprises would be sufficient. We will consider these issues in the context of Ofcom's definition of media plurality: ensuring diversity of viewpoints that are available and consumed; and preventing any one media owner or voice having too much influence over public opinion and the political agenda.

We welcome views and evidence which address the questions set out below.

1.	**Whether and how the ability of the Murdoch Family Trust (MFT) to control or influence editorial and commercial decisions at Sky News will change as a result of Fox's share ownership of Sky increasing from approximately 39% to 100%, and whether that change is material in nature?**

Sky Media makes this offer to advertisers: 'We're the art of the possible – fusing your campaigns and objectives with Sky's unparalleled content, talent and channel brands. From Branded Content creation and distribution across TV, VOD and beyond, to contextual advertising, competitions, bespoke hubs and native advertorials' (https://www.skymedia.co.uk/partnerships/).

Here, the broadcaster offers to provide editorial services ('branded content…native advertorials'). Yet the Ofcom rules under which it operates requires that the broadcaster (Sky) retains independent editorial control over all programme material broadcast. So, Sky is offering services already that are potentially in breach of the rules under which it operates. One could therefore argue that increasing MFT control from 39% to 100% would not materially alter the current situation. However, the evidence of the behaviour of Fox towards advertisers, and the behaviour of the Murdoch's indicate that the situation is likely to change. First, serving advertisers will be strongly promoted and second, the behaviour of Fox towards breaches of the Ofcom code indicates a comparatively low degree of adherence and support. So, a change in ownership is likely to result in a material change in the way commercial decisions operate affecting all services, including Sky News.

At present, the opportunities for corporate cross-media promotion between 21 Century Fox and Sky, while extensive, are restricted in important ways. While, MFT has a controlling share in Sky is it not able to dictate policy so as to maximise resources for cross-promotion. Businesses owned by MFT can cross-promote Sky, but the 'reverse flow' of promotions from Sky is not entirely within MFT control. The presence of other shareholders and the role of independent board members places limits. Total ownership of Sky would allow MFT to undertake far more extensive, and more integrated, cross-promotion. Media cross-promotion can be a serious inhibitor of plurality and competition. It can have two main effects:

One, to enable a company with a dominant market position unfairly to drive customers to its own media at the expense of alternatives, and

Two, in news and current affairs, to distort editorial values to give prominence to a company's commercial interests at the expense of regular editorial values.

The opportunities for cross-promotion across a wholly owned Sky would be very considerable indeed. The creation of a corporate entity commanding major shares of broadcasting and on-demand services on all platforms, news media, wholesale radio news, publishing and other media, fixed and mobile telecoms and broadband would be unprecedented. A wholly-owned Sky would offer its 'quad-play' services - broadband internet access, television, telephone and wireless – across its combined channels and across the range of properties of Fox and News Corporation/News UK. Such extensive multi-platform, intra-firm cross-promotion is not addressed in either Ofcom's Cross-Promotion Code and Broadcasting Code, nor in the provisions of other UK regulators for newspapers, advertising or other media, nor in the 1994 newspaper code that News Corporation announced for its own self-regulation. This scale of cross-promotion would be detrimental to competition, plurality, broadcasting standards, and to public interest considerations. More details are set out in my submission made in March 2017 to Ofcom's consultation on the proposed acquisition by 21st Century Fox.

2. Whether and how the range of viewpoints available from news and current affairs sources in the UK is evolving in general and would change in particular as a result of the Transaction?

Sky and News Corporation (trading as News Corp) are by far the largest commercial news Producers in the UK. Sky News Radio is the main supplier of news to more than 280 commercial stations. In both radio news and 24-hour television news, Sky's only real competitor is the BBC, whose total revenues are now considerably smaller than Sky's. The combined editorial influence on Sky and News Corporation is a significant cause for concern. 21st Century Fox, which is controlled by Murdoch's News Corp, will go from owning less than half of Sky to having total ownership and control, making 21st Century Fox the dominant commercial news producer across the UK in television, radio and news publishing. Such unprecedented consolidation would reduce the diversity of sources of supply, and exposure diversity, to such a degree that it would undermine media plurality as a credible policy objective.

