



HOUSE OF COMMONS
LONDON SW1A 0AA

Rt Hon Karen Bradley MP
Secretary of State
Department for Culture, Media and Sport
100 Parliament Street
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14th July 2017

Dear Karen

You invited submissions on the issue of a public interest referral of the Sky bid by 21st Century Fox (21CF) on the grounds of broadcasting standards.

The issue for you is whether to refer the bid to the CMA for more detailed investigation of whether if Sky becomes 100% owned by 21st Century Fox it would be committed to compliance with broadcasting standards.

The obvious anxiety about broadcasting standards to which the bid gives rise is that the new ownership will not be committed to appropriate ethical standards, or appropriate levels of impartiality, as laid down in the relevant Act and codes under it.

Our case in summary is this: Concerns about the dangers of Sky News being taken in the direction of Fox News, breaching broadcasting standards, are unanswered by the Ofcom report.

Ofcom finds "significant corporate failure" (fit and proper report, paragraph 10) at Fox News, on top of what happened at News International. But they then fail in their duty as a regulator to properly consider this damning evidence in the context of the correct threshold for a broadcasting standards referral to Ofcom. We believe they have made a serious legal error in their duties. Indeed we believe this is a sufficiently serious error to be open to judicial review should you decide not to make a reference on grounds of broadcasting standards.

We believe the standard for you to refer –that the transaction "may operate or may be expected to operate against the public interest" on grounds of broadcasting standards is met and we ask you to refer it on those grounds.

In your letter of 3rd March 2017, you expressed three sets of specific concerns about the bid in the context of broadcasting standards: breaches of the Broadcasting Code by Fox News, the implications of the phone hacking scandal at the News of the World and evidence of wider corporate failure at 21CF.

Ofcom's argument in their report is as follows:

1. There are not a significant number of infringements of UK Broadcasting Standards recorded against either Sky or Fox, so that metric does not suggest a lack of commitment to Broadcasting Standards
2. They have concluded Sky would remain fit and proper to hold a broadcasting license after the bid.
- 3 Therefore there is no basis to conclude to that the new ownership of Sky will lead to an unacceptable lack of commitment to Broadcasting Standards.

Their argument is flawed in the following respects.

Record of Sky and Fox

The report is clear that if the bid proceeds Sky will be controlled by Murdoch family interests in a way that is materially greater than now. The infringement record of Sky under its current ownership is therefore little guide to commitment to broadcasting standards in the future.

In regard to Fox News , Ofcom say "We have not found Fox News to have breached the accuracy and impartiality provisions of the Broadcasting Code in respect of its news programming." (public interest report, paragraph 10.26). However, this is likely to be because the audience is so small (average 2000 across a week) and likely to be in favour of Fox's point of view, and therefore unlikely to complain. Moreover, Ofcom themselves acknowledge that they are not subject to the impartiality rules of major UK outlets.

You asked for a qualitative assessment of breaches by Fox News. This is not explicitly addressed in the report, although Ofcom say there were no sanctions for the breaches that took place. However, those breaches that have been found indicate the dangers of the opinionated approach to content –for example the widely publicized view on Fox News that areas of Britain were "no-go areas" for "non-Muslims".

Moreover, what Ofcom's report exposes is that there was no compliance procedure within Fox until mid May of this year. This leads Ofcom to say there are "significant concerns about Fox's approach to ensuring Fox News content compliance with the Broadcasting Code". (public interest report 2.51).

The new compliance procedure was only introduced as a result of Fox's attempts to persuade the regulators to allow the bid to proceed. This is a clear breach of basic standards

and totally at odds with Fox's previous claim that since 2011 their corporate governance procedures had been "fixed". This failure to comply with basic requirements undermines any confidence about the commitment to broadcasting standards, and indeed the new system has not even been tested in practice.

