

THE FOX/SKY TAKEOVER

WHY A PHASE TWO REFERRAL ON
BROADCASTING STANDARDS IS NEEDED TO
PROTECT THE PUBLIC INTEREST

14 JULY 2017

AVAAZ

Introduction

The Secretary of State's minded-to decision not to refer the 21st Century Fox bid for Sky on Broadcasting Standards relies on an Ofcom assessment which is incomplete and seriously flawed. This submission exposes these limitations and flaws, including that:

- Ofcom was willing to ignore significant evidence and accept assurances from Fox and the Murdoch Family Trust at face value
- Ofcom accepted a new compliance process as evidence that Fox is committed to Broadcasting Standards, but has failed to proactively ensure it is effective. Fox is currently broadcasting materials that break the Standard.
- Ofcom has failed to fully investigate a range of material concerns, including Fox's UK broadcasts, the experience of Sky Australia after it was taken over by Fox, and a corporate governance failure at News America Marketing that resulted in financial settlements significantly higher than those paid for phone hacking.

This submission additionally presents new evidence on the issues reviewed by Ofcom, including:

- Continued breaches of UK Broadcasting Standards by Fox News since it implemented its new compliance policy on 15th May 2017
- Biased and inflammatory coverage at Sky Australia, which Fox took over fully last December
- The pervasive effects of slanted coverage by Fox which Ofcom should have considered, particularly in light of their statement that "Sky News is a trusted voice for those who use it"¹
- The News America Marketing scandal which sheds significant light on the Murdoch Family Trust's approach to corporate governance.

Avaaz argues that this weight of evidence requires the Secretary of State to use her power to make a reference to the Competition and Markets Authority because there may be a case that the creation of the merger situation may be expected to operate against the public interest by undermining broadcasting standards.²

¹ Ofcom, 'Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox' (20 June 2017) <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 4.

² This is the correct legal standard to apply. See article 5(2)(c) 1 of the Enterprise Act (Protection of Legitimate Interests) Order 2003.

SECTION A - Views on the Secretary of State's minded-to decision not to refer on the grounds of genuine commitment to broadcasting standards

Summary

The Secretary of State's minded-to decision on broadcasting standards relies on an Ofcom report which is flawed in several respects. This section highlights some key errors.

Ofcom finds many serious issues with Fox's record on and approach to broadcasting standards and corporate governance. Yet its recommendation states: "in light of Fox's and Sky's broadcast compliance records and taking account of our separate assessment of whether Sky remains fit and proper to hold broadcast licences following the transaction, we do not consider that the merged entity would lack a genuine commitment to the attainment of broadcasting standards. Therefore, we consider that there are no broadcasting standards concerns that may justify a reference by the Secretary of State to the Competition and Markets Authority."³

The statutory standard for a Phase 2 referral on broadcasting standards is low. Ofcom must recommend a full investigation on broadcasting standards if it believes it "may be the case" that "the merged entity would lack a genuine commitment to the attainment of broadcasting standards". They failed to use this standard in reaching their recommendation and thus their recommendation is not a full and safe basis for the Secretary of State's final decision on broadcasting standards.

The threshold for the Secretary of State to refer a bid on broadcasting standards grounds is low, only requiring the Secretary of State 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. Ofcom provides strong evidence that makes it reasonable to believe that standards would be endangered, yet concludes that this low threshold test has not been met.⁴

In addition, Ofcom presents an overly favourable view of Fox's compliance record. Ofcom looks only at the breaches resulting from complaints rather than proactively examining the material Fox broadcasts in the UK. Our previous evidence submitted in March shows that Fox News has a long history of showing material in the UK that is partial, inaccurate and offensive, yet Ofcom accepted that Fox News changed its approach overnight when it issued a new compliance policy on 15 May, during Ofcom's review period.

³ Ofcom, 'Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox' (20 June 2017) <https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 5.

⁴ This argument is spelled out in more detail in a letter sent by Avaaz's lawyers, Hausfeld, to the Secretary of State on 14th July 2017.

Insufficient analysis of Fox standards breaches

Ofcom identified “significant concerns” about Fox’s approach to ensuring Fox News content complies with the Broadcasting Code.⁵ Despite this clear red flag concerning Fox News’s output, Ofcom does not then appear to give sufficient weight to the submissions made which demonstrate a long-standing pattern of serious breaches of the Broadcasting Code by this news channel. Instead of analysing these and investigating further the serious qualitative issues (in which the Secretary of State expressed an interest in her ‘minded to’ letter of 3 March) they raise about Fox News’s output, Ofcom merely performed a quantitative analysis. This found relatively few breaches of the accuracy and impartiality rules against Fox News and that the compliance record of the wider set of Fox channels is in line with that of comparable broadcasters.⁶

Ofcom’s use of this quantitative analysis to justify a finding that Fox does not lack a genuine commitment to broadcasting standards is based on an incomplete analysis of Fox’s UK record and a misleading analysis of Fox’s record beyond the UK, combined with an over-hasty acceptance that Fox News’ May 2017 compliance policy will make a real difference to what is aired.

Incomplete analysis of UK breaches

Ofcom claims to have acknowledged and taken account of the concerns about Fox News, submitted by ourselves and others, by paying what it calls “particular attention” to the channel’s record of compliance with the rules of the Broadcasting Code on due impartiality and due accuracy.⁷ While it therefore clearly recognises the importance of this area of Fox’s output to its deliberations, Ofcom fails to do justice to the relevant facts.

Ofcom notes the small UK audience for Fox News programmes of around 2000 viewers and affirms that this audience’s expectations, regarding for example bias, of the channel are relevant. But it appears to have relied on findings of breaches which are triggered by complaints from members of the public and, in doing so, has failed to account of the fact that Fox News’s acknowledged small audience size necessarily limits the number of such complaints regardless of how well or badly Fox is implementing the UK’s Broadcasting Code.

The evidence submitted to Ofcom on 30th March by Avaaz and Media Matters for America clearly showed a consistent pattern of partial and inaccurate coverage on a number of topics, ranging from climate change to immigration and terrorism. Ofcom should have looked into and reported on breaches of the broadcasting code that were submitted by Avaaz and others, as well as proactively finding its own examples - its own procedures for investigating breaches of content standards for television and radio clearly articulate that Ofcom “may launch investigations on its own initiative as

⁵ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 4, pa 1.12.

⁶ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 4, pa 1.11.

⁷ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 13 July, 2017, p 95.

well as investigate complaints.”⁸ In short, it does not appear that Ofcom carried out the Secretary of State’s request for qualitative analysis expressed in her ‘minded to’ letter of 3 March 2017.

Ofcom relies on this limited analysis to find that Fox News’s approach to accuracy and impartiality does not show a lack of genuine commitment to the attainment of broadcasting standards.⁹ Ofcom simply states that the channel has been found guilty of several breaches of the Broadcasting Code in relation to non-news content but guilty of no breaches in relation to news programming. Together with its findings that the incidence of breaches across all Fox channels is comparable with other broadcasters and that Fox News’s new policy on broadcasting standards is adequate, this is crucial to Ofcom’s eventual conclusion that Fox as a whole does not lack genuine commitment to broadcasting standards.

Ofcom agreed with us in finding that “Fox had not put in place adequate procedures to ensure the compliance of Fox News’ content with the Broadcasting Code”, and wrote to Fox stating this. Fox countered by sending Ofcom details of new compliance arrangements, leading Ofcom to conclude that “the improvements made by Fox to its compliance arrangements and procedures are sufficient to meet the requirements of its licence.”¹⁰

In the light of the lack of scrutiny and qualitative analysis of the evidence submitted to it, Ofcom’s conclusions that this new compliance policy is sufficient and that Fox has a genuine commitment to broadcasting standards, are premature and unreasonable. The new policy arrangements and procedures are less than two months old and 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. And Ofcom’s passive monitoring approach to Fox News means that subsequent breaches may not be detected, including breaches caused by the unbalanced selection of issues and commentators.

Damaging inaccuracies about the UK

We have compiled several recent examples of damaging inaccuracy and partiality on stories relating to the UK that could have serious consequences. To our knowledge, none of these instances were reviewed by Ofcom for potential breaches of broadcasting standards, because no viewer complained.