3. How do people consume news and current affairs and to what extent do they rely on multiple sources? How is this likely to change in future?

4. What is the impact and importance of different news and current affairs sources, including online and through social media, for media plurality? And, in turn, what are the implications of the impact of online and social media on the use of traditional (ie broadcast and print) news and current affairs sources by consumers?

5.	**Whether and how the ability of the MFT to influence the political agenda would change as a result of the Transaction?**

6.	What is the level of media plurality in the UK that should be considered sufficient?

In order to protect plurality it is essential that there is adequate recognition of the breadth of plurality concerns. UK regulation should reflect the Council of Europe (CoE)'s identification of media plurality as the scope for a wide range of social, political and cultural values, opinions, information and interests to find expression through the media. The CoE understands media pluralism to encompass 'the diversity of media supply, use and distribution, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests' (European Commission (2009) *Independent Study on Indicators for Media Pluralism in the Member States – Toward a Risk-Based Approach: Final Report, Prepared for the European Commission Directorate-General Information Society and Media*, p5.

Plurality concerns include:

1. Content variety and cultural diversity
2. Media access (social, cultural and economic access for individuals and groups in society, especially marginalized groups)
3. Independence of creators, programmers and journalists
4. Owner influence affecting media content and performance in entertainment, fiction and factual programmes as well as 'news'
5. Plurality of sources of funding for media

The plurality test in the 2003 Communications Act should be used and extended. The existing test is not restricted to news but also covers plurality in broadcasting services across the UK or in any part.

- The need for a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests
- The need for persons carrying on media enterprises to have a genuine commitment to the attainment [of broadcasting standards]

Strong cross-ownership rules are needed with clear ceilings on the share across media markets. Any supplier with a 15 per cent share in a designated media market should be subject to a PI test in respect of any merger or acquisition in the same or another media market. Ownership concentration and cross-ownership above the 15% threshold may be permitted subject to organisations meeting certain public interest obligations in their operation. The maximum permitted holding in any of the following designated market should be 30% (national news; regional news on all platforms and in each of the following platforms - radio, television, newspapers, online).

7.	Whether and how the Transaction would result in an insufficient level of media plurality in the UK, taking into account the increase in the level of control held by the MFT over Sky following the Transaction and its existing control over Fox and News Corporation (News Corp)?

8.	**Are there any existing factors which might help to prevent or reduce any potential negative effects of the Transaction on media plurality? What are these and why?**

Public interest consideration – a genuine commitment to broadcasting standards

With respect to broadcasting standards the CMA is looking for views and evidence on whether the merged entity post-Transaction will have a genuine commitment to broadcasting standards objectives. In assessing this, we will consider the record of the Parties' compliance with broadcasting and other applicable regulations, and their broader attitude to compliance in general.

We welcome views and evidence which address the questions set out below.

9.	What is the current approach of Fox, Sky, the MFT and News Corp to compliance with broadcasting standards?

Sky and Fox are not alone in breaching the Broadcasting Code rules on commercial communications. What is unusual, and highly problematic, is the poor level of engagement with the rules and regulatory system. Some Sky or Fox corporate responses indicate a lack of understanding of the rules themselves or mount defences that do not demonstrate a serious effort to ensure that rules are adhered to. Repeatedly, the licensee has responded with a defence that has been found wanting and Ofcom has ruled that breaches of Section Nine (Commercial References in Television), or other rules, have occurred. **Taken together, the breaches of rules and responses shown by the company give grounds for concern and warrant further investigation to determine the level of compliance with broadcasting standards.**

The wider context is relevant. The practices of Fox are rooted in a highly competitive, thoroughly commercialised media system in the United States with comparatively weak regulation governing sponsorship and commercial involvement in programmes, and which allows much greater advertising minutage than is permitted under EU and UK regulations. Looking forward, the pressure to accommodate marketers in and around programmes can only be expected to increase significantly. It matters, therefore, that the breaches of Ofcom rules show a lack of consistent adherence to existing broadcasting standards.