We also know Rupert Murdoch has expressed a wish to make Sky News more like Fox News. As Ofcom acknowledge in relation to plurality "We are concerned that following the transaction, members of the Murdoch Family Trust may be able to influence the output of Sky News to align its editorial stance with that of Fox News and the News Corp titles..." (public interest report 9.7)

Ofcom goes on to recognise the danger that the broadcasting code is an insufficient protection against the Murdoch family ensuring all its media outlets adopt a similar editorial outlook. They say: "[The Broadcasting Code] does not provide for [Ofcom] to take a view on the overarching approach of a channel, for example, the specific news stories that it covers or its tone." (public interest report, 9.11)

But if Ofcom believes there is a danger that Mr Murdoch might use greater control over Sky to pursue a political agenda which does not respect impartiality but stays within the code, there must also be an equally legitimate worry that he might do so in ways that contravene the code, for example in the way stories are covered. That is the significance of the way Fox News already operates in other jurisdictions.

In considering what may happen if Sky becomes 100% owned by 21CF this possibility is not even discussed by Ofcom. They simply assert that Mr Murdoch has said that if he took Sky down a road more like Fox News, it would need to be within the code. But we contend that Mr Murdoch's assertions are simply an inadequate basis on which to conclude there is no issue for the CMA to investigate, particularly given his long and indeed recent history of regulatory non-compliance, two examples of which we discuss below.

In summary, we do not believe the risks that Sky News become more like Fox, thereby threatening broadcasting standards is adequately considered or answered by Ofcom.

News International

You asked in your letter of March 3rd 2017 for Ofcom to consider the "extent to which 21CF and the individuals who will have control of Sky and/or who will be responsible for carrying on the business of Sky following the merger have a good record of compliance more generally.." and you go on to cite the experience at the News of the World.

In their report on broadcasting standards to you, Ofcom say they have considered: "the recent track record of regulatory compliance by newspaper titles operated in the UK by News Corp, and the extent to which this may provide an indication of whether Fox has a genuine commitment to the attainment of the broadcasting standards objectives" (public interest report, 10.30).

Unfortunately, Ofcom focus only on breaches of the code of IPSO. IPSO is a regulator that does not meet the criteria agreed by Parliament in relation to independence and effectiveness and has therefore been refused recognition by the panel established by the government under the Royal Charter. It is inexplicable that Ofcom should place any reliance on the record of News UK compliance with IPSO's code.

But of even more concern is that OfCom does not *in any way* address the record of the News of the World and News International more broadly in their report on broadcasting standards. The convictions of senior employees and executives, the corrupt payments to police and public officials who were convicted for taking them, the finding that two senior executives lied to Parliament, the attempt to pervert the course of justice by senior journalist Mazher Mahmood all speak precisely to regulatory compliance. It is a deeply regrettable omission by Ofcom to not even address this specifically in its analysis of regulatory compliance for the purposes of broadcasting standards particularly given that you asked them to do so.

In your letter to Ofcom, you also explicitly asked them to look at the implications of the behavior of James Murdoch. You were clear that "James Murdoch as CEO of 21CF would have responsibilities relating to Sky News following the merger as well as an increased level of control or influence over Sky".

As you put it "His failures were essentially failures of corporate governance" and you asked for a "report on the implications, if any of these matters for the commitment to broadcasting standards ground".

Ofcom do not do this. Ofcom say there is no "new material evidence directly touching on these individuals" (fit and proper, paragraph 70). We dispute this, but in any case, this is not the question you asked. Instead you asked for the implications of what Ofcom had *already* discovered about Mr Murdoch for his future role as CEO of Sky.

Ofcom said in their 2012 fitness and propriety report "We consider that the events set out above raise questions regarding James Murdoch's competence in the handling of these matters, and his attitude towards the possibility of wrongdoing in the companies for which he was responsible" (fit and proper, 2012 report, paragraph 36)

It went on to say that in the circumstances of the time, they were not considering Mr Murdoch in the role of chief executive or chairman: "Whilst we consider that James Murdoch's conduct in various instances fell short of the standard to be expected of the chief executive officer and chairman, we do not find that James Murdoch's retention *as a non-executive director of Sky means that Sky is not fit and proper to hold broadcast licences.*" (emphasis added) (fit and proper 2012, paragraph 46)

So the question of Mr Murdoch's role as CEO, which you specifically asked to be considered, remains unaddressed. Indeed, far from looking at the implications of the past conduct of Mr

Murdoch, Ofcom say that a new corporate governance code can be trusted because “James Murdoch and Lachlan Murdoch have put themselves personally behind [it]” (fit and proper, 2017, paragraph 71).