On 23 March 2017, Walid Phares, the channel’s National Security and Foreign Affairs expert, claimed that ‘one man...shut down a city’ after a terrorist drove into pedestrians on Westminster Bridge and stabbed a policeman, killing three people in London.¹¹ Contrary to Fox News reports, the city was not shut down and was functioning largely as normal by Thursday morning. Katie Hopkins then went on

⁸ Ofcom, ‘Procedures for Investigating Breaches of Content Standards for Television and Radio’ (3 April 2017)

<https://www.ofcom.org.uk/_data/assets/pdf_file/0020/55109/breaches-content-standards.pdf>
accessed 11 July 2017, p 3, pa 1.19.

⁹ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf>, accessed 13 July, 2017, p 95.

¹⁰ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 16 pa 252.

¹¹ Chris York, ‘Fox News’ And Katie Hopkins’ Comments On London Attack Spark Incredible Response From Londoners’ (*Huffington Post*, 23 March 2017) <http://www.huffingtonpost.co.uk/entry/fox-news-and-katie-hopkins_uk_58d39945e4b0f838c62f8cc4> accessed 12 July 2017.

Fox News to say Brits were “cowed”, “afraid” and “not united” after the attack,¹² a description that many citizens felt was inaccurate.¹³

But, perhaps the most stark example of inaccurate reporting used to promote a particular view, was when Nigel Farage appeared on Fox News linking the Westminster terror attack to a lack of immigration controls. Speaking on Wednesday 26 March to right-wing news anchor Sean Hannity, he said: “Frankly, if you open your door to uncontrolled immigration from Middle Eastern countries, you are inviting in terrorism.”¹⁴ It is hard to imagine that these apparent violations of broadcasting would have escaped Ofcom’s censure if they had aired on a current mainstream UK TV channel.

Insufficient analysis of compliance beyond the UK

For its analysis of Fox breaches in the last five years in other jurisdictions, Ofcom appears to have relied solely on evidence from Fox itself. It is troubling that Ofcom did not approach other regulators directly.¹⁵ Ofcom then only produced a few brief sentences about breaches outside the UK, and dismisses breaches in non EU countries including South Korea, Argentina, India and Turkey as unimportant without explaining why.¹⁶ This makes it impossible to assess Ofcom’s investigation. For example, if the breaches in non-EU countries happened in countries with laxer broadcasting regimes, this could actually be more troubling than breaches in the EU, as it is harder to breach a weak regime. Ofcom’s conclusion that “Fox’s compliance record in relation to overseas broadcast jurisdictions does not give cause for concern” therefore appears to be based on an incomplete analysis and cannot be relied upon by the Secretary of State.¹⁷

Insufficient action to ensure compliance

Fox has not been fulfilling its obligations under the Broadcasting Standards, as Ofcom found when it investigated elements of this issue during its review for the Public Interest Test. Ofcom uncovered a serious breach of the license condition, yet Ofcom seems to have issued no penalties to Fox, instead simply allowing the company to put in place a procedure belatedly on 15 May 2017.

¹² Tom Powell, ‘Londoners hit back after Katie Hopkins ‘insults Britain’ by saying people are afraid in wake of terror attack in interview on Fox News’ (*The Standard*, 23 March 2017) <<http://www.standard.co.uk/news/crime/london-attack-katie-hopkins-slammed-for-saying-brits-are-afraid-and-disunited-a3497151.html>> accessed 12 July 2017.

¹³ Tom Powell, ‘Londoners hit back after Katie Hopkins ‘insults Britain’ by saying people are afraid in wake of terror attack in interview on Fox News’ (*The Standard*, 23 March 2017) <<http://www.standard.co.uk/news/crime/london-attack-katie-hopkins-slammed-for-saying-brits-are-afraid-and-disunited-a3497151.html>> accessed 12 July 2017.

¹⁴ Jon Sharman, ‘Nigel Farage forced to admit Westminster attack had nothing to do with immigration’ (*The Independent*, 26 March 2017) <<http://www.independent.co.uk/news/uk/politics/nigel-farage-admits-westminster-attack-immigration-fox-news-sean-hannity-a7650541.html>> accessed 12 July 2017. Farage was later asked to apologise by Sky News Presenter Sophy Ridge, who said the claim was “not relevant” to the Westminster attack, which was carried out by a 52-year-old British man from Kent.

¹⁵ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 98.

¹⁶ 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 Fit And Proper Report 2017’ <https://www.ofcom.org.uk/data/assets/pdf_file/0013/103621/decision-fit-proper.pdf> accessed 7 July 2017, p11.

¹⁷ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 4.

We know, however, that Ofcom has taken action when other broadcasters have violated broadcasting standards. Between 2015 and 2017, it issued sanctions and fines of £25,000,¹⁸ £65,000,¹⁹ and £75,000²⁰ to broadcasters Asia TV, Peace TV Urdu, and Mohiuddin Digital Television, respectively, for giving harmful medical advice, broadcasting anti-discriminatory remarks against Jewish people, and including hate speech against Jewish people. The consideration of a sanction follows a decision by Ofcom that a broadcaster has breached a relevant requirement, particularly when Ofcom considers that a broadcaster has “seriously, deliberately, repeatedly, or recklessly breached a relevant requirement.”²¹ Failing to have an effective compliance process for over 15 years seems to show a serious and repeated pattern.

As Fox has faced no meaningful consequences for its previous failures, and as Ofcom has not committed to an enhanced, proactive monitoring regime in future, the Secretary of State cannot even be confident that Fox will be compliant in future, let alone that a Sky fully-owned by the Murdochs would be so compliant.

From partisan to ‘compliant’ - ignoring the pattern

The Murdochs’ new pledge to make Fox News compliant should not be taken at face value given the consistent pattern of behaviour by Murdoch Family Trust controlled media outlets around the world.

In our March briefing “Murdoch’s Fox Effect: How full ownership of Sky risks undermining British broadcasting standards” Avaaz and Media Matters provided Ofcom with detailed examples of Murdoch outlets presenting biased, sometimes inaccurate, coverage, to achieve political objectives.

Other submissions made exactly the same point, for example the *Crowdnewsing* submission “Exploiting the socio-political fault lines to carve out a market,” highlights how the Murdoch Family Trust controlled Star TV in India regularly undermines the distinction between fact and opinion and broadcasts material that is offensive to particular groups, for example, women.²²

Many of these examples come from media outlets that do not have strict Broadcasting Standards requirements, such as UK newspapers and US and Australian tv stations. However, it is shocking to see that there seems to be no example of any media outlet fully controlled by the Murdoch Family Trust which is full fair, fact-driven, and free from interests that seek to influence public policy.

¹⁸ Ofcom, ‘sanction 97(15) Asia TV Limited’ (29 July 2015) <https://www.ofcom.org.uk/data/assets/pdf_file/0021/67251/asia_tv_limited.pdf> accessed 14 July 2017.

¹⁹ Ofcom, ‘sanction 103(16) Club TV Limited’ 11 November 2016) <https://www.ofcom.org.uk/data/assets/pdf_file/0032/93866/Peace-TV-Urdu-Sanctions-Decision.pdf> accessed 14 July 2017.

²⁰ Ofcom, ‘sanction 104 (16) Mohiuddin Digital Television Limited’ (20 December 2016) <https://www.ofcom.org.uk/data/assets/pdf_file/0022/96124/Noor-TV.pdf> accessed 14 July 2017.

²¹ Ofcom, ‘Procedures for the consideration of statutory sanctions in breaches of broadcast licences’ (3 April 2017) <https://www.ofcom.org.uk/data/assets/pdf_file/0030/71967/Procedures_for_consideration.pdf> accessed 12 July 2017, p 4 pa 1.13.

²² Crowdnewsing, ‘Exploiting The Socio-political Fault Lines To Carve Out A New Market For News: India’s Murdoch Experience’ (5 May 2017).

Given this pervasive pattern, Ofcom has failed in its duty by focusing merely on breaches of Broadcasting Standards rules in the UK and other jurisdictions while failing to give sufficient weight to the significance of the many examples of the pattern of behaviour submitted to it by participants in the public interest review process.

This failure is particularly stark because Ofcom accepts that there are ways to circumvent the spirit of the Broadcasting Standards while not breaking any existing rules. Ofcom clearly states “the Broadcasting Code does not provide a guarantee against greater coordination of news sources under the influence of the Murdoch Family Trust.”²³ Therefore, it is particularly relevant to examine the behaviour of Murdoch Family Trust controlled news outlets when there are no rules to restrain them.

In addition, Ofcom has not even been robust in its approach to looking at breaches of rules. Ofcom must be aware that Murdoch Family Trust controlled companies do not have a good record of providing regulators with the information that show them in a bad light.