Sky was found in breach of rules on sponsorship credits for sponsorship of the Financial Report on Sky News by Finspreads, a spread betting company (Ofcom Bulletin 237, 2013). The sponsorship breached the restriction on the advertising of spread betting companies outside of specialist financial channels or programming. Sky argued that the Financial Report item, which was under a minute long, was a specialist financial programme in itself, and so could be sponsored. Ofcom rejected that argument, stating it 'did not consider a short financial update shown either integrated with or alongside general news content on a channel appealing primarily to a general news audience, was likely to be of particular interest only to business people or finance professionals'.

In 2013, a programme on Fox Extra was found in breach of rules on undue prominence after featuring close up shots of a pet food brand. Fox stated that 'neither it, the programme producer, nor any person connected with either, received payment or other valuable consideration for the inclusion of the references to IAMS during the item, and that therefore the references had not been subject to any product placement arrangement'. Ofcom accepted that paid placement had not occurred in breach of the rules, but found the programme in breach of rules prohibiting undue prominence. Ofcom also noted that the programme had failed to advise viewers about the commercial relationship between the featured guest and IAMS pet food (Ofcom Bulletin 227, 2013).

To take another recent investigation, Fox News Channel was found to have breached Rule 9.2, which requires that 'Broadcasters must ensure that editorial content is distinct from advertising', for a programme, *Fox and Friends*, broadcast on 28 June 2016 (Ofcom Bulletin 319, 2016). The complaint arose from a four-minute segment called *It's Your Money*, featuring discussion between two programme presenters and Megan Meany, a representative of the website Mega Morning Deals. As Ofcom reports, 'Each discussion focused on a particular product offered exclusively to Fox & Friends viewers at a discounted price. Viewers were directed to the programme's website to take advantage of the special offers'. Mega Morning Deals gained publicity through on-screen graphics, visual links to the website's deals and verbal references. FNN stated that 'Megan Meany's appearance in the Programme was not connected to any financial arrangement for which Fox News or the hosts of the Programme were beneficiaries. Neither Fox News nor the hosts received any compensation as a result of the Programme'. However, the Mega Morning Deals website featured as an icon and hyperlink on the Fox and Friends website, with viewers directed there to obtain discounts. In the segment, one of the presenters advised viewers 'just click on the Mega Morning Deals icon on the Fox and Friends website...yeah foxandfriends.com...shop "til you drop!"' FNN's statement does not cover the totality of economic benefits that might arise from featuring the Mega Morning Deals website on the Fox and Friends website. Were there to have been some material economic benefits then the statement given to Ofcom would be insufficient and that is a matter of concern both in regard to the incident, and in regard to approach taken by the licensee to the regulatory authority.

FNN argued that the section was programming, not advertising and stated *It's Your Money* was 'clearly distinguished as a featured segment distinct from advertising by the absence of the use of lead-in and lead-out bumps and teases that broadcasters use to alert viewers when a commercial interstitial is appearing'. Ofcom's ruling made clear that it dismissed the argument that this was programming rather that advertising: 'Although the content was scheduled and presented as programming, Ofcom considered that it served the function of advertising, i.e. the promotion of the supply of products in return for payment by viewers'.

Ofcom added that it 'was concerned by FNN's suggestion that using devices such as "lead-in and lead-out bumps and teases" is sufficient to ensure distinction between advertising and editorial content. Although such devices can be useful signals to alert viewers to a transition between a programme and an advertising break, their absence does not negate the need for broadcasters to ensure that content presented and scheduled as programming does not function as advertising'. That admonishment indicates a more serious problem of understanding of the rules and compliance with them. This case, like others, arose from one complainant alerting Ofcom.

