

Rt Hon Karen Bradley MP PC

Secretary of State for Culture, Digital, Media and Sport.

Consultation on Fox bid for Sky plc

Dear Secretary of State,

I did not participate in the Ofcom consultation on this proposed transaction, as I have no particular interest in the outcome: I am indifferent as to whether it succeeds or fails.

However, reading the Ofcom report on the possible impact on media plurality, raised many concerns in my mind, especially after you announced to the House of Commons that you found it sufficiently persuasive to have in mind a reference to the Competition and Markets Authority for a full review.

Of course, the legislation places you in a difficult position. You are required to act in a quasi-judicial fashion, making decisions in an area where few politicians will have enough specialist knowledge to question a report from the media regulator. Indeed, one of your predecessors, in a similar position six years ago, expressly announced his intention to be guided by what supposedly independent regulators recommended.

As it happens, the advice he received then was so error-strewn, and so seemingly biased, that the very independence of Ofcom at the time came into question. The new report avoids some of the egregious mistakes of 2010, but is so weakly underpinned by relevant data, and so eccentric in its arguments, that whatever superficial persuasiveness it might have had needs to be set aside, and deeper consideration given to the matter by you.

The Legal Definition of Sufficient Plurality

The immediate difficulty in making decisions of the type that you now face is that the legislation is unhelpfully vague. There are two types of “sufficiency” required: of variety of views in terms of national newspapers, and of variety of persons in terms of persons in control of media enterprises. The reason for this differentiation is that the 2003 Communications Act specifies in parallel that those licensed by Ofcom to provide broadcasting services in the UK must abide

by the Broadcasting Code, which imposes a duty to “due impartiality”, which effectively precludes the provision of “views”: hence “persons”.

However, nowhere in the relevant legislation is there a definition of “sufficient”. When Ofcom in June 2012 published a paper on media plurality, it made no attempt to offer a definition, but specifically advised against introducing “hard” limits on ownership, such as 20% of newspaper circulation, as a way of delivering a sufficient variety of views: not just because of the many practical difficulties arising from such limits, but because there was no guarantee that even if they could be successfully operated, they would actually deliver the desired variety of views.

For more than two decades, one owner – News UK (formerly News International), part of News Corp – has controlled more than 30% of national newspaper circulation, and as a result has been uniquely targeted by legislation, with a restriction on owning more than 20% of any ITV franchise (and by extension, of ITV plc). A further limit applies to any company in which someone controlling 20% of national newspaper circulation holds a 20% shareholding in turn owning more than 20% of any ITV franchise. This limit effectively prevented BSkyB (as it then was) from buying more than 20% of ITV (as News Corp then owned 39% of BSkyB): but even the 17.9% of ITV it did buy was deemed by the Competition Commission to be against the public interest, in that it might allow BSkyB to exercise enough control over ITV (for instance, when not enough of ITV’s widely dispersed shareholders voted on certain matters) as to be anti-competitive. BSkyB was forced to divest down to 5%: and would probably have been forced to divest even if News Corp had not owned 39% of BSkyB (and therefore what might have happened under the new ownership structure of the Murdoch companies is probably moot).

There have been other specific cross-media ownership rules, but nearly all of these have now been abandoned as times change: for instance, control over ownership of local radio licences was relinquished on the basis that the need to have at least one commercial competitor for the BBC in every local area was the primary objective. The dominance of News Corp in the – admittedly rapidly declining – national newspaper business seemed not to have been an inhibition to its acquiring The Wireless Group of national radio stations (TalkRadio, TalkSport and Virgin Radio), even though the transaction

measurably reduced the number of persons controlling media enterprises. Implicitly, that reduction did not affect “sufficiency” – which was also the implication when Northern and Shell purchased Channel 5 from RTL, quite clearly reducing the number of owners of media enterprises (Channel 5, despite being larger as a business than a number of ITV franchises, was not placed off limits to newspaper groups or foreign ownership in the relevant legislation).

