

Fox/Sky merger review:

The problem of undertakings

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July 2017



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I. Executive Summary

On 29th June 2017, the Secretary of State announced her ‘minded to’ decision to refer the proposed merger between 21st Century Fox (21CF) and Sky Ltd to the Competition and Markets Authority (CMA) for a phase two review on plurality grounds. At the same time, she published Ofcom’s report into the public interest test in relation to the proposed merger, after the deal was referred by the Secretary of State in March for a phase one review on grounds of plurality and broadcasting standards.

Ofcom’s report raised substantive public interest concerns in relation to plurality, which formed the basis of the Secretary of State’s initial ‘minded to’ decision to refer the bid to the CMA. Its findings were unequivocal and significantly stronger than when it raised similar concerns in respect of News Corporation’s proposed merger with BskyB in 2010. In 2017, Ofcom stated that

The transaction raises public interest concerns as a result of the risk of increased influence by members of the Murdoch Family Trust over the UK news agenda and the political process, with its unique presence on radio, television, in print and online.¹

Whereas in 2010, Ofcom’s stated view was that it

reasonably believes that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross media audiences²

The basis of these findings was similar in both contexts. It centred on perceived risks that the deal would result in an unprecedented accumulation of control of significant news assets across all of the main platforms for news (television, radio, print and online). In 2017, Ofcom’s concerns were further underlined by new evidence pointing to the unusually wide reach of both Sky News and the *Sun*’s branded content on third party online platforms, including aggregators and social media.

But there was another key distinction between the two reports. During its 2017 review, Ofcom received proposed Undertakings-in-Lieu (UiLs) from 21st Century Fox which it detailed and commented on in its public interest test report. No such UiLs were invited or proposed during the comparable phase of the 2010/11 review. In her ‘minded to’ statement last month, the Secretary of State noted that this aspect of Ofcom’s review was ‘unusual’ and that “the decision as to whether or not to accept undertakings in lieu is for the Secretary of State alone”.

There are three further discrepancies which raise serious concerns about the phase one process. First, Ofcom’s consideration that the proposed UiLs “mitigate the plurality concerns” is not in keeping with its very strongly worded findings in respect of the public interest test, and its acknowledgement that “it can be difficult to ensure the effectiveness of behavioural undertakings [as have been proposed by 21CF] due to the challenges around effective monitoring and enforcement”.

Second, the recommended acceptance of behavioural UiLs is out of step with the relevant statutory guidance for phase one merger reviews in general. Under the public interest test framework, Ofcom’s review supplants the CMA’s phase one review where, according to the guidance, “the CMA is highly unlikely to accept behavioural remedies at phase 1. The CMA will therefore typically expect UiLs offered by parties to be structural, rather than behavioural, in nature”. In its analysis of past

¹ [Ofcom Public Interest Test 2017](#) p4 para 1.10

² [Ofcom Public Interest 2010](#) p15 para 1.57

remedies, the CMA has remarked that “even clearly specified [behavioural] remedies may be subject to significant risks of ineffective monitoring and enforcement”.³

Third, the exclusive reliance on behavioural UILs contradicts the precedent established by the News Corporation/BskyB merger review, where a structural separation of Sky News was agreed with the merging parties as a condition of the deal (prior to the bid being withdrawn against the backdrop of the unfolding phone hacking scandal at the former *News of the World*). In its 2017 report, Ofcom states that “we would have significant concerns that an undertaking based on structural separation may lead to the risk of the scale of Sky News decreasing over time, given the inherent difficulties in sustaining a loss-making unit outside of the Sky corporate structure.” But it is not clear in the report how Ofcom arrived at this conclusion, and the basis on which it has ruled out alternative possibilities for structural remedies that might mitigate the risks of sustainability for Sky News.⁴ Our analysis suggests that the question of whether structural remedies may be applicable can only be addressed by a full phase 2 review by the CMA.