Fox News has been the subject of a disproportionately high number of complaints for code breaches to Ofcom. 21st Century Fox has now ceased re-broadcasting Fox News in the UK. **A more extensive review of Sky's total UK output should be conducted by Ofcom to assess the levels of compliance with broadcasting standards.**

James Murdoch has a lengthy record of challenging the legitimacy and rulings of regulators, including Ofcom. His speech to the Marketing Society in 2008, for instance, criticised European Union rules on sponsorship and advertising in TV programmes, enforced by Ofcom, which he argued had forced the cancellation of a broadcast from Sky Plus on BskyB showing an Indian mobile phone logo (other broadcasters pixelate brand images that breach rules) and stated: 'But the heart of this is not petty rules about advertising. Those rules are simply a consequence of the establishment's much deeper discontent with a free media'.
(https://www.theguardian.com/media/2008/apr/25/ofcom.newsinternational).

10.	What is the approach of Fox, Sky, the MFT and News Corp to effective corporate governance and other applicable regulations, including regulations relating to the treatment of employees, in the UK and overseas?

All of the companies named and the MFT have been found to have serious deficiencies in governance. This strong pattern of poor governance, across Fox and News Corp in particular, is not typical of firms that have such a large share of communications services, many of which carry considerable societal obligations and 'public interest' responsibilities, for the provision of news and information and the circulation of ideas and imagery. The poor record on governance is described in various reports and studies and set out in extensive evidence to Ofcom's consultation on the acquisition earlier this year. Ofcom's 2017 report to the Secretary of State on 21st Century Fox describes as "significant corporate failure", the "extremely serious and disturbing" allegations of sexual harassment at Fox News.

11.	What is the degree to which compliance with other applicable regulations, and effective corporate governance more generally should be considered in assessing a company's commitment to broadcasting standards? Please include whether and which particular regulations may be considered more relevant to this assessment.

All matters that may affect compliance and commitment to broadcasting standards should be considered. In addition to the comments of the CPBF and others, I would like to highlight the special requirements for broadcasters in relation to commercial communications.

The Broadcasting Act 1990 prevented advertising agencies from holding broadcasting licences. The White Paper, *A New Future for Communications*, in 2000 proposed removing the restrictions on advertising agencies holding broadcast licences and allowing the competition authorities to ensure fair competition in the advertising market. It was argued that the Government could "rely on the competition authorities to judge the likely impact on competition of agencies holding licences'. In the event, this restriction was not repealed by the Communications Act 2003.

Advertising on television and radio is regulated by the Advertising Standards Authority in accordance with the UK Code of Broadcast Advertising (BCAP) drawn up by the Committee of Advertising Practice. Ofcom's rules implement European Union regulations set out in the Audiovisual Media Services Directive. The relevant rules are set out in two main documents, Ofcom Code on the Scheduling of Television Advertising (April 2016), Ofcom Broadcasting Code (May 2016). Section Nine of the Broadcasting Code concerns commercial references in television programmes and includes rules on product placement, sponsorship and advertiser-funded programmes and related matters.

Ofcom requires that broadcasters retain editorial control for all programmes. 'There may be circumstances in which it is acceptable for a person or organisation other than the broadcaster or programme-maker to provide input into the editorial of a programme. For example, in the case of an advertiser-funded programme. However, in all cases broadcasters are responsible for the programmes they transmit. Therefore, while other parties may contribute to programme content, broadcasters must retain ultimate editorial control over the programmes they transmit' (Ofcom Guidance Note on Commercial Communications 1.11, emphasis added).

Sky Media's offer to brands includes the following statement: 'Sponsorship provides brands the opportunity to get closer to content by allowing direct association with programmes, strands or entire channels. At Sky Media there's an amazing portfolio to help you find the perfect match… As well as delivering innovative and bespoke sponsorship solutions, Sky Media provides brands with a full-service offering: brokering deals; producing award-winning creative as well as analysing performance and effectiveness to get the most out of your campaign. (https://www.skymedia.co.uk/partnerships/)

The key issues that arise include these:

Can Sky Media provide the range of services it offers to brands while Sky retains editorial control as a broadcaster for all programmes?

Are the arrangements whereby a subsidiary serves brands ones that are structurally non-compliant with the Communications Act 2003?

