

Ms. Anne Lambert, Inquiry Chair
Fox/Sky merger inquiry
Competition and Markets Authority
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24th October 2017

Dear Ms. Lambert,

We wrote to you on 3rd October to draw your attention to the evidence we submitted earlier this year to the DCMS and to Ofcom. Now we are writing to submit evidence to the CMA, covering several aspects of the issues statement you published earlier this month.

We attach three briefings:

1. 21st Century Fox and News Corporation: the Murdochs' common control;
2. Defiance, not compliance: the culture and behaviour of Murdoch-owned companies;
3. Fox News: broadcasting non-compliance.

They respond to the core concerns at the heart of the theories of harm proposed by the CMA - the reduction of the range of viewpoints, the increase in influence of the MFT and the lack of a genuine commitment to broadcasting standards.

Avaaz has supported an additional briefing on some of the plurality issues raised by the bid, responding to your theory of harm 1. This is being sent to you separately by the Media Reform Coalition.

We trust that this information is helpful to your extremely important inquiry, look forward to attending an oral evidence session at the CMA this Friday and remain available to provide further information at any time.

Yours sincerely,

Alex Wilks
Campaign Director

Fox News: broadcasting non-compliance

October 2017

AVAAZ

About AVAAZ

Avaaz has a simple democratic mission: organize citizens of all nations to close the gap between the world we have and the world most people everywhere want. Avaaz enables millions of people from all walks of life to take action on pressing global, regional and national issues, from corruption and poverty to conflict and climate change.

The Avaaz community campaigns in 16 languages, served by a core team on 6 continents and thousands of volunteers. We have 45 million members worldwide and 1.5 million in the United Kingdom.

Avaaz members across the UK are concerned about Rupert Murdoch's threat to our public debate and democracy, and played a major role in slowing and halting the Murdochs' bid for BSkyB in 2010-11. The Avaaz movement has been vocal and effective in calling for a full scrutiny of the bid for Sky in 2016-2017, including by submitting evidence, bringing witnesses from the USA, and encouraging inputs to consultations.

Contact: Alex Wilks or Alaphia Zoyab.

About this report

This report is intended to inform the Competition and Markets Authority in its scrutiny of the proposed takeover of Sky plc by 21st Century Fox.

It should be read in the context of other submissions made to the CMA at the same time:

1. 21st Century Fox and News Corporation: the Murdochs' common control
2. Defiance, not compliance: the culture and behaviour of Murdoch-owned companies.

And in the context of Avaaz's previous submissions and representations on the Fox/Sky takeover:

Submissions to the Secretary of State

- The Fox/Sky Takeover: Why A Phase Two Referral On Broadcasting Standards Is Needed To Protect The Public Interest, 14 July 2017
- Consolidating Control The Fox/Sky Merger And News Plurality In The UK, February 2017

Submissions to Ofcom

- Before The Murdoch Takeover: New Evidence Indicating The Need For A Further "Fit And Proper" Review, 8 March 2017
- Murdoch's Fox Effect: How full ownership of Sky risks undermining British broadcasting standards, 30 March 2017
- Report entitled "Rupert Murdoch and Donald Trump - The Conflicted Alliance", 8 May 2017;
- Report entitled "Racist content in the Murdoch Media" 11 May 2017;
- 21st Century Fox and News Corporation: the Murdochs' common control, 30 March 2017, amended on 13 April 2017
- Sexual harassment, denials and cover ups: evidence of a rotten corporate culture at Fox, 30 March 2017.

Executive Summary

Ofcom's scrutiny of Fox News during its Phase 1 assessment of the Sky takeover revealed that the channel had been on air in the UK for 16 years without any compliance policy or governance in place to ensure compliance with UK broadcast standards designed to protect the public interest. This meant that there was no agreed procedures, formal sign off, or line management systems in place during this time. Despite this, and a rising number of upheld complaints against Fox News on impartiality, accuracy and offensive content, Ofcom said its overall compliance record was good.

Fox News produced a new compliance policy during Ofcom's review, although its contents have not been made public. In response, Avaaz warned "the new policy arrangements and procedures ... cannot be relied upon to fix a persistent pattern of behaviour dating back two decades at Fox News, and longer at other Murdoch-controlled media outlets". Fox later withdrew Fox News from the UK just before the Secretary of State asked the CMA to assess whether Sky would retain "a genuine commitment to the standards for broadcasting".

In three earlier submissions to Ofcom and the Secretary of State, Avaaz has pointed to Fox News' long history of showing material in the UK that is partial, inaccurate and offensive, and argued that Ofcom's approach to assessing breaches by Fox was limited and incomplete, as it relied on complaints by a small, self-selecting audience.

This submission provides evidence as to the kind of compliance culture that 21st Century Fox (21C Fox) would be likely to introduce as the ultimate editorial controller of Sky, provides further evidence that Ofcom's analysis of Fox News breaches was incomplete, and suggests further lines of enquiry for the CMA's work. We also provide evidence as to the "Foxification" of a 21C Fox acquisition in Australia. We are concerned that, if Sky's legal and compliance teams are absorbed into 21C Fox management structures and business models, Sky would be subject to the culture revealed in this research.

In particular, we demonstrate:

1. 21C Fox's lack of accommodation to UK regulation and its assumption that the rules are not relevant to them, as US broadcasters, can be seen throughout their responses to complaints about Fox News in the UK. This reveals their underlying compliance understanding and processes that adhere to US business models that will be directly applied by 21C Fox to Sky if the merger is permitted.
2. How Fox News breached the UK Broadcasting Code by failing to distinguish between editorial and commercial content; how this is a revenue-generating model adopted from the US; and why the CMA needs to consider the potential implications of 21C Fox's commercialised news business model being applied to Sky after the takeover.
3. That 21C Fox's record of non compliance was greater than even the complaints against it suggest. There were a number of uninvestigated complaints in 2015 and 2016 that are of potential relevance and interest to the CMA enquiry. These were not considered at the time of Ofcom's Phase 1 report, nor were they covered by Ofcom's rationale as to the reasons for not investigating the additional complaints during 2017, when Fox News was under particular scrutiny. They should form part of the CMA's investigation into 21C Fox's approach to broadcast compliance.

Recommendations

Avaaz recommends that the CMA:

- seeks further information on Ofcom's internal discussions about whether and how to investigate and sanction Fox News, for example over Fox's decision to broadcast partial information while polling was taking place in the EU referendum;
- reviews Fox's justifications provided to Ofcom in response to inquiries about potential breaches;
- obtains the Fox News UK compliance policy provided to Ofcom this year, and notes of Ofcom's analysis of that policy;
- seeks detail on Fox's training of junior and mid level staff, and specifically about the compliance approval pathways, line management and promotion routes of mid level executives and production staff between Sky and Fox after the proposed acquisition;
- investigates the management lines of command in relation to commercial revenue streams and product placement decisions from editorial channels; and
- widens its investigation of the commitment to standards to explore how 21C Fox will behave in relation to the commercial goals it will set for Sky, and whether those commercial goals and business plans will include enhanced advertising and product placement revenue from its news channels.

Section 1: Ofcom investigations into bias, impartiality and accuracy

Background

Under UK law persons carrying on media enterprises, and for those with control of such enterprises, are required to have “a genuine commitment” to the attainment of broadcasting standards objectives as set out in section 319 of the Communications Act 2003.

These include:

- that news and current affairs included in television and radio services are presented with due impartiality
- that news included in television and radio services is reported with due accuracy;
- that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;
- that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
- that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.

Avaaz has made the case in previous submissions that Fox News’ broadcasting in the UK - and the broadcasting by channels owned by 21C Fox in other jurisdictions, including Sky Australia, and Fox US - repeatedly and regularly fail to attain these objectives.

While other countries’ media laws differ from the UK’s, the behaviour and standards demonstrated by 21C Fox-owned media in other jurisdictions is of relevance to the discussion in the UK, because they show the dominant approach taken by the parent company, and the attitude of its owners to news and current affairs reporting.

In Australia, a 2016 full takeover by 21C Fox saw the editorial policy at Sky Australia change markedly in a process that has been referred to as “Foxification”. Although, we respect the integrity of Sky’s current legal and compliance teams, we believe once they are absorbed into the structures and business models of Fox, significant pressure will be applied to change their approach.

The persistent and repeated breach of broadcasting standards by Fox News UK calls into question the commitment of the owners of 21C Fox to the UK’s broadcasting standards, and is a cause for concern in the face of the potential takeover of Sky. The examples that follow further illustrate the tendencies and attitudes evidenced in earlier submissions.

The broader implication is that Fox would like UK audience expectations and laws to change to allow their style of broadcasting, an attitude implied by James Murdoch’s comment that the UK’s

media laws are an 'impingement on freedom of speech and on the right of people to choose what kind of news to watch.'¹

Below Avaaz explores a few clear examples of Fox News content in the two years preceding Ofcom's Phase 1 Public Interest assessment for the Sky bid. They show that Ofcom investigations and analysis as summarised in its Phase 1 report do not give a full picture of Fox's behaviour and intentions, and suggests specific ways the CMA should go further during its Phase 2 investigation.

All examples given below are taken from Ofcom's *Broadcast and On Demand Bulletins*.

BOX 1 - Timeline of Fox News in the UK

DATE	EVENT
September 2001	Fox News launched in UK
April 2017	Ofcom finds "Fox had not put in place adequate procedures to ensure the compliance of Fox News' content with the Broadcasting Code"
May 2017	Fox News creates new compliance policy
June 2017	Ofcom concludes "the improvements made by Fox to its compliance arrangements and procedures are sufficient to meet the requirements of its licence."
July 2017	Avaaz requests Ofcom and Fox News to share the compliance policy as other major broadcasters do publicly on their websites. Neither Ofcom, nor Fox make it known.
August 2017	21 C Fox withdraws Fox News from the UK, citing 'commercial' reasons.

1.1. "Why would any Brit wanna offshore its sovereignty to Brussels?"

Rule 6.4 of the Broadcast Code, which refers to broadcasting during elections, states: "Discussion and analysis of election and referendum issues must finish when the poll opens." This is designed to prevent broadcasters unduly influencing voters just as they prepare to cast their ballot.

In the UK, newspapers traditionally declare their support for one party (or candidate) or another in the run up to or on the day of the election. Murdoch-owned newspapers tend to be extremely vocal in support of their candidate or position. However such declarations are strictly prohibited for broadcasters, which are required to remain neutral.

¹ James Murdoch, MacTaggart Lecture, 28 August 2009
<http://image.guardian.co.uk/sys-files/Media/documents/2009/08/28/JamesMurdochMacTaggartLecture.pdf>

Your World with Neil Cavuto is one of Fox News' flagship discussion programmes. On 23 June 2016, while UK voters went to the polls in the EU Referendum, the show included a targeted and partial discussion of issues likely to sway UK voters, such as the cost of European Union membership, sovereignty and immigration.²

Here are some excerpts from the discussion, which demonstrate clear bias and inaccuracy:

- *This is the end of a very messy, very long campaign and at stake is everything – it's the UK's future in Europe – the Europeans' future in the world.*
- *At the heart of this is whether the UK should cut all ties with the European Union and go at it alone or if they should remain within as part of the super state, the European super state which makes many decisions on the behalf of the UK.*
- *I mean we are governed by a bunch of bureaucrats that don't speak English in a funny place called The Hague, which makes no sense at all, and it tells Britain what to do, it takes British money, it doesn't send much of it back – it's a very unfair one-way street when you begin to dig into it and the biggest thing of course is that all of this is all a disguise over the immigration issue.*
- *I don't know why any Brit, maybe I'm just too much of a Yank, why would any Brit wanna offshore its sovereignty to Brussels? That makes no sense to me but that's what we have today.*

Fox News describes the show as providing financial analysis aimed to coincide with the closing of the US stock market. Here are some examples of how it reported on the complex financial arguments for and against Britain's membership of the EU:

- *British banks are warning of potential chaos – the Bank of England is said to be on high alert tonight. Is that really something to be worried about or is it just plain old fear mongering?*
- *Now those who want to stay say it is simply madness to be cut off from our largest trading partners in the UK and economically it would lead to a massive recession.*

Given the timing of the programme, and its extensive discussion and subjective analysis of events broadcast while voters were still visiting the polls, it is not surprising that Ofcom found Fox News to be in clear breach of Rule 6.4.

The responses from Fox News' management betray their disrespect for UK law, their prejudice against what they consider the parochial nature of UK politics, and their strong disinclination to consider UK viewers' needs and perspectives.

Fox News breached a simple rule that no analysis of any kind may be conducted by broadcasters during polling time, and yet in their response to the Ofcom ruling they neither defend nor apologise for their airing of the programme at that time. They give no undertaking as to future compliance

² The material in this section is all drawn from Ofcom's Broadcast and On Demand Bulletin Issue No. 311 (22 August 2016), p 8:
https://www.ofcom.org.uk/data/assets/pdf_file/0028/88750/Issue_311_of_Ofcoms_Broadcast_and_On_Demand_Bulletin.pdf.

measures to avoid such breaches, and they fail to explain why the show went out when it did, except that it coincided with the closure of the US markets.

What the management does defend is an anticipated accusation of bias and impartiality, arguing that the show was unlikely to have influenced UK voters as it was not aimed at them but was “prepared with a view towards an American audience and the expectations of what an American audience would find interesting”.

They also assert that the content of the programme was clearly within the scope of legitimate news reporting and commentary and that “it is important that individuals are permitted to explore current affairs and their future impacts.”

These comments by Fox News’ management suggest that they were aware of the possibility that they were in breach of another part of Ofcom’s Broadcasting Code, namely rule 5.5, which states that “due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved.”

Ofcom took no position in relation to Fox’s arguments as to the programme’s content, reaching a limited conclusion that the programme was in breach of rule 6.4, without considering any aspect of bias or partiality. It stated:

“We also had regard to the fact that the prohibition in Rule 6.4 on discussion and analysis of referendum issues while the polls are open is not qualified in any way – for example by the possibility of a broadcaster justifying the material by the context.”

We would like to draw to the CMA’s attention to this decision, and contrast it with other Ofcom findings that have taken a strict interpretation of the rules to ensure compliance during referenda. For example, London-based community radio channel Resonance FM, earned Ofcom’s censure for misguided banter about the Scottish referendum, despite the fact the radio station is aimed at the London’s artistic community with little or no reception in Scotland and no aspirations as to serious news or current affairs coverage.³

Ofcom’s failure to investigate the impartiality and bias aspects of the Your World broadcast leaves the CMA without a regulatory view as to whether Ofcom would have accepted Fox News’ arguments. We do have some guidance in the way they approached the dual questions in Hannity, just 6 months later (see section 1.3 of this document) but as there are so few investigations during Fox News’ tenure as a UK regulated broadcaster, the CMA should seek further information on what discussions Ofcom had at the time to guide the decision not to widen the investigation to include rule 5.5. Ofcom’s view on the show’s content, as documented in their finding in terms of partiality would be useful evidence.

³ Ofcom bulletin no 270 at https://www.ofcom.org.uk/data/assets/pdf_file/0012/51132/obb270.pdf

To illustrate the tone and level of bias, we quote the DJ who says “People have been asking me, ‘Henry, how do you think it’s going to be if Scotland goes independent?’ And my reply is, ‘I think it will be perfect’”.

1.2. “Abortion is murder”

Rule 5.5 did come into play on another occasion. As stated above, Rule 5.5 in Ofcom’s Broadcast Code requires that: “Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole.”

On 7th April 2016 at 15:23, Fox News broadcast a segment featuring “Judge” Andrew Napolitano speaking on the topic of abortion. Andrew Napolitano is a frequent Fox News commentator with the title “Senior judicial analyst”.

Following a complaint, Ofcom found that the show was not balanced, neither internally nor through other clearly signalled companion programming designed to provide alternative viewpoints. Ofcom succinctly summarised the item as concluding that “abortion is murder” and ruled that the programme was in breach of Rule 5.5.⁴

Fox News threw a variety of defences into its representations to Ofcom when asked to respond to the complaint of apparent bias. They said that:

- they did not consider that abortion was a matter of current public controversy in the UK;
- this piece was targeted at the debate in the US;
- Fox Extra was not a factual programme but was presented as one of a series of short editorial opinion pieces and that “many in the audience of ‘personal view’ programmes are “comfortable with adjusting their expectations of due impartiality”;
- the audience would have known that Andrew Napolitano is an extreme commentator in the US, and that the audiences of Fox News and Fox Extra “know and expect that Fox News is a home of strident presenter opinions and that furthermore the programme’s the style and presentation, its “crafting”, would suggest that the opinions put forward will be strong and potentially disagreeable.

Again, a disrespect for UK law is demonstrated and the onus seems to be placed on the audience to distinguish between fact and opinion, to understand the context in which the remarks are being made, and for whose benefit.

The arguments put forward by Fox demonstrate that this was more than a lapse in editorial judgement. It indicates a US-based approach which ignores the journalistic principles of sound research, factual balance, and compliance that underpin trusted news and factual output in the UK.

In their first line of defence, Fox News’ management dismissed both the UK’s legislative position on abortion and the potential effect of their broadcast on their own viewers. It is apparent from their defence that Fox News had not checked the relevant UK legislation prior to broadcast. They gave

⁴ The material in this section is all drawn from Ofcom Broadcast and on Demand Bulletin no 311 (22 August 2016), p 12 ff, at www.ofcom.org.uk/__data/assets/pdf_file/0028/88750/Issue_311_of_Ofcoms_Broadcast_and_On_Demand_Bulletin.pdf

no apparent thought to the impact of the item on those UK viewers who might have been touched by the issue in their lives. As Ofcom stated:

“They (Fox News) criticised abortion in general terms using highly emotive language which would also resonate with viewers in the United Kingdom, where in Ofcom’s view abortion continues to be a controversial subject”.