We believe that Ofcom has not, as you asked, addressed the corporate failures at News International and their implications for broadcasting standards, nor the role of Mr James Murdoch. On these grounds alone, a broadcasting standards referral is now clearly necessary to address these matters going forward.

Conduct at Fox News

You also asked Ofcom whether the corporate failures at News Corporation, now 21CF, have been satisfactorily remedied. We now know that Fox News has over decades had very senior employees who have infringed required standards in relation to sexual harassment and Fox News did nothing about it until recently and then only when publicity focused on the issue.

As a result, Ofcom finds “significant corporate failure” at Fox News, around the handling of sexual harassment and other issues. They are right. Despite this, they conclude that Sky would remain fit and proper to hold a broadcast license in the event of 100% Murdoch control. While we dispute this conclusion, we recognise that is not the point at issue for you.

You must adjudicate on a separate question: whether the “significant corporate failure” at Fox News raises concerns about Sky’s commitment to broadcasting Standards (once it is 100% owned by 21st Century Fox) and whether you should make a referral to the CMA.

Different thresholds

Whilst many of the factual issues may overlap there is a pivotal difference in the thresholds of evidence that need to be applied for an assessment, on the one hand, of fitness and propriety and on the other, a broadcasting standards referral to the CMA. Indeed, in Ofcom’s own words one is a “high” threshold and the other “low”.

According to Ofcom: “If a broadcaster is found to be not fit and proper to hold a particular licence, then by law Ofcom must revoke that licence...This is a major interference with freedom of speech... Ofcom considers that the threshold for finding a broadcaster not fit and proper to hold a broadcast licence is, therefore, high.” (Fit and proper, paragraph 18).

By contrast, they say about a referral to the CMA on grounds of broadcasting standards “The threshold for a reference is low. The Secretary of State would need to hold a reasonable belief that it may be the case that the transaction may operate or may be expected to operate against the public interest.” (public interest report, paragraph 1.2)

So it *cannot* be inferred from a finding that a licensee is fit and proper, on the basis of a high threshold of impropriety, that a licensee should not be referred to the CMA on grounds of a significantly lower threshold of a risk to broadcasting standards. But this is precisely the mistake Ofcom make.

At no point in their report on broadcasting standards do they undertake any consideration of the evidence on the “significant corporate failure” at Fox News, and on what happened at the News of the World in the context of this lower threshold. Nor do they address this lower threshold in their report on fitness and propriety.

This is quite simply a fundamental failure on the part of the regulator, as well as being contrary to your specific request. Indeed, we believe that the Ofcom error is sufficiently serious to be open to judicial review if you decide not to refer on grounds of broadcasting standards.

So it must now be for you to consider the evidence in the context of the correct, lower threshold. We urge you to recognise that the finding of significant corporate failure at Fox News, coming on top of the events at the News of the World, clearly meet the bar required. Two such egregious examples of wrongdoing, and its persistence and toleration, suggests a failure of corporate governance which may well risk compliance with broadcasting standards and easily justify a CMA investigation.

Together, we strongly believe the evidence about the serious failures at Fox News and events at News International, as well as the unanswered questions about James Murdoch, and the dangers of Sky being taken in the direction of Fox News justify a referral by you on broadcasting standards grounds.

We urge you to follow the logic of the evidence and make such a referral.

Yours sincerely

Rt Hon Ed Miliband MP

The Rt Hon. the Lord Falconer of Thoroton

Rt Hon Sir Vince Cable MP

Rt Hon Kenneth Clarke MP