



HOUSE OF COMMONS

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Dear Sabrina

To: The Competition and Markets Authority Panel

1. We write to follow up on a particular point that was raised during our evidence session --- around the level of control the Murdochs already have with 39% ownership of Sky by 21CF and the difference in control that 100% ownership will provide. In particular this issue was raised directly or indirectly by Mr Bamford (p.23, 26), Ms Lambert (p.28), Ms Chambers (p.30) and Mr Krumins (p.74).
2. We wish to demonstrate two related arguments in what follows: that the 39% provides "material influence" for the Murdochs but crucially not "full control" (in the words of Ofcom's public interest report, 2017) and that the difference between the two is highly significant in the key factors of editorial policy, regulatory standards and corporate governance of Sky. We contend therefore that issues of plurality and broadcasting standards are directly engaged by this change in ownership and it would be wholly wrong to conclude otherwise.
3. In summary our argument is as follows:

---The Murdochs do not exercise full control of Sky at present because Sky's status as a publicly listed UK company with a majority of independent shareholders means: there is a Board with a majority of genuinely independent directors who protect the independence of Sky News, as well as a respected and independent CEO who oversees Sky News. Furthermore, we show the clear evidence that independent shareholders have acted to constrain Murdoch power, examples that are important in themselves and as a warning to the Murdochs about the limits of their power.

---This contrasts sharply with the situation that would exist post-takeover: Sky absorbed into 21CF, overseen by the 21CF Board which we show is controlled by and in no sense independent of the Murdochs, governed on the basis of 21CF corporate practices, which have been shown to be deeply flawed, with a

CEO and Head of News to be effectively chosen by the Murdochs, with no credible constraints or guarantees against their power. Further we show the Murdochs will not just have opportunity to remake Sky News in their own interests but the commercial motive to do so.

39% Ownership

4. The limits to current Murdoch control of Sky have been put most clearly by none other than Sky themselves in their submission to your predecessor body, the Competition Commission, in 2007, concerning the Murdoch interest in Sky, then under the auspices of News Corporation : "...the media interests of Sky's shareholders, including those of its major shareholder News Corporation, are irrelevant as all editorial decisions regarding the content of Sky's various news services are taken by the Sky News editorial staff. **Accordingly neither News Corp, nor any of its subsidiaries has any ability to influence Sky News's content (emphasis added).**"¹
5. A similar sentiment was expressed at an earlier stage of the process by Sky. Sky criticised Ofcom's report on the transaction as follows: "The Ofcom Report has not sought to properly analyse the relationship between Sky and News Corporation, or whether News International [through which the Sky stake was held at the time] is able to influence Sky's editorial policy (**which it is not**)."²
6. These are highly significant statements by Sky. They are statements that would never be made about the Murdoch-owned newspapers, where News Corp (now News UK) enjoys 100% ownership. As we said at our hearing, Mr Murdoch himself told Lord Justice Leveson "If you want to judge my thinking, look at The Sun".
7. We contend that this state of affairs is directly related to the current ownership structure of Sky, and the resulting corporate arrangements. In particular, the structure of the Board, the operation of that Board, and the consistent willingness of the independent shareholders to seek to rein in Murdoch power.
8. It is because of the ownership structure of Sky and the minority stake of 21CF, as opposed to 100% ownership, that Sky has 11 directors, of whom 6 are independent of the Murdochs under the UK Corporate Governance Code. Neither of the two executive directors have worked at any other Murdoch-run

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http://webarchive.nationalarchives.gov.uk/20111202184308/http://www.competition-commission.org.uk/inquiries/ref2007/itv/pdf/bskyb_response_issues_statement.pdf, paragraph 5.22

²http://webarchive.nationalarchives.gov.uk/20111202194531/http://www.competitioncommission.org.uk/inquiries/ref2007/itv/pdf/main_party_submission_sky.pdf, Paragraphs 5.21 and 5.22

company. Only three directors have worked at News Corp or its successor, and only one of them, James Murdoch, is a member of the MFT. All of the independent directors have significant board-level experience. None have personal, family or commercial connections to the Murdochs. As we will show below, this is in direct contrast to the situation at 21CF, of which Sky would simply be a division, without this independent Board, if the takeover is allowed to proceed.