Fox News’ reliance on the argument that the programme was aimed at addressing US issues was both factually wrong, and also shows a basic misunderstanding of compliance. As Ofcom stated:

“We ...considered Judge Napolitano’s comments would be controversial and as relevant to UK (and other international) audiences as they would be to US-based viewers, as a result, the requirement to preserve due impartiality was not materially reduced by the fact that the programme was focused on non-UK matters.”

This demonstrates that Fox News (UK) take their thought leadership and editorial business model from their US counterpart, and have not adjusted their editorial stance for UK viewers. They will in fact adhere as closely as possible to this business model expecting viewers to, in their own words, “adjust their expectations of due impartiality”. In the UK, while every channel is allowed to find its own creative expression, rules on impartiality and truth are not adaptable according to perceived audience demand.

Fox News then asserted that the programme was not factual, but opinion. This defence indicates that Fox News management considers Judge Andrew’s output to be entertainment. But they are not licensed to run an entertainment channel. Indeed, UK broadcast culture delineates a difference between fact and fun and imposes licence conditions accordingly. Ofcom quite rightly dismiss the claim stating:

“The programme was still a broadcast (albeit a brief one) dealing with a current affairs topic transmitted as part of the editorial schedule on a rolling news channel and audiences would have viewed it in this light. Again we see Fox News’ adherence to the structural model of the US counterpart, irrespective of local compliance requirements”.

This basic mismatch between Fox’s info-tainment approach to news and the expectations in the UK of unbiased, facts-based provision of information, lies at the heart of the Fox News management approach, and is a succinct illustration of the danger of 21C Fox taking over Sky.

1.3 “The queen of corruption”

A further investigation also concerned Ofcom’s Broadcasting Code requirements on due impartiality in both sections 5 - the general rules on matters of political or industrial controversy and section 6 - on election coverage. The effect of Rule 6.1 specifically is to ensure broadcasters preserve due impartiality in their coverage of elections and referendums and applies to the coverage of elections or referendums both inside and outside the UK.

In August 2016, at the height of the US presidential campaigns, “Hannity” on Fox News broadcast a series of reports on the 2nd, 5th, and 6th of August which Ofcom found to be in breach of UK

rules on bias and impartiality.⁵ "Hannity" is a live current affairs programme presented by Sean Hannity which discusses and analyses political news and stories. The broadcasts addressed the policy positions of, and personal integrity claims and counterclaims made by, the Trump and Clinton campaign camps.

Given the public commitment of its main presenter to both Donald Trump and right wing politics in general, it is unsurprising that he took a strong position for Donald Trump and against Hillary Clinton. What the programme did not do is provide commentators with strong counterbalancing views or give due air time to Clinton's policy positions. The Ofcom finding here is extensive, and quotes numerous occasions on which the Clinton's campaign or Hillary Clinton herself are subject to trenchant criticism. For example Hannity's broadcast advice to Trump damns Clinton and praises Trump:

SH: "...The only two people that he (Trump) really should mention with 95 days left are Obama's disastrous economic and foreign policy and Hilary's horrible record. And the other thing I think he should do is, you know, focus on the things that he said to me in interview after interview – I've put up on the screen – you know, the differences between these two campaigns: he's going to appoint originals to the Supreme Court, those that have fidelity to the Constitution, believe in separation of powers, co-equal branches of government; he's going to talk about protecting the homeland and securing the border for both of the economy and our safety; implementing a safe refugee programme; fixing America's broken economy; balancing budgets; creating jobs; energy independence; education and the states; his negotiating better trade deals....

...Put America first. That's his message"

By contrast, here is his view on Hillary Clinton's policy position:

SH: "...last week, about the DNC. I watched Hillary's speech. I know you had millions more watching when you compare Thursday to Thursday, but I kind of viewed it as a check-list, sort of clichés and platitudes and slogans, not a lot of specifics, you know."

As to their personal characteristics, he describes Clinton as dishonest and repeats and encourages rumours of corruption without evidence or any opportunity to respond, for example quoting Clint Eastwood:

SH: "... [Clint Eastwood] also said the following: 'I'd have to go for Trump, you know, because, you know, she's [i.e. Hillary Clinton] declared that she's gonna to follow in Obama's footsteps. There's just been too much funny business on both sides of aisle. She's made a lot of dough being a politician"

Interviewing Donald Trump he invites him to casually slander Hillary Clinton, without challenge:

⁵ The material in this section is all drawn from Ofcom's Broadcast and On Demand Bulletin Issue No. 317 (21 November 2016), p 23, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0023/94271/Issue-317.pdf

SH: "She [i.e. Hillary Clinton] lies a lot".

DT: "Yeah".

SH: "What's your reaction to that?"

DT: "Well, she lied about a lot of things. She's now lying about her job and she's lying that she's going to be the agent of change. She's not going to change, she's been there for 30 years..."

We have explained the purpose of due impartiality above. Although the impartiality due to a non-national matter may be less than for a UK referendum or election, broadcasters are expected to apply impartiality rules. Ofcom asked Fox for a response on this basis.

The licensee's response was, in essence, that it had provided a balanced form of presentation as they gave Clinton's position before knocking it down, explaining: "countering or challenging criticisms is but one way to achieve an appropriate range of views, however it is not the only way". Fox News relied strongly on the exemption of current affairs commentary shows from the news requirement of due accuracy arguing that "Given that the programmes are for commentary, when they mention the US presidential election or related topics they were done so to offer analysis and opinions" in a matter that complied with s 5.11.

Fox News also argued that they had offered the Clinton campaign sufficient right to reply, stating that "throughout the US Presidential campaign season, Fox News have made numerous and frequent invitations to Hillary Clinton for her (or any of her campaign staff) to appear on Hannity". In her absence Fox News felt it had balanced the program by using clips from other sources or prior interviews as a foundation for discussing her. Fox News felt its guests were not unduly partial, they conceded that "each person may have spoken to varying degrees on aspects of Mr Trump's campaign strategy ... but such statements even if positive or laudatory do not mean that a speaker supports Trump's campaign".

Ofcom concluded that the overwhelming balance of the programmes was against the Clinton campaign. They noted that she was variously described as "bogey woman"; "lying about lying"; "the queen of corruption"; "a monster"; "a weak person"; "not strong enough to be President"; "Hillary 'rotten' Clinton"; "reckless and crooked"; "putting her personal interests before our national security interest"; not being able to "win on issues based on honesty, integrity and truthfulness"; not being "honest or trustworthy"; and putting forward a "stale agenda".

They also dismissed the argument proposed by Fox News that including some clips of Hillary Clinton was sufficient to establish balance, noting that "In our view the few video clips of Hillary Clinton featured in the programmes were used only in a manner to criticise her and her candidacy."

Ofcom summarises the series of programmes overall as offering a high degree of unanimity in the viewpoints expressed with overwhelming support given to the candidacy of Donald Trump. This meant there was an overwhelmingly "one-sided view" on a matter of major political controversy.

Stepping back, and looking at the editorial management this finding exposes, we again see that Fox News exhibited a misunderstanding of the impartiality which should be the lifeblood of any news broadcaster committed to attaining standards of compliance. Fox News undertook special

pleading for its US-centred approach, offering no concessions as to any potential fault on the part of the broadcaster, nor proposals to avoid future breaches.

No sanctions were suggested or imposed by Ofcom. If such bias had been shown in relation to any UK election, one would expect Ofcom to have censured the programme and levied a fine.

Conclusion

We believe all of the cases outlined above are significant in predicting the likely path for the future of Sky news.

Fox withdrew Fox News from the UK in August 2017, just three months after it had introduced a policy claiming to make it compliant with the UK broadcasting code, and just two weeks before the Secretary of State referred the bid to the CMA. In a brief statement, 21C Fox claimed this withdrawal was for commercial reasons. However, company sources and other commentators said it was to avoid discussion of Fox News programming in the UK, an implicit admission that the compliance policy had failed to bring the channel into line with UK standards.⁶

While other countries' media laws differ from the UK's, the behaviour and standards demonstrated by 21C Fox-owned media in other jurisdictions is relevant to the discussion in the UK, because they show the dominant approach taken by the parent company, and the attitude of its owners to news and current affairs reporting.

This approach has been shown in the last year in Australia, as a full takeover by 21C Fox in December 2016 saw the editorial policy at Sky Australia change markedly. The prime time evening schedule has shifted from news programming as we would recognise it in the UK to panels of commentators, similar to much of Fox News' programming. Starting at 7pm Monday to Thursday, it now airs five hours of mostly politically biased talk. The line up starts with News Corp columnist Andrew Bolt and ends with another News Corp columnist Chris Kenny.

In May, one of Murdoch's former media writers, Mark Day, surveyed Sky News' line-up of opinionated presenters, and wondered whether there had been a "brand reset" since News Corp acquired it. "Will it be 'Foxified' – that is, turned into a Down Under version of America's most watched and controversial cable news channel, Fox News?" he asked. before saying that appeared "broadly" to be the case.⁷

Rupert Murdoch has said explicitly that he would like Sky in the UK to be more like Fox US.⁸ A House of Lords report states that Murdoch believed Sky News would be more popular if it were more like the Fox News Channel as it would then be a "proper alternative to the BBC." He claimed

⁶ 21C Fox Pulls U.K. Fox News Feed From Sky, Variety, 29th August 2017:

<http://variety.com/2017/tv/news/21st-century-fox-pulls-fox-news-feed-sky-1202541510/>,

Ed Miliband, 'Britain doesn't need a Fox News. The regulators must block the Murdochs' bid', The Guardian, September 1, 2017 <https://www.theguardian.com/commentisfree/2017/sep/01/britain-fox-news-murdochs-uk-media>. Both accessed on 24th October 2017.

⁷ Mike Secombe, 'Murdoch's failure to launch Fox here', The Saturday Paper, October 7, 2017

<https://www.thesaturdaypaper.com.au/news/politics/2017/10/07/murdochs-failure-launch-fox-here/15072948005316>

⁸ Owen Gibson, 'Murdoch wants Sky News to be more like rightwing Fox' (The Guardian, 24 November, 2007)

<<https://www.theguardian.com/media/2007/nov/24/bskyb.television>>accessed on 12 July 2017.

one of the reasons that it was not yet a proper alternative was because no one knew any better and that Sky could become more like Fox even without a change to the impartiality rules in the UK. He stated Sky had not yet made the presentational progress that Fox had made and that the only reason that Sky News was not more like Fox News yet was because “nobody at Sky listens to me.”⁹

We believe that no evidence has been supplied to date to indicate that this model of Foxification will not be applied to Sky if Sky is absorbed into the management structures and business models of 21C Fox.

Despite separation of management in channels acquired in Australia, the US station’s editorial approach rapidly affected Sky Australia’s news output and culture, with the choice of presenter and programme structure leading to a subjective, narrative-driven, and entertainment-focused news output. Small programme inserts, like the one that featured Judge Napolitano, are the kind of infotainment fodder junior producers are typically tasked with at Fox. They are the training ground for future programme editors and presenters. It seems inevitable that this culture will come to affect Sky’s programming too.

To address this, the CMA should request detail as to the training of junior and mid-level staff, including the compliance approval pathways, line management and promotion routes of mid-level executives and production staff between Sky and Fox under the proposed joined companies.

⁹ Murdoch: Sky News could be more popular if it emulated Fox News
<http://www.adweek.com/tvnewser/murdoch-sky-news-could-be-more-popular-if-it-emulated-fox-news/18096>
Accessed 20 October 2017

Section 2: Ofcom investigations into commercial influence

The Broadcasting Code has a number of explicit rules designed to protect news and current affairs provision from commercial influence. These range from the strict prohibition of disguised paid for content within programmes (surreptitious advertising) to more subtle distinctions preventing undue prominence of a particular product within a program - even if no money has exchanged hands.

There are also clear rules on how to separate advertising from editorial content, with clear “break bumpers” required between the end of a part of a show and the advert break.

We have argued in previous submissions that Fox News has breached these rules in the UK in the past, and in this section we provide further evidence of this tendency, and the concomitant risk to Sky News’ standards.

In the US, where 21C Fox is headquartered, and where the culture of the company has been established, product placement and promotion in news and current affairs programmes is common. Indeed many flagship US drama and current affairs productions are funded by product placement and advertiser funding¹⁰ and they are an important part of 21C Fox’s business model.¹¹ The commercialisation of broadcast and cable programming has been seen by US Congress and the FCC as largely the business of the networks in the US. Thus this issue does not fall under great scrutiny in the States - and the few recommendations which do exist are generally restricted to soft recommendations as to how a distinction between advertising and editorial content is achieved, rather than scrutiny of the content itself.

The track record established by Fox News in its 16 years of broadcasting in the UK, suggests that the strictures placed on advertising in this country are ones the company is reluctant to comply with and is familiar with in the US. This raises concerns about how a Sky News that was 100%-owned and controlled by 21C Fox would fare under these regulations.

¹⁰ Mallory Russell, *Here Are Some Of TV's Most Successful Product Placements* (Business Insider, March 14, 2012) <http://www.businessinsider.com/here-are-some-of-tvs-best-product-placements-2012-3>

¹¹ Brian Steinberg, *Pepsi Taps Fox's 'Empire' To Build A TV Commercial For The Future* (Variety, November 19, 2015) <http://variety.com/2015/tv/news/pepsi-empire-fox-tv-advertising-1201644340/>

2.1 “Shop till you drop”¹²

Section 9.2 of Ofcom’s Broadcasting Code states clearly that, “Broadcasters must ensure that editorial content is distinct from advertising.” Indeed, the distinction between paid for content and editorial content, is a mainstay of UK broadcast compliance. The rules, which derive both from the UK’s broadcast law and European Union Directives, are designed to both strictly limit the amount of advertising per clock hour and keep it distinct from programmes - so no extra advertising content can be inserted.

On June 28, Fox News programme “Fox and Friends” contained an editorial segment - called It’s Your Money, which breached this rules and the guidelines around it.

Ofcom’s report describes a sequence of discussions between the programme’s two presenters and a representative of the website Mega Morning Deals. 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.

Here’s a typical conversation about a golf product, which was accompanied by helpful on-screen graphic directing views to the website where purchases could be made:

Representative: *“Ok, the Golf Buddy; this is for the golf fanatic. This is basically a wristband, you get on the course and it has this special green view technology. It tells you exactly the distance from any angle or approach to the greens, so you know which to choose; 38,000 courses programmed into this baby. It’s got GPS; it’s typically pretty pricey \$300 – but today: \$119. So –”*

First Presenter: *“Wow”*

Second Presenter: *“That’s awesome”.*

Representative: *“just click on the Mega Morning Deals icon on the Fox & Friends website”*

First Presenter: *“Yeah, Foxandfriends.com”*

Representative: *“Shop till you drop”*

And another exchange, promoting a new exercise tool:

“This internationally acclaimed personal trainer came up with the system – it comes with a DVD, it’s great for sculpting and toning and it’s the new thing”,

“[pointing at portable charging sticks] they’ve got these really cool designs, there’s one for fourth of July, there’s a rainbow one, love that they’re fashionable”,

[in reaction to an on-screen banner, reading]: “Stellar Savings: Amazing deals on the season’s best products. Wow, what a saving; today it doesn’t cost \$44, it costs £18”;

¹² The material in this section is all drawn from Ofcom Bulletin 319 at https://www.ofcom.org.uk/_data/assets/pdf_file/0018/96012/Issue-319-of-Ofcoms-Broadcast-and-On-Demand-Bulletin.-to-be-published-on-19-December-2016.pdf

Fox and Friends was found in breach rule 9.2 on the grounds that the It's Your Money section contained advertising that was not sufficiently distinct from the editorial content, raising the risk that viewers could be confused as to whether they were watching a recommendation that was genuine and impartial, or one made because the channel had been paid to make it.

This also raises issues of trust. Under the guise of helping the viewer to find discounts, Fox's presenters were actually selling products. This is a form of partial reporting motivated by commercial interests that directly calls into question Fox's commitment to broadcast standards. Yet again, it places too much of an onus on viewers to distinguish between types of content.

In its representations to Ofcom, Fox News made much of the "important principle of the expression rights should be restricted only when necessary and proportionate to do so". They argued it was programme content, not advertising, designed to let viewers know about the discounts available to them, rather than the products to which the discount applied.

They also said that 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 rightly rejected Fox's arguments and identified the material as serving the function of advertising i.e. the promotion of the supply of products in return for payment by viewers. They also pointed out that the regulations explicitly require promotional material to be separated from editorial content by teasers and that the lack of them compounds the risk that viewers will be confused as to what they are watching.

In its final comments, Ofcom attempted to give Fox a basic lesson in the difference between advertising and programming, and make clear that the absence of bumpers does not negate the need to ensure that editorial content does not function as advertising.

At this point, Fox News had been broadcasting in the UK for 15 years. The need to distinguish between commercial and editorial content, particularly in current affairs and news programmes, should have been an established principle. The fact that the UK regulator had to go out of its way to explain the basic rules to the It's Your Money production team suggests a wilful desire by the producers to misunderstand or test the rules.