For example, the Australian Broadcasting Tribunal rejected a Murdoch bid for a Melbourne TV station and criticised Rupert Murdoch for giving “directly contradictory evidence.”²⁴ The American Federal Communications Commission review board said Fox’s application to renew its license of its Los Angeles tv station, which failed to disclose a \$21million federal fraud suit settlement, “shows either carelessness or arrogance, depending on how the Fox compliance record is interpreted and we cannot sweep them aside lest we condone such conduct on the part of all FCC licensees.”²⁵

Murdoch Family Trust-controlled companies have also proved reluctant to submit legally required evidence in the UK. For example in The Sun hacking trial in June, Justice Mann ordered the Murdoch Family Trust owned division of News Group to disclose invoices for the use of private investigators that may have hacked phones or otherwise unlawfully obtained personal information. Justice Mann pointed out an “unfortunate history to this part of the case” because News Group previously claimed not to have any relevant invoices at all.²⁶

A limited look at corporate governance issues

The Secretary of State insisted she wanted corporate governance covered under the broadcasting standards public interest test, but this has not been achieved by Ofcom, which provides only three paragraphs on the issue, plus a reference to its separate report on Fitness and Propriety, which has different terms of reference and a higher threshold for its conclusion. The analysis of corporate governance is therefore insufficient as a basis for Ofcom’s recommendation to the Secretary of State, a recommendation that should be based on a low threshold of whether it is likely that such concerns may be substantiated in a full review - a Phase 2 referral is appropriate and lawful even if the likelihood that such concerns will be substantiated is less than 50%.

²³ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20June 2017) <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 14, pa 2.36.

²⁴ Jonathan Aitken, ‘Times Newspapers - in the House of Commons at 3:51pm on 27 January 1981’ (*They Work For You*, 27 January 1981) <<https://www.theyworkforyou.com/debates/?id=1981-01-27a.780.0>> accessed 14 July 2017.

²⁵ Felons on the Air, Does GE’s Ownership of NBC Violate the Law?’ (*Fair*, 1 November 1994) <<http://fair.org/extra/felons-on-the-air/>> accessed 13 July 2017.

²⁶ Graham Ruddick, ‘Owner of the Sun forced to hand over invoices before new hacking trial’ (*The Guardian*, 14 June 2017) <<https://www.theguardian.com/media/2017/jun/13/owner-of-the-sun-forced-to-hand-over-invoices-before-new-hacking-trial>> accessed 13 July 2017.

The Secretary of State's mandate

In her 3 March letter the Secretary of State called on Ofcom to consider and report on the implications of corporate governance for the commitment to broadcasting standards ground.²⁷ Ofcom confirmed in its letter to Avaaz on 14th March that “in considering whether a person had a ‘genuine commitment’ to the attainment of the standards set out in section 319 [of the Communications Act 2003] Ofcom would be entitled, if we considered it relevant to do so, to consider the track record of that person in establishing and maintaining appropriate governance and compliance arrangements in relation to the legal and regulatory regimes to which they were subject ...”²⁸

Ofcom notes that “the behaviours alleged at Fox News amount to significant corporate failure”, but goes on to conclude that “the overall evidence available to date does not provide a reasonable basis to conclude that if Sky were 100% owned and controlled by Fox, it would not be fit and proper to hold broadcast licenses.”²⁹ Ofcom further concluded: “we do not consider that the merged entity would lack a genuine commitment to the attainment of broadcasting standards”³⁰

In reaching this conclusion Ofcom has incorrectly applied the wrong, ‘high’ threshold of the “fit and proper” test to the low threshold test of whether the bid should be referred to the Competition and Markets Authority under a public interest test. Withdrawing a license would have significant impact on shareholders, employees and viewers. But that reasoning does not apply to a decision to refer the possible merger to the Competition and Markets Authority. Such a referral is the logical step so the Secretary of State has the benefit of a detailed, fact-finding exercise in order to be able to make a decision in the public interest.

Additionally Ofcom was unwise to accept assurances from the Murdochs and their employees at face value, despite the long history of cover ups and corporate governance failures at these companies.

Fox's 2012 corporate governance mechanism failed - no questions asked:

In our 30 March submission Avaaz argued that Ofcom needs to investigate thoroughly how the mechanism of “rapid escalation of material issues” that Fox put in place in 2012 actually worked, since it still took a full 4 years for the Board to recognise that there was a massive problem of widespread sexual harassment. This is especially important because the problems emerged only because a high-profile anchor sought external redress in court.

We specifically said, “Ofcom should investigate whether there is a record of this escalation, how this compliance mechanism works in practice, and whether plaintiffs’ employment and civil rights have been respected. In short, whether 21C Fox’s representations are accurate and whether the company’s claims to meet the ‘highest standards of corporate conduct’ are true.”³¹

²⁷ UK Department for Digital, Culture, Media and Sport, ‘letter to SKY and 21st C Fox’ (3 March 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/610045/r_20130303_Sky_letter_FINAL.pdf> accessed 12 July 2017.

²⁸ Sweeney, Mark, Ofcom letter to Ingrid Gubbay Hausfeld on behalf of Avaaz, 14th March 2017.

²⁹ Ofcom, ‘Decision Under Section 3(3) Of The Broadcasting Act 1990 And Section 3(3) Of The Broadcasting Act 1996: Licenses Held by British Sky Broadcasting Limited Fit And Proper Report 2017’ <https://www.ofcom.org.uk/_data/assets/pdf_file/0013/103621/decision-fit-proper.pdf> accessed 10 July 2017, pa. 10.

³⁰ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 5.

³¹ Avaaz, ‘Sexual harassment, denials and cover ups: evidence of a rotten corporate culture at Fox. Briefing for Ofcom’ (30 March 2017), p 18.

We note that Fox's only defence has been to claim that no senior executive at 21st Century Fox knew about the harassment until July 2016. We see no evidence of Ofcom having asked probing questions about why no one knew.

The reason to ask those questions would be because the new system put in place to supposedly ensure something like phone hacking never happens again at a Murdoch Family Trust controlled business is completely ineffective. Besides the fact that it took four years to discover that dozens and dozens of women had been sexually harassed over years, it is also worth noting that all of these women who spoke out eventually have all been gagged from talking about their story, subsequently. Yet Ofcom has chosen to completely trust Fox's version without treating it with much needed circumspection.

Incidentally, it took Fox even longer to recognise racial harassment and again only when a group of black employees in the payroll department went to court in 2017.

It also appears that Ofcom is brushing aside all the corporate governance failures, including potential criminal activity such as phone hacking in other parts of Murdoch Family Trust controlled companies, prior to 2012, by placing faith in this new corporate governance arrangement. Without conducting any investigation, Ofcom simply states that it cannot draw conclusions about conduct that took place prior to 2012. We facilitated attorneys Douglas Wigdor, Lisa Bloom and her client Wendy Walsh to present their testimony to Ofcom. Many of the victims that these attorneys represent suffered years of abuse stretching back over a decade. Ofcom has not provided any reasoning for why they accept the new policy as proof that Fox had reformed in 2012. Equally, Ofcom has not provided a compelling explanation for why they ignore everything prior to that.

Selective amnesia again

Ofcom acknowledges that Fox was slow to act in firing their star anchor Bill O'Reilly whose history of sexual predation dates back to 2004. The fact that Rupert Murdoch was briefed about this man's abuse is also acknowledged by Ofcom by citing the most authoritative external source on Fox News, Gabriel Sherman, who was former CEO Roger Ailes' unofficial biographer. However, Ofcom simply states that Rupert Murdoch does not recall when he was briefed.

This is selective amnesia by Rupert Murdoch, who has a long history of using this convenient excuse. It is just like his claim to Lord Justice Leveson that he couldn't remember meeting Margaret Thatcher at Chequers in the early 1980s when he wanted to take over The Times.

If Ofcom had looked more closely at the source that they cite, Gabriel Sherman's book, it would be clear that Rupert Murdoch almost certainly knew about the Ailes allegations at the time they were first made, in 2004.³² The book indicates that what exercised Rupert Murdoch most at the time, was not that his male employee had been harassing a female employee but that News Corp could potentially have to pay millions for his behaviour. He told Bill O'Reilly that he would have to settle the amount himself but there were no other penalties for his behaviour. It took Rupert Murdoch 13 years to eventually fire him and as Ofcom acknowledged, O'Reilly was only let go as the result of a large advertiser boycott.³³ Given that it was financial and public pressure and not a commitment to a fair

³² Gabriel Sherman, *The Loudest Voice in the Room - How the Brilliant, Bombastic Roger Ailes Built Fox News - and Divided a Country* (Random House, New York, 2017) p 300.