9. The ownership and Board structure at Sky in turn produces a culture whereby Sky News is clearly cordoned off from interference by the Murdochs—or indeed anyone else at Board level, as demonstrated by the powerful testimony you heard from Sky’s independent directors: “The independent directors said that Sky News has complete editorial independence without interference from the Board.” Furthermore “The independent directors stated that James Murdoch has no executive or quasi-executive involvement in Sky....There was no communication between the independent directors and the other members of the Murdoch family other than during and in relation to the bid from Fox. The independent directors said that in their experience there had been no concerns raised at the board around undue influence from the members of the Murdoch family and if there were any such attempts these would be raised by management to the Board....”³
10. This suggests both that the Murdochs have not sought to intervene in the running of Sky News, and if they had, there would obviously have been deep concern among Board members because they would have expected it to be reported to them.
11. Two possible conclusions follow from this: that the Murdochs would never intervene in the running of Sky News or its editorial policy, whether 21CF owned 39% or 100% (as it would after the takeover) because that is simply not in their interests or character, or alternatively, that they have not intervened, at least in part, because of the role and potential threat of the 61% independent shareholders. This is an absolutely crucial question for the purposes of this issue of control.
12. We contend it would be perverse and wholly unreasonable conclusion for the CMA to reach the first rather than the second conclusion, namely that the Murdochs have not intervened in the editorial policy of Sky because they would never have a desire to do so, rather than because they are constrained by the ownership structure from doing so. In support of this argument we cite the following:

--- the record of all other major news outlets which are wholly owned by News Corp or 21CF: for example, all the Murdoch newspaper titles in the UK and indeed across the world, and the major TV outlets, including Fox News and

³<https://assets.publishing.service.gov.uk/media/5a02fa0840f0b60b048399eb/summary-of-hearing-with-sky-independent-directors.pdf>, paragraphs 21,17,18.

the Fox Business Network⁴ in the United States and Sky News Australia. All of these bear the stamp of Rupert Murdoch's commercial and political leanings. So to conclude that there is no world in which this would happen at Sky flies directly in the face of clear evidence.

--the role of Rupert Murdoch in particular, who, as the independent directors testified is currently locked out of any direct Board influence at Sky, because of the ownership structure, and has shown a clear desire to intervene in the editorial stance of his media outlets. As Chairman of 21CF, Mr Murdoch will obviously face none of these constraints if the takeover proceeds.

---the evidence of the independent shareholders flexing their muscles over a long period of time: during the tenure of James Murdoch as CEO (see below), forcing the removal of James Murdoch as Chairman in 2012 in the wake of phone-hacking and their voting in very significant numbers against his chairmanship in 2016 and 2017.

13. Mr Bamford asked us about the period of James Murdoch's tenure as CEO. We believe that this period and subsequent events when he became Chairman demonstrate our case that, unsurprisingly, as a significant minority shareholder, News Corp did exercise material influence, as 21CF does now, but this is notably and crucially short of full control. Indeed, we believe events from the period show how constrained the Murdochs' power was --and indeed remains--at Sky.
14. James Murdoch was appointed CEO in 2003 against a background of complaints by independent shareholders. At the time the Association of British Insurers, for example, voiced "serious concerns" and the National Association of Pension Funds said it "continued to have concerns" after his appointment. The appointment of Lord Rothschild as Deputy Chairman was widely seen as an attempt to head off unrest.⁵ At the time, The Times noted "BSKYB appointed Lord Rothschild, the City grandee, to the newly created post of non-executive deputy chairman last night in an attempt to assuage shareholder disquiet over the company's corporate governance record."⁶
15. Moreover, it is clear that the unrest did not dissipate. Between 2004 and 2005, there was significant opposition to a share buyback plan to increase News Corp control from 37% to 39%. Legal and General, a 3% shareholder in Sky, said "We are not supportive of increased control by News Corp"⁷. In 2005, 46% of independent shareholders voted against the plan. Reports at the time