The problem in relation to the Fox/Sky transaction is that there cannot be two “persons” controlling one media enterprise – in this case, Sky. The 61% of its shares not owned by Fox are very widely dispersed, and even though the Sky board has directors who are independent of Fox, no-one has ever argued that they control Sky. Throughout its 29-year history, Sky has been controlled by companies themselves controlled by the Murdoch Family Trust: whether they owned 100% of the business, 50% (after the merger with BSB) or 39% (as was agreed during the public flotation of the business, which allowed the old BSB shareholders to exit). Of course, this is operational control, not outright control, which allows accounts to be consolidated, has measurable tax advantages, and eliminates the need for arm’s length commercial relationships with companies in the same ownership: but the legislation specifically provides for situations where a shareholder with less than 50% of the shares in a media enterprise can nonetheless ensure that its wishes are followed in most material matters.

Ofcom’s approach to this 39% conundrum has never been tested by a full competition review. In its assessment of the 2010 bid for Sky, Ofcom discounted the 39% in calculating shares of news consumption, choosing instead to treat all 100% of Sky’s news provision as newly additional to the consumption of news through the News Corp newspapers.

At the time, I described this as the “Ofcom paradox”, in that, by extension, if News Corp had sold off 61% of News UK, but retained full operational control, and used the proceeds to secure operational control of all other national newspapers by buying 39% of the equity in them, still leaving 61% of shares in other hands, the Murdoch Family Trust would have had editorial control of 100% of national newspapers, but – according to Ofcom’s logic – there would have been no reduction in the number of persons controlling media

enterprises, and therefore no issue of media plurality. Indeed, on Ofcom's reckoning, the MFT would not even be one of that number.

Given that the statutory threshold for any reference to the CMA is a reduction in the number of those controlling media enterprises, to a level where there is an insufficient number, it is hard to see that Ofcom has met the test.

Instead, Ofcom has offered a number of pieces of research that it obviously believes are relevant to this kind of assessment. Yet in its own report on measuring media plurality, in June 2012, it placed at the front of any consideration the measurement of actual consumption. What is remarkable about this year's report is that it has not even attempted this most basic of calculations. Indeed, the suspicion is bound to arise that it has failed to do so because it knows that the answer would undermine any case for intervention.

Of course, it is a step forward from 2010 that Ofcom has this time avoided the serious and cumulative errors in calculation of share of consumption that rendered its report that year so open to criticism. Yet the failure to make any attempt at an estimate of actual consumption this time proves to be equally unsatisfactory: Ofcom has again arrived at an unsustainable conclusion by means of a fatally flawed methodology.

The first issue that Ofcom has again declined to address in 2017 is what precise difference 100% ownership of Sky makes in terms of media plurality and sufficiency of persons controlling media enterprises, as compared with the full operational control bestowed by 39% ownership. Which "person" would be replaced by the transaction? And what "control" of Sky did that "person" exercise? Ofcom has addressed the issue in relation to the editorial policy of Sky News, but in an entirely theoretical way: it has not addressed the sufficiency argument at all. Indeed, when it raised a similar objection – that Sky might negatively affect ITN if it was allowed to keep the 17.9% of ITV's shares it had bought in a dawn raid – the Competition Commission explicitly rejected that argument (the forced divestment was based on the potential commercial pressures the CC thought Sky might bring to bear on ITV).

In 2010, Ofcom claimed that 100% ownership of Sky would give the MFT (then through News Corp) enough additional control of Sky News as to allow it to choose the editor. I pointed out at the time that no editor of Sky News had

ever been appointed without the approval of the MFT. Ofcom has abandoned that line of argument this time, but nonetheless advances in para1.4 of its report the claim that “the proposed transaction would bring [Sky News] under the material influence of the MFT”. This is simply untrue. The MFT already has material influence over Sky News – indeed, decides its budget and has practical approval of the appointment of key personnel. Ofcom has advanced no evidence whatsoever to demonstrate that MFT currently lacks material influence over Sky News.

Ofcom goes on to say (same para) that the transaction would “expand the reach of online news sources influenced by the MFT”. Again, this is straightforwardly untrue. The misleading nature of the Ofcom report is then compounded by the claim that Fox/Sky “would be used by three in ten adults”. The evidence for this is extremely flimsy, and even if true, is meaningless. Despite repeatedly being warned that the use of “reach” as a measure of significance is fraught with risk, Ofcom continues to place far too much reliance upon it.

The “three in ten” figure is largely based on speculative measurement of online activity – activity which is notoriously difficult to measure. In my evidence to Parliament, and to Ofcom’s own exercise on measuring media plurality, I pointed out that large proportions of the page views reported by websites constituted accidental landings initiated by search engines, and that in any attempt to measure online activity, the first 60 seconds of any reported usage should be discounted.