Above all, a full CMA review is needed to determine whether even a structural remedy will be sufficient to mitigate the plurality concerns. Ofcom’s report acknowledges gaps in data which suggest that a more in-depth and extensive gathering of evidence is needed to substantiate the full extent of plurality issues posed by the deal.

It is equally clear, in respect of Ofcom’s on-going fit and proper test framework, that the full extent of issues to do with corporate governance cannot be substantiated until the Leveson Inquiry is completed, which would require a reversal of the government’s stated intention not to carry out part two of the inquiry. The original terms of reference for that inquiry explicitly mention issues of corporate governance issues, suggesting that it would have the adequacy or appropriateness of any undertakings proposed in respect of the bid.

For these reasons, we are very concerned that Ofcom’s acceptance in principle of relatively weak UILs is out of step with the substantive issues raised in its report and which underscore the need for a fuller phase two review on plurality grounds.

What follows is a detailed analysis of UILs as have been proposed in this case and as compared to a range of precedents. It is organised in two parts. The first reviews undertakings offered and agreed in respect of previous media mergers involving the Murdoch Family Trust including News Corporation’s proposed buyout of BskyB in 2010; News International’s purchase of *The Times* and *Sunday Times* in 1981; and News Corporation’s purchase of the *Wall Street Journal* and *Dow Jones* in 2007. The following section sets out the reasons why a CMA review is needed both to uncover the full extent of plurality concerns raised by the initial public interest test, and to properly assess the potential for meaningful structural remedies.

Overall, this analysis suggests that the proposed UILs are highly unlikely to be effective or enforceable, and that Ofcom’s assertion that the current undertakings are “more robust” than what has been offered previously in media mergers involving the Murdoch family⁵ is not supported by either the current proposals or the evidence from these cases. In particular:

- The composition of the Sky News Editorial Board—including a majority of independent members—is functionally identical to both the WSJ ‘Special Committee’ and the TNL system of National Directors.

³ [CMA \(2017\) Understanding past merger remedies: Report on case study research](#) p21

⁴ Detailed further evidence in relation to alternative structural remedies will be provided in due course

⁵ [Ofcom public interest test 2017](#) p104 para 11.21

- Ofcom’s claim that the Head of Sky News is protected by the Board from editorial interference⁶ does not take into account the examples in which proprietors have directly interfered with editors’ coverage despite the presence of editorial boards and/or undertakings prohibiting this interference. As Ofcom acknowledges in its 2017 report, the broadcasting code is not sufficient to alleviate concerns about potential editorial influence, which may manifest in ways that do not contravene the code but threaten plurality (by for instance, instructing editors as to which stories or issues should be covered or omitted from the agenda).⁷
- 21CF’s provisions for editorial board transparency—in particular, giving ultimate oversight to Ofcom and the Secretary of State⁸—are inadequate in light of the disproportionate access and potential influence that members of the Murdoch Family Trust [MFT] may wield over the political process. The Ofcom report concedes that the deal would amplify this risk.⁹ There is also nothing in 21CF’s undertakings to protect against this access being used to pressure a Secretary of State into relaxing the UiLs in a way that would compromise the editorial independence of Sky News. Finally, there are legitimate concerns that giving either the regulator or Secretary of State oversight in appointments to the editorial board of Sky News would amount to undue state interference.

Upon formal notification of the proposed merger, James Murdoch (Chief Executive of 21CF and Chairman of Sky) stated that he did not believe the deal would require “meaningful concessions” in order to win regulatory clearance.¹⁰ Even a strengthened version of the proposed behavioural UiLs at this stage of the review would not amount to what might reasonably be considered meaningful concessions. Acceptance of any behavioural UiLs in the absence of a fuller phase two inquiry will fall well short of mitigating the substantive public interest concerns. Given the contradictory precedents, acceptance of such UiLs at this stage of the review also risks bringing the public interest framework for media mergers into disrepute.