³³ Ofcom, 'Decision Under Section 3(3) Of The Broadcasting Act 1990 And Section 3(3) Of The Broadcasting Act 1996: Licenses Held by British Sky Broadcasting Limited Fit And Proper Report 2017' <https://www.ofcom.org.uk/data/assets/pdf_file/0013/103621/decision-fit-proper.pdf> accessed 10 July 2017, pa. 62.

workplace that achieved this result, it is surprising that Ofcom still concludes that there is no risk of future corporate governance failures.

Even in May 2017, when 21st Century Fox announced in a regulatory filing that it had spent \$10 million to settle pending and potential litigations relating to sexual harassment, Rupert Murdoch was asked by the BBC at that time, if he was concerned about scandals at Fox News and he dismissed the whole thing declaring “Nothing’s happening at Fox News. Nothing.”³⁴

Such a flippant, public dismissal does not reassure anyone that sexual and racial harassment is indeed taken seriously and that perpetrators will be punished. Alongside the massive \$40 million golden parachute which Rupert Murdoch extended for Roger Ailes on his sacking last summer, this casts massive doubt on the claims by James and Lachlan Murdoch that “no individual working for Fox News could now be under the impression that sexual harassment is acceptable, having seen the sacking of Mr. Ailes, Mr. O’Reilly and a number of other employees including very senior managers.”³⁵

Credible journalists including Gabriel Sherman and Sarah Ellison have reported that employees see these sackings in the context of the Murdochs’ bid to buy Sky rather than a genuine commitment to putting their house in order. Very few insiders believe them³⁶ as many people who participated in the cover up still hold positions of power inside the company.

Suzanne Scott who was promoted after the ouster of the previous head of programming, is herself named in two lawsuits and widely seen inside the company³⁷ as a facilitator and accomplice in allowing sexual harassment.³⁸ Fox News head of legal affairs is named in three lawsuits where victims allege she received complaints about racial harassment but did nothing about them and instead protected the perpetrator because “she knew too much”.³⁹ The head of Fox News’ media relations team, Irena Briganti, is also named in the lawsuit of high-profile anchor Andrea Tantaros who alleges a campaign of vicious retaliation.⁴⁰ Staff also know that while some people have been fired, the retaliation that employees face for attempting to make complaints is still a danger. Jessica Golloher, a

³⁴ Paul Bond, ‘Rupert Murdoch in ambush interview: “Nothing’s happening at Fox News”’ (*The Hollywood Reporter*, 5th May 2017) <<http://www.hollywoodreporter.com/news/rupert-murdoch-ambush-interview-nothings-happenin-g-at-fox-news-1001375>> accessed 10 July 2017.

³⁵ Ofcom, ‘Decision Under Section 3(3) Of The Broadcasting Act 1990 And Section 3(3) Of The Broadcasting Act 1996: Licenses Held by British Sky Broadcasting Limited Fit And Proper Report 2017’ <https://www.ofcom.org.uk/data/assets/pdf_file/0013/103621/decision-fit-proper.pdf> accessed 10 July 2017, pa. 60.

³⁶ Sarah Ellison, ‘The O’Reilly Scandal has Divided the Fox News Bunker’ (*Vanity Fair*, 5 April 2017) <<http://www.vanityfair.com/news/2017/04/bill-oreilly-scandal-has-divided-fox-news>> accessed 5 July 2017.

³⁷ Sonia Saraiya, ‘Fox News’ Suzanne Scott Isn’t the Answer to Network’s Discrimination Problem’ (*Variety*, 2 May 2017) <<http://variety.com/2017/tv/opinion/fox-news-suzanne-scott-doesnt-solve-gender-problem-1202407406/>> accessed 10 July 2017.

³⁸ Meera Jagannathan, ‘Fox News’ Suzanne Scott promoted in wake of Bill Shine’s exit, was named in at least 2 sexual harassment suits.’ (*New York Daily News*, 1 May 2017) <<http://www.nydailynews.com/entertainment/tv/newly-promoted-suzanne-scott-named-fox-harassment-suits-article-1.3124797>> accessed 10 July 2017.

³⁹ Kara Scannell, ‘Fox News scandal puts spotlight on behind-the-scenes lawyer’ (*Financial Times*, 3 May 2017) <<https://www.ft.com/content/80c6cd86-2eb6-11e7-9555-23ef563ecf9a>> accessed 10 July 2017.

⁴⁰ Kara Scannell, ‘Fox News scandal puts spotlight on behind-the-scenes lawyer’ (*Financial Times*, 3 May 2017) <<https://www.ft.com/content/80c6cd86-2eb6-11e7-9555-23ef563ecf9a>> accessed 10 July 2017.

Fox radio host in Israel, was fired within 24 hours after making her complaint about gender discrimination to Fox's anonymous hotline. This happened at the height of Ofcom's investigations.

Lord Justice Leveson's response to claims that senior management didn't know about criminal activity was robust: "If News Corporation were not aware of the allegations which, as Rupert Murdoch has said, have cost the corporation many hundreds of millions of pounds, then there would appear to have been a significant failure in corporate governance and in particular in the effective identification and management of risks affecting NI and, thus, the corporation."⁴¹ Ofcom's failure to draw any relevant inference about the fitness and propriety of Murdoch Family Trust controlled businesses stands in stark contrast to this judgement.

Retaliation and intimidation

Attorneys Lisa Bloom, Douglas Wigdor and harassment victim, Wendy Walsh provided Ofcom with written and oral evidence showing systemic racial and sexual harassment at 21st Century Fox and crucially the extent of the retaliation that victims and whistleblowers face. Many have been driven out of the television industry altogether. In response to this wealth of evidence, Ofcom says that as the broadcast regulator it is not its role to "investigate the accuracy of the claims."⁴² This conclusion is highly questionable as Ofcom has the power to call witnesses to get first hand accounts. However, it failed even to take the simple step of calling members of the Murdoch Family Trust (Rupert, Lachlan and James Murdoch) to be interviewed under oath.

While it is for the courts to rule on the individual cases, Ofcom failed to use its power and responsibility to recognise the significant corporate governance failures related to how the harassment claims have been handled. Other authorities are taking action, such as the New York Human Rights Division which is investigating the extent of retaliation and abuse that Fox victims faced and the US Attorney's office which is looking into concealed payment allegations.

Anchor Andrea Tantaros filed a lawsuit against Fox News for sexual harassment and has now filed a fresh case against the network saying it used "digital weapons"⁴³ to spy, monitor and intimidate her. It names Fox News media relations head, Irena Briganti saying she had launched a campaign of retaliation against her through "illegal electronic surveillance."⁴⁴

Despite the serious nature of this allegation, as well as the parallels with illegal phone hacking here in the UK which ended the Murdoch's previous attempt to take over Sky, Ofcom seems not to have investigated this case at all. We attach an independent assessment of her laptop by a cybersecurity expert, which has also recently been submitted in court by her legal team to assist in this process.

⁴¹ The Leveson Inquiry, "An Inquiry Into The Culture, Practices and Ethics of The Press" (November 2012) bid., <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270939/0780_i.pdf> accessed 8 March 2017, p 348 - 349.

⁴² Ofcom, 'Decision Under Section 3(3) Of The Broadcasting Act 1990 And Section 3(3) Of The Broadcasting Act 1996: Licenses Held by British Sky Broadcasting Limited Fit And Proper Report 2017' <https://www.ofcom.org.uk/data/assets/pdf_file/0013/103621/decision-fit-proper.pdf> accessed 10 July 2017, pa. 50

⁴³ Christopher Hooton, 'Fox News used 'sock puppet' fake social media accounts to intimidate female host, Andrea Tantaros lawsuit claims.' (*The Independent*, 25 April, 2017) <<http://www.independent.co.uk/arts-entertainment/tv/news/fox-news-andrea-tantaros-lawsuit-all-egations-hacking-sock-puppet-fake-social-media-a7700551.html>> accessed 10 July 2017.