But the problem with “reach” as a measure is its multiple unreliability. It is simply not possible – *not possible* – to correlate “reach” within one medium with “reach” in another. In television, there are accurate measures of “reach”, but dozens of different definitions to choose from: depending on duration of viewing (1 minute, 3 minutes, 5 minutes, 10 minutes), how it is measured (continuous, discontinuous) and over what period the measurement takes place (during the course of a day, a week, a month, longer). The same source can have a “reach” ten times larger under one definition than under another.

Radio news and current affairs “reach” is less easily ascertained, because the RAJAR research system in radio is much less precise than the meter-based TV

research, tool, BARB. We have many different versions of station “reach”, but can only guess at the “reach” for news and current affairs. Indeed, even actual consumption of radio news and current affairs requires a careful study of schedules and an allocation of appropriate proportions of reported listening according to the known output. Consumption of news and current affairs can be reasonably estimated: “reach” estimates are multiple and inherently unreliable.

Newspaper readership has a well-established measurement system, in the shape of the national readership survey: the NRS measures “reach”, in several versions – monthly, weekly and daily, print only, PC only and combined. Separately, it measures actual time reading – the only reliable measure of news consumption as far as media plurality issues are concerned. So for The Sun, daily print readership (before calculating actual time spent reading) is 3.8m on a daily basis, 7.9m on a weekly basis and 10.7m on a monthly basis. Adding PC reading enlarges daily readership by 10%, weekly by 20% and monthly by 30% - an entirely intuitive outcome. Even these figures depend upon digital readership input from ComScore, with samples as low as 40, so reliability is far below that for, say, BARB, with samples of 5,000 plus.

The readership figures need to be carefully filtered to arrive at a judgement on news and current affairs consumption. First, an average number of minutes needs to be allocated to each reader – typically, less than 40 minutes for a tabloid, up to 100 minutes for a weekend broadsheet. Then a discount has to be applied to allow for non-news consumption: newspapers are filled with recipes, horoscopes, puzzles, gardening, TV listings, etc. In Germany, the regulator discounts by 50%. Enders Analysis, in evidence to the Leveson Inquiry, suggested that 80% was more reasonable. In the US and Canada, research shows that a third of people “reading” newspapers never read the news pages.

Ofcom makes much in its report of mobile access to “news”. Frankly, if this were important, NRS would be measuring it for its customers. The Ofcom claim that “three in ten adults” would be using online news sources “influenced by the MFT” if the transaction proceeded is close to meaningless. The measure is speculative, the amount of consumption is unknown, and the proportion of

that consumption that could be categorized as news is not assessed. It is a claim high in tendentiousness but low in value.

In any case, the thrust of Ofcom's advice is that it is only *after* the transaction that the MFT will be exercising this supposed "influence". "Influence" is a much weaker word than "material control": given that the MFT already exercises material control over both the News UK newspapers and Sky News, it is simply wrong to state that the transaction will "expand" the "reach" of online news sources "under the material influence" of the MFT.

The report then deploys its bespoke "share of reference" data, as researched by Kantar. However interesting such data might be, it is untested by any independent research organisations, and anyway cannot be used as a substitute for measures of actual news consumption. That the combination of News Corp and Sky might deliver a 10% score on "share of reference" is neither surprising nor important. (Incidentally, Ofcom offers no explanation of why a 3% score for News Corp and a 6% score for Sky should deliver a 10% score if the businesses were counted together.)

A 10% share of actual news consumption is the regularly reported score for News Corp and Sky combined. To attach significance to this as "third largest" is simply to underline the overwhelming dominance of the BBC in terms of news consumption, news provision, "reach", "share of references" and any other measure that could be suggested. To suggest that this "third largest" status might be contrary to the public interest is a remarkable stretch. Given that – mistakenly – Ofcom in 2010 reported that share at 23% (of which there is no mention in this report), and still managed to approve the transaction then proposed, on the basis of UILs, it is startling that Ofcom believes the transaction rises even to the low level that might justify a reference to the CMA.