⁶ Ibid. p104 paras 11.17-18

⁷ Ibid. p14 para 2.36

⁸ Ibid. p108 para 4.1(v)

⁹ Ibid. p4 para 1.10 and p85 paras 8.36-40

¹⁰ Sweeney, M. (2016, 15 December). Rupert Murdoch confirms £11.7bn Sky bid. *The Guardian.com*. Retrieved from <https://www.theguardian.com/business/2016/dec/15/rupert-murdoch-sky-bid-pay-tv>

II. The Limits of Behavioural Remedies

21CF's proposed UiLs

Prior to the submission of Ofcom's public interest test report, 21CF proposed undertakings for mitigating adverse public interest considerations relating to the merger as follows¹¹:

- i. To maintain arrangements within Sky to ensure compliance with broadcasting standards set out in s319 of the Communications Act 2003
- ii. To maintain a Sky-branded news service and continue operational investment in that service for at least 5 years
- iii. To establish a Sky News Editorial Board, comprised of a majority of independent board members appointed first by independent directors of Sky and by the 21CF Board thereafter
 - a. That changes to the position of Head of Sky News or editorial guidelines are only approved by a majority of independent members of the Editorial Board.
 - b. That these changes receive prior approval of the Secretary of State/Ofcom.
- iv. To maintain Sky News' current editorial guidelines and the independence of the Head of Sky News
 - a. That attempts to influence selection of news by figures from 21CF outside of the Editorial Board are reported to the Editorial Board.
- v. To allow for the Secretary of State to waive, modify or substitute one or more of these undertakings following a request from 21CF.

These provisions bear strong parallels with previous UiLs agreed in respect of newspaper mergers under the control of Rupert Murdoch and the MFT, as set out below.

CASE 1: 1981 PURCHASE BY NEWS INTERNATIONAL OF *THE TIMES* AND *SUNDAY TIMES*

Proposal and context:

News International purchased Times Newspapers Ltd (TNL) from the Thomson Corporation. Rupert Murdoch's undertakings for "protecting the editorial quality and integrity" of the newspapers were codified in the agreed Articles of Association.¹²

The purchase was not referred to the Monopolies and Mergers Commission under ministerial discretion by the Secretary of State for Trade John Biffen. Ostensibly this decision was made because of fears that "if a new owner does not take over these newspapers they will cease publication".¹³

Declassified reports¹⁴ of a meeting between then Prime Minister Margaret Thatcher and Rupert Murdoch at Chequers, prior to the decision not to refer the deal, has raised

¹¹ Numbers in [] refer to the corresponding paragraph(s) of 21CF's undertakings as published in [Ofcom's public interest test](#) 2017 p106.

¹² [Evidence presented to the Leveson Inquiry](#)

¹³ Biffen, HC Deb 27 January 1981 vol 997 col 780-826

¹⁴ McSmith, A. (2012, 17 March). Revealed: Murdoch's secret meeting with Mrs Thatcher before he bought The Times. The *Independent*. Retrieved from <http://www.independent.co.uk/news/media/press/revealed-murdochs-secret-meeting-with-mrs-thatcher-before-he-bought-the-times-7575910.html>

speculation that the decision may have been compromised by political influence exerted by Murdoch.

Principal UILs:

- i. To preserve the existing system of Independent National Directors
 - a. Editors may be removed or appointed only by a majority agreement of Directors.
- ii. To maintain editorial independence
 - a. Neither paper would be subject to “restraint or inhibition either in expressing opinion or in reporting news that might directly or indirectly conflict with the commercial interests or political concerns of the Proprietor”.
 - b. “Editors will not be subject to instruction from either the Proprietor or the Management on the selection and balance of news and opinion”.¹⁵

UILs in effect:

Murdoch’s personal interference in both editorial stance and appointments at TNL has been widely documented, particularly by Harold Evans who served as editor of *The Times* immediately after the purchase. Evans recalls being sent “a stream of memos asking me to downplay or suppress news that was bad for the government”.¹⁶ Andrew Neil, editor of the *Sunday Times* from 1983-94, has declared from his own experience that Murdoch “does not regard himself as Editor-in-Chief of *The Times* or *Sunday Times*, but he does regard himself as someone who should have more influence on these papers than anybody else”.¹⁷

In a letter to the National Directors in February 1982, one month before conflict with Murdoch led him to resign, Evans claims that Murdoch attempted repeatedly to circumvent Evans’ authority as editor in order to change the editorial stance of the paper.¹⁸ Murdoch himself has declared that he at least exerted undue pressure on Evans, if not directly removed him from the role of editor¹⁹, in spite of the undertaking that editors “may be appointed or removed only by the agreement of a majority of the Independent National Directors”.