⁴ <https://www.thedailybeast.com/trump-never-needed-a-trump-tvhes-got-the-fox-business-network>

⁵ <http://www.independent.co.uk/news/media/rothschild-brought-on-board-at-sky-as-sop-to-anti-murdoch-camp-76634.html>

⁶ <https://www.thetimes.co.uk/article/bskyb-attempts-to-assuage-investors-zrcrcvfgv6k>

⁷ <https://www.theguardian.com/media/2004/nov/12/business.bskyb>

noted "In the past two years, Sky's board has been reorganised and News Corp insiders, including Rupert Murdoch, removed from key committees." So irritated was he about these constraints that Mr Murdoch protested at the time: "'When I started this business, people like you in the City, their reaction was to short my shares... They are still all against us, but we are winning and building one of the great companies of Britain.'"⁸

16. In this context, and given his relative inexperience, it is not credible to believe that James Murdoch, even with his father's support as Chairman, would have sought at this time to take the highly controversial step of making Sky News follow the direction of Fox News's editorial model or that he could have done so without major shareholder blowback. To achieve that change would likely have required replacing many key editorial staff at Sky News, including the Head of News. Given that they did not have scope to do so, it would be perverse to give the Murdochs 'credit' for not having sought to take Sky in this direction or to believe that it offers any reliable guide to a world of 100% 21CF ownership of Sky.
17. It was also during this period, with his son as CEO that Rupert Murdoch gave testimony to the House of Lords Communications Committee: "He stated that the only reason that Sky News was not more like Fox News was that 'nobody at Sky listens to me'.⁹ For Mr Murdoch to make this statement must be seen as highly significant testimony to the constraints on his power.
18. Mr Krumins asked us whether the view of the 61% shareholders wasn't simply "you invest in Rupert. You know what you are getting. It is a strong commercial story and that is why we invest in Sky." (p.74 of our testimony). To put it mildly, it seems hard to square this thesis with the repeated shareholder revolts, including right up to the present day against James Murdoch's Chairmanship, and the words of Rupert Murdoch that "Nobody at Sky listens to me". Contrast this with his view that "If you want to judge my thinking, look at the Sun".
19. We contend that the only logical explanation for this direct contrast in Mr Murdoch's own view about the level of control he exercises at Sky lies in its ownership structure. Moreover, we would strongly make the case to the CMA that rather than adopting a far-fetched explanation which even Mr Murdoch disagrees with, that Sky currently operates as if the Murdochs have full control, it is much more logical, reasonable and rational to believe that the independent shareholders act as a significant constraint on the power of the Murdoch family.

⁸ <https://www.theguardian.com/media/2005/nov/05/newscorporation.broadcasting>

⁹ <https://publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/122i.pdf>, p.119