Using the "share of reference" metric in this report, rather than actual figures for consumption of news and current affairs, is inherently unsatisfactory. That it diminishes the apparent dominance of the BBC (over 60% by measure of consumption versus 42% by this metric) is even more unfortunate. Ofcom has simply failed to do the job required: even in its June 2012 report, actual news

consumption is designated as the most important metric for judging matters of media plurality. Here it is largely ignored.

Even actual news consumption figures can benefit from context: especially as the statutory intervention is posited on undue influence, rather than raw numbers. Saliency therefore matters a great deal: if a popular source of news is widely disbelieved, its influence is likely to be lower than that of an equally popular source which is much trusted. Figure 4.6 of the Ofcom report is ignored in its executive summary and in its recommendations, yet it shows that in the category of “the single most personally important wholesale news provider”, the BBC scores 49%, ITN 12%, Facebook 6%, Sky 5%, DMGT and Google 3%, and News Corp and Guardian Media Group 2%. If we combined the Sky and News Corp figures, we would have 7% – placing the combined business third (yes!) but at such a remote distance from the market leader (seven times more influential) that no competition authority could realistically regard that combination as sufficiently contrary to the public interest to justify blocking the transaction.

The nub of the Ofcom report is in para 1.9, which I quote in full: **“The transaction may increase the ability of members of the Murdoch Family Trust to influence the overall news agenda.** 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.”

There follows Ofcom’s advice and recommendation on the plurality consideration. “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.”

The reference to the MFT’s “unique presence” on four platforms gives a clue as to the good faith of Ofcom in this report. The Kantar research shows that the proportion of UK news consumers who rely only on newspapers is 1% (six

years ago it was 5%). Given that News Corp accounts for barely a third of newspaper readership, even that 1% - if it were measurable – is three times larger than the actual advantage delivered to News Corp and Fox from being on four platforms. This is persiflage masquerading as expertise.

Indeed, as Ofcom knows from the many critiques of its last effort in this area in 2010, excluding local and regional news platforms distorts the overall picture. Kantar estimates that 20% of news consumption is from local and regional sources: the NRS estimate is 24%. So a more correct description of the number of platforms would be seven, adding local and regional television, local and regional radio and local and regional newspapers (online content may be regional in origin, but is inherently national in availability). By this measure, the BBC uses five platforms, Fox/News Corp four, and several other suppliers three. So much for “unique”.

What of the actual concern expressed by Ofcom in para 1.9? Clearly, Ofcom’s own powers under the licensing regime and the Broadcasting Code preclude any open advocacy of political preferences by Sky News: the obligations to due impartiality and due accuracy remain. What, then, might Ofcom have in mind?

It is common ground that those obligations do not protect against different settings of the news agenda. Indeed, James Murdoch, 8 years ago, noted that “it should hardly be necessary to point out that mere selection of news stories and their place in the running order is itself a process full of unacknowledged partiality”. If this were not the case, every single news bulletin carried by every news broadcaster would be identical. On some days, the main stories are so obvious that they appear in each broadcaster’s bulletin, sometimes in the same order, sometimes given the same weight. But the norm is for bulletins to have different running orders, and for some stories to appear in one bulletin, but not another. Nor is the way a story is reported necessarily the same.

None of this is contrary to the Code, the terms of an Ofcom licence, or the public interest. Arguably, a diversity of approaches actually serves the public interest (and echoes the stated requirement in the legislation for newspapers to offer a sufficient variety of views to the public). The question is, at what point does a news agenda from a licensed broadcaster become evidently part of a “co-ordinated editorial policy”? How would we know it was such? Would it

still be licence-compliant? And if so, in what way would it be contrary to the public interest?

Ofcom cites the possibility of omission of certain news stories: yet the constraints of a bulletin (and Sky News is mostly a rolling service rather than a series of half-hour bulletins) limit the number of stories that can be carried to between 8 and 12. Compared with a newspaper, the entire contents of a TV bulletin might constitute barely a broadsheet page. How would anyone – including Ofcom – know that any of the dozens of potential stories not broadcast had been omitted as part of a “co-ordinated editorial policy”? If we do not know – and if such omissions were so blatant, yet did not fall foul of Ofcom licence requirements – how can we judge that they are contrary to the public interest? Given the intense scrutiny to which media departments in our universities subject the Murdoch empire, it is highly unlikely that any large variation of story selection, as compared with ITN and the BBC, would go unnoticed. If such variation is not compliant with licence obligations, Ofcom has the power to step in. If such story selection *is* compliant, how can it be (and we are dealing with multiple hypothetical scenarios here) sufficiently contrary to the public interest to warrant rejection of the proposed transaction?