Indeed, this is upheld by the fact that this was not the first time Fox had been in trouble for blurring commercial and editorial boundaries. In 2013, in a Fox News Extra item, a veterinarian praised a particular brand of pet food for its qualities in supporting senior pets. Ofcom found the segment to have given undue prominence to the pet food, even though Fox News claimed they had received no money for the item's inclusion.¹³

All of this provides grounds for concern as to the business model Sky's new owners would expect it to follow under the combined corporate entity. At 21C Fox, interpolation of commercial content into editorial is key to revenue models. If Sky's business advisors and legal compliance officers,

¹³ Ofcom Broadcast Bulletin (April 8, 2013) Page 61
https://www.ofcom.org.uk/data/assets/pdf_file/0030/46992/obb227.pdf

became part of an institution whose goal is to maximize the revenue of all of its television operations, we fear they may be pressured to pursue more forms of commercial revenue.

Indeed, in the Annual Report to shareholders of 2017, Rupert Murdoch's son Lachlan, a director of 21C Fox, makes clear that they want to streamline and increase Sky's revenue generating capabilities: "our proposed acquisition of the shares of Sky that we do not own will deliver more balanced revenue streams and geographic spread and is expected to be significantly accretive to our earnings and free cash flow."¹⁴

In our view, the CMA should therefore widen its investigation of the commitment to standards beyond those concerning due accuracy, impartiality and bias, and investigate whether 21C Fox is likely to set commercial goals for Sky that include enhanced advertising and product placement revenue from its news channels.

This aspect was not covered by Ofcom's report, so the CMA will need to review product placement and advertiser revenue policies both in relation to Fox News, and to the business plan for Sky should it be acquired by Fox.

Any corporate governance and undertakings imposed on Fox in relation to editorial interference should be mirrored by undertakings to avoid commercial influence over programme content. The CMA should also investigate how decisions about commercial revenue streams and product placement on editorial channels would get made.

¹⁴ "A message from the chairmen" 21 CF Annual Report 2017 at https://www.21CFox.com/sites/default/files/uploaded/investors/annual-reports/21C_Fox_full_final_ar_2017.pdf

Section 3: Complaints not investigated

The previous two sections detail the results of Ofcom's completed investigations into complaints against Fox News. Noting Ofcom's decision not to look into the question of impartiality in Fox News' coverage of the EU referendum, Avaaz decided to look back at other complaints that were recorded but not investigated.

One of the factors that Ofcom uses to decide whether to pursue an investigation is the level of harm caused by the potential breach. We understand that the Fox News audience was so small (around 2000 simultaneous viewers at any one time, of around 70,000 regular viewers) that the potential harm caused by breaches was relatively minimal. However, our contention is that these breaches acquire more relevance in the light of the CMA enquiry, and the potential takeover of Sky, which reached 14.5 million viewers in the first quarter of 2017.¹⁵

It is on these grounds that we sought to identify potentially relevant cases that should be further examined in the context of the proposed acquisition. We used Ofcom's records at the back of each bulletin from 2015 and 2016, on the grounds that as Ofcom is most likely to still hold records and original complaints material for these more recent years.

3.1. Background to the complaints process

Ofcom's "Procedures for investigating breaches of content standards for television and radio" explain that the regulator is free to investigate, on the basis of its own monitoring and any other evidence presented before it, any issue which is a potential breach of the Broadcasting Code.¹⁶ It does not only have to investigate issues that are complained about, nor does it have to investigate all issues about which it receives complaints.

The official procedures state that Ofcom will first consider whether, on its face, a complaint raises potentially substantive issues under the Broadcasting Code (or other Code to which these Procedures apply). It will also consider the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm, harm to minors and/or financial harm.

Ofcom may ask the broadcaster for a copy of the relevant programme at this stage, which must be provided within five working days. They may also request any other relevant background material or evidence, such as the audience data for the day, or any compliance arrangements that had been made to avoid problems in a less controlled broadcast environment such as a live broadcast. They will not normally request written representations from the broadcaster at this stage.

A group of Ofcom standards executives then review the content supplied and undertake an initial assessment. The triage group may decide there is no case to answer, or that there is a possible

¹⁵ Statista, Quarterly reach of the Sky News channel in the United Kingdom (UK) from 1st quarter 2012 to 2nd quarter 2017 <https://www.statista.com/statistics/290872/sky-news-viewers-reached-quarterly-united-kingdom>

¹⁶ Ofcom, Procedures for investigating breaches of content standards for television and radio https://www.ofcom.org.uk/_data/assets/pdf_file/0020/55109/breaches-content-standards.pdf

breach but that it does not pass the potentially substantive issues test. They may also refer the matter up to the Director of Standards. If the event that Ofcom decides not to investigate the matter further it publishes its decision in its Broadcast and On-demand Bulletin.

3.2 Pro-Trump fake news

In May 2017, just after Fox News issued its new UK compliance policy, Fox News broke a story that murdered Democratic National Committee staffer Seth Rich provided DNC emails to WikiLeaks ahead of the 2016 presidential election.

Fox News host Sean Hannity, one of Fox News' biggest stars, devoted several editions of his TV shows to pushing this demonstrably false claim.¹⁷ His commentary contrasted with the intelligence community's determination that the emails were hacked and distributed by Russian intelligence services,¹⁸ and relied on evidence from Rod Wheeler, a private investigator hired by Fox who rapidly challenged Fox's story and has since filed a court case arguing that Fox fabricated quotes in his name and pressured him to produce a false narrative. Lawyers acting for Wheeler further allege that the Fox story was produced in collusion with the White House, aiming to distract from the president's sacking of FBI chief Comey, who was investigating Trump/Russia links. Evidence presented in the case includes a text to Wheeler from senior Trump campaign donor, Ed Butowsky: "the president just read the article. He wants the article out immediately. It's now all up to you."

Rich's family joined Wheeler to demand retractions of Fox's reporting, and Fox News removed its online report after ten days, claiming that it was launching an internal investigation.¹⁹ However Hannity frequently referred back to this false story in subsequent weeks, and neither he nor the other journalists, editors, producers or others at Fox, have faced any consequences from their employer, as far as is publicly known.

Ofcom advised the Secretary of State that:

"We previously received a complaint about this programme's coverage of Seth Rich's murder. We did not consider that this raised issues that warranted investigation under the Code. Hannity is not a news programme so there was no due accuracy requirement. We also did not consider it to be materially misleading. The segment about Seth Rich was presented as a "murder mystery". Hannity did not state that this was the definitive account of what happened and made it clear that the official version of events, according to police,

¹⁷ David Weigel, 'The Seth Rich conspiracy shows how fake news still works,' (*The Washington Post*, 20 May 2017)

<https://www.washingtonpost.com/news/the-fix/wp/2017/05/20/the-seth-rich-conspiracy-shows-how-fake-news-still-works/?utm_term=.b5bcff89b31b> accessed 12 July 2017; Sean Hannity: 'I'm not backing off' the Seth Rich conspiracy,' (*Media Matters for America*, 19 May 2017); 'Sean Hannity Continues Smear Campaign Against Slain DNC Staffer,' (*Media Matters for America*, 18 May 2017) <<https://www.mediamatters.org/video/2017/05/18/sean-hannity-continues-smear-campaign-against-slain-dnc-staffer/216554>> accessed 13 July 2017.

¹⁸ Scott Shane, 'What Intelligence Agencies Concluded About the Russian Attack on the U.S. Election,' (*The New York Times*, 6 January 2017) www.nytimes.com/2017/01/06/us/politics/russian-hack-report.html?_r=0.

¹⁹ 'Statement on coverage of Seth Rich murder investigation,' (*Fox News*, 23 May 2017)

<http://www.foxnews.com/politics/2017/05/23/statement-on-coverage-seth-rich-murder-investigation.html>.

was that Seth Rich was killed during a robbery gone wrong. He set out information that might undermine the official account of what happened.”²⁰

We recommend that the CMA:

- examine the Wheeler complaint²¹
- obtain additional court documents from Wheeler’s attorney Douglas Wigdor
- obtain the Fox internal inquiry into the Seth Rich story and its retraction, and:
- obtain internal Ofcom documentation on its review of this story.

3.3 Detail of other complaints not investigated

The Broadcast and On-demand Bulletins from 2015 and 2016 detail numerous complaints about due accuracy and due impartiality recorded against Fox News, which were not investigated.

In 2015:

Bulletin No 272 records “various” complaints regarding due accuracy against Fox News but does not record how many and on which occasions.

- Bulletin No 275 records a complaint against Sean Hannity, for a programme on 10/01/2015 as being for “crime”, which we take to be incitement to crime.
- Bulletin 288 records a complaint against “The O’Reilly Factor” on due impartiality and bias.

In 2016, there were six other complaints recorded but not investigated:

- Ofcom Bulletin 301, lists a complaint concerning due accuracy in Fox News programming on 2nd March 2016.
- Bulletin 303, a complaint that the “The O’Reilly Factor” on Fox News, broadcast on 17 March 2016, was materially misleading.
- Bulletin 310, a complaint that “Outnumbered” on Fox News, 16th June 2016, failed to observe due accuracy.
- Bulletin 312, a complaint that the “Hannity” show on Fox News failed to achieve due impartiality.
- Bulletin 313, a complaint that “The O’Reilly Factor” on Fox News on the 11th of August 2016 failed to demonstrate due accuracy.

The nature and frequency of the complaints recorded suggests there could be additional material of use to the CMA in determining the question of Fox News’ commitment to UK broadcast standards, and how Ofcom approaches its duty to protect the public interest.

The litany of uninvestigated complaints should also cause the CMA to re-examine the assessment provided by Ofcom of Fox News compliance record, as none of these complaints were mentioned in its public interest test report:

Ofcom stated in its public interest report submitted to the Secretary of State that:

²⁰ Ofcom letter to Secretary of State, 25th August 2017.

²¹ Wheeler complaint, available at: https://regmedia.co.uk/2017/08/01/wheeler_complaint.pdf.

“We have not found Fox News to have breached the accuracy and impartiality provisions of the Broadcasting Code in respect of its news programming. We have, however, recorded breaches against Fox News in respect of non-news content under rules concerning materially misleading content on one occasion and the rules of due impartiality and elections on three occasions.³ We did not, however, consider any of those breaches sufficiently serious to warrant the imposition of a sanction. On this basis, we have recorded relatively few breaches of the accuracy and impartiality rules against Fox News and the report concludes that these few breaches do not indicate a lack of genuine commitment to the attainment of broadcasting standards”.²²

Given that each of the complaints not investigated in the name of administrative efficiency could have been a breach of compliance standards, was Ofcom safe to come to this conclusion? We note Ofcom took pains to explain to the Secretary of State its rationale in not taking up any of the 2017 complaints brought to it by parties interested in the takeover. The CMA should now ask Ofcom to provide its reasoning for not investigating these other complaints in the same way. We believe they are particularly illustrative of the kind of compliance we might expect when it is business as usual at 21C Fox.

We believe any assessment by the CMA must take these uninvestigated complaints into account and would suggest it call upon Ofcom to deliver any additional information and relevant material it still holds. We also think they are relevant to its consideration of the market impact that 21C Fox's acquisition of Sky may have on UK regulation. The CMA must satisfy itself that when the number of complaints about a small channel such as Fox News are magnified by the reach and audience numbers of Sky news, any commitment given to standards can be adequately monitored and regulated.

The most frequent reason cited by Ofcom for not looking further into the issues raised in the various programmes considered by the regulator is that the requirement for due accuracy only does not apply to current affairs discussion programmes.

Designating prime time programmes as discussion style programmes rather than news programmes is a pattern that 21C Fox have applied to both its domestic, and non US news channel holdings. Ofcom has accepted that due accuracy does not apply to these shows, even though some of the programmes complained of in the Annex seem to coast perilously close to the provision of news. They feature comment and discussion on issues or items of news which had happened that day - in the same way as we would see in mainstream news coverage. For example on Tucker Carlson Tonight - 22nd March, Katie Hopkins described British citizens as being “cowed”, “afraid” and “not united” over a terrorist attack that had happened only hours earlier. Ofcom accepted that many would believe this to be inaccurate, but said that even though the Tucker Carlson format covers and reports on news events, it does so in a panel presentation format and so is not news and so not subject to the remit of that section of the Code.

²² See p 90 Ofcom's report to the Secretary of State Public interest test for the proposed acquisition of Sky plc by 21C Fox, Inc published 20 June 2017
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/623244/Public_Interest_Test_report_-_on_confidential_-_For_publication.pdf .

We believe this is something the CMA, whose remit is to examine market impact, will need to address in its enquiry, looking beyond compliance with the technical letter of the Broadcast Code to the potential impact of the acquisition on the market for news provision. It would be of the greatest concern to the level playing field expected in the UK news provision market if Sky moved to a Fox style rolling current affairs discussion schedule, exempt from the regulations other news channels observe.

We think that the CMA must consider anew those complaints about due accuracy which have been raised and not investigated fully by Ofcom on the basis that they are not news, in order to understand the kind of approach and impact Fox's ownership of one of the largest trusted UK news providers could have. We believe it indicates the direction of travel that Sky News editors will be asked to take.

Section 4: Fox News' compliance arrangements

It emerged during Ofcom's preparation of its report to the Secretary of State that Fox News has never introduced adequate UK compliance arrangements for its news content. This astonishing admission that a basic licence condition had not been fulfilled, should be assessed in the context of serious breaches from failed compliance processes dating back to at least 2012. At that time, inadequate compliance provisions allowed the live suicide of a man to be broadcast at UK tea time - to the shock and consternation of presenter and viewers alike.²³

In its finding against Fox News in 2012, Ofcom reminds Fox of the importance of such procedures, concluding in its final lines:

“Licensees are reminded that when broadcasting live, if there is a reasonably foreseeable chance that something might be broadcast that would raise issues under the Code, they should be able to demonstrate that they have taken all reasonable measures both before and during the broadcast to ensure compliance with the Code.”²⁴

Its therefore all the more surprising that Ofcom had to stress the point again to Fox some five years later to make it produce compliance procedures, stating in its 2017 Public Interest Test report:

“We remain concerned that Fox did not initially have adequate compliance procedures in place for the broadcast of Fox News in the United Kingdom and only took action to improve its approach to compliance after we expressed our concerns.”²⁵

Ofcom points out in that same report that a lack of compliance procedures does not mean that a channel will necessarily breach broadcasting standards, but may foretell a risk of future breaches. We believe this is a telling comment on the culture that could hold sway after any acquisition. It is highly indicative of the lack of commitment to compliance by the main news channel owned by an organisation now seeking to take on a major UK news provider.

Ofcom has said that Fox did eventually supply details of the new compliance arrangements, together with a set of compliance procedures. It considered that:

“the improvements made by Fox to the Fox News compliance arrangements and procedures are sufficient to meet the requirements of its licence.”²⁶

Ofcom did not give any detail of the arrangements in its report and Fox, unlike other major news providers in the UK such as the BBC, ITN, Channel 4 and 5, never made its compliance processes public. This lack of transparency is a concern, if it is a model for future compliance arrangements in

²³ Fox News - Fox News 28 September 2012 see Bulletin 222 at https://www.ofcom.org.uk/_data/assets/pdf_file/0029/47963/obb216.pdf

²⁴ Fox News - Fox News 28 September 2012 see Bulletin 222 at https://www.ofcom.org.uk/_data/assets/pdf_file/0029/47963/obb216.pdf

²⁵ Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc, Ofcom, June 2017, p.98, available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf

²⁶ Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc, Ofcom, June 2017, p.90, available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf

the new combined entity. The compliance procedures of a broadcast channel, and their public, accountable, backing by senior management, should underpin its staff's understanding of the ethos of the channel.

The CMA should be given sight of these processes in order to understand 21C Fox's approach to news compliance. The CMA should compare the processes with published procedures of other UK news providers, looking specifically at their preservation of editorial integrity, and the value they place on truth, accuracy, and adherence to broadcast compliance.

It is key to understand the likely paths of compliance approval expected under the new organisation. There is little value, for example, in a Head of News role being protected if he/she has to defer on all compliance risks to the new organisation's legal counsel in corporate headquarters in the US.

Conclusion

We have raised a series of concerns and suggested additional lines of enquiry we believe the CMA must undertake to be properly placed to consider whether the commitment to broadcast and compliance values can be preserved in the light of Fox News' record.

We have drawn some conclusions from reviewing several Ofcom investigations. We believe the CMA should seek evidence from both regulators and those within the compliance pathway within 21C Fox that were responsible for Fox News whether they would still defend the choices that were made by production teams operating without compliance procedures.

The CMA needs to gain a true picture of the kind of news that we can expect from a 21C Fox-owned news supplier, and determine whether this will be in the partial reporting style permitted in the US, but completely at odds with UK broadcast news culture.

The CMA must seek details about the training of junior and mid level staff, and the compliance approval pathways that their line management will provide. The staff exchange and promotion routes of mid-level executives and production staff between Sky and Fox under the proposed joined companies must also be examined, as they carry one organisation's culture through to the other.

The CMA should widen its investigation of the commitment to standards beyond those concerning due accuracy, impartiality and bias and explore how 21C Fox will behave in relation to the commercial goals it will set for Sky, and whether they will include enhanced advertising and product placement revenue from its news channels. We advise that the CMA investigate the management lines of command in relation to commercial revenue streams and product placement decisions from editorial channels.