The Move to 100% 21CF Ownership

20. We are strengthened in this belief when we examine the situation that would exist post-takeover at Sky. Below we spell out what this would mean, in particular: the end of Sky as a publicly listed company, the replacement of the Sky Board by the 21CF Board which is far less independent, the appointment of a new CEO by the Board of 21CF to run Sky News, and the clear threat these new arrangements pose to the independence of Sky News.
21. After this takeover, Sky will no longer exist as a separate, publically listed company. This has clear implications for the information that must be provided and the transparency with which Sky operates. Operating as a division of another organisation inevitably provides scope for reduced transparency as we see from the example of Fox News, where a Federal investigation is currently examining how multiple multi-million dollar settlements may have been hidden from shareholders and regulators for many years.
22. The attitudes to governance and risk which would apply to Sky would cease to be those that currently apply through the rules at Sky as a separate company, but instead would become those of 21CF. Concerns about 21CF's governance record were further deepened by this week's news that 21CF settled with an institutional investor for \$90 million, at the earliest opportunity, a case that alleged a failure of fiduciary duty by members of the 21CF Board to adequately deal with racial and sexual harassment at Fox News. The corporate culture of 21CF has demonstrably failed in relation to these issues and yet its culture and practices would now govern Sky. (This recent episode strengthens our view that the CMA should get a picture of the approach to corporate governance by 21CF and its board members by using its powers to obtain from the company full records of which board members knew what and when about the Roger Ailes and Bill O'Reilly harassment allegations and settlements.)
23. The Sky Board will now be replaced by the 21CF Board to oversee the company. We set out above the composition of the Sky Board and the independence of its directors. This is in direct contrast to the Board of 21CF. Consistent with the above analysis of the Sky Board, It is clear that at least 8 out of the 13 21CF Board members would not be considered to be independent under the UK Corporate Governance Code.
24. In addition to 5 members acknowledged to be non-independent of the Murdochs (the 3 Murdochs, Chase Carey, David Devoe), Rod Eddington, Viet Dinh, and Jacques Nasser would all be rejected as independent directors on the basis of UK rules because of variously, long board service, close ties to the Murdoch and previous service on the Board of a related company (Sky). Mr Eddington and Mr Dinh have long standing professional or personal connections with the Murdoch family, Viet Dinh being the godfather of Lachlan Murdoch's son. Dinh was also one of the two people (along with Joel

Klein, another director with close ties to Rupert Murdoch) put in charge of the investigation by News Corp into hacking in 2011.

25. Of the other five remaining so called independent directors two are investors with clear loyalties to the Murdochs – Jeffrey Ubben, described by the FT as a vocal supporter of James Murdoch, and James Breyer who is CEO of Breyer capital which has common investments with News Corp. That leaves only 3 out of 13 directors of 21CF who have even a plausible claim to independence: Tidjane Thiam, Delphine Arnault, and Robert Silberman.
26. We would further point out that this is a pattern of behaviour that characterises both 21CF and News Corp, in striking contrast to the majority of genuine independents on the Sky Board. News Corp has 11 directors, of whom five are acknowledged not to be independent – Rupert, James and Lachlan Murdoch, and Robert Thompson and Joel Klein, the latter two being long-term employees of Murdoch companies. Of the remaining 6 directors although they are all described as independent in US filings, by UK standards at least three of them are not independent of the Murdochs because of length of service – Natalie Bancroft, Jose Maria Aznar and Peter Barnes. A fourth, Kelly Ayotte, defeated Republican US Senator for New Hampshire, has no corporate experience and is a politician who should she wish to re-enter politics would need the good will of the Murdoch media interests.
27. 21CF and News Corp also both have dual voting structures which concentrates voting power in the Murdochs' hands disproportionate to their economic interest in the company. The commercial reasoning for this is that investors are investing in the philosophy and strategy of a key commercial person or group of people. To give effect to that approach that person or group must be given control of the company, which is the reason for the dual structure. Sky does not have that dual structure.
28. It is also clear that if the takeover proceeds, it is very likely that a new CEO will be appointed at Sky. Sky's CEO is Jeremy Darroch. He had never worked for any Murdoch company before joining Sky. He became CFO of Sky from 2004-7, and has been CEO since 2007. He is expected to stand down of his own volition if the 21CF takeover proceeds.¹⁰ The new CEO will, of course be appointed by 21CF whose CEO is James Murdoch and whose Joint Chairmen are Rupert and Lachlan Murdoch.
29. The continuing protection of Sky News' editorial independence after the Transaction in practice depends on the Murdochs. 21CF's board, which is not independent of the Murdochs, passed a resolution on the 20th April 2017 that the appointment or removal of the Head of Sky News, any change to his or her authority or reporting lines, or any change to the Sky News Editorial Guidelines requires the approval of the 21CF's Nominating and Corporate Governance Committee (NCGC). The resolution offers no meaningful

¹⁰ *The Financial Times*, 21/12/16 <https://www.ft.com/content/bc21a49a-c6cf-11e6-9043-7e34c07b46ef>

protection. It can be revoked at any time. The members of the NCGC are appointed by the Board, which is controlled by the Murdochs.