⁴⁴ Christopher Hooton, 'Fox News used 'sock puppet' fake social media accounts to intimidate female host, Andrea Tantaros lawsuit claims.' (*The Independent*, 25 April, 2017) <<http://www.independent.co.uk/arts-entertainment/tv/news/fox-news-andrea-tantaros-lawsuit-all-egations-hacking-sock-puppet-fake-social-media-a7700551.html>> accessed 10 July 2017.

A full investigation by the CMA

Given that Ofcom has not sufficiently probed this serious failure of corporate governance, Ofcom lacks a firm basis for its assertion that “we therefore cannot reasonably conclude that were Sky to be wholly-owned by Fox, Sky would not in future properly investigate and resolve misconduct, and take measures to prevent it from recurring.”⁴⁵ This statement again uses the wrong threshold for determining whether a full CMA analysis is merited.

In the absence of a sufficiently thorough examination by Ofcom, and its application of the wrong threshold, the Secretary of State should refer the Sky takeover bid for a phase 2 referral to the CMA on broadcasting standards grounds (comprising corporate governance) as well as media plurality grounds.

⁴⁵ Ofcom, ‘Decision Under Section 3(3) Of The Broadcasting Act 1990 And Section 3(3) Of The Broadcasting Act 1996: Licenses Held by British Sky Broadcasting Limited Fit And Proper Report 2017’ <https://www.ofcom.org.uk/data/assets/pdf_file/0013/103621/decision-fit-proper.pdf> accessed 10 July 2017, pa. 62.

Section B: New or substantive evidence on the question of commitment to broadcasting standards and on Ofcom's assessment of these matters.

Summary

This section outlines important evidence that either was not available prior to the March deadline for submissions earlier in this process, or was missed by Ofcom in its investigations of the Murdoch Family Trust-controlled companies.

It provides a illustrative examples to show that Fox has continued to broadcast material in the UK that breaches Broadcasting Standards in the two months since the new "compliance procedure" was created.

Ofcom's licensing rules required Fox to have a Broadcasting Standards compliance procedure in place, and Ofcom discovered that Fox has not had an effective mechanism for ensuring compliance since it was granted a broadcasting licence in 2001. Ofcom did not see this lapse as a sufficient ground to recommend a referral on broadcasting standards grounds, and instead accepted that Fox has instituted an effective, new Broadcasting Standards compliance procedure. Avaaz has requested this compliance procedure from Fox and Ofcom, but has not received it.

Since the previous submission deadline, there has now been more time to see the effects in practice of Fox's December 2016 takeover of Sky Australia. This section also sets out how Sky Australia has taken on many of Fox News' characteristics, foreshadowing what might happen in the UK.

Academic analysis of the pernicious long-term effects of partial, inaccurate broadcasting is also presented, reinforcing the importance of maintaining a high threshold when assessing risks to the public interest in the UK.

Corporate governance failures at Murdoch Family Trust-controlled News America Marketing led to settlements that are close to a billion dollars, dwarfing payments made for phone hacking and sexual harassment. These settlements occurred in the light of disturbing evidence of illegal anti-competitive practice, phone hacking and defamation.

Finally, this section reminds the Secretary of State that a wealth of new evidence relating to Broadcasting Standards will be forthcoming in the period of a Phase 2 investigation, including from court cases related to illegal phone hacking and sexual harassment.

Fox News' compliance process isn't working

Fox News presented Ofcom a moving target. After the regulator found that "Fox News did not have adequate procedures in place to ensure compliance with our rules", Fox moved fast to "put in place a new compliance process for Fox News with effect from 15 May 2017."⁴⁶ In its June report, Ofcom

⁴⁶ Ofcom, 'Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox' (20 June 2017) <https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 16, pa 2.51.

expressed confidence in this new process: “We consider that the improvements made by Fox to the Fox News compliance arrangements and procedures are sufficient to meet the requirements of its licence.”⁴⁷ This conclusion was ill-founded, given the company’s track record, and premature.

An examination of some of Fox’s recent output here in the UK suggests that it is failing to meet the standards.

Firstly, Fox News continues to broadcast material that does not meet the standard objective set out in section 319 of the Communications Act 2003 regarding “inclusion in such services of offensive and harmful material”⁴⁸ Tucker Carlson, currently the anchor of Fox’s prime-time slot, is beloved by neo-Nazis and members of the extreme “alt-right” for his virulent commentary targeting women, people of color, and those he disagrees with politically.⁴⁹ Since the new compliance process was brought in, Carlson has continued to offend women and minority groups on his show, ‘Tucker Carlson Tonight,’ which airs every weekday at 1am, 4am, and 7am, in the UK.

For example, on 18 May 2017, Carlson did a segment on new New York Times research which found that the gender pay gap largely existed as a result of motherhood. He spun the findings to claim that the pay gap had nothing to do with sexism, that it was simply a fair result of free choices, and that it did not really exist in the first place.⁵⁰

Other main anchors on shows broadcast by Fox News in the UK include Eric Bolling and Jesse Watters, who both have long histories of using incendiary rhetoric targeting women, Muslims, immigrants, LGBTQ people and those who live in poverty.⁵¹ These few examples show Fox News in the UK is not meeting or committed to Broadcasting Standards relating to offensive material.

On 31 May, Carlson broadcast material that actually broke the Broadcasting Code in three ways. He invited anti-abortion extremist Lila Rose onto the show to discuss a video attacking abortion providers that was so inaccurate and inflammatory that a federal judge had previously ordered the footage taken offline out of concern for abortion providers’ safety. Carlson even asked Rose if there were places where his viewers could go to view the video, adding that: “If there was ever a time for civil

⁴⁷ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 98, pa 10.52.

⁴⁸ UK, ‘Communications Act 2003’ <<http://www.legislation.gov.uk/ukpga/2003/21/section/319>> accessed 13 July 2017, s 319.

⁴⁹ Matt Gertz, ‘Fox News’ New Prime-Time Host Tucker Carlson Is Beloved By Neo-Nazis And Misogynists,’ (*Media Matters for America*, 5 January 2017) <<https://www.mediamatters.org/blog/2017/01/05/fox-news-new-prime-time-host-tucker-carlson-beloved-neo-nazis-and-misogynists/214933>> accessed 13 July 2017.

⁵⁰ Craig Harrington, ‘Professional sexist Tucker Carlson misses the point, declares victory on gender pay gap’ (*Media Matters for America*, 19 May 2017) <<https://www.mediamatters.org/blog/2017/05/19/professional-sexist-tucker-carlson-misses-point-declares-victory-gender-pay-gap/216569>> accessed 12 July 2017.

⁵¹ Cat Duffy, Zachary Pleat, and Jared Holt, “Fox News Promotes Eric Bolling, Noted Bigot, Conspiracy Theorist, And Muppet-Hater,” (*Media Matters for America*, 19 April 2017) <<https://www.mediamatters.org/research/2017/04/19/fox-news-promotes-eric-bolling-noted-bigot-conspiracy-theorist-and-muppet-hater/216108>> accessed 12 July 2017; Matt Gertz, Zachary Pleat, and Cristina López, ‘Fox News Rewards O’Reilly Minion Jesse Watters With Prime-Time Slot On *The Five*’ (*Media Matters for America*, 19 April 2017) <<https://www.mediamatters.org/research/2017/04/19/fox-news-rewards-o-reilly-minion-jesse-watters-prime-time-slot-five/216105>> accessed 12 July 2017.

disobedience, it seems like some might think that this would be the time.”⁵² This breaks section 3 as “material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services.”⁵³ It breaks section 2 of the Code because it is offensive.⁵⁴ Finally the segment broke section 5 of the Code by being biased and inaccurate.⁵⁵

Fox News in the UK is regularly failing to meet the 2003 Communications Act requirement “that news included in television and radio services is reported with due accuracy.”⁵⁶ One example concerns Fox News host Sean Hannity, considered one of Fox News’ biggest stars. Even after the new compliance process was brought in at Fox News in the UK, he has been championing the thoroughly debunked conspiracy that the late Democratic National Committee (DNC) staffer Seth Rich was murdered because he was involved in WikiLeaks’ publication of stolen DNC emails.

Hannity has devoted several editions of his TV shows to pushing this demonstrably false claim.⁵⁷ His commentary not only counters the intelligence community’s determination that the emails were hacked and distributed by Russian intelligence services,⁵⁸ but also prompted Rich’s family to demand retractions of Fox’s reporting. Fox News ultimately removed its online report,⁵⁹ however Hannity continues to this day to aggressively promote this false story without consequences from his employer.