We have raised questions over the volume of uninvestigated complaints. We believe the CMA should request Ofcom to provide all the evidence about complaints received, but never investigated, over the past 5 years. Even if Fox News was considered to be a minority interest channel aimed at US viewers in Ofcom's consideration of specific complaints at the time, it is not so now, as it represent the compliance model understood and accepted by the organisation seeking to acquire a large and trusted UK news brand. We also think they are relevant to its consideration of the market impact that 21C Fox's acquisition of Sky may have on UK regulation. The CMA must satisfy itself that, if the compliance culture illustrated above does begin to influence a broadcaster with the reach and audience numbers of Sky news, any commitment given to standards can be adequately monitored and regulated.

We have described the insight that the Fox News procedures may have provided to Ofcom about the reality of compliance in the new organisation. We believe the CMA should carefully review the evidence in the unpublished compliance procedures provided to Ofcom by Fox, and compare them to the processes of other major news providers. Only once the full compliance picture is established can the CMA properly consider its recommendations to the Secretary of State.

The CMA will note we have focussed our inquiry on the past record of Fox and not Sky. This is because we join Ofcom in judging Sky news to be a good, well-run and compliant broadcaster and it is precisely the diminution in this trust, accountability and reliability of Sky News that we fear will result from the proposed merger with 21C Fox. Compliance in the final analysis is more than a set of procedures. It is an ethos that rests on the training, experience and commitment of every link in the production chain: a commitment to the idea that news output must be trusted, and that it is trusted if it is impartial, fair and accurate.

Fox's statement in its response to Ofcom in the programme Fox Extra that they and their intended audience should be "comfortable with adjusting their expectations of due impartiality", coupled with the knowledge that at the time they were defending a news channel that had no adequate compliance processes in place, must create concern over the impact that the proposed acquisition could have on the trusted brand of Sky News.

21st Century Fox and News Corporation: the Murdochs' common control

October 2017

AVAAZ

About AVAAZ

Avaaz has a simple democratic mission: organize citizens of all nations to close the gap between the world we have and the world most people everywhere want. Avaaz enables millions of people from all walks of life to take action on pressing global, regional and national issues, from corruption and poverty to conflict and climate change.

The Avaaz community campaigns in 16 languages, served by a core team on 6 continents and thousands of volunteers. We have 45 million members worldwide and 1.5 million in the United Kingdom.

Avaaz members across the UK are concerned about Rupert Murdoch's threat to our public debate and democracy, and played a major role in slowing and halting the Murdochs' bid for BSkyB in 2010-11. And the Avaaz movement has been vocal and effective in calling for a full scrutiny of the bid for Sky in 2016-2017, including by submitting evidence, bringing witnesses from the USA, and encouraging inputs to consultations.

Contact: Alex Wilks, Alaphia Zoyab or Nick Flynn.

About this briefing

This briefing is intended to inform the Competition and Markets Authority in its scrutiny of the proposed takeover of Sky plc by 21st Century Fox.

It should be read in the context of other submissions made to the CMA at the same time:

- 1) Fox News: broadcasting non-compliance
- 2) Defiance, not compliance: the culture and behaviour of Murdoch-owned companies.

And in the context of Avaaz's previous submissions and representations on the Fox/Sky takeover:

Submissions to the Secretary of State

- The Fox/Sky Takeover: Why A Phase Two Referral On Broadcasting Standards Is Needed To Protect The Public Interest, 14 July 2017
- Consolidating Control The Fox/Sky Merger And News Plurality In The UK, February 2017

Submissions to Ofcom

- Before The Murdoch Takeover: New Evidence Indicating The Need For A Further "Fit And Proper" Review, 8 March 2017
- Murdoch's Fox Effect: How full ownership of Sky risks undermining British broadcasting standards, 30 March 2017
- Report entitled "Rupert Murdoch and Donald Trump - The Conflicted Alliance", 8 May 2017;
- Report entitled "Racist content in the Murdoch Media" 11 May 2017;
- 21st Century Fox and News Corporation: the Murdochs' common control, 30 March 2017, amended on 13 April 2017
- Sexual harassment, denials and cover ups: evidence of a rotten corporate culture at Fox, 30 March 2017.

Executive summary

In this briefing, we argue that 21st Century Fox's ("21C Fox") bid for Sky plc ("Sky") raises serious plurality and broadcasting standards concerns which justify a recommendation by the CMA to the Secretary of State that it should be rejected.

The Murdoch Family Trust's shareholdings in 21C Fox and News Corporation ("News Corp") gives Rupert Murdoch common control of both companies. 21C Fox's recent submission to the CMA, that OFCOM misunderstood the legislative framework for assessing control and plurality, is misleading and wrong.

A failure to recognise this and a failure to recommend rejection of the bid risks compromising media plurality in the U.K. and would give Rupert Murdoch increased influence over British public life despite compelling evidence of his utter disregard for broadcasting standards and basic journalistic norms.

21C Fox's previous submissions on control emphasise the splitting in two of News Corporation

When writing to the Secretary of State in December 2016 and March 2017, 21C Fox placed great emphasis on the splitting of News Corporation in 2012 into two separate companies, News Corporation and 21C Fox, each with supposedly majority-independent shareholders and majority-independent boards.

It argued that the relevance of this split could not be dismissed merely because of any degree of cross-ownership between the two companies, by which it meant the Murdoch Family Trust's holdings of voting shares in each company. 21C Fox stressed that to take that approach would be contrary to the appropriate legal test, relying on the Court of Appeal's own emphasis in the Sky/ITV case on the need to take account of the "*actual extent of control*".¹

This issue is critical to the consideration of the questions of 'sufficiency of plurality' and 'genuine commitment' to broadcasting standards which section 58 of the Enterprise Act 2002 places at the heart of the public interest review of media mergers.

OFCOM's conclusion in June that "*internal plurality cannot allay our concerns about external plurality in the wider news market*" is particularly relevant here.² In a recent briefing to the CMA by its lawyers, Allen & Overy, 21C Fox undermines that conclusion by returning to its earlier argument, described above. It develops it into an attack on OFCOM's whole approach, in

¹ 21C Fox's letter to the Secretary of State, dated 8 March, 2017 and *British Sky Broadcasting Group plc v Competition Commission & Anor.* [2010] EWCA Civ 2

² Page 13 of OFCOM's public interest report. See also, para 80 of the Sky/ITV judgment defines internal and external plurality - "If the control was less than complete, and if in practice it would not enable the controlling enterprise to dominate the policy and the output of the controlled enterprise, that was something that should be taken into account. [The CC] referred to this situation as "internal plurality", as compared with the effect of counting the number of controlling enterprises, and ignoring the limits on the control exercised by any of them, which it referred to as external plurality.."

particular of treating 21C Fox, Sky and News Corporation as a single entity, and accuses OFCOM of misunderstanding the Court of Appeal's interpretation of the legislative framework.³

We note too that the CMA, in its recent issues statement, says that it will not start by assuming the existence of such a single entity, albeit by reference to a slightly different list (the Murdoch Family Trust, Fox and News Corp).

Quantitative and qualitative distinctions lead 21C Fox into 'deep water'

The Court of Appeal judgment in Sky/ITV undoubtedly emphasises the need to take account of the actual extent of control, but 21C Fox's and Allen & Overy's emphasis on this overlooks important distinctions the court made concerning how the merger regime comes into play and how plurality should be treated in a situation where, as is the case here, there is already an existing level of control between two enterprises which is going to increase as a result of the merger. The Court acknowledged how difficult these distinctions can be, including arguments put to it concerning the "*deep water [that] the interaction between quantitative and qualitative assessment*" can lead the unwary into.⁴

Where 21C Fox argues that OFCOM built its analysis on an irrelevant 'legal fiction'⁵ (by treating 21C Fox, Sky and News Corp as a single entity and finding that the number of persons in control of media enterprises is reduced⁶), we argue that this part of OFCOM's analysis is the quantitative analysis that is explicitly acknowledged by the Court of Appeal to be required under the Enterprise Act in the circumstances of this Transaction.

Where 21C Fox argues that OFCOM does not consider the actual extent of control, we argue that this is precisely what OFCOM does look at for the purpose of the separate qualitative analysis which it acknowledges is required for assessing 'internal plurality'.

In seeking to undermine OFCOM's whole approach by blurring the distinctions between these necessary quantitative and qualitative analyses, it is Allen & Overy and 21C Fox who misinterpret the legislative framework. The CMA's clarification that it will not assume the existence of a single entity is surely correct for the purposes of assessing internal plurality, but we would respectfully point out that the requirement to construe plurality considerations in the manner prescribed by sub-section 58A(4) of the Enterprise Act is explicitly reaffirmed by the Court of Appeal. It is this provision on which OFCOM relies to find a reduction in the number of persons in control.

³ See Allen & Overy's "Initial submission to the CMA regarding media plurality" dated 27 September, 2017. See also footnote 2 above for the definition of internal and external plurality.

⁴ See paragraph 112 of the Sky/ITV judgment.

⁵ See para 1.6(i) of Allen & Overy's submission to the CMA, dated 27, September 2017.

⁶ See paras 2.5 and 3.27 of OFCOM's public interest report.

Empirical evidence reveals the extent of Rupert Murdoch's control over media companies

We also provide empirical evidence of the considerable actual control, and resulting political bias, which Rupert Murdoch, through the Murdoch Family Trust, exercises over the nominally independent companies in which he is invested.

This evidence strongly supports OFCOM's conclusion that, in this Transaction, internal plurality cannot allay concerns about external plurality as well as emphasising the artificiality of the corporate split introduced by the Murdochs in 2012, a change believed by many to be designed in part to facilitate a second bid to take over Sky.⁷

We also clarify the concerns we raised in our previous briefing to OFCOM on common control about the independence of News Corporation under NASDAQ rules in the light of new developments.

⁷ See, for example, "Scandal fallout drives News Corp. restructuring" - <http://variety.com/2012/tv/news/scandal-fallout-drives-news-corp-restructuring-1118055975/>

SECTION 1. *The Sky/ITV judgment - Fox and Allen & Overy distort OFCOM's position*

1.1 *Sections 58 and 58A - how to interpret 'sufficient plurality' and 'genuine commitment' to broadcasting standards*

The key part of the Court of Appeal's judgment for present purposes is the discussion of sections 58 and 58A of the Enterprise Act. The Secretary of State has the power to refer mergers to OFCOM and the CMA concerning 'specified considerations' in public interest cases.⁸ Section 58 sets out these specified considerations, including 'sufficiency of plurality' and 'genuine commitment' to broadcasting standards, which apply to media mergers pursuant to sub-section 58(2C).

Section 58A is a 'construction' provision whose sole purpose is to clarify the meaning of key concepts used in relation to the specified considerations set out in the previous section 58. The judgment focuses in detail on two separate 'deeming' provisions - sub-sections 58A(4) and 58A(5) - which give specific instructions on how certain situations should be construed.

The exact interpretation of sub-sections 58A(4) and 58A(5) has important consequences for any assessment of plurality which we describe below. Before proceeding to those, the Court explained an important piece of context - that there are three different levels of control which may have the effect of causing two enterprises to cease to be distinct under section 26: "*ownership, ability to control policy, and ability materially to influence policy.*"⁹ The deeming provisions of sub-section 58A(4) and 58A(5) are intended to avoid distortions which may otherwise arise as a result of the interaction of these different levels of control in a merger.

1.2 *21C Fox's 'legal fiction' argument rests on a statutory provision on which OFCOM does not rely*

The judgment concentrates on the effect of sub-section 58A(5). The court acknowledges that this addresses the issue of 'internal plurality' between two or more enterprises under any degree of control by the same person. The Court considered whether its meaning is to deem that all relevant enterprises in such a situation will simply be treated as under the 'control' of one person without any regard being paid to the level of actual control that person may exercise.

The Court recognised that, here, the wording of the sub-section presents a stark and perverse choice between legal fiction and reality. It therefore effectively neutered the sub-section by preferring an interpretation which focuses on the '*actual extent of control*' to the exclusion of any artificiality.

⁸ Section 42 of the Enterprise Act 2002

⁹ See paragraphs 11, 12 and 81 of the judgment [citation]

Crucially, OFCOM's approach in treating 21C Fox, Sky and News Corp as a 'single entity'¹⁰ and its 'starting point', that "*the transaction would reduce the number of persons having control of media enterprises by bringing Sky under the full control of Fox*",¹¹ is based on sub-section 58A(4) instead of 58A(5).

Section 58A(4) states that: "Wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards."

We set out below how the Court interpreted these words and we show how OFCOM followed its instructions to the letter. A proper reading of the judgment reveals that, not only is it misleading to accuse OFCOM of reliance upon any 'legal fiction', the Court's reasoning also has adverse consequences for one of 21C Fox's key arguments - that the current Transaction brings about no real change.

1.3 Paragraph 93 of the Court of Appeal's judgment and section 58A(4) - OFCOM's approach correctly addresses an 'oddity' recognised by the Court

Paragraph 93 of the Court's judgment sets out its approach to sub-section 58A(4). It discusses what it calls an "*oddity*" arising from the existence of the three different possible relevant levels of control already referred to above. This oddity "*may mean that an enterprise, A, which already has the lowest level of control over another enterprise, B, so that they have ceased to be distinct, may gain an increased level of control.*" {emphasis added}

This is the situation in the present Transaction. 21C Fox accepts that the Murdoch Family Trust already has the lowest level of control over Sky provided for in the Act - 'material influence' - and goes on to argue that, as a result, the Transaction will make no difference.¹² This argument, that the change in control will make no difference, is precisely what sub-section.58A(4) is designed to rebut. The Court clearly affirms this.

Paragraph 93 makes clear that, where the oddity of an increase from a low to a higher level of control arises, "*B is again treated as being brought under the control of A and they cease to be distinct for a second time under section 26(1)*". Otherwise, the merger control regime set out in Part 3 of the Enterprise Act would not apply.

The Court then says that the very point of sub-section 58A(4) is that it "*precludes an argument that, because B is already under the control of A at the start, the added level of control makes no difference, and the number of enterprises serving the relevant audience is the same before and after the [relevant merger situation].*" {emphasis added}

¹⁰ Ofcom's public interest report - paragraph 2.5

¹¹ Ofcom's public interest report - paragraphs 2.5 and 3.27, footnote 58

¹² See para 1.6(i) and (ii) of Allen & Overy's submission to the CMA of 27 September, 2017

When OFCOM looks at existing levels of control to identify a ‘single entity’ and then applies sub-section 58A(4) in order to deem that the increase in 21C Fox’s control of Sky is the second time they cease to be distinct under section 26, it correctly follows the interpretation of sub-section 58A(4) by the Court.

OFCOM then proceeds to the qualitative analysis of the ‘actual extent of control’ for ‘internal plurality’ purposes which is also required by the Court of Appeal. In order to do that, OFCOM relies on the substantial evidence submitted to it showing interference with editorial choice by enterprises controlled by the Murdoch Family Trust and concludes that the increase in control over Sky gives rise to risks which mean that “*internal plurality cannot allay our concerns about external plurality in the wider news market*”.¹³

Those conclusions are the result of the quantitative and qualitative analysis which OFCOM was obliged by the legislative framework to carry out. To argue, as Allen & Overy suggest, that the change from a low level of control to a higher one has no effect is the irrelevant ‘legal fiction’ here and is, as the Court makes clear, precluded by statute.

1.4 The change will remove obstacles in the way of Rupert Murdoch’s ambition to make Sky News more like Fox News

That change pulls Sky closer into the orbit of 21C Fox and News Corp by removing a bulwark of independent shareholders who have, up to now, restrained the full force of the Murdoch Family Trust’s influence over the company. By contrast to 21C Fox and News Corp, the Murdochs do not enjoy an executive position within Sky at present, and independent shareholders have shown a willingness to act as a constraint on the Murdochs’ power. James Murdoch’s removal as Chair of Sky in 2012 happened after pressure from independent shareholders following the phone-hacking scandal.¹⁴ His reappointment as Chair of Sky in 2016 has been actively opposed too; just this month 48.4% of independent shareholders refused to support him in for this role. Rupert Murdoch himself has previously complained to a Parliamentary Committee in 2007 that the only reason Sky News had not already become more like Fox News is that ‘*nobody at Sky listens to me*’.¹⁵ The change contemplated by this Transaction will, however, leave the Murdoch Family Trust, via its control of 21C Fox, free to dominate and control the Sky board and allow him to fulfil that frustrated ambition.

¹³ Page 13 of OFCOM’s public interest report

¹⁴ See - <https://www.theguardian.com/media/2012/apr/03/james-murdoch-step-down-bskyb-chairman>

¹⁵ See evidence to the House of Lords communications committee as reported in <https://www.theguardian.com/media/2007/nov/24/bskyb.television>

Section 2. Rupert Murdoch's dominance of weak and ineffective 'independent' boards

OFCOM's conclusion that internal plurality cannot allay its concerns over external plurality here is amply justified by the evidence submitted to it of the actual extent and highly damaging effect of the control exercised by Rupert Murdoch, through the Murdoch Family Trust, over 21C Fox and News Corp.

Our own earlier briefing on common control for OFCOM highlights three class action claims in the US courts which are based on allegations that Rupert Murdoch had complete control of the News Corp (now 21C Fox) board, and that this caused serious harm to shareholders, employees and the public as a result of, for example, the acquisition of Elisabeth Murdoch's production company, Shine, at a gross overvaluation of \$674m or the phone hacking scandal in the UK.¹⁶

We reiterate here, in particular, how one of those claims, by Amalgamated Bank, was settled by 21C Fox in 2013 for \$139m - one of the largest settlements of corp litigation in Delaware history. Our earlier briefing to OFCOM on common control provided a summary of the relevant allegations of lack of independence made against each relevant director. Our other briefings to OFCOM also highlight how the Murdoch Family Trust's influence encouraged a shocking culture of sexual and racist abuse at Fox News.