30. Furthermore, we would point out that this Committee of 4 so-called independent directors is chaired by Viet Dinh, godfather to Lachlan Murdoch's second child, Board member of 21CF for thirteen years, with close personal ties to the Murdoch family. The other members are James Breyer, who has substantial investments with News Corporation and Robert Silberman, the Executive Chairman of Strayer Education, for which Viet Dinh is General Counsel. Given the extent to which they are embedded in close relationships with the Murdochs, it is simply not credible to believe that these individuals provide an independent, countervailing force against them.
31. We ask the CMA to contrast the new arrangements with the current arrangements at Sky: a CEO appointed by the Murdochs, the appointment of a Head of News decided by the Murdochs, rubber stamped by a Committee controlled by their allies as against the current situation where the CMA heard direct testimony from the independent directors about the painstaking way the independence of Sky News is safeguarded from Board, and Murdoch, interference. We contend that the change and the contrast could not be more stark in terms of the control exercised by the Murdochs.
32. We would also contend that no faith can be placed in the Board Resolution reaffirming the editorial guidelines of Sky News. Given the repeated breaches of undertakings and commitments by Mr Murdoch from his takeover of the Times in the 1980s to the Wall Street Journal in the 2000s, it is wholly implausible to place any credibility on this Board Resolution, which in the first place offers scant protection, and also could be changed the day after the takeover without any recourse.
33. The effect, therefore of allowing the transaction to go ahead is that Sky changes from being a company where the Murdochs have influence to one where they have total control, and the only guarantee of a commitment to broadcasting standards, or the impartiality of Sky News depends on the Murdochs deciding to comply with their assurances, in respect of which there is no legal means of enforcement, and which are of the kind they have given in the past in other media takeovers and have failed to comply with.
34. Not do we believe that there is any good reason to believe that other 'safeguards' cited by 21CF can be relied upon. Editorial culture is in the gift of the Murdochs, and the examples of every Murdoch outlet—from the New York Post to the Times to the Sunday Times to most recently Sky News Australia—shows the impact Mr Murdoch has on this culture.
35. As for the system of broadcast regulation, the key point is that the system of broadcast regulation is premised on broadcasters having a genuine commitment to broadcasting standards. Ofcom, the regulator charged with enforcing the Code, has taken the view that "we do not consider that the impartiality rules of the Broadcasting Code are sufficient of themselves to

ensure that the editorial stance of Sky News does not become aligned with the other news outlets under the influence of the Murdoch Family Trust.”¹¹

36. Indeed, examination of the way the ex post system of regulation works shows it is slow and relatively light-touch. Ofcom has found five code breaches by Fox News, the *shortest time* taken from broadcast to conclusion was 107 days. Moreover, Ofcom rarely imposes fines and will understandably be deeply reluctant to invoke the ultimate sanction of taking away a license.
37. To summarise, we contend that the end of the public listing of Sky and the takeover by the corporate culture of 21CF, the replacement of a Board that is majority independent with one which is controlled by the Murdochs, the appointment of a new CEO by the Murdochs, the control of the appointment of the Head of News by the Murdochs and the absence of any effective protections for the independence of Sky News represent a material and significant change as a result of the increase in ownership from 39% to 100% by 21CF. Indeed, we contend that the only rational and credible view for the CMA to take is that this would be a significant change in control and we would argue that no reasonable public authority could conclude to the contrary.
38. We therefore conclude that this material change in ownership and control means the issues of plurality and broadcasting standards are directly and materially engaged by this takeover. The increase in Murdoch ownership and control does, as we set out in detail in our first submission, threaten the harm that one owner would have too much control over the public policy and political agenda and the harm that the diversity of voices would be reduced. It cannot be plausibly contended that the Murdochs already have full control and therefore these issues are somehow diminished.
39. Similarly, we do not think the issues of broadcasting standards are, in any way, diminished. The Murdochs ‘record’ at Sky with 39% NewsCorp, then 21CF, ownership, does not provide any reliable guide to a world where 21CF owns 100% of Sky. To understand that world, those outlets where NewsCorp, or 21CF, own 100% are the only reliable guide. To conclude otherwise would fly in the face of the evidence presented above about the constraints operating on the Murdochs in a world of 39% ownership by 21CF.