The duty to report accurately is not limited to what happens here in the UK. But even if there were geographic limitations, an accurate understanding about potential Russian interference in other countries’ elections is globally relevant, not least because the USA is not the only country affected.

⁵² Sharon Kann, Tucker Carlson ignores court order, hypes video that stokes harassment of abortion providers’ (*Media Matters for America*, 1 June 2017) <<https://www.mediamatters.org/blog/2017/06/01/tucker-carlson-ignores-court-order-hypes-video-stokes-harassment-abortion-providers/216733>> accessed 12 July 2017.

⁵³ Ofcom, ‘Section three: Crime, disorder, hatred and abuse’ (3 April 2017) <<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-three-crime-disorder-hatred-abuse>> accessed 14 July 2017, s 3.1.

⁵⁴ Ofcom, ‘Section Two: Harm and offence’ (3 April 2017) <<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-two-harm-offence>> accessed 14 July 2017.

⁵⁵ Ofcom, ‘Section Five: Due impartiality and due accuracy’ (3 April 2017) <<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-five-due-impartiality-accuracy>> accessed 14 July 2017.

⁵⁶ UK, ‘Communications Act 2003’ <<http://www.legislation.gov.uk/ukpga/2003/21/section/319>> accessed 13 July 2017, s 319 d.

⁵⁷ 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.

⁵⁸ Scott Shane, ‘What Intelligence Agencies Concluded About the Russian Attack on the U.S. Election,’ (*The New York Times*, 6 January 2017) <https://www.nytimes.com/2017/01/06/us/politics/russian-hack-report.html?_r=0> accessed on 13 July 2017.

⁵⁹ ‘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>> accessed 13 July 2017.

An additional example of Fox's failure to comply with the accuracy standard occurred on May 23rd, when the host of Fox News' America's News Headquarters -- which airs at 7pm every weekday in the UK -- suggested the Manchester bomber might be a refugee, despite clear evidence which had already emerged of his birth in the UK.⁶⁰

The response to the London Bridge terror attack also promoted inaccurate and biased coverage. On June 4th Katie Hopkins stated on Fox & Friends Sunday -- which is broadcast in the UK on weekdays and on Sundays from 11-3pm -- "we do need internment camps." Fox apologised,⁶¹ but continued to broadcast material in the UK that is not consistent with the Broadcasting standards. For example, when Sadiq Khan voiced his opinion that the UK should not "roll out the red carpet" for President Trump, the Fox host on the 6 June edition of Fox News' show The Five -- which is broadcast in the UK on weekdays at 2am and 5am -- falsely claimed that Khan is rolling out the red carpet for Muslim extremists.⁶² Given Fox's ongoing support for President Trump, it seems to fall foul of the Broadcasting Standard demand for impartiality as well as the demand for accuracy.

Recent coverage of climate change also shows how Fox News fails to respect UK Broadcasting Standards. For example, on 12 July, on a show called the Fox News Specialists, which airs every weekday in the UK at 10pm, Fox hosts attacked a new study⁶³ published in the peer-reviewed journal Proceedings of the National Academy of Sciences.⁶⁴ The study, which argued that a sixth mass extinction is under way, and warned against overpopulation and overconsumption, was dubbed "an absurd piece of environmental garbage" by Fox hosts, and tantamount to "climate change hysteria." Instead of discussing the scientific facts around climate change, the hosts instead made fun of scientists, arguing that they developed their own "religion" and were "trying to cut off the debate." None of the hosts or panelists who spoke on this issue mentioned the scientific consensus around human-induced climate change. The show is another example of Fox News in the UK breaking section five of the Broadcasting Code which requires "due impartiality and due accuracy."⁶⁵ It is particularly misleading given the show is called 'Fox News Specialists', yet there was not a single scientist present.

⁶⁰ 'Even after reports confirm Manchester bomber was born in the UK, Fox speculates that he may have been a refugee' (*Media Matters For America*, 23 May 2017) <<https://www.mediamatters.org/video/2017/05/23/even-after-reports-confirm-manchester-bomber-was-born-uk-fox-speculates-he-may-have-been-refugee/216616>> accessed 13 July 2017.

⁶¹ Marina Fang, 'Fox News Host Disavows Internment Camps, After Panelists Suggest Rounding Up Muslims' (*Huffington Post*, 6 April 2017) <http://www.huffingtonpost.com/entry/fox-news-london-attack_us_59343347e4b075bff0f475f8> accessed 12 July 2017.

⁶² 'Fox host: "Some could argue" London mayor has "been really rolling out the red carpet for a lot of these Muslim extremists"' (*Media Matters for America*, 6 June 2017) <<https://www.mediamatters.org/video/2017/06/06/Fox-host-Some-could-argue-London-mayor-has-been-really-rolling-out-the-red-carpet-for-a-lo/216808>> accessed 12 July 2017.

⁶³ Fox's Jason Chaffetz after large iceberg breaks away from Antarctica: "The weather changes every day" (*Media Matters for America*, 12 July 2017) <<https://www.mediamatters.org/video/2017/07/12/foxs-jason-chaffetz-after-large-iceberg-breaks-away-antarctica-weather-changes-every-day/217239>> accessed on 14 July 2017.

⁶⁴ Gerardo Ceballos, Paul R Ehrlich and Rodolfo Dirzo, 'Biological annihilation via the ongoing sixth mass extinction signaled by vertebrate population losses and declines' in *Proceedings of the National Academy of Sciences* (28 March 2017) <<http://www.pnas.org/content/early/2017/07/05/1704949114?tab=author-info>> accessed 14 July 2017.

⁶⁵ Ofcom, 'Section Five: Due impartiality and due accuracy' (3 April 2017) <<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-five-due-impartiality-accuracy>> accessed 14 July 2017.

These failures to respect the Broadcasting Standards at the very moment Fox is bidding for Sky, are clear evidence that the merger must be investigated further on Broadcasting Standards grounds. A CMA referral on broadcasting standards grounds is needed to buy time for further analysis of the effects of the Fox News compliance policy. There seems to be a very strong case for Ofcom to use its proactive powers to launch an investigation of Fox News broadcasts in the UK to see whether the compliance process is making any significant difference to what is aired.⁶⁶

Australia shows what to expect of a Fox-owned Sky

In our March submission, we warned that Sky could be subject to the “Fox Effect” in the UK if Murdoch’s bid was to be approved.⁶⁷ Ofcom recognised some elements of the Fox Effect. For example Ofcom stated that “safeguards are not absolute. More subtle attempts to influence editorial policy, such as the choice of news stories, or of commentators whose views align with the Murdoch Family Trust, could in practice be difficult to detect. In addition, the Broadcasting Code does not apply to online content. As such, the Broadcasting Code does not provide a guarantee against greater coordination of news sources under the influence of the Murdoch Family Trust.”⁶⁸ Now, new evidence suggests this process has already begun at Sky in Australia, ever since News Corp took full ownership of the news network in December.

In early July Australia’s ABC Media Watch host Paul Barry described what has been going on at the influential news channel: “there’s long been talk of the Foxification of Sky News,” Barry said. “Since News Corp took full ownership in December it’s been looking and sounding more and more like it’s famous American counterpart, especially in the evenings, when its conservative commentators are often in furious agreement.”⁶⁹ Many see this reshaping of the evening programming as a direct result of Murdoch’s takeover and as part of a wider strategy to create Australia’s own version of Fox News.⁷⁰

One way the Fox Effect can be clearly seen is in the rise of “shock jocks.” Sky News in Australia has started investing heavily in opinion programming on prime time weekday evenings. 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. While

⁶⁶ Ofcom, ‘Procedures for Investigating Breaches of Content Standards for Television and Radio’ (3 April 2017)

<https://www.ofcom.org.uk/_data/assets/pdf_file/0020/55109/breaches-content-standards.pdf> accessed 11 July 2017, p 3.

⁶⁷ Avaaz and Media Matters for America, ‘Murdoch, the Fox Effect and Trump: How the Sky takeover could poison Britain’s public debate’ (March 2017)

<<http://www.mediareform.org.uk/wp-content/uploads/2017/05/MMAAvaaz.pdf>> accessed 14 July 2017, p 3.

⁶⁸ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 14, pa 2.36.

⁶⁹ ‘Paul Murray’s spectacular Sky dummy spit’ (*Media Watch for America*, 3 July 2017) <<http://www.abc.net.au/mediawatch/transcripts/s4695558.htm>> accessed 14 July 2017.