The resignation of the *Sunday Times* editor, James Harding, in 2012 is another example of interference by News International management in news coverage and editorial appointments. Various reports suggest that Harding’s departure was caused by disagreements between the editor and senior executives concerning:

- the paper’s coverage of the phone hacking scandal²⁰, despite the undertaking not to “restrain or inhibit” reporting that conflicted with proprietorial interests.

¹⁵ Biffen, HC Deb 27 January 1981 vol 997 col 780-826

¹⁶ [Evidence provided to the Leveson Inquiry](#) p495

¹⁷ [Communications Committee, 23 January 2008, HL 122-II 2007-08](#) p339

¹⁸ [Letter to the National Directors, 26 February 1982](#)

¹⁹ [Witness statement to the Leveson Inquiry, 25 April 2012](#) p33-36

²⁰ Rushton, K. (2012, 12 December). James Harding steps down as editor of The Times. *The Telegraph*.

Retrieved from

<http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/9740384/James-Harding-steps-down-as-editor-of-The-Times.html>

- Harding’s opposition to Rupert Murdoch’s desire to merge *The Times* and *Sunday Times* into a single seven-day paper²¹, again in spite of the undertaking in 1981 to “preserve the separate identities” of the two outlets.

Harding himself alluded to having been forced out of the role by Murdoch, saying in 2013 that when a “proprietor [has] a different view of things from the editor, I understand that the proprietor is not leaving”.²²

CASE 2: 2007 PURCHASE BY NEWS CORPORATION OF DOW JONES & WALL STREET JOURNAL

Proposal and context:

News Corporation purchased Dow Jones following negotiations with majority shareholders. The purchase included daily business-focused newspaper *The Wall Street Journal* (WSJ). The proposed deal was stalled by shareholders in the Bancroft family, who rejected an initial offer in April 2007 based on fears about continuing the journalistic integrity of the company.²³

Principal UIs:

In a letter dated 11 May 2007, Rupert Murdoch detailed several UIs to assuage these doubts.²⁴ These included:

- i. To continue to promote journalistic integrity
- ii. To establish an independent editorial board
 - a. Editors and Managing Editors of WSJ would be appointed or dismissed only with majority approval of this Board.
 - b. The Board would arbitrate disputes between management and editors.
- iii. To appoint to the Board a Bancroft family member or mutually agreed person in order to “alleviate any concerns about maintaining journalistic integrity”
- iv. To retain the existing WSJ team of journalists, editors and management as a “key priority for News Corporation”

UIs in effect:

The ‘Special Committee’ criticised News Corporation for failing to meet “the letter and the spirit” of Murdoch’s pledges, after WSJ’s managing editor resigned in April 2008 without the Committee’s prior knowledge.²⁵ Similarly the presence of key News Corporation figures at WSJ (namely former London Times editor Robert Thomson as publisher) clearly undermined the prospect of genuine editorial independence from the new owners of Dow Jones.