Media Landscape 2017

40. We would additionally point the CMA to one final argument in connection with the issues raised above. We believe, as already stated, that the move from 39% to 100% ownership of Sky by 21CF will give far greater opportunity for the Murdochs to control the editorial policy of Sky and take it in the direction of Fox News. We also believe that the media landscape of 2017 considerably

¹¹ https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf, paragraph 9.12

strengthens their motive to do so, contrary to some of the claims made by 21CF.

41. The commercial landscape has changed considerably in the time that Sky has existed. When James Murdoch was CEO, for example, Sky News channel was far less widely watched at that time than it is now and Murdoch newspapers were more widely read in their print edition. At that time, many UK households did not yet have Freeview. Online news was in its relative infancy. Facebook did not exist. Today, by contrast, Sky News is a major player online (where content is not subject to the Broadcasting Code) with more followers on Facebook and Twitter than either The Sun or The Times, in addition to being available on all UK televisions since the digital TV switchover.
42. If it is indeed the case that his newspapers are struggling in the digital age, as Mr Murdoch stated at the recent 21CF AGM¹², it is all the more reason for him to seek to take Sky News in a more sensationalist direction and seek to turn it round from its current loss-making situation. Fox News is highly profitable and as of October 2017, it was the most watched cable news network for 190 consecutive months. It is widely reported that the Murdochs want to build a 'news and sport empire'. That will increase the impetus to turn Sky News into a different, more profitable vehicle. Indeed, the above evidence strongly suggests that far from being a burden to bear, Sky News should be regarded as a significant opportunity for the Murdochs if the takeover proceeds.
43. We also know from his testimony to the House of Lords Committee that "He [Mr Murdoch] believed that Sky News would be more popular if it were more like the Fox News Channel. Then it would be 'a proper alternative to the BBC'. One of the reasons that it is not a proper alternative to the BBC is that no broadcaster or journalist in the UK knows any different. Mr Murdoch stated that Sky News could become more like Fox without a change to the impartiality rules in the UK."¹³ We have no reason to believe that Mr Murdoch has changed his view about the commercial opportunities at Sky News.
44. To those who suggest that there will not be a market for sensationalist, ideological content in the UK (along the lines of Fox News), that is exactly the same argument that was made before Rupert Murdoch took over The Sun in the 1960s, before he started Fox News in the United States, and indeed before his recent full acquisition of Sky News Australia. We think it would be extremely unwise and incautious for the CMA to reach conclusions based on this assumption, which has proved so wrong elsewhere.

¹² <https://www.theguardian.com/media/2017/nov/16/ruPERT-murdoch-newspapers-struggling-digital-age>

¹³ <https://publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/122i.pdf>, p. 119

Conclusion

45. We believe that this takeover bid will give the opportunity for the Murdochs to control Sky News in a way that has simply not been possible with 39% ownership of its shares by 21CF. We believe that we have demonstrated beyond any reasonable doubt that a material and significant increase in control would arise from this transaction.
46. We also believe that we have demonstrated in both our original submission and more briefly here that the Murdochs have not just opportunity but motive to take Sky in the direction of Fox. We trust and expect that in its consideration of these matters, the CMA will weigh this additional evidence in mind.

Yours sincerely

Rt Hon Ed Miliband MP

Rt Hon Lord Falconer of Thoroton

Rt Hon Sir Vince Cable MP

Rt Hon Kenneth Clarke MP