To give just the most recent example of accusations of how Rupert Murdoch's dominates wholly ineffective boards, a story in *The New York Times*, dated 6 October, 2017, shows how complaints of this kind by investors persist and remain unresolved within the Murdoch empire.¹⁷ CtW Investment Group, which advises several union pension funds invested in 21C Fox, called for the company to overhaul its board and conduct a comprehensive review of its workplace culture in the wake of sexual and racial harassment scandals at its Fox News division. CtW sent a letter to Viet D. Dinh, the chairman of the board's nominating and corporate governance committee, accusing directors of failing to effectively address a "*longtime ethics crisis*" at Fox News, and risking the company's reputation, operations and long-term value.

Since our earlier briefings, we have also reviewed empirical academic research into the impact of the Murdoch Family Trust's ownership or control on the editorial output of media enterprises. We summarise these below. They demonstrate that OFCOM's concerns about the real increase in the actual level of control by Rupert Murdoch and the Murdoch Family Trust which this Transaction would create are supported by in-depth and detailed data-driven analysis.

¹⁶ See '21st Century Fox and News Corporation: the Murdochs' Common Control' by Avaaz, dated 30 March, 2017 (as amended 13 April).

¹⁷ See NYT -

<https://www.nytimes.com/2017/10/12/business/media/21st-century-fox-sexual-harassment.html?rref=collection%2Fsectioncollection%2Fbusiness&action=click&contentCollection=business®ion=rank&module=package&version=highlights&contentPlacement=9&pgtype=sectionfront&r=0>

2.1 Professor David McKnight of University of New South Wales - Rupert Murdoch is deeply committed to an ideological stance and News Corp is unique among media conglomerates

In 2010, David McKnight analysed the history of News Corporation and argued that it is “*unique among media conglomerates in its commitment to Rupert Murdoch's ideological beliefs, providing evidence that Murdoch is willing to let some of his newspapers lose great sums of money in the service of the promotion of his beliefs*”.¹⁸

McKnight examined a broad range of evidence and data, including, for example News Corporation's approach to the war in Iraq. He noted:

- how News Corp's global news media uniformly supported the Iraq invasion and its subsequent occupation
- that a former Sunday Times editor, Andrew Neil, told a House of Lords inquiry in 2008 that “*there were more discordant voices [on the Iraq invasion] in the Bush administration than there were in the Murdoch empire, and that is just the way he runs things.*”
- a survey of News Corporation newspapers before the war by Professor Roy Greenslade which concluded that Murdoch had an “*unerring ability to choose editors across the world who think just like him*” and: “*How else can we explain the extraordinary unity of thought in his newspaper empire about the need to make war on Iraq?*”

McKnight concludes by saying that his evidence shows that “*for all his business acumen and desire to succeed, Rupert Murdoch is deeply committed to an ideological stance, which he is prepared to further through media outlets in some cases at the cost of significant losses.*”

2.2 Wagner and Collins - the Wall Street Journal post-Murdoch displays a broad, ideological shift to the right and editorial changes which are unique to News Corp compared with other comparable publications

In 2014, Wagner and Collins compared the *Wall Street Journal's* editorial page before and after Rupert Murdoch's News Corporation purchased the paper with two newspapers that did not change ownership structures over the same time period (*The New York Times* and *Washington Times*).¹⁹

In approaching their analysis, Wagner and Collins acknowledged that before questions of changes in Murdoch's control over the conservative movement and partisan political debate in the United States could be answered, it was essential to know whether the editorial page of the *Wall Street Journal* changed after Murdoch's purchase of the paper. In other words they asked

¹⁸ See p.308 of David McKnight (2010) Rupert Murdoch's News Corporation: A Media Institution with A Mission, *Historical Journal of Film, Radio and Television*, 30:3, 303-316, DOI: 10.1080/01439685.2010.505021: <http://dx.doi.org/10.1080/01439685.2010.505021>

¹⁹ Michael Wagner and Timothy Collins - Does Ownership Matter - *The case of Rupert Murdoch's purchase of the Wall Street Journal* - *Journalism Practice*, Vol 8, 2014, Issue 6, pp- 758 to 771 - Wagner is a Professor at the University of Wisconsin; Collins is a well-known journalist.

the question: did Rupert Murdoch's acquisition of the *Wall Street Journal* systematically change the paper's editorial voice?

In their article, they present the first systematic evidence that there are significant differences in the editorial page of the *Wall Street Journal's* support for government action, attention paid to the two major parties, and tone toward both Republicans and Democrats in the pre- and post-Murdoch eras. More specifically, they demonstrate that Rupert Murdoch's *Wall Street Journal* takes a more active opposition to government intervention on political issues, mentions Democrats more often, treats Democrats more negatively, and is more positive to Republicans than the editorial page was under Bancroft family ownership.

Further, they note that the differences in News Corporation's *Wall Street Journal* stand in stark contrast to the behavior of two other major newspapers that did not change publishers over the same time period—one with a conservative editorial page (*Washington Times*—WT) and one with a liberal editorial page (*The New York Times*—NYT).

Their evidence shows that

- “the WSJ exhibited a broad, ideological shift to the right subsequent to Murdoch's purchase of the paper” and that it “fundamentally changed that paper's editorial page from what it was under Bancroft family ownership and with respect to how it compared to other major newspapers.”
- the *Wall Street Journal's* editorial page is a ‘very different place’ under Rupert Murdoch/News Corporation's ownership than it was under Bancroft family ownership.
- Democrats were much more likely to become the focus of editorial content and when they were mentioned, they were treated far more negatively after Murdoch's purchase of the paper than before.
- Crucially, when comparing the changes the *Wall Street Journal* exhibited to the behavior of two major newspapers that did not undergo changes in ownership, they demonstrate that the differences in the *Wall Street Journal's* editorial were generally unique from a statistical perspective and always more pronounced from a substantive perspective.
- The *Wall Street Journal* has become, and is likely to continue to be, a much more conservative paper on the editorial side than it has been over the past several decades—a time during which the paper developed a reputation as a conservative news source.
- Given the great effects that editorials can have on reporters the *Wall Street Journal's* change in ownership could have consequences on the tone and slant of the paper's news reporting, what the WSJ's own columnists write in their op-eds, and how the paper's readers evaluate and behave toward political candidates and issues.

While all three newspapers exhibited some statistically significant changes in the post-Murdoch era, the authors found that the *Wall Street Journal* exhibited the largest statistical and

substantive changes, clearly demonstrating the marked impact that assumption of control by the Murdoch Family Trust may be expected to cause.

2.3 ***Bruce Bartlett - Fox consistently peddles propaganda***

In his comprehensive 2015 review of this kind of research into the links between control and editorial choice - "*How Fox News Changed American Media and Political Dynamics*" - the respected and influential Washington journalist, Bruce Bartlett,²⁰ notes a number of interesting examples of bias in Rupert Murdoch's outlets:²¹

- the reaction of Pulitzer Prize-winning columnist Leonard Pitts Jr. of the *Miami Herald* to a rare Fox apology for the extreme anti-Muslim views of one of its contributors, which were widely ridiculed in the European press:

*"In America, it has come to seem normal that a major news organization functions as the propaganda arm of an extremist political ideology, that it spews a constant stream of racism, sexism, homophobia, Islamophobia, paranoia and manufactured outrage, and that it does so with brazen disregard for what is factual, what is right, what is fair, what is balanced — virtues that are supposed to be the sine qua non of anything calling itself a newsroom."*²²

- **Right-wing bias became commonplace at Fox:** how, buoyed by its success as an explicitly conservative network, it appears that right-wing bias, including inaccurate reporting, became commonplace on Fox. For example:
 - A study of network coverage of the Iraq and Afghanistan wars in 2005 found that Fox was alone in supporting the Bush administration during a period when the wars were going badly by any objective standard. It concluded that "*scholars should consider Fox as alternative, rather than mainstream, media.*"²³
 - Fox instructed its on-air talent to avoid using the term "public option" when discussing health reform and are required to say that global warming is merely a theory "*based on data that critics have called into question.*"²⁴
 - A 2010 study found that Fox actively spread rumors and inaccurate information about a proposed mosque planned for lower Manhattan.²⁵
 - A 2012 study found that Fox takes a dismissive tone toward climate change and interviews a much larger number of doubters than believers. Fox viewers are

²⁰ About Bruce Bartlett - <https://www.creators.com/author/bruce-bartlett>

²¹ See <http://ritholtz.com/2015/05/how-fox-news-changed-american-media-and-political-dynamics/>

²² See the Miami Herald, 24 Jan, 2015 - <http://www.miamiherald.com/opinion/opn-columns-blogs/leonard-pitts-jr/article8028834.html>

²³ Sean Aday, "Chasing the Bad News: An Analysis of 2005 Iraq and Afghanistan War Coverage on NBC and Fox News Channel," *Journal of Communication*, 60:1 (March 2010): 144-64.

²⁴ "Fox's Unbalancing Act," Los Angeles Times (December 17, 2010)

²⁵ Erik Nisbet and Kelly Garrett, "Fox News Contributes to Spread of Rumors About Proposed NYC Mosque," Ohio State University (October 14, 2010).

much more likely to be skeptical of global warming. A 2014 study found that 72 percent of references to climate change on Fox in 2013 were misleading.²⁶

- Fox consistently downplays gun violence.²⁷
- **Fox promotes political propaganda:** how Fox consistently peddles propaganda and that Fox long ago ceased being anything remotely akin to an objective news source and now functions basically as a propaganda arm of the Republican Party.
 - CNN president Jeff Zucker told the Television Critics Association in 2014, “*The Republican Party is being run out of News Corp. headquarters masquerading as a cable news channel.*”²⁸
 - Political scientist Jonathan Bernstein: “*It’s a real mistake to call Fox a conservative channel. It’s not. It’s a partisan channel....To begin with, bluntly, Fox is part of the Republican Party. American political parties are made up of both formal organizations (such as the RNC) and informal networks. Fox News Channel, then, is properly understood as part of the expanded Republican Party.*”²⁹
 - Pulitzer Prize-winning journalist Thomas Ricks: “*I think the emphasis on Benghazi [on Fox] has been extremely political, partly because Fox is operating as the wing of the Republican Party.*”³⁰
 - Former *The New York Times* executive editor Howell Raines: “*For the first time since the yellow journalism of a century ago, the United States has a major news organization devoted to the promotion of one political party.*”³¹

²⁶ Lauren Feldman et al., “Climate on Cable: The Nature and Impact of Global Warming Coverage on Fox News, CNN, and MSNBC,” *International Journal of Press/Politics*, 17:1 (January 2012): 3-31. See also Jon A. Krosnick and Bo MacInnis, “Frequent Viewers of Fox News Are Less Likely to Accept Scientists’ Views of Global Warming,” Stanford University (December 2010).

²⁷ Brian Stetler, “At Fox News, Less Attention Paid to Gun Debate Than Elsewhere,” *New York Times* (April 19, 2013)

²⁸ Quoted on TV Guide’s twitter feed (January 10, 2014)

²⁹ Jonathan Bernstein, “Understanding Fox News,” *The New Republic* (October 27, 2010)

³⁰ Quoted in “Thomas Ricks Accuses Fox News of ‘Operating as a Wing of the Republican Party,’” *Huffington Post* (November 27, 2012)

³¹ Howell Raines, “Why Don’t Honest Journalists Take on Roger Ailes and Fox News?” *Washington Post* (March 14, 2010)

Section 3. Update on the independence of the boards of 21C Fox and News Corp under NASDAQ rules

Our briefing to OFCOM in March addressed claims about the independence of the 21C Fox and News Corp boards made in Allen & Overy's preliminary briefing to the Secretary of State of 20 December, 2016 and 21C Fox's letter to her of 8 March. These were key to 21C Fox's argument that the Transaction would not increase the scope for co-ordination of the editorial output of the News Corp newspapers and Sky News or the operational integration of Sky News and News Corps newspapers.³²

We drew OFCOM's attention to the fact that Elaine Chao's resignation from the News Corp board in January ended its nominal majority of independent directors under NASDAQ rules. News Corporation disclosed this to the S.E.C. at the relevant time but, despite this being a crucial development to the argument it put to the Secretary of State in the preceding December, 21CF failed to take the opportunity to explain the change to the Secretary of State in a letter of 8 March to her. That letter, nevertheless, discussed control issues at length.

Since then, Kelly Ayotte has been appointed to the News Corp board as an independent director and this reinstates its nominal independence under NASDAQ rules. However, that nominal independence does not address the central issue raised by the Iron Workers, Stricklin and Amalgamated Bank claims as well as the sexual and racial harassment claims highlighted in our earlier submissions - that supposedly independent board members are completely ineffective in opposing the Murdoch Family Trust's control of 21C Fox and News Corporation.

Conclusion

21C Fox has distorted OFCOM's position on control and media plurality to suit its own argument. It has emphasised board independence and then failed to be transparent with the Secretary of State about a material change to this under NASDAQ rules. This is all consistent with the compelling evidence of corporate governance failings and disregard for broadcasting standards which are common to Rupert Murdoch's businesses.

It is clear that, wherever he is allowed, Rupert Murdoch uses his control of these businesses to promote his own divisive ideological and economic agenda aggressively. We respectfully submit that the CMA should be wary of any representations made by 21C Fox concerning the issue of common control and should conclude that that the changes brought about by this Transaction will be highly damaging to media plurality and broadcasting standards in the U.K..

³² See para 1.7(c) (i) and (ii) of Allen & Overy's preliminary briefing of 20 December, 2016.

Defiance, not compliance: the culture and behaviour of Murdoch- owned companies

October 2017

AVAAZ

About AVAAZ

Avaaz has a simple democratic mission: organize citizens of all nations to close the gap between the world we have and the world most people everywhere want. Avaaz enables millions of people from all walks of life to take action on pressing global, regional and national issues, from corruption and poverty to conflict and climate change.

The Avaaz community campaigns in 16 languages, served by a core team on 6 continents and thousands of volunteers. We have 45 million members worldwide and 1.5 million in the United Kingdom.

Avaaz members across the UK are concerned about Rupert Murdoch's threat to our public debate and democracy, and played a major role in slowing and halting the Murdochs' bid for BSkyB in 2010-11. And the Avaaz movement has been vocal and effective in calling for a full scrutiny of the bid for Sky in 2016-2017, including by submitting evidence, bringing witnesses from the USA, and encouraging inputs to consultations.

Contact: Alex Wilks or Alaphia Zoyab.

About this report

This report is intended to inform the Competition and Markets Authority in its scrutiny of the proposed takeover of Sky plc by 21st Century Fox.

It should be read in the context of other submissions made to the CMA at the same time:

1. 21st Century Fox and News Corporation: the Murdochs' common control
2. Fox News: broadcasting non-compliance.

And in the context of Avaaz's previous submissions and representations on the Fox/Sky takeover:

Submissions to the Secretary of State

- The Fox/Sky Takeover: Why A Phase Two Referral On Broadcasting Standards Is Needed To Protect The Public Interest, 14 July 2017
- Consolidating Control: The Fox/Sky Merger And News Plurality In The UK, February 2017

Submissions to Ofcom

- Before The Murdoch Takeover: New Evidence Indicating The Need For A Further "Fit And Proper" Review, 8 March 2017
- Murdoch's Fox Effect: How full ownership of Sky risks undermining British broadcasting standards, 30 March 2017
- Report entitled "Rupert Murdoch and Donald Trump - The Conflicted Alliance", 8 May 2017;
- Report entitled "Racist content in the Murdoch Media" 11 May 2017;
- 21st Century Fox and News Corporation: the Murdochs' common control, 30 March 2017, amended on 13 April 2017
- Sexual harassment, denials and cover ups: evidence of a rotten corporate culture at Fox, 30 March 2017.

Executive Summary

This submission aims to provide the CMA with the views it is seeking on “the record of the Parties’ compliance with broadcasting and other applicable regulations, and their broader attitude to compliance in general”.¹ Specifically, this submission addresses Theory of Harm 3 identified by the CMA, which states:

“As a result of the Transaction, there will not be a genuine commitment to broadcasting standards at the merged entity.”²

Acting unethically and breaking rules is the norm at many enterprises owned and run by the Murdochs. A series of major corporate governance scandals have engulfed their companies. Nell Minow, of ValueEdge Advisors, summarised their record as follows, “Fox received an F rating, based on a report-card style A-F assessment of governance risk, only because there was no lower grade. This ... pervades all of the various offshoots and subsidiaries.”³ Fox’s full takeover of Sky poses a serious risk to the public on broadcasting standards grounds.⁴

Our analysis of the corporate governance scandals at some prominent Murdoch-owned companies reveals patterns of:

- relentless pressure to seek commercial success and political power, at the expense of ethical and legal boundaries;
- statements of support, promotions, financial rewards, and re-hiring of executives who have committed offences, signalling that loyalty and results trump compliance;
- using illegal and aggressive tactics such as hacking and espionage as tools to generate news, or to gain an advantage over competitors and staff;
- using out-of-court settlements to silence staff, competitors and victims who seek justice;
- using arbitration clauses in employment contracts to prevent staff from going to court;
- misleading regulators, shareholders, and competitors.