This case demonstrates that behavioural remedies involving independent boards (as proposed by 21CF) are neither effective nor independent where figures from the controlling party in a merger undertake roles equal or superior to that of the board. Although the departing editor claims to have left on amicable terms with Murdoch, that the departure

²¹ <https://www.theguardian.com/media/greenslade/2012/dec/13/jamesharding-thetimes>

²² <http://www.pressgazette.co.uk/james-harding-admits-he-was-pushed-out-times-editors-chair/>

²³ <https://www.ft.com/content/7e5a663c-0259-11dc-ac32-000b5df10621>

²⁴ Republished by the Financial Times on 14 May 2007 <https://www.ft.com/content/56190d92-0257-11dc-ac32-000b5df10621>

²⁵ {Statement behind paywall here <https://www.wsj.com/articles/SB120949854773153675> though quoted by other sources}

was approved without the knowledge of the Committee highlights how easily such measures can be circumvented and made redundant. The proposal by 21CF to establish a Sky News Editorial Board is therefore clearly insufficient for protecting the editorial control over Sky News content, particularly given the already close ties between the companies and likelihood of further integration should the deal be approved.

Assessment

Both cases demonstrate the unreliability of behavioural undertakings previously offered by companies controlled by Rupert Murdoch and the MFT. Post-merger, Rupert Murdoch and/or senior News Corporation officials appear to have ignored undertakings to protect editorial independence of the news assets at stake, or to isolate senior editorial appointments from the influence of the proprietor.

It is unclear in either case whether editors were forced or pressured to resign, or whether they made an independent decision to do so. What is clear is that proprietorial pressure was applied on editors to change editorial stance and had – at the very least – a significant impact on their departure.

Though the broadcasting code limits the scope of proprietorial influence over editorial agendas in the present merger case, it does not by any measure offset the plurality risks posed by the deal. This is because proprietorial influence can take the form of setting news agenda priorities, focussing on particular issues or stories and marginalising or ignoring others in accordance with wider interests. Such practices do not contravene the broadcasting code but nevertheless raise profound questions about the potential for this deal to be used by the Murdoch Family Trust as further leverage over the news agenda.

Indeed, it is this potential to influence the news agenda which is at the heart of Ofcom's plurality concerns:

There is a risk that members of the Murdoch Family Trust may seek to coordinate the editorial policy of news outlets under their influence by omitting certain news stories, highlighting others or using the same commentators in their newspapers and on television news. This type of coordination could weaken the editorial independence of Sky News and so give members of the Murdoch Family Trust greater influence over public opinion.

The potential for agenda influence in this sense may be even more threatening to plurality than the kind of editorial influence associated with previous newspaper mergers involving the Murdoch family. Sky News – along with other broadcasters – attracts relatively high levels of audience trust compared to newspapers and this suggests, according to Ofcom, that its potential impact on public opinion should be considered greater as a result.

This potential impact is also directly linked to the risk of undue influence over the political process:

The transaction could increase the perception among some politicians that members of the Murdoch Family Trust are more able to shape the editorial direction of Sky News, in order to favour one side of a political debate over another. Our assessment, therefore, is that there is a risk that the transaction may increase the political influence of members of the Murdoch Family Trust.

The limitations of behavioural remedies in general is given further weight by wider precedents, as highlighted by the CMA and acknowledged by Ofcom. One recent example of note relates to Ofcom's Digital Communications Review in 2016 which found that British Telecom's behavioural

undertakings, adopted in 2005 in respect of its wholesale operations via Openreach, were not fit for purpose. Ofcom noted that “Openreach’s governance lacks independence from BT Group”²⁶ and that BT “has retained control over Openreach’s decision-making and the budget that is spent on the network”.²⁷ Ofcom’s criticism of the original behavioural undertakings is supported by the 59 non-trivial breaches²⁸ of BT’s commitments in the decade since Openreach was established.²⁹

²⁶ [Ofcom Digital Communications Review](#) p8

²⁷ <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2016/digital-comms-review-feb16>

²⁸ A ‘non-trivial’ breach is defined by BT’s [Equality of Access Board](#) as having had “a direct impact on CPs [communications providers]” p13

²⁹ [Ofcom Digital Communications Review](#) p63

III. The need for a more extensive review

The evidence presented above suggests that the behavioural undertakings proposed by 21CF and Ofcom are wholly inadequate, and will neither guarantee the editorial independence of Sky News nor mitigate media plurality concerns posed by the deal.