⁷⁰ Mark Di Stefano, ‘Australia’s News Channel And What It Learned From Fox News’ (*Buzzfeed*, 10 July 2017) <https://www.buzzfeed.com/markdistefano/fox-news-down-under?utm_term=.he9mMKM5N#.ssv3vmv6g> accessed 14 July 2017.

there are more moderate voices, politically motivated commentator Paul Murray also hosts a two-hour show, as well as strongly biased commentators Peter Reith and Alan Jones.⁷¹

Paul Murray openly urges defections to right wing parties and has referred to politicians on air with terms such as “arsehole” and “wanker.”⁷² Paul Murray Live has become the highest rated show on Sky News, echoing the trajectory of Bill O’Reilly at Fox News and giving the Murdoch Family Trust a strong incentive to follow a similar approach if they take over 100% control of Sky in the UK.

Sky News Australia hired Labor Party MP Mark Latham and gave him his own political chat show, Outsiders. This was despite the fact that the former politician was exposed as a creator of a Twitter account which attacked high-profile Australian women, said it was wrong people could not use terms like “negro,”⁷³ and proclaimed that domestic violence was just a tool of a feminist left.⁷⁴ Latham was then fired in April, but only after “doing what the network hired him to do”⁷⁵ - i.e. make a series of controversial and offensive comments on the new station that would draw in a new audience. For example Latham offended his female Sky panellists and questioned a schoolboy’s sexuality by calling him gay after he appeared in an International Women’s Day video on feminism.⁷⁶

Rupert Murdoch has been explicit that he wants Sky News in the UK to become more like his right-wing cable network Fox.⁷⁷ Sky Australia shows the direction he would like to travel in the UK. While Australia has a different broadcasting regime to the UK, DTI guidance on broadcasting standards is explicit that “all other material factors will also be taken into account. This might include comments, statements and any other plans made by the acquiring media owner which give an indication as to its commitment to UK broadcasting standards post-merger.”⁷⁸

⁷¹ Mark Di Stefano, ‘Australia’s News Channel And What It Learned From Fox News’ (*Buzzfeed*, 10 July 2017)

<https://www.buzzfeed.com/markdistefano/fox-news-down-under?utm_term=.he9mMKM5N#.ssv3vmv6g> accessed 14 July 2017.

⁷² Paul Murray’s spectacular Sky dummy spit’ (*Media Watch for America*, 3 July 2017)

<<http://www.abc.net.au/mediawatch/transcripts/s4695558.htm>> accessed 14 July 2017.

⁷³ Ebony Bowden, ‘Mark Latham attacks Rosie Batty, ‘elitists’, domestic violence on Triple M show’ (*The Sydney Morning Herald*, 22 January 2016)

<<http://www.smh.com.au/entertainment/tv-and-radio/mark-latham-attacks-rosie-batty-elitists-domestic-violence-on-triple-m-show-20160121-gmbhj6.html>> accessed 14 July 2017.

⁷⁴ Luke Cooper, ‘Mark Latham Sacked By Sky News For Series Of Controversial Comments’ (*Huffington Post*, 29 March 2017)

<http://www.huffingtonpost.com.au/2017/03/29/mark-latham-sacked-by-sky-news-for-history-of-controversial-comm_a_22016488/> accessed 14 July 2017.

⁷⁵ ‘Latham lessons not learnt’ (*Media Matters for America*, 3 April 2017)

<<http://www.abc.net.au/mediawatch/transcripts/s4647549.htm>> accessed 14 April 2017.

⁷⁶ Luke Cooper, ‘Mark Latham Sacked By Sky News For Series Of Controversial Comments’ (*Huffington Post*, 29 March 2017)

<http://www.huffingtonpost.com.au/2017/03/29/mark-latham-sacked-by-sky-news-for-history-of-controversial-comm_a_22016488/> accessed 14 July 2017.

⁷⁷ 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.

⁷⁸ UK Department of Trade and Industry, ‘Enterprise Act 2002: Public interest intervention in media mergers’ (May 2004)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/595816/file14331_1.pdf> accessed 12 July 2017, p 36, pa 7.25.

The broader impact of Fox News' biased and inaccurate coverage

Avaaz and Media Matters provided extensive evidence of how Fox News presents biased and inaccurate information.⁷⁹ Ofcom summarised some of this information, saying for example “Regarding section 5 of the Broadcasting Code (relating to due impartiality and due accuracy), Avaaz cited ‘11 days of fact-free accusations against the leading candidate for the 2008 Democratic presidential nomination’ and stories regarding Barack Obama’s religion and origin of birth.”⁸⁰ However Ofcom did not find that Fox News presents a systemic, ongoing problem.

We would therefore like to expand on this point by giving scientific evidence about how Fox News has undermined the knowledge base of the American public. The UK Broadcasting Standards Code of course applies only to material broadcast in the UK, but all of the studies listed look at material that was shown in the UK as well as the US.

In recent years, studies have shown that Fox has succeeded in deeply entrenching fictions in its audience so much so that they believe these lies as irrefutable fact. Following the 2010 election, the University of Maryland released a study showing that Fox News viewers were the most misinformed audience of any major news network.⁸¹ Compared to viewers of other cable news channels, they were, for example, thirty-one percentage points more likely to agree that “it is not clear that Obama was born in the United States.” In our earlier submission we showed how Fox bandied about this lie repeatedly for days on end, making this complete fiction a major political story forcing other networks and newspapers to carry it, and helping to launch the political career of Donald Trump in the process.

Fox has also shaped audience opinion on matters that are directly relevant for UK voters. For example, a Stanford University professor found that “more exposure to Fox News was associated with more rejection of many mainstream scientists’ claims about global warming, with less trust in scientists, and with more belief that ameliorating global warming would hurt the U.S. economy.”⁸² Another study found exactly the same results, “Fox News viewing manifests a significant, negative association with global warming acceptance.” Viewers were also less likely to agree with the false statement that “most scientists think global warming is happening.”⁸³ These studies were conducted in the US, but the shows they were based on were broadcast here in the UK too.

⁷⁹ Avaaz and Media Matters for America, ‘Murdoch, the Fox Effect and Trump: How the Sky takeover could poison Britain’s public debate’ (March 2017) <<http://www.mediareform.org.uk/wp-content/uploads/2017/05/MMAAvaaz.pdf>> accessed 14 July 2017.

⁸⁰ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 130, pa 102.

⁸¹ Clay Ramsay, Steven Kull, Evan Lewis and Stefan Subias, ‘Misinformation and the 2010 Election’ on behalf of the WorldPublicOpinion.org and Knowledge Networks (10 December 2010) <http://drum.lib.umd.edu/bitstream/handle/1903/11375/Misinformation_Dec10_rpt.pdf;jsessionid=340BDC03BE188476C86E5AF078554031?sequence=4> accessed 14 July 2017.

⁸² 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) <<https://woods.stanford.edu/sites/default/files/files/Global-Warming-Fox-News.pdf>> accessed 14 July 2017.

⁸³ Lauren Feldman, Edward W. Maibach, Connie Roser-Renouf and Anthony Leiserowitz, ‘Climate on Cable: The Nature and Impact of Global Warming Coverage on Fox News, CNN, and MSNBC’ *The International Journal of Press/Politics* XX(X) 1–29 (2011) <<http://climateshiftproject.org/wp-content/uploads/2011/11/FeldmanStudy.pdf>> accessed 14 July 2017.

Perhaps the most startling outcome is from a study that compared accurate knowledge of current events, both domestic and foreign. Just one finding is enough to demonstrate how corrosive Fox News is to public knowledge: “all else being equal, someone who watched only Fox News would be expected to answer just 1.04 domestic questions correctly — a figure which is significantly worse than if they had reported watching no media at all.”⁸⁴ Obviously it is less important for British viewers to hold an accurate understanding of American domestic politics, but many of the issues Fox News discusses, from terrorism to the UK’s membership in the UN to climate change and beyond, are highly relevant for UK citizens.

It is deeply concerning that the studied programmes have already been broadcast in the UK without Ofcom recognising the breaches of the Broadcasting Standards. However it is more concerning that a full Fox takeover of Sky could see Sky News moving in this direction. As Ofcom states, “Sky News is a trusted voice for those who use it. We are more concerned about a transaction involving Sky News than we would be for a news provider with lower levels of trust.”⁸⁵

The biggest corporate governance failure

A corporate governance scandal in another Murdoch-controlled company has given rise to settlement payouts which dwarf the hacking and harassment scandals. This was not mentioned by Ofcom in its report, and as such may not be known to the Secretary of State.