This pattern was borne out during the first four months of the 21st Century Fox (21C Fox) Sky bid. In December 2016, Allen & Overy, acting for 21C Fox, advised Karen Bradley, the

¹ This submission should be read in the context of a related submission by Avaaz to the CMA covering on screen broadcasting standards, and of previous submissions made by Avaaz to the DCMS and Ofcom.

² Competition & Markets Authority, ‘Anticipated Acquisition By 21st Century Fox, Inc Of Sky Plc: Issues statement’ (10 October 2017), p 19, available at: <https://assets.publishing.service.gov.uk/media/59db8a2840f0b63118216841/fox-sky-issues-statement.pdf>

³ Letter to Secretary of State, Karen Bradley from Nell Minow (14 July 2017).

⁴ The Secretary of State asked the CMA to consider in more detail whether “corporate governance failures [cannot] be seen in isolation to their impact on broadcasting standards because the possibility exists of a corporate culture that does not prioritise the need for regulatory compliance.” DCMS letter to 21C Fox, and to Sky, dated 12 September 2017.

Secretary of State, that the company “has adopted strong governance measures and controls to ensure it meets the highest standards of corporate conduct”, in their preliminary submission on the bid. These measures centre on “the rapid escalation of material issues” to the full 21C Fox Board.”⁵ However, in the weeks after Fox’s lawyers wrote this, the Fox board failed to obtain details of a massive \$32 million settlement by star Fox News anchor Bill O’Reilly of a series of claims advanced by his colleague Lis Wiehl. These claims included repeated harassment, sending of explicit material, and ‘non-consensual sexual relations’.⁶

In mid-October 2017, during the CMA’s review, 21C Fox told the New York Times it was not privy to the amount of Mr. O’Reilly’s January settlement. The company viewed this agreement between two staff who had worked together on Fox News for 15 years, as “a personal issue between the two of them”. This failure to probe O’Reilly’s sixth known settlement with staff was especially stark as Fox News was in the process of renewing his contract for four years and awarding him a 30 per cent pay rise. The New York Times reported that Rupert Murdoch, then acting CEO of Fox, claimed not to know the details of the January settlement. And that the settlement bound the victim to silence by paying her over a period of time, while ensuring that all photos, text messages and other communications between her and O’Reilly would be destroyed.

This submission briefly reviews several other significant scandals and presents evidence of the above patterns, plus suggestions for how the CMA can obtain a fuller picture:

1. Fox News - a subsidiary of 21st Century Fox with an epidemic of sexual and racial harassment;
2. News America Marketing - a subsidiary of News Corporation that has settled claims amounting to almost \$1 billion for fraud, espionage and hacking;
3. NDS - a former subsidiary of News Corporation convicted of computer hacking and sabotage in breach of the Federal Communications Act and US criminal law;
4. News of the World - a former subsidiary of News International, closed down after industrial-scale phone hacking;
5. The Sun - a subsidiary of News Group Newspapers, currently being sued by over 70 individuals for phone hacking cases, and;
6. Various Australian broadcasting companies - misleading regulators and breaking rules.

⁵ Allen & Overy, ‘Offer by 21C Fox for the Remaining Shares in Sky PLC: Preliminary Briefing to the Department for Culture, Media & Sport’, (20 December 2016), pa 2.10 and 2.11.

⁶ Emily Steel and Michael S. Schmidt, ‘Bill O’Reilly Settled New Harassment Claim, Then Fox Renewed His Contract’ (*The New York Times*, 21 October 2017), available at: <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html>.

A rigorous evaluation of these considerations would show that 21CF and the Murdochs are not committed to “the spirit as well as the letter of the broadcasting standards”⁷ just as they are not committed to the spirit or letter of other business rules. A 100% takeover of Sky by Fox would therefore be likely to worsen Sky’s approach to corporate governance and implementing applicable regulations, including broadcasting standards.

The Murdochs run their companies across contexts and jurisdictions by frequently silencing whistle-blowers, offering up ‘paper-only policies’, rewarding or re-hiring staff involved in illegal tactics, and continuing non-compliant practices. This flagrant disregard for regulatory compliance as an employer, a market competitor, and as a broadcaster is accompanied by a repeated resort to aggressive anti-competitive and illegal practices. We urge the CMA to assign equal weight to all instances of regulatory non-compliance in Murdoch-owned enterprises until it is satisfied it understands the pattern and attitude which underlie them.

Annex 1 of this report provides suggestions of documents and witnesses which the CMA may find useful in its inquiries.

⁷ DTI, ‘Enterprise Act 2002: Public Interest Intervention in Media Mergers: Guidance on the Operation of the Public Interest Merger Provisions Relating to Newspaper and Other Media Mergers’ (May 2004), available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/595816/file14331__1_.pdf.

Corporate governance scandals - a culture of defiance

1. Sexual and racial harassment at Fox in the US

The epidemic of sexual and racial harassment at Fox News and other Fox affiliates in the US goes to the heart of the company's attitude to compliance. Avaaz made a submission to Ofcom in March on this issue, which concluded that:

“Investigative news reports, victims' testimonies, and court documents paint a picture of a management with no meaningful accountability and no credible governance structure”.

Avaaz cited a legal complaint by one victim of alleged sexual harassment that “[T]he Murdochs have been misleading the public into believing that they are taking action. In fact, they have done the opposite”, and drew attention to Roger Ailes getting a \$40 million severance payment, rather than being dismissed for cause when his sexual harassment was uncovered.⁸

Revelations in the New York Times on 21 October 2017 show that a very similar pattern was repeated by the Murdochs in January/February this year. Indeed, they actively participated in a decision to protect their star presenter Bill O'Reilly without regard to the numerous sexual harassment allegations he had settled and was in the process of settling personally.⁹ In early 2017, Rupert Murdoch, then acting CEO of Fox News, oversaw Bill O'Reilly making his sixth settlement for sexual harassment, for \$32 million, then immediately awarded him a 30 per cent pay rise as part of a four year contract extension worth a total of \$100 million.

In the statement that Fox sent the NY Times, there are further troubling indications of Fox's attitude towards compliance. It dismisses the \$32 million settlement as a “personal issue between the two of them” (ie: between Bill O'Reilly and Lis Wiehl), despite the fact that they had worked together at Fox for 12 years.¹⁰ And with regards to his contract extension, his repeated misdemeanours and the signal sent to other Fox staff appear to have played no part. In a statement responding to the NY Times, 21st C Fox says Fox News “surely would have wanted to renew” Mr. O'Reilly's contract, noting, “he was the biggest star in cable TV.”¹¹ 21st Century Fox claimed all the evidence was “equivocal”, in its deposition to Ofcom earlier this year.¹²

⁸ Tantaros Andrea vs. Fox News network, LLC (157054/2016).

⁹ Emily Steel and Michael S. Schmidt, 'Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract' (*The New York Times*, 21 October 2017), available at: <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html>.

¹⁰ Emily Steel and Michael S. Schmidt, 'Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract' (*The New York Times*, 21 October 2017), available at: <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html>.

¹¹ Emily Steel and Michael S. Schmidt, 'Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract' (*The New York Times*, 21 October 2017), available at: <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html>.

¹² Ofcom, 'Decision Under Section 3(3) Of The Broadcasting Act 1990 And Section 3(3) Of The Broadcasting Act 1996: Licences Held By British Sky Broadcasting Limited' (11 September 2017), pa 57, available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0013/103621/decision-fit-proper.pdf.

This fundamentally undermines the claim by Fox's lawyers' to the Secretary of State in December 2016 that Fox "has adopted strong governance measures and controls to ensure it meets the highest standards of corporate conduct" and casts doubt on Fox's entire evidence to UK authorities to date. Specifically, 21st C Fox claimed that it had established an "enhanced global compliance programme, including a global compliance steering committee" claiming these arrangements ensured the "rapid escalation" of material issues" from "individual businesses to the Independent directors of the Audit Committee and the full Board."¹³

As part of his defence, Bill O'Reilly has stated that in the more than 20 years he worked at Fox News, "not one complaint was filed against him with the Human Resources Department or Legal Department by a coworker."¹⁴ If this is true, this further undermines claims by Fox that its corporate governance mechanism meets the highest standards. The CMA must investigate whether the culture of fear and retaliation in the organisation meant that such governance systems were bound to fail.

The CMA must use its powers of investigation to the fullest extent to understand the failures of corporate governance at Fox. Until the CMA has had insight into how decisions were made based on looking at the full context, including minutes of meetings, it will be impossible to judge their broader attitude towards regulatory compliance and infringements to ascertain their genuine commitment to broadcasting standards.

Protecting Bill O'Reilly - despite serial wrongdoing

One of Bill O'Reilly's producers, Andrea Mackris, filed a five-count lawsuit alleging sexual harassment in 2004. Her claims were backed up with a recording she had made of him phoning her in the middle of a sex act, which she threatened to make public. The transcript of the recording includes incriminating details such as the following:

*"You would basically be in the shower and then I would come in and I'd join you and you would have your back to me and I would take that little loofa thing and kinda' soap up your back...rub it all over you, get you to relax, hot water ... I would start to massage your boobs ..."*¹⁵

Roger Ailes' biographer, Gabriel Sherman, who investigated the internal workings at Fox News said in his 2014 book, that as the senior leadership at Fox, which included Roger Ailes, the

¹³ Allen & Overy, 'Offer by 21C Fox for the Remaining Shares in Sky PLC: Preliminary Briefing to the Department for Culture, Media & Sport,' (20 December 2016), pa 2.10 and 2.11.

¹⁴ 'Statement by Mark Fabiani on Behalf of Bill O'Reilly Relating to the New York Times Smear Piece' (21 October 2017), available at: <https://www.billoreilly.com/g/October-21-Statement/881.html>.

¹⁵ 'O'Reilly Hit with Sex Harassment Suit' (*The Smoking Gun*), available at: <http://www.thesmokinggun.com/file/oreilly-hit-sex-harass-suit?page=15>.

CEO, as well as Rupert Murdoch himself, discovered the details of O'Reilly's wrongdoing, their top priority was to ensure their biggest rated-star O'Reilly was protected. The book states:

"Ailes was furious. So was Murdoch, who made it clear that O'Reilly - and not News Corp - would be responsible for any settlement. Ailes may have been livid at his star, but he needed to protect Fox's biggest brand."¹⁶

Bill O'Reilly was so sure of Fox's backing that he threatened Andrea Mackris with a counter-suit alleging extortion, stating:

*"If you cross Fox News channel, it's not just me, it's [Fox President] Roger Ailes who will go after you. I'm the street guy out front making loud noises about the issues, but Ailes operates behind the scenes, strategises and makes things happen so that one day BAM! The person gets what's coming to them but never sees it coming."*¹⁷

Such bravado was not misplaced as Bill O'Reilly was only fired 13 years later under pressure from a federal investigation and Ofcom's fit and proper probe. Indeed, despite Roger Ailes' participation in the cover-up, Ailes was named to the "Office of the Chairman, an elite group of a half dozen executives who ran the company."¹⁸

As these new details from the New York Times investigation show, Fox officials and the Murdochs have not been fully transparent with British authorities. Indeed, new details released by Bill O'Reilly himself show that there is yet more detail to unearth on Fox's internal culture and corporate governance. He states that after dozens of women came forward to complain to Fox, naming several perpetrators, Fox settled cases worth almost \$100 million. If that is accurate that is double the number that Fox has disclosed¹⁹ to its shareholders.²⁰ Concealed settlements remain the subject of an ongoing federal investigation.

Serial sexual and racial harassment, starting at the top

One of the most troubling aspects of the corporate culture at Fox News is how Roger Ailes, the CEO, now implicated in dozens of lawsuits oversaw a regime and culture of "top-down" sexual

¹⁶ 'O'Reilly Hit with Sex Harassment Suit' (*The Smoking Gun*), available at: <http://www.thesmokinggun.com/file/oreilly-hit-sex-harass-suit?page=15>.

¹⁷ 'O'Reilly Hit with Sex Harassment Suit' (*The Smoking Gun*), available at: <http://www.thesmokinggun.com/file/oreilly-hit-sex-harass-suit?page=11>.

¹⁸ Gabriel Sherman, *The Loudest Voice in the Room: How the Brilliant, Bombastic Roger Ailes Built Fox News--and Divided a Country* (Random House, 2014), p 305.

¹⁹ 21st Century Fox, 'United States Securities and Exchange Commission Form 10K: Annual Report,' (For the fiscal year ended June 30, 2017), p 125, available at: <http://investor.21cf.com/secfiling.cfm?filingid=1564590-17-17693&CIK=1308161>.

²⁰ 'Statement by Mark Fabiani on Behalf of Bill O'Reilly Relating to the New York Times Smear Piece' (21 October 2017), available at: <https://www.billoreilly.com/g/October-21-Statement/881.html>.

and racial harassment.²¹ What all of Fox's depositions to Ofcom and the Secretary of State fail to do is show how their corporate governance mechanism accounted for wrongdoing by its most senior figures. And if it did, why it failed so spectacularly in containing Roger Ailes and other powerful figures.

As CEO of Fox News, Roger Ailes had the power to make or break women's careers. Only those loyal to him could advance at Fox. That meant that he could impose a strict dress code²² - skirts only. Ailes once famously screamed when a presenter Catherine Crier wore trousers, "Tell Catherine I did not spend x-number of dollars on a glass desk for her to wear pant suits."²³

In case after case there is evidence that individuals who dare to take on the Murdochs or their executives are confronted with a smear campaign by Murdoch-owned press outlets. For example, Murdoch's New York Post newspaper smeared Andrea Mackris in several stories. The headlines, both in October 2004, include, "EXCLUSIVE: O'Reilly Accuser in Bar Blow Up²⁴" and "Boozy Boast - Gal said she'd ruin O'Reilly: Bar owner."²⁵

Those smear campaigns have often resulted in out of court settlements. Bill O'Reilly eventually settled the Mackris lawsuit out of court for an alleged sum of \$9 million. He entered into a string of other settlements amounting to nearly \$13 million that continued well into 2016. His misconduct, which would have been challenged in a court pursuant to US employment discrimination law,²⁶ was kept under wraps due to mandatory non-disclosure clauses contained in each of these settlements. The latest NY Times revelations show his settlements are now at \$45 million. He denies all the allegations.

The executives of the parent company 21st C Fox told Ofcom that they did not know about harassment at Fox News until July 2016. Ofcom reported:

"In answer to an information request (which by law must be answered truthfully, subject to financial penalty or imprisonment) Fox has said that no executive director was aware of any allegations of sexual and racial harassment at Fox News prior to July 2016."

²¹ 11 Sue Fox News, Citing 'Intolerable' Racial Bias, New York Times, 25 April 2017, available at https://www.nytimes.com/2017/04/25/business/media/fox-news-racial-discrimination-lawsuit.html?_r=0

²² Dayanita Ramesh, "'Well It Looks Like I'll Be Able To Wear Pants': Fox News Personality Alludes To Fox's Sexist Dress Code Policy' (*Media Matters*, 7 January 2016), available at:

<https://www.mediamatters.org/blog/2016/01/27/well-it-looks-like-ill-be-able-to-wear-pants-fo/208228>

²³ Dayanita Ramesh, "'Well It Looks Like I'll Be Able To Wear Pants': Fox News Personality Alludes To Fox's Sexist Dress Code Policy' (*Media Matters*, 7 January 2016), available at:

<https://www.mediamatters.org/blog/2016/01/27/well-it-looks-like-ill-be-able-to-wear-pants-fo/208228>

²⁴ Gabriel Sherman, 'The O'Reilly Fracture' (*Newsweek*, 6 February 2014), available at:

<http://www.newsweek.com/oreilly-fracture-228136>.

²⁵ Dareh Gregorian, "'Boozy' Boast – Gal Said She'd Ruin O'Reilly: Bar Owner' (*New York Post*, 19 October 2004), available at: <http://nypost.com/2004/10/19/boozy-boast-gal-said-shed-ruin-oreilly-bar-owner/>.

²⁶ The US Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, sex, colour, national origin or religion.

However Ofcom failed to treat that claim with the necessary scepticism that the following facts should have warranted. Further reasons for such scepticism include:

- Allegations against Roger Ailes had become public in 2014 via the publication of his unofficial biography, which included a specific mention that Rupert Murdoch knew about Bill O'Reilly's sexual harassment scandal well before July 2016;²⁷
- Fox News signed a Consent Decree with the Equal Opportunity Employment Commission back in 2006 to ensure Fox News senior staff receive training in federal and state laws to stop discrimination. Despite being party to a court-monitored undertaking from 10 years ago, Fox was unable to improve its internal culture through the introduction of the new 2012 corporate governance structure.
- In 2004 the Andrea Mackris lawsuit against Bill O'Reilly was front page headline news in Murdoch's rival newspaper the New York Daily News and her court complaint was posted on the internet at that time.²⁸

Cover-ups, not compliance

Fox has tried to cover up the scale of the epidemic of sexual and racial harassment for many years, at least since 2002. Fox News has made a series of settlements with victims of sexual harassment but allegedly disguised these payments as salaries or compensation leading the United States Justice Department to launch a federal investigation.²⁹ This federal investigation was not revealed proactively to shareholders by Fox but instead leaked by an attorney whose client was subpoenaed to appear before a Grand Jury probing these payments.³⁰

The work culture at Fox News is also under investigation by the New York State Division for Human Rights.³¹ Fox faces lawsuits of sexual harassment, gender discrimination and a class action lawsuit for racial harassment from at least 23 current and former employees.