Is Sky Media an advertising agency under the current legislation?

Are the professional services offered by Sky Media compatible with the requirement to ensure the editorial independence of the broadcaster?

Do the intra-corporate relationships and practices of Sky provide sufficient safeguards for compliance with section nine and other sections of the Ofcom Code?

The relevant legislation in the 1990 Broadcasting Act comes from an era of more discrete divisions than exist today between marketers, agencies and media. The legislation refers to a conventional division between advertising agencies, that included media buying services, and media companies that sold advertising space and other marketing communications opportunities. A key purpose of the disqualification on advertising agencies owning broadcast licences was to ensure fair competition in the advertising market (see https://publications.parliament.uk/pa/cm200203/cmstand/e/st030130/am/30130s06.htm). What was not anticipated was the increasing integration of media and marketing communications in the creation of branded content, distributed over a variety of digital platforms, as well as in publishing formats (advertorials, native advertising), radio and television formats (advertiser-financed shows, product placement and integration, etc.). Today, many broadcasters offer a range of services to marketers including content production that they subsequently broadcast. There is therefore a broader need to investigate how these practices conform to current legislation, both UK and European, and to Ofcom rules. However, there are pressing considerations in respect of the 21st Century Fox acquisition. The corporate structure of Sky would offer a very powerful, 'vertically integrated' service for brands. This structural arrangement needs to be investigated. The poor record of Murdoch-owned companies' compliance with current rules, and the service offer to brands, give grounds for concern about the likely behaviour of the 100% owned business. There are also concerns about how effectively compliance on matters such as editorial control could be assured given the opacity of intra-firm dealings and agreements made between the media company's creative content services, advertising placement services, and brands.

A further concern is that 'media selling' has also been transformed by digitalisation. Sky's AdSmart service, launched in January 2014, tailors advertisements to household's profile and location, allowing precise targeting. Amassing a considerable amount of data from its subscribers, the company has a business model based on a mixture of subscriber and advertiser revenue, and so aims to monetise its data to maximise revenue from marketers. So, the incorporation and vertical integration of content creation for brands and the intra-firm and inter-firm media buying, selling and placement warrants very careful investigation on behalf of competition, consumer welfare, information and communications regulation concerns.

12.	What constitutes a genuine commitment to broadcasting standards?

It is legitimate for media organisations to defend their output and their staff when called upon to address complaints and code breaches. However, a genuine commitment to broadcasting standards means that a firm will act to ensure a strong culture of compliance, involving staff training, and an approach that works to remedy code breaches by meaningful, sustained action. The record of Fox and Sky has been to contest rulings, deny charges and on occasions challenge their legitimacy. That behaviour gives cause for concern and warrants further scrutiny.

13.	Whether and if so, how, the Transaction might lead to the merged entity lacking a genuine commitment to broadcasting standards?

The merged entity would be subject to a wide range of competing pressures and incentives, including provide high-quality, valued and trusted services for consumers. However, as outlined above, there would be considerable economic pressures and incentives to serve advertisers in ways that would be incompatible with existing rules to ensure broadcaster editorial control and to prohibit promotional references to brands within programmes. For instance, Ofcom guidance states: ‘There must always be sufficient editorial justification for the inclusion of product placement in programmes. In particular, editorial content must not be created or distorted so that it becomes a vehicle for the purpose of featuring placed products, services or trade marks’. The question is how will such editorial independence be secured given the corporate structure, stated aims and business model of the merged entity.

14.	Are there any existing factors which might help to prevent or reduce potential negative effects of the Transaction on the merged entity’s commitment to broadcasting standards?

There needs to be an investigation of structural remedies, behavioural remedies and undertakings, and other suitable mechanisms to ensure compliance with current law and regulations.

Other comments and further contact

Do you have any other comments you would like to add?

Would you be willing for us to contact you to discuss your response?*	Yes

Thank you for taking the time to complete this form.

Please email it to: FoxSky.submissions@cma.gsi.gov.uk**.**

Or post it to:

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