

FAO: Rt. Hon. Karen Bradley MP

Secretary of State for Culture, Media and Sport
Department for Culture, Media and Sport
100 Parliament Street
London
SW1A 2BQ

14 July 2017

By email: karen.bradley.mp@parliament.uk

Dear Secretary of State,

Re: 21st Century Fox's bid for Sky

As you know, we are instructed by Avaaz, the global citizens' movement. We write further to our letter of 10 July, which concerned the possibility of accepting undertakings in lieu of reference to the CMA on media plurality grounds. The present letter deals with your statement that you were minded not to refer the transaction to the CMA on broadcasting standards grounds.

In essence, the section of OFCOM's report to you that deals with broadcasting standards grounds is so flawed that it is not reasonably open to you to decline, on the basis of that section, to make a reference on broadcasting standards grounds.

The correct threshold

We start by observing that under the statutory test – article 5(2)(c)¹ of the Enterprise Act (Protection of Legitimate Interests) Order 2003 (“the Order”) – you have power to make a reference if you believe that it is or may be the case that, taking account only of the broadcasting standards consideration, the creation of the merger situation may be expected to operate against the public interest.

However, despite a brief reference to the correct test at §1.2 of their report, it is in fact apparent that OFCOM have applied a different, and higher standard. Thus, at §10.51 (which concludes a very short section on this point), they state that “*we do not consider that this evidence [the Culture Select Committee's findings of huge failures of corporate governance at News Corporation and the 'extremely*

¹ It is not in dispute that sub-paragraphs (a) and (b) are satisfied.

OFCOM have applied a different, and higher standard. Thus, at §10.51 (which concludes a very short section on this point), they state that “we do not consider that this evidence [the Culture Select Committee’s findings of huge failures of corporate governance at News Corporation and the ‘extremely disturbing and serious’ allegations of sexual and racial harassment at Fox News] demonstrates that the merged entity would lack a genuine commitment to the attainment of broadcasting standards” (emphasis added).

But that is a basic misdirection in law: the question for you is not whether it has been demonstrated that the merged entity would lack such a commitment, but, rather, whether it “may be the case” that it would do so. While it would not be right to make a reference if the concern was purely fanciful, you do have power to do so even if the likelihood that such concerns will be substantiated is less than 50%: see *IBA Health v OFT* [2004] EWCA Civ 142 at §§47-48.

Moreover, it is irrelevant to your consideration that OFCOM have, separately, concluded that that evidence is insufficient for it at this stage to take the step of withdrawing Sky’s licence under the Broadcasting Acts. OFCOM make it clear in their “fit and proper” decision that they were not applying the “may be the case” test that you are required to apply: rather, they state at §§4 and 18 of that decision that they were applying a “high” threshold. Indeed, as is apparent from §4 of that decision, OFCOM’s reasoning in support of a “high” threshold in relation to its “fit and proper” decision relies on the point that immediate cessation of a licence is a major disruption to the status quo with substantial consequences for shareholders, employees, and viewers. That consideration does not apply to a decision to refer a proposed merger to the CMA, which cannot result in any removal of rights or benefits currently enjoyed by shareholders, employees or viewers. Further, such a decision does no more than result in a detailed fact-finding exercise enabling the CMA to get to the bottom of the concerns and to report to you accordingly so that you can decide, on the basis of full information, whether the status quo should be maintained or whether the transaction should be allowed to proceed.

Finally, it is important to bear in mind that the CMA has powers, in a merger reference, to obtain documents and information, and to obtain by compulsion written and oral evidence, under criminal sanction for supplying false or misleading information: see, for example, sections 109 and 117 of the Enterprise Act 2002, as applied by Schedule 3 to the Order. Those powers are not available to OFCOM.