One of the reasons a lot of the scandals at Fox News have remained hidden from public view is that New York state has a statute of limitations of 3 years to report sexual harassment and many victims now cannot come forward. Fox also uses forced arbitration clauses in its contracts that deny employees access to public court hearings.

Concerns about the way the company has been run have also been raised by the NY City Public Advocate Letitia James to the US Securities and Exchange Commission. She has urged

²⁷ Gabriel Sherman, *The Loudest Voice in the Room: How the Brilliant, Bombastic Roger Ailes Built Fox News--and Divided a Country* (Random House, 2014), p 300.

²⁸ Image available at:

https://img.huffingtonpost.com/asset/58e4f3a816000021004d8de2.jpeg?ops=scalefit_720_noupscale

²⁹ Brian Stelter, 'Exclusive: Federal probe of Fox News expands' (CNN, 27 April 2017), available at: <http://money.cnn.com/2017/04/27/media/fox-news-federal-investigation/index.html>.

³⁰ Matthew Garrahan and Kara Scannell, *Federal probe into Fox News casts shadow over Murdoch empire*, at: <https://www.ft.com/content/26ce771c-1916-11e7-9c35-0dd2cb31823a>.

³¹ Gene Maddaus, 'Fox News Faces Probe From N.Y. Human Rights Division, Attorney Says' (*Variety*, 19 June 2017), available at: <http://variety.com/2017/tv/news/fox-news-human-rights-new-york-lisa-bloom-1202470426/>.

the SEC to investigate whether the network's failure to disclose big payments means it has been misleading shareholders as well.³²

Back in July 2006, Fox News signed a Consent Decree issued and monitored by the United States District Court, Southern District of New York.³³ According to the agreement that the two parties Fox News and the Equal Employment Opportunity Commission entered into, Fox was to provide "trainings in federal laws prohibiting discrimination in employment for all current employees and particularly for all management/supervisory employees." It is clear that such training was completely ineffectual given that a full-scale sexual and racial harassment scandal had blown open in 2016.

Roger Ailes and Bill O'Reilly have together received \$65 million in payouts from the company on their way out. In Ailes' case, Rupert Murdoch personally praised his contribution to the growth of Fox News.

Such denial is in line with the "one rogue reporter" line taken in the phone hacking scandal, but one that News Corp. eventually had to abandon as authorities forced them to cooperate. The CMA must probe whether this claim of ignorance by the entire Board of 21st Century Fox is true. Kindly look at Annex 1 for questions that we propose the CMA ask of Fox and others, including suggestions of witnesses that the CMA should invite to assist their inquiry.

2. News America Marketing: sabotaging the competition in direct marketing

Relevant to the CMA's inquiry into broadcasting standards is a major scandal involving serious allegations of corporate espionage, computer hacking and anti-competitive practices by News America Marketing ("NAM"), a consumer goods marketing business wholly owned by News Corp. NAM creates and sells promotional opportunities for consumer goods, for example through coupon inserts found in newspapers, and in-store adverts on aisle displays and on shopping trolleys.

The allegations speak to a deliberate attempt to establish a monopolistic position using illegal practices. If similar practices were used to undercut competition with other broadcasters and print media owners in the UK, that could allow the Murdochs to increase their market power, and undermine broadcasting standards.

³² Jillian Jorgensen, 'EXCLUSIVE: Public Advocate Letitia James demands city and federal investigation into Bill O'Reilly' (*New York Daily News*, 12 April 2017), available at: <http://www.nydailynews.com/new-york/manhattan/letitia-james-demands-nyc-fed-probe-bill-o-reilly-article-1.3044904>.

³³ United States District Court, Southern District of New York. *Equal Opportunity Employment Commission vs Fox News Network LLC*, available at: <https://www.clearinghouse.net/chDocs/public/EE-NY-0058-0002.pdf>.

News Corp. has paid out approximately \$936 million in settlements for a series of lawsuits against NAM, a sum that dwarfs settlements for phone hacking or for sexual harassment by other Murdoch-owned companies.

News Corp. settled for \$656 million with marketing competitors, one of which had previously obtained a \$300 million jury verdict against NAM. In 2016, News Corp. also settled for \$280 million in a class-action lawsuit brought by its clients, several major packaged goods brands. A further lawsuit, this time for \$560m, again by Valassis Communications, continues. It alleges that NAM continued to behave anti-competitively after its 2010 settlement, ultimately driving out its rivals from the in-store promotions business.³⁴

Lawsuits against the company alleged an orchestrated scheme over more than a decade to force both retail chains and consumer goods companies into long-term exclusive contracts to suppress competitors' access to market, in violation of U.S. federal and state antitrust laws. The lawsuits additionally alleged breaches of other laws based on activities such as hacking competitors' computers to obtain customer lists and staff addresses.

The markets concerned were:

1. Newspaper/magazine inserts: The market for consumer goods manufacturers like Heinz to insert free-standing insert coupon booklets into newspapers, a market NAM allegedly came to control 55% of by 2009.
2. In-store displays: The market for consumer goods manufacturers to promote their products to shoppers in grocery stores, drugstores, mass retailers, home improvement stores and bargain stores throughout the United States, a market NAM allegedly came to control 90.5% of by 2009.

NAM was also accused of 'unlawful tying' by using its in-store monopoly to monopolize the coupon market, offering its clients large discounts from its regular in-store prices, but only if they exclusively purchased their coupons from NAM. NAM also allegedly made large up-front payments to supermarkets to guarantee they would deal exclusively with NAM. This exclusivity then enabled them to raise in-store promotion prices artificially, prompting allegations that NAM overcharged clients by as much as 40%. Competitors alleged this practice would lead to "tipping," where smaller firms are forced to exit the market after losing a critical mass of business.³⁵ News Corp. internally acknowledged that it sought to build contractual barriers to make it difficult, if not impossible, for competitors to compete.³⁶

³⁴ 'Byline Investigates: Murdoch, Mobsters And News America Marketing' (*Byline*, 22 September 2017), available at: <https://www.byline.com/project/76/article/1835>.

³⁵ *Dial Corp v News Corp.*, Third Amended Complaint (S.D.N.Y. Aug. 16, 2013) 2013 WL 5475241 at para 85; see also David Folkenflik, 'Beyond Sexual Harassment, Lesser Known Scandals Could Cost The Murdochs A \$14B Deal' (*NPR*, 24 April 2017), available at: <http://www.npr.org/2017/04/24/525337958/beyond-sexual-harassment-lesser-known-scandals-could-cost-the-murdochs-a-14b-dea>.

³⁶ *Dial Corp v News Corp.*, Third Amended Complaint (S.D.N.Y. Aug. 16, 2013) 2013 WL 5475241 at paras 12, 72, 87, 122.

NAM was also accused of devious and illegal practices to destroy the competition. These included hacking into computers owned by competitors (such as Floorgraphics) to obtain customer lists, tearing down competitors' in-store signs and ads, and telling customers that promotions they had placed via competitors had failed to appear in the stores. NAM also misrepresented competitors' in-store advertising compliance rates as well as their financial capacity. The Chief Operating Officer of NAM, Paul Carlucci, threatened to fire any employee who did not support exclusive control by NAM of these markets. He was later promoted to CEO of NAM, in an apparent signal that he enjoyed the full support of News Corporation and the Murdoch Family Trust which controlled the business.

The attorney who took Carlucci's deposition in the Valassis case, Greg Curtner, agreed that Murdoch knew exactly what Carlucci was doing. Curtner said: "I have looked at the evidence and it's clear to me that Mr Rupert Murdoch is aware of what is going on, on a day to day basis, in his businesses. Mr Carlucci reports to Mr Murdoch." Answering why Murdoch chose not to rein in NAM, Curtner went on:

"The best answer to that question came from Mr Carlucci's own mouth: 'I work for a man who has to have it all and does not understand being told that he can't have it all'. That's the culture, shown time after time, in business activity after business activity, lawsuit after lawsuit. The legal fees are staggering."³⁷

NAM made significant and repeated efforts to prevent these cases coming to court. When a whistleblower, Richard Emmel, came forward with substantial evidence that News America Marketing was engaging in "criminal conduct against competitors", and employing "deceptive and illegal business practices" to defraud retailer customers, NAM filed a lawsuit accusing Emmel of six violations. NAM pressed its case with more than 300 pleadings to the Georgia courts.³⁸ Then, a few days after Floorgraphics started a civil lawsuit, NAM bought out Floorgraphics entirely, and stopped the legal proceedings.

³⁷ 'Byline Investigates: Murdoch, Mobsters And News America Marketing' (*Byline*, 22 September 2017), available at: <https://www.byline.com/project/76/article/1835>.

³⁸ 'Byline Investigates: Murdoch, Computer Hacking And The F.B.I.' (*Bylines*, 20 September 2017), available at: <https://www.byline.com/project/76/article/1829>.

3. NDS: hacking and sabotaging competitors in the set-top box industry

The NAM scandal exposed aggressive and illegal anti-competitive practices carried out by companies controlled by the MFT, including hacking and espionage against competitors. Similar practices have surfaced at NDS, a broadcast company which competes with Sky. NDS,³⁹ then 80% owned by News Corp (of which James Murdoch was non-executive director at the time), was a lynchpin in the success of Murdoch's pay-TV business.

Serious allegations of hacking and sabotage have been levelled against NDS, a set-top box software provider, in various court cases since 2002. NDS was an Israeli start-up bought by News Corp. in 1992.⁴⁰

NDS's core business was to produce smartcards used to manage the subscriptions of digital TV customers. A Sky competitor, ITV Digital, accused the company of hiring a computer hacker to obtain and then distribute the codes which allowed subscribers to watch ITV Digital for free. Meanwhile, Sky's signal remained encrypted. These allegations were also investigated by the BBC's Panorama programme.

ITV Digital eventually folded.

Similar allegations were made against NDS in 2002 by the French pay-TV company Canal Plus. But the facts never emerged in court as News Corp bought the part of the Canal Plus business that made the allegations.

Another company, EchoStar (now Dish Network) sued NDS in the US for "reverse engineering" its smartcards and then leaking the hacked information on the internet. While EchoStar won only \$1500 in statutory damages, the Federal Southern California District Court in 2008 found that NDS Group Americas had violated the Federal Communications Act and the California Penal Code.

News Corp has maintained that it hired a hacker to keep track of and catch other hackers and pirates.

4. News of the World: phone hacking in the newspaper industry

³⁹ NDS was acquired by Cisco in 2012.

⁴⁰ Michael Rundle, 'News Corp Firm Under Fire After BBC's Panorama Alleges Hacking Of ITV Digital' (*Huffington Post*, 27 March 2012), available at: www.huffingtonpost.co.uk/2012/03/27/news-corp-nds-bbc-itv-digital-ondigital-murdoch_n_1381735.html.

The phone hacking scandal at News of the World led to “huge failings of corporate governance” at News Corporation, the precursor company to 21st Century Fox.⁴¹ The cover-up, the convictions and massive settlements all point to a rogue corporate culture where generating salacious stories through illegal means was deeply embedded in the newsroom culture. Indeed, the integrity of the news gathering process was so heavily compromised and mired in illegality that the conclusion is inescapable: the Murdochs cannot be trusted in any of their enterprises to exhibit a genuine commitment to ordinary journalistic norms, including the impartiality and accuracy that underpin broadcasting standards.

The original Met Police enquiry into phone hacking at News of the World began in 2005 but led to just two convictions. Until 2010, the parent company, Murdoch’s News International, publicly maintained that it was just “one rogue reporter” who had hacked phones.⁴² By 2011, Murdoch was forced to abandon this claim after rival media groups exposed the scale of the cover-up both by News International and the police. The subsequent inquiry and its offshoots led to the arrests and interviews under caution of nearly 210 people and then the hacking trial of 2014.

Overall, there have been 9 convictions of News International staff for offences related to payments to public officials. 29 public officials and their relatives were convicted of accepting payments. The charges for these 38 individuals included: (1) conspiracy to intercept voicemails, (2) acquiring private subscriber information from British Telecom’s database; (3) breaches of the Data Protection act; (4) conspiracy to intercept communications without lawful authority; and (5) conspiracy to commit misconduct in public office.

In the most recent case, News Group Newspapers, publisher of the former News of the World agreed to settle claims of breach of confidence and misuse of private information after accepting that hacking had occurred. Former intelligence officer, Ian Hurst, whose computer was hacked, accepted substantial undisclosed damages from News Group Newspapers, having brought proceedings at London’s High Court against the Murdoch-owned group.⁴³

Hurst served in the Intelligence Corps and the Force Research Unit in Northern Ireland between 1980 and 1991, recruiting and running agents within Republican terrorist groups in order to obtain intelligence. Hurst said that he feared for the safety of many of the people with whom he had been in contact.

⁴¹ HOC Culture, Media and Sport Committee, ‘News International and Phone-Hacking’ (1 May 2012), p 122, available at: <https://publications.parliament.uk/pa/cm201012/cmselect/cmcmds/903/903i.pdf>.

⁴² Lisa O’Caroll, “Phone-hacking: 10 Years of Resignations, Cover-ups and Convictions’ (*The Guardian*, 11 December 2015), available at: <https://www.theguardian.com/media/2015/dec/11/phone-hacking-10-years-resignations-cover-ups-convictions>.

⁴³ PA Mediapoint, ‘Former Intelligence Officer Paid Damages By News Group Newspapers Over Computer Hacking’ (*Press Gazette*, 6 October 2017), available at: <http://www.pressgazette.co.uk/former-intelligence-officer-paid-damages-by-news-group-newspapers-over-computer-hacking/>.

The sheer magnitude of the phone and computer hacking resulted in it becoming one of the most expensive trials in British criminal history.⁴⁴

News International has admitted to phone hacking at the News of the World in several hundred phone-hacking claims and has made payments to victims and lawyers in relation to these charges amounting to nearly £500 million.⁴⁵

The Privileges Committee report cast further light on the culture of paying what was alleged to be “hush money” to employees guilty of criminal offences to deter them from co-operating with the police and prosecuting authorities. These payments were approved by News International Chief Executive, Les Hinton.

Employees at News of the World gave anonymous testimony to the National Union of Journalists saying, the pressure for stories was so relentless that some staff even suffered physical collapses at the office.⁴⁶ The Leveson Inquiry report concluded:

“It seems clear, therefore, that a drive for circulation increased the pressure on those working at the NoTW. The Inquiry heard from a number of former employees of the newspaper who were in complete agreement that the newsroom at NoTW was a very pressurised environment and that reporters were under pressure to deliver stories, preferably exclusive stories, regularly.”⁴⁷

An employment tribunal found that the ex-editor Andy Coulson presided over a culture of bullying.⁴⁸ The Leveson Inquiry report went further to state:

“Whether the pressures to perform amounted to bullying or not, it has been suggested by a number of witnesses that these pressures, both to deliver a story and to deliver sufficient evidence to make it legally defensible, may have led journalists to use

⁴⁴ Martin Evans, ‘At £100m, Phone Hacking Trial Makes History For Expense’ (*The Daily Telegraph*, 24 June 2014), available at: <http://www.telegraph.co.uk/news/uknews/phone-hacking/10924126/At-100m-phone-hacking-trial-makes-history-for-expense.html>.

⁴⁵ Dominic Ponsford, ‘News Corp Hacking Scandal Costs Total \$7m For Last Three Months Of 2015, Up 40 Per Cent On Previous Quarter’ (*Press Gazette*, 8 May 2015), available at: <http://www.pressgazette.co.uk/news-corp-hacking-scandal-costs-rise-512m/>.

⁴⁶ James Ball, ‘News of The World Journalists Reveal a Newsroom Culture of Bullying And Stress’ (*The Guardian*, 9 February 2012), available at: <https://www.theguardian.com/media/2012/feb/09/news-of-the-world-bullying-stress>.

⁴⁷ The Leveson Inquiry, ‘An Inquiry Into The Culture, Practices And Ethics Of The Press: Volume II’ (November 2012), p 497, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270941/0780_ji.pdf.

⁴⁸ Caitlin Fitzsimmons, ‘Ex-editor Andy Coulson bullied News of the World reporter, rules tribunal’ (*The Guardian*, 18 December 2008), available at: <https://www.theguardian.com/media/2008/dec/18/andy-coulson-bullied-news-of-the-world-reporter>.

whatever means were necessary, even if that meant stepping beyond the Editors' Code or the law."⁴⁹

Re-hiring offenders:

The hacking scandal and the convictions didn't seem to constrain the company's behaviour. In a leaked recording, Rupert Murdoch is heard assuring a gathering of Sun journalists:

*"What you're asking is, what happens if some of you are proven guilty? What afterwards? I'm not allowed to promise you - I will promise you continued health support - but your jobs - I've got to be careful what comes out - but frankly, I won't say it, but just trust me."*⁵⁰

Nick Parker, who was convicted of a criminal offence in December 2014 for handling stolen property, was rehired by the Sun newspaper.⁵¹ All staff received a memo from Sun's editor David Dinsmore, saying:

"We have given a commitment to every individual involved in the legal process that we would review their cases individually and that no decisions or actions would be taken without discussing it with them.

Following the conclusion of his trial in December, we have been talking to Nick about the issues surrounding his case and the events of 2010. The discussions have led us to the belief that punitive action against Nick would be disproportionate.