Ofcom also suggests that the MFT might deploy commentators from its newspapers on Sky News as part of its “co-ordinated editorial policy”. The multiple absurdity of this hypothesis raises serious questions about Ofcom’s sheer ignorance concerning the way the media it supposedly regulates actually operate.

Newspaper “commentators” are columnists who write regularly for the opinion pages. Most serious newspapers deploy a range of such columnists: The Times, for instance, employs Philip Collins (former speech writer for Tony Blair and active Labour supporter), Lord Finkelstein (former speech writer for John Major and a Tory peer), David Aaronovitch (former Trotskyist), Jenni Russell (Labour supporter), Mathew Parris (anti-Brexit Conservative), Melanie Phillips, Matt Ridley, Carol Midgley and several others.

What they all have in common is not that they are mouthpieces for the editor of The Times (never mind the MFT), but that they are entirely independent.

Over the years, I have written columns for The Guardian, The Observer, The Financial Times, The Times, The Sunday Times, The Daily Telegraph, The Mail On Sunday, The Sun and The Independent. No-one has ever told me what to write, or refused to publish what I had written.

Given the wide range of views published in the UK newspapers belonging to News Corp, and the absence of “co-ordination of editorial policy” amongst them – both for and against Brexit, and recommending different ways of voting to their readers in the same general election – it is hard to know what “editorial policy” might even be “co-ordinated”, assuming (for which there is no evidence) any desire to “co-ordinate”. Ian King – who used to be the business editor at The Sun and The Times – nowadays presents the early evening Sky Business News. Can anyone – including Ofcom – tell me what his “editorial policy” is, and whether it reflects that of the MFT (whatever that is)? If a section editor from The Times can be injected into Sky News without any complaint from any viewer or the regulator, where is the danger to the public interest?

The naivety of the Ofcom anxiety goes further: it displays a worrying ignorance about how television works. The ability to write a newspaper column by no means automatically translates into the ability to be a successful television journalist. Columnists from The Times occasionally appear on Sky News, and also on BBC news and current affairs programmes: but their ability to promote a “co-ordinated editorial policy”, even if there were one, and even if they subscribed to it, is inherently limited by the rarity of their appearances and their limited on-air skills.

All of this speculation might have some substance if there were any prior indication of a desire on the part of the MFT to do what Ofcom appears to fear. In my experience of Sky, the MFT certainly has material control over the business, including over Sky News, yet there has never – to my knowledge – been any attempt by any Murdoch in the 29-year history of the channel to influence its output. Perhaps regaining 100% control of Sky (as they had before the merger with BSB) would suddenly release some long pent-up ambition to shape editorial output: but how would we know if it happened? If it was obvious, and contrary to Ofcom licence terms, it could be stopped. If it was obvious, and licence-compliant, where is the objection? And if it was

undetected by those who scrutinize and those who regulate, how could it be contrary to the public interest?

The difficulty here lies with the inadequacy of the legislation. The faint possibility imagined by Ofcom might just rise to the level of the transaction conceivably acting against the public interest, even though any actual outcome of the kind feared by Ofcom seems bound to be either licence-compliant or subject to sanction. Yet if that possibility is so low that it could not reasonably rise to the level that the CMA must determine in order to block the transaction – the *probability* that it would act against the public interest – then a reference to the CMA seems a waste of public money, as well as running the risk that the UILs offered by Fox, and deemed by Ofcom likely to mitigate potential harm, could fall away.

The position in which the Secretary of State is placed by the legislation is not easy. Given that Ofcom is the regulator installed by statute 14 years ago, it is understandably hard to ignore the advice it offers. The deficiencies of that advice may be evident to those who have participated in, studied and written about this subject for decades, but a minister cannot reasonably be expected to have that depth of knowledge.

In the circumstances, your statement to the House of Commons reflected the role you were assigned by law. It may even serve to extract from Fox further concessions in relation to Sky News, so as to bring an end to the intervention process. However, even if no further concessions are forthcoming, it would be a serious mistake to go ahead with a reference to the CMA, given the high level of predictability of the outcome. Erring on the side of extreme caution would be the wrong response in these circumstances.

David Elstein 14/7/2017