Ofcom note in their report that they “considered the possibility of *structural* separation of Sky News from Fox”, but were dissuaded from this option due to information from Sky which indicated that Sky News would not be financially sustainable if divested from the parent company.³⁰

It is unclear from Ofcom’s report whether this investigation of structural separation was initiated by Ofcom or prompted by a proposal from 21CF. However, a similar measure was proposed by News Corporation in the 2010 bid but rejected by Ofcom based on comparable financial concerns that “make it very difficult for the channel to be sold to investors as a standalone concern”.³¹ Without access to the financial information requested by Ofcom in relation to Sky News’ structural separation³², it is impossible to test Ofcom’s claim that such measures “may lead to the risk of the scale of Sky News decreasing over time, given the inherent difficulties in sustaining a loss-making unit outside of the Sky corporate structure.”³³

A full review by the CMA is needed to properly address the question of whether structural remedies may be appropriate, or whether *any* undertakings may be considered adequate to mitigate the plurality concerns raised by the deal.

The scope of Ofcom’s review was also inevitably constrained by the relatively narrow timeframe and the two separate public interest grounds - plurality and broadcasting standards – on which the bid was originally referred by the Secretary of State. This required Ofcom to examine a range of issues and contexts that was unprecedented in its breadth, in addition to a concurrent Fit and Proper test of the broadcast license holder which Ofcom carried out in lieu of the proposed merger. In addition, Ofcom’s investigatory powers during the public interest test were not as extensive as the CMA’s would be in a phase two review, as set out under the Enterprise Act 2002.

In light of these limitations, and the substantive concerns nevertheless raised by Ofcom’s initial review, it is essential that the CMA is given the opportunity to produce a full picture of the risks posed to plurality by the deal. This is further underlined by the acknowledged gaps in data used to underpin Ofcom’s initial findings. In particular, the public interest report notes that whilst “the available evidence suggests there is substantial consumption of Sky News and The Sun news content through intermediaries”. This is based partly on research carried out by the Media Reform Coalition which examined the prevalence of Sky News branded articles on Yahoo News, one of the leading news aggregators in the UK.

But this research was based on a limited sample of only one outlet. The additional time afforded to a phase two review would provide an opportunity to extend this analysis to cover more aggregators (including Google News UK, MSN, etc.) and over a more prolonged time period.

Ofcom also notes anecdotal evidence suggesting both Sky and the Sun brands outperform many of their competitors on social media platforms. There is, however, a multitude of relevant data on this collected by the commercial online market research sector, which would provide, in a more extensive review, the opportunity to gather more definitive evidence of the relative brand performance of the merging parties on such platforms.

³⁰ [Ofcom public interest test](#) p104 para 11.22

³¹ Enders Analysis (2017) End-game for the merger of 21CF and Sky p1

³² [Ofcom public interest test](#) p113 Annex 2

³³ *Ibid.* p104 para 11.22

In respect of corporate governance, Ofcom notes in its fit and proper assessment that although it does not consider the present available evidence to raise substantial concerns in respect of the proposed merger, there are on-going proceedings in respect of alleged phone hacking at the *Sun* newspaper and that “we can re-examine our position if new evidence comes to light.” It also notes that “We have reviewed again the evidence published by the Leveson Inquiry and the conclusions of that Inquiry in light of new – albeit limited - evidence provided to us.”³⁴

But that inquiry is yet to be completed according to its original terms of reference. Part two of the inquiry – which the government has indicated its intention not to carry out – has particular resonance for any proposed undertakings given its terms of reference to, among other things, “inquire into the extent of unlawful or improper conduct within News International” and “the extent of corporate governance and management failures at News International”.

It would be extremely damaging to public trust in the efficacy of the media merger review process if the bid was to be approved, at any stage, absent the planned completion of the Leveson Inquiry intended to look in depth at the very issues that concern Ofcom’s on-going fit and proper assessment. It is equally not possible to properly judge the efficacy of proposed undertakings, without a full and complete picture of corporate governance issues which, given the constraints outlined above, was not feasible during phase one of this review.

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³⁴ 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](#)