*Lessons have been learned from this experience by all of us in the newsroom. We would handle the story very differently today. We have improved processes in place to help support our decision-making and I want to thank each of you for embracing the enhancements in governance, which reflect the growth in business standards across our organisation".*⁵²

⁴⁹ The Leveson Inquiry, 'An Inquiry Into The Culture, Practices And Ethics Of The Press: Volume II' (November 2012), p 500, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270941/0780_ii.pdf.

⁵⁰ 'Rupert Murdoch Tape: Read Extracts from the Transcript' (*The Guardian*, 4 July 2013), available at: <https://www.theguardian.com/media/2013/jul/04/ruPERT-murdoch-tape-extracts-transcript>.

⁵¹ Roy Greenslade, 'Convicted Sun Journalist Nick Parker is Welcomed Back to the Newspaper' (*The Guardian*, 20 February 2015), available at: <https://www.theguardian.com/media/greenslade/2015/feb/20/convicted-sun-journalist-nick-parker-is-welcomed-back-to-the-newspaper>.

⁵² Roy Greenslade, 'Convicted Sun Journalist Nick Parker is Welcomed Back to the Newspaper' (*The Guardian*, 20 February 2015), available at: <https://www.theguardian.com/media/greenslade/2015/feb/20/convicted-sun-journalist-nick-parker-is-welcomed-back-to-the-newspaper>.

The message was clear: being individually implicated in court proceedings, or even a guilty plea or conviction, was no obstacle to further employment within the Murdoch newsroom and businesses. Rebekah Brooks was re-hired despite being the editor of the News of the World at the time the Milly Dowler story, based on hacking, was published. The court did not find her guilty, but the company did not make her take responsibility for this breakdown of journalistic ethics.

5. The Sun: phone hacking

Civil cases, brought by 91 phone hacking victims, are currently underway against The Sun, alleging that the Murdoch-subsidary News Group illegally obtained personal information about them.⁵³ Corporate governance failures have already been recognized by the court. Justice Mann, presiding over the cases, said News Group had “consistently failed to provide proper disclosure and to meet its disclosure obligations.”⁵⁴

The court has ordered News Group to disclose all invoices submitted by private investigators between 2010-2011 who were found to have used illegal means of acquiring personal information. News Group is expected to hand over at least 6000 invoices.

The judge has further called into question James Murdoch’s role in the phone hacking, by ordering that his laptop be searched for potentially relevant documents pertaining to the trial and demanding an explanation from News Group about why it had made hundreds of redactions on documents pertaining to the hacking cases. This is pertinent in light of Ofcom’s 2012 ‘fit and proper’ decision regarding News Group, which determined that James Murdoch’s conduct in relation to events at NGN “repeatedly fell short of the conduct to be expected of him as a chief executive officer and chairman.”⁵⁵ Ofcom found the company fit and proper only because James Murdoch had stepped down from running the company. Courts, shareholders and regulators alike have had grave reservations about the role James Murdoch has played at NGN in the past. He would have the key role CEO in shaping the culture, practices and outputs of the new merged entity.

Further, News Group has again relied upon its oft-used tactic of pay-outs to silence victims of its misconduct. The phone-hacking cases were due for trial in October 2017, but News Group recently settled 17 cases out of court with non-disclosure agreements. The trial would have aired allegations of phone-hacking and evidence deletion at The Sun newspaper, which News Group has always denied, and would have forced James Murdoch to take the stand.⁵⁶

6. Misleading regulators in the Australian broadcast industry

⁵³ Graham Ruddick, ‘Owner of The Sun Forced to Hand Over Invoices Before New Hacking Trial’ (*The Guardian*, 13 June 2017), available at: <https://www.theguardian.com/media/2017/jun/13/owner-of-the-sun-forced-to-hand-over-invoices-before-new-hacking-trial>.

⁵⁴ Graham Ruddick, ‘Owner of The Sun Forced to Hand Over Invoices Before New Hacking Trial’ (*The Guardian*, 13 June 2017), available at: <https://www.theguardian.com/media/2017/jun/13/owner-of-the-sun-forced-to-hand-over-invoices-before-new-hacking-trial>.

⁵⁵ Ofcom, ‘Decision Under Section 3(3) Of The Broadcasting Act 1990 And Section 3(3) Of The Broadcasting Act 1996: Licences Held By British Sky Broadcasting Limited’ (2012), pa 14, available at: <http://webarchive.nationalarchives.gov.uk/20170112202155/https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2012/ofcom-decision-on-fit-and-proper-assessment-of-sky>.

⁵⁶ Graham Ruddick, ‘News Group Settles 17 Cases Related To Allegations Of Criminality At The Sun’ (*The Guardian*, 7 September 2017), available at: <https://www.theguardian.com/uk-news/2017/sep/07/news-group-settles-17-cases-allegations-criminality-the-sun-phone-hacking>.

The Murdochs have repeatedly misled authorities in the UK and in other parts of the world. The CMA is interested in:

“the extent to which the Parties, both in the UK and in other jurisdictions in which they operate, have complied with the relevant rules on broadcasting standards and on applicable regulatory and corporate governance requirements more broadly”.⁵⁷

Avaaz and others have previously provided relevant evidence on the Murdoch takeovers of The Times and The Wall Street Journal. The ways that Murdoch Family Trust-controlled companies have misled Australian regulators over many decades are also pertinent.

John Menadue, who used to run Murdoch’s Australian news operations, was categorical when he described the Murdoch’s businesses in Australia earlier this year:

“It’s a rogue organisation and the Australian government should resist any attempt to expand the media power of the News organisation, which already controls 60 to 70 per cent of the metropolitan media in Australia.”⁵⁸

A brief analysis of the Murdochs’ track-record in Australia will help illustrate Mr Menadue’s unequivocal condemnation of how the Murdochs do business. Here are just a few examples:

Rupert Murdoch’s record of misconduct: In the 1980s the Australian Broadcasting Tribunal rejected a Murdoch bid for a Melbourne TV station and criticised Rupert Murdoch for giving “directly contradictory evidence” before the bid, claiming he would make no changes to the station.⁵⁹ It also found Mr Murdoch and his companies “guilty of four separate sets of contraventions of section 92 of the Australian Broadcasting and Television Act, and said that he had misled the Stock Exchange over share purchase.” In addition, the Australian Press Council has found him guilty of “misleading and unfair reporting, and of gaining an unfair advantage through distortion.”

Lachlan Murdoch’s record of misconduct: The Australian Communications and Media Authority (ACMA) also determined that Lachlan Murdoch and his business advisor Siobhan McKenna breached the commercial radio broadcasting directorship limits in section 56 of the Broadcasting Services Act 1992 when Murdoch became the director of a further radio station in the Brisbane-Nambour area between October and November 2010.⁶⁰

⁵⁷ Competition & Markets Authority, ‘Anticipated Acquisition By 21st Century Fox, Inc Of Sky Plc: Issues Statement’ (10 October 2017), p 20, available at: <https://assets.publishing.service.gov.uk/media/59db8a2840f0b63118216841/fox-sky-issues-statement.pdf>

⁵⁸ ‘Paul Murray’s Spectacular Sky Dummy Spit’ (*ABC Media Watch*, 3 July 2017), available at: <http://www.abc.net.au/mediawatch/transcripts/s4695558.htm?site=coffscoast>.

⁵⁹ The regulator’s transcript records Rupert Murdoch saying: “It would be madness to contemplate any changes at all... I wish to give an assurance to the tribunal that no change is contemplated at all”. Cited by Jonathan Aitken MP in the House of Commons on 27 January 1981, available at: <http://hansard.millbanksystems.com/commons/1981/jan/27/times-newspapers>.

⁶⁰ ACMA, ‘ACMA Finds Breach of Radio Directorship Limits’ (April 2011), available at:

Section 56 of the Act provides that a person cannot be a director of companies that are in a position to exercise control of more than two commercial radio licenses in the same licence area.⁶¹ Murdoch breached section 56 on 7 October 2010 when he was appointed as a director of Prime Media Group Limited, which is in a position to exercise control of Hot 91.1 FM - 4MCY. At that time, Mr Murdoch was also a director and a controller of a number of companies which were in a position to exercise control of Nova 106.9/4BNE and 97.3/4BFM.

The ACMA also found that Ms McKenna was a director of companies that controlled more than two radio licences in the combined Nambour/Brisbane radio licence area, and was in breach of section 56.⁶² ACMA revealed these breaches in January 2011, noting that Murdoch and McKenna had by then resigned from their additional roles in cooperation with the regulator.⁶³

Then there is the Murdoch's recent failed takeover of Network 10, which some media commentators believe might have breached cross media ownership laws. Mike Secombe describes how Lachlan Murdoch and his partner Bruce Gordon "drove [the Network] into administration in June. Their plan would have seen the network rid of a lot of its pesky debt and also put the weights on the Turnbull government to hasten the passage of regulatory changes advantageous to big players such as them. Then they would have bought it back from the administrators."⁶⁴ However, when the government took longer to pass the proposed media laws, and the American media giant CBS got involved, they lost ownership of the company.

www.acma.gov.au/Industry/Broadcast/Radio/Commercial-radio-standards/media-release-42011-14-january-acma-finds-breach-of-radio-directorship-limits.

⁶¹ ACMA, 'ACMA Finds Breach of Radio Directorship Limits' (April 2011), available at: www.acma.gov.au/Industry/Broadcast/Radio/Commercial-radio-standards/media-release-42011-14-january-acma-finds-breach-of-radio-directorship-limits.

⁶² ACMA, 'ACMA Finds Breach of Radio Directorship Limits' (April 2011), available at: www.acma.gov.au/Industry/Broadcast/Radio/Commercial-radio-standards/media-release-42011-14-january-acma-finds-breach-of-radio-directorship-limits.

⁶³ Lucy Battersby, 'In Ten Takeover, The Media Regulator Is Refusing To Prove Itself Useful' (*The Sydney Morning Herald*, 4 September 2017), available at: <http://www.smh.com.au/business/media-and-marketing/in-ten-takeover-the-media-regulator-refusing-to-prove-itself-useful-20170901-gy8vsw.html>.

⁶⁴ Mike Secombe, 'Murdoch's Failure to Launch Fox Here' (*The Saturday Paper*, October 7 - 13, 2017), available at: <https://www.thesaturdaypaper.com.au/news/politics/2017/10/07/murdochs-failure-launch-fox-here/15072948005316>.

Conclusion

The Murdochs have frequently exhibited a fundamental disregard for the law, and for regulations designed to protect the public interest and ensure fair competition. Their approach is to protect senior executives at the expense of junior staff and the UK public, with an aggressive attitude to using settlements and their political reach to close down investigations that might harm them.

We urge the CMA to consider the evidence presented in this submission in its analysis of Theory of Harm #3, as presented in the Issues Statement, namely an inquiry into the Murdochs' genuine commitment to broadcasting standards, and an assessment of the likely compliance with broadcasting standards by a merged Fox/Sky.

The attached annex identifies specific suggestions for documents the CMA might use its powers to obtain, and witnesses it could contact. Additionally we encourage the CMA to conduct its own investigation of the issues mentioned in this submission, to ensure it is able to form a full, rounded and independent view of the Murdochs' track record.

Annex 1 - proposed evidence and witnesses

We welcome the CMA's Issues statement, which suggests that its analysis of its theory of harm 3 could include:

- The approach to effective corporate governance, including regulations on the treatment of employees;
- Comments, statements, and plans made by the acquiring media owner which give an indication as to its commitment to UK broadcasting standards post-transaction;
- The broader attitude within the relevant organisations towards regulatory compliance and to infringements that have taken place;
- The extent of efforts made to ensure compliance such as strategies in place, investment in training, seniority of staff responsible for compliance, the extent of Board involvement, actions taken following the remedying of any breaches.⁶⁵

We would encourage the CMA to extend that list to include:

- The record of settlements and payouts to victims with non-disclosure clauses
- Shareholder concerns about the way the companies are run
- The nature and number of official inquiries and investigations into MFT-controlled companies.

This annex signposts documents and witnesses which we believe will be helpful for the CMA to obtain or contact in this regard. We understand that the CMA has significant powers to obtain information from parties to a merger, so it can obtain a full picture.

Sexual and racial harassment scandals at Fox in the US

The CMA should ask 21C Fox for access to:

1. Details of the number and type of complaints that were escalated from individual Fox businesses to the full 21C F Board since 2012. This should include Fox Sport, Fox Business, Fox Films and other businesses beyond Fox News;
2. Minutes of 21C Fox Board meetings, especially ones where the Murdochs were personally present, that discussed corporate governance failures, especially after July 2016 when Roger Ailes' conduct was exposed publicly;
3. Terms of reference and findings of the July 2016 investigation into harassment and discrimination handled by Fox's law firm Paul, Weiss, Rifkind, Wharton and Garrison;

⁶⁵ Anticipated Acquisition by 21st Century Fox, Inc. of Sky PLC, Issues Statement, 10th October 2017, Competition and Markets Authority.

4. Structure of the new 2012 corporate governance mechanism - including which departments were covered by such a mechanism and if there were contingency plans for when senior staff were themselves involved in perpetrating or covering up failures;
5. Reports of any internal investigations that Fox may have launched into Bill O'Reilly's sexual harassment - since Fox has claimed that the evidence was "equivocal";
6. Full disclosure of all out of court settlements made to victims of harassment, discrimination and retaliation etc., including ones made personally by staff members;
7. Number and nature of any complaints that are currently in private arbitration, and;
8. Details of misconduct allegations and settlements in other Fox divisions, for example Fox Sports, Fox Business, and Fox Films.

In addition, the CMA could seek details from the following authorities on the nature and status of their inquiries:

1. the US Attorney's office in the Southern District of New York that is investigating secret harassment settlements made by Fox but not disclosed to shareholders
2. the New York State Division of Human Rights that has an ongoing investigation into the work culture at Fox News.

Witnesses that the CMA should consider contacting:

1. Douglas Wigdor - a lawyer who represents 23 current and former victims of Fox News suing the company for sexual and racial harassment and discrimination;
2. Victims of Fox News, some of whom are likely willing to speak off the record;
3. Brian Lewis - ex-PR manager at Fox who allegedly oversaw many of the smear campaigns against victims;
4. Mark Kranz - ex-CFO at Fox News who was allegedly aware of many of the secret settlements made by Fox News that are now being probed by federal investigators;
5. Dianne Brandi - Fox News top legal counsel who signed the Consent Decree in 2006 with the Equal Employment Opportunity Commission to stop discrimination and harassment at Fox News. Since early October 2017 Brandi has been on "voluntary leave" from Fox News.
6. Joe Lindsley, former Fox employee who worked closely with Roger Ailes and has written a forthcoming book about his experiences, including intimidation by Ailes.

News America Marketing: sabotaging the competition in direct marketing

The CMA should ask News Corp for access to:

1. Documents detailing settlements made by NAM;
2. Documents about any ongoing litigation or settlement negotiations, and;
3. The sworn testimony of Floorgraphics founder, the late George Rebh.

Witnesses that the CMA should consider inviting:

1. Antonia DeMatto - former vice president of Floorgraphics;
2. Richard Rebh - a co-founder of Floorgraphics;
3. Steve Marquis - former vice president for retail sales development at News America Marketing;
4. US Representative Rush Holt, Democrat from New Jersey - who raised this case with the US Attorney, and;
5. Gret Curtner - Valassis Communications lawyer.

NDS: hacking and sabotaging competitors in the set-top box industry

The CMA should request access to:

1. The court verdict of the Federal Southern California District court judgement from 2008 showing NDS Group Americas had violated the Federal Communications Act
2. Records from News Corp showing how and why it allegedly hired hackers.

Witnesses that the CMA should consider inviting:

1. Lee Gibling - the computer hacker allegedly hired by News Corp;
2. The BBC Panorama team Reporter Vivian White and producer Stephen Scott - who found incriminating emails;
3. Simon Dore - formerly Chief Technical Officer for ITV Digital; and
4. Ray Adams - former UK Security Chief at NDS.

News of the World and Sun hacking

The CMA should request access to:

1. Court complaints filed by victims of hacking at the Sun newspaper;
2. Official policies on email deletion at News Group Newspapers and Fox.

Witnesses that the CMA should consider inviting:

1. Mark Lewis - the Milly Dowler's family lawyer, who was also himself hacked;
2. Nick Davies - the investigative journalist who broke many of the hacking stories;
3. Christopher Hutchings - Hamblins LLP, the main lawyer representing nearly 91 victims of alleged hacking by the Sun newspaper;
4. Charlotte Harris - another phone hacking lawyer;
5. Mark Thomson - Atkins Thomson's lead lawyer dealing with email destruction;
6. Sue Akers - former hacking inquiry head at the Met police;
7. Peter Jukes - journalist who investigated the alleged subversion of the Daniel Morgan murder investigation by the Murdoch media.

Australian broadcasting: misleading regulators, breaking rules

The CMA should request access to:

1. Records held by the Australian Communications and Media Authority which speak to the Murdochs' history of breaching the media regulatory framework in Australia.
2. Documents relating to how Lachlan Murdoch breached radio station ownership rules in 2010, and whether he deliberately misled regulators then or before his unsuccessful attempt to take over Network Ten.

Witnesses that the CMA should consider inviting:

1. John Menadue, former Murdoch executive in Australia;
2. Mark Day, former Murdoch newspaper editor in Australia.
3. Timothy Dwyer, Associate Professor, Department of Media, University of Sydney;
4. David McKnight, Associate Professor, School of the Arts & Media, University of New South Wales, and;
5. Paul Barry, ABC Media Watch host.