Record of Sky and Fox

Avaaz makes the following points: -

- Sky's compliance record since 2012 is irrelevant: the question is how it is likely to behave when wholly controlled by the Murdoch family through Fox.
- Fox's compliance record in the UK (or EU) throws little light on anything. Fox News is at present a marginal broadcaster in the UK (and EU) with a tiny audience (2,000 or so in the UK). It is likely (or at least entirely possible) that its tiny audience chooses Fox News precisely because of its bias and disregard for factual accuracy (vividly demonstrated by its promulgation of the canard relating to alleged "no go" areas for non-Muslims in Birmingham²): so they are unlikely to complain about inaccuracy or lack of due impartiality. In any event, OFCOM accept that they do not apply to Fox News the impartiality rules that they apply to major broadcasters such as Sky.
- On the other hand, Fox's failure to put in place adequate procedures to ensure Fox News' compliance with UK broadcasting standards is clear evidence of a failure to take those standards seriously. A hurried instatement of compliance procedures, only when pointed out and only in the context of an ongoing regulatory investigation, is of very limited comfort in that regard.
- Further, Fox News' bias and contempt for accuracy – amply demonstrated in the evidence put to OFCOM and to you – is a matter for serious concern. It is no answer to that concern to observe that US regulatory standards do not require impartiality: the point is that Fox News shows the type of news product that the Murdoch family and companies under their control wish to produce when permitted to do so, namely biased and inaccurate news, designed to suit their political agenda and business interests. The question that you are then obliged to ask – but which OFCOM fail to ask – is whether, in the UK regulatory context, there are non-fanciful concerns that a broadcaster under the control of a family with such a record of producing biased and inaccurate news where they can will fail to comply with broadcasting standards relating to impartiality and accuracy. The only possible answer to that question is "yes": such concerns are not fanciful. We note in particular that:
 - Paying lip service to compliance with the Broadcasting Code (see §10.46) is of little comfort if there are real concerns (for the reasons referred to at §§10.46-48) that the Murdoch family regard that Code's provisions on impartiality as an unwarranted imposition and that (as Fox News shows) they will produce biased news where they can.
 - Further, there are real and non-fanciful concerns, based on their history of regulatory non-compliance, that the Murdoch family do not in fact take their regulatory obligations

² Dylan Stableford, "Fox News apologizes for terror expert's 'totally Muslim' claim," Yahoo News, 18 Jan. 2015, <https://www.yahoo.com/news/fox-news-apologizes-muslim-only-city-birmingham-uk-154509889.html>.

seriously. Examples include not only Fox News' disregard for its obligation to comply with UK broadcasting standards until prompted to set up correct procedures in the context of an ongoing regulatory investigation but also: -

- the history of non-compliance with and evasion of regulatory undertakings set out in our letter of 10 July (matters plainly within the knowledge and control of the Murdoch family and for which they were on any view responsible);
 - the history of failure by senior employees and executives at News International to comply with the criminal law and acceptable standards of journalistic conduct; and
 - the history of extensive and unacceptable racial and sexual harassment at Fox News³.
- It is inappropriate, in a merger control context, to rely on OFCOM's ex post enforcement powers: the whole point of merger control is to avoid regulatory issues arising ex ante.
 - Those enforcement powers are in any event at best unreliable in cases where bias consists not of plainly partial and selective reporting but in, for example, choosing to prioritise coverage of issues that suit a particular political or business agenda and to ignore or downplay issues that do not, and to prefer correspondents and commentators who support the Murdoch's agenda rather than those who do not support it – the dangers expressly recognised by OFCOM at §9.7. Such insidious bias is unlikely to generate complaints and is inherently difficult to prove: it is therefore unlikely to lead to enforcement action.

News International

Avaaz agrees with the letter sent today by the Rt Hon Ed Miliband MP and others, a copy of which we have seen. It is not enough to consider the conduct of News International only in relation to the IPSO Editors' Code, for the reasons given in that letter. Moreover, as explained in that letter, OFCOM fail adequately or at all to examine whether there are non-fanciful concerns arising from the role of James Murdoch as CEO, given OFCOM's own findings in 2012 about his conduct in relation to the newspapers owned by News International and the hacking scandal. Any proper examination of that matter would have concluded that there were non-fanciful concerns in relation to broadcasting standards arising from

³ In this and the previous example given here, OFCOM's position appears to be that there is inadequate evidence to link the Murdoch family to those matters: we deal with that issue in the following sections of this letter.

James Murdoch's role in the hacking scandal, and that those concerns should be addressed by the CMA in detail and with the aid of the extensive powers to obtain evidence at the CMA's disposal.

Conduct of Fox News

Again, Avaaz agrees with the Miliband letter. The key point is that OFCOM concluded that the nature and extent of the allegations made were "*extremely serious and disturbing*": §10.50. But (because, as explained above, OFCOM misdirected themselves as to the threshold) OFCOM failed to draw the inevitable conclusion that those allegations gave rise to non-fanciful concerns as to corporate governance and compliance with the law at Fox News. Further, OFCOM failed, applying the correct threshold, to consider whether there were non-fanciful concerns that the Murdoch family, as controllers of Fox News, were responsible for those failings. As to that, its findings in its "fit and proper" decision on the responsibility of the Murdoch family for failings at Fox News are irrelevant for present purposes because: (a) those findings there were on the basis of a different, "*high*", threshold and not the "non-fanciful concern" threshold at issue here; and (b) those findings were made without deploying the extensive powers to verify the claims made by the Murdoch family as to their non-involvement that are available to the CMA.

Conclusion

In the light of the matters set out above, we consider that you would not be acting lawfully if you declined, on the basis of the OFCOM report, to make a reference to the CMA on broadcasting standards grounds. If you do decide not to make such a reference, our clients would urgently consider a legal challenge to that decision.

Yours faithfully,