News America Marketing (NAM) is a marketing division under News Corporation which creates coupon inserts for newspapers and displays in supermarkets for shelving and shopping carts. Since 2005,⁸⁶ NAM has paid out approximately \$936 million in settlements to competitors and clients in a series of lawsuits that include allegations of fraud, threats, intimidation and hacking. News Corporation settled the most recent of these suits in March 2016 for \$280 million.⁸⁷ These enormous settlements arise in connection with misconduct spanning two decades which reveals some strong similarities to the phone hacking scandal in the UK and the sexual harassment scandal in the US.

NAM’s in-store adverts reach millions of customers every day and its Sunday newspaper inserts reach up to 60 million households in America. Monopolizing this market in direct advertising became hugely significant to the Murdoch Family Trust’s profits.⁸⁸ Ken Chandler, the former publisher of Murdoch’s New York Post described it as “a faucet, spewing dollars.”⁸⁹

⁸⁴ Fairleigh Dickinson University’s Public Mind, ‘What you know depends on what you watch: Current events knowledge across popular news sources’ (3 May 2012) <<http://publicmind.fdu.edu/2012/confirmed/final.pdf>> accessed 14 July 2017.

⁸⁵ Ofcom, ‘Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox’ (20 June 2017) <https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 11 July 2017, p 4.

⁸⁶ David Folkenflik, ‘Beyond Sexual Harassment, Lesser Known Scandals Could Cost The Murdochs A \$14B Deal’ (NPR, 24 April 2017) <<http://www.npr.org/2017/04/24/525337958/beyond-sexual-harassment-lesser-known-scandals-could-cost-the-murdochs-a-14b-dea>> accessed 12 July 2017.

⁸⁷ Nate Raymond, ‘News Corp to settle in-store promotions litigation for \$280 million’ (Reuters, 29 February 2016) <<http://uk.reuters.com/article/uk-news-corp-lawsuit-idUKKCN0W222G>> accessed on 11 July 2017.

⁸⁸ David Folkenflik, ‘Beyond Sexual Harassment, Lesser Known Scandals Could Cost The Murdochs A \$14B Deal’ (NPR, 24 April 2017) <<http://www.npr.org/2017/04/24/525337958/beyond-sexual-harassment-lesser-known-scandals-could-cost-the-murdochs-a-14b-dea>> accessed 12 July 2017.

⁸⁹ David Folkenflik, ‘Beyond Sexual Harassment, Lesser Known Scandals Could Cost The Murdochs A \$14B Deal’ (NPR, 24 April 2017)

Hacking, harassment and intimidation

Competitors have accused NAM of stealing their customer lists and then offering those customers large payments to guarantee exclusive deals intended to put NAM's rivals out of business.⁹⁰ These were tactics used in a sustained campaign of illegal, anti-competitive practice by NAM over decades. The allegations concerning the theft of customer lists also include claims of repeated hacking into computers, which mirror similar illegal behaviour in the UK, and which NAM's lawyers have acknowledged in court.⁹¹ NAM has also been accused of tearing down competitors' signs and ads in stores, then lying to customers that their promotions with competitors did not appear, as well as making false statements about competitors.⁹²

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 strongly supported by the company's owners and was then promoted to CEO.⁹³ A NAM employee who gave evidence about this kind of conduct was forced into bankruptcy by company lawsuits.⁹⁴ In sworn testimony from one competitor, Paul Carlucci is said to have threatened him, saying, "You should know I work for a man who wants it all and doesn't understand anyone telling him he can't have it all. And know this: If you ever get into any of our businesses, I - we - will destroy you."⁹⁵

Illegal anti-competitive practices

In these lawsuits NAM is also accused of violating U.S. federal and state antitrust law by deliberately forcing both retail chains and consumer packaged good companies into long-term exclusive contracts. Had News Corporation not settled the 2016 class action lawsuit out of court, they could have been forced to pay up to \$2 billion under federal antitrust law.

<<http://www.npr.org/2017/04/24/525337958/beyond-sexual-harassment-lesser-known-scandals-could-cost-the-murdochs-a-14b-dea>> accessed 12 July 2017.

⁹⁰ 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)

<<http://www.npr.org/2017/04/24/525337958/beyond-sexual-harassment-lesser-known-scandals-could-cost-the-murdochs-a-14b-dea>> accessed 12 July 2017.

⁹¹ David Folkenflik, 'Beyond Sexual Harassment, Lesser Known Scandals Could Cost The Murdochs A \$14B Deal' (*NPR*, 24 April 2017)

<<http://www.npr.org/2017/04/24/525337958/beyond-sexual-harassment-lesser-known-scandals-could-cost-the-murdochs-a-14b-dea>> accessed 12 July 2017.

⁹² Floorgraphics alleged that News America Marketing persisted with this strategy for several years, even hacking into Floorgraphics' password protected accounts at least eleven times in 2003 and 2004 to obtain its customer lists and other marketing materials. Dial Corp v News Corp., Third Amended Complaint (S.D.N.Y. Aug. 16, 2013) 2013 WL 5475241 at para 86.

⁹³ Dial Corp v News Corp., Third Amended Complaint (S.D.N.Y. Aug. 16, 2013) 2013 WL 5475241 at para 5.

⁹⁴ David Folkenflik, 'Beyond Sexual Harassment, Lesser Known Scandals Could Cost The Murdochs A \$14B Deal' (*NPR*, 24 April 2017)

<<http://www.npr.org/2017/04/24/525337958/beyond-sexual-harassment-lesser-known-scandals-could-cost-the-murdochs-a-14b-dea>> accessed 12 July 2017.

⁹⁵ David Folkenflik, 'Beyond Sexual Harassment, Lesser Known Scandals Could Cost The Murdochs A \$14B Deal' (*NPR*, 24 April 2017)

<<http://www.npr.org/2017/04/24/525337958/beyond-sexual-harassment-lesser-known-scandals-could-cost-the-murdochs-a-14b-dea>> accessed 12 July 2017.

The exclusive contracts locked in supermarkets for years. News Corp. internally acknowledged that it sought to build contractual barriers to make it difficult, if not impossible, for competitors to compete. NAM also kept prices artificially high, with allegations of overcharging clients by as much as 39.6% for in-store promotions. Competitors alleged such practices could force smaller firms out of the market, leading to a market monopoly for the dominant firm.

The NAM lawsuits reinforce the appearance of a persistent and universal pattern of corporate governance failure across Murdoch-controlled businesses. These corporate governance failings are given insufficient weight by Ofcom and should be investigated further in Phase II.

A full investigation is needed

This submission contains new evidence that strengthens the case for a Phase 2 referral on Broadcasting Standards grounds. We argue that Ofcom was not proactive enough in its investigations of what is broadcast by Fox News in the UK, that it failed to sufficiently follow up on evidence presented to it, for example on the sexual and racial harassment cases at 21st Century Fox, and that it generally failed to be robust enough in its investigations and conclusions.

A Phase 2 investigation would allow these failings to be addressed and ensure the Secretary of State has full and balanced information.

Additionally it would mean that fresh information from relevant legal cases is likely to be available in time, for example from The Sun hacking case which goes to trial in October in the UK and from a series of sexual and racial harassment court cases being litigated in the US.

Ofcom has not provided a sufficiently extensive or robust recommendation to the Secretary of State. It failed to apply the correct threshold for recommending a Phase 2 referral. It accepted pleas of ignorance by the Murdochs too readily. It relied on misleading statistics about breaches at Fox and Fox News while failing to investigate clear evidence of the latter's long and ongoing history of serious breaches of the UK Broadcasting Code.

Ofcom correctly found 21CF guilty of a serious breach of the Broadcasting Code by failing to have adequate policies for Fox News's content, yet hastily accepted assurances about a new policy instead of drawing reasonable conclusions about the existence of a persistent pattern of misconduct at Murdoch-controlled companies. It found serious and troubling corporate governance failings in connection with the current sexual harassment scandal at Fox News but, again, failed to draw any meaningful conclusions or draw any parallels to the Murdoch's indulgence of rogue executives in the phone hacking scandal in the UK and the News America Marketing scandal. The only reasonable course for the Secretary of State to protect the public interest is to refer the bid to Phase 2 on the ground of broadcasting standards as well as media plurality so that these issues can be examined properly by the CMA.