

Ms. Anne Lambert, Inquiry Chair  
Fox/Sky Merger  
Competition and Markets Authority  
Victoria House  
Southampton Row  
London  
WC1B 4AD

06 February 2018

Re: Response to Notice of Proposed Remedies in Sky/Fox Merger

Dear Ms. Lambert,

We thank you for this opportunity to respond as an interested third party to the Competition and Market Authority (CMA)'s Notice of Possible Remedies in the Sky/Fox merger, issued on the 23rd of January.

We fully agree with your panel's provisional view that a complete prohibition of this transaction represents "a comprehensive solution to all aspects of the provisional adverse public interest finding and that it poses relatively few risks, compared to other options, in terms of implementation or effectiveness."<sup>1</sup> As the CMA rightly notes, this remedy would address "the root cause of [its] concerns regarding media plurality as set out in [its] provisional findings, preserve the status quo and prevent the harm associated with the Transaction from arising."<sup>2</sup> Further, its implementation proves the least difficult to enforce.

We believe this is the only *effective* remedy available.

First, as you note, there are several external circumstances over which the CMA does not have control but which may significantly impact the outcome of this transaction. Should a merged Disney-Fox result, it should not be afforded any special treatment in the UK merger control regime through automatic approvals. We submit that any new entity should have to proceed through the full regulatory process contained in the UK merger control regime from the beginning, including relevant public interest tests if necessary. This will ensure the fairness of the process, also critical to counter a widely-held public perception that the Murdochs have long enjoyed special treatment in the UK despite severe failures of journalistic ethics and corporate governance.<sup>3</sup>

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<sup>1</sup> Paragraph 15 of the Anticipated Acquisition by 21st Century Fox, Inc of Sky PLC: Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups, dated 23 January 2018.

<sup>2</sup> *Ibid.*

<sup>3</sup> After Mazher Mahmood, Murdoch cannot be let off the hook -

<https://www.theguardian.com/commentisfree/2016/oct/21/mazher-mahmood-murdoch-fake-sheikh-jailed-news-uk-leves-on-part-two> (Accessed 4 February 2018).

Second, as we previously set forth in a letter to Secretary of State Bradley, dated 10 July 2017 (which we enclose herewith), the CMA cannot rely on any of the remedies put forth by 21st Century Fox to Ofcom as “clear cut” or “effective” in light of the Murdochs’ long track record of breaking written undertakings in the UK, US, and Australia. Additionally, 21st Century Fox’s previous proposed undertakings to Ofcom were ambiguous, limited and suffered from grave concerns over monitoring and enforceability. Noteworthy here is an [Avaaz-ICM poll](#)<sup>4</sup> carried out in July 2017, demonstrating that only 6% of British citizens thought Rupert Murdoch could be trusted to keep his promises.

For these reasons, we support the CMA’s provisional proposal for a complete prohibition of the merger. We thank you, on behalf of over 70,000 UK citizens who have signed an Avaaz petition on this issue, for the opportunity to participate in these important deliberations that seek to uphold our robust regulatory framework for a free media that provides accurate information and a genuine range of views.

Please do not hesitate to contact us or our representative, Ingrid Gubbay at Hausfeld & Co. LLP, should you require any further information or seek clarification on our position on this matter.

Yours sincerely,

Alex Wilks  
Campaign  
Director Avaaz

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<sup>4</sup> Poll on Sky takeover bid: Brits don’t trust Rupert Murdoch - [https://www.avaaz.org/act/media.php?press\\_id=835](https://www.avaaz.org/act/media.php?press_id=835)

**FAO: Rt. Hon. Karen Bradley MP**  
Secretary of State for Culture, Media and Sport  
Department for Culture, Media and Sport  
100 Parliament Street  
London  
SW1A 2BQ

10 July 2017

By email: [REDACTED]

Dear Secretary of State,

**Re: 21st Century Fox's bid for Sky**

We are instructed by our client, the global citizens' movement Avaaz, to respond to your statement to Parliament on the 29th July. Specifically, you said you were persuaded by Ofcom's clear findings that the Sky takeover 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.

You made clear that at this interim stage, you were minded to refer the deal for a full Phase Two investigation on plurality, citing the CMA's guidance that it is "highly unlikely to accept behavioural remedies at phase 1" unless remedies are "clear cut... effective and capable of ready implementation'. However, more disturbingly, you indicated that you are ready to entertain an improved offer from the Murdochs of such remedies.<sup>1</sup>

Thus, the purpose of this letter is to ensure you are fully aware that remedies put forward by the Murdochs can never be considered clear cut and effective, as the Murdochs have a long and dismal track record of breaking previous undertakings in the UK, USA and Australia.

<sup>1</sup> Bradley, Karen, Statement to the House of Commons, 29th June 2107, available at: <https://www.theyworkforyou.com/debates/?id=2017-06-29b.761.3>

What is clear cut, is that the Murdochs cannot be entrusted to uphold any written undertakings, as is demonstrated by the continuous disregard for previous commitments they have entered into as set out in numerous authoritative reports. In our view, it would be wholly unreasonable for you to accept their proposals for limited and temporary protection to Sky News, especially on the basis of a limited analysis by Ofcom. Accordingly, we urge you, bearing in mind your ultimate duty to protect the public interest, to refer the Sky deal for a full Phase Two investigation, so that the long history of double-dealing and deception around similar undertakings previously agreed by the Murdochs is fully considered.

### **A long track record of breaking undertakings**

There are many examples of reckless disregard for undertakings agreed in good faith. Some examples include:

1. The purchase of *The Times* and *The Sunday Times* in 1981. Rupert Murdoch gave legally binding undertakings on editorial independence to the then Secretary of State. Harold Evans, the first *Times* editor under Murdoch, says Rupert Murdoch broke what had looked like a cast iron agreement that he would not give instructions to journalists or interfere with the editor's freedom to manage spending within set annual budgets.<sup>2</sup>
2. A later editor, Andrew Neil says Rupert Murdoch forced him out as *Sunday Times* editor after a major story took a line that conflicted with Murdoch's business interests in Malaysia.<sup>3</sup> Most recently James Harding resigned as *Times* editor when Rupert Murdoch made it clear he should leave following strongly worded editorials on phone hacking.<sup>4</sup>
3. Before agreeing to sell Dow Jones to the Murdochs, the Bancroft family took extensive legal advice to draw up what they thought were watertight commitments to editorial independence at the Wall Street Journal. A tougher version of *The Times* commitments in the UK, these established that News Corporation would have the ability to hire and fire the top editors and publishers, but an independent five-person committee would have the right of veto on these decisions. But soon after the takeover, Murdoch fired managing editor Marcus Brauchli, informing the committee only after that decision was taken.<sup>5</sup>

<sup>2</sup> Evans, Harold, The king of broken promises: Rupert Murdoch, *The Independent*, 25 June, 1994. Available at: <http://www.independent.co.uk/arts-entertainment/the-king-of-broken-promises-rupert-murdoch-1425246.html>

<sup>3</sup> Blackhurst, C., Murdoch Fired Editor of Sunday Times to protect TV interests, *The Independent*, 15 October 1996. Available at: <http://www.independent.co.uk/news/murdoch-fired-editor-of-sunday-times-to-protect-tv-interests-1358587.html>

<sup>4</sup> O'Carroll, L, James Harding: ex-Times editor could become the story at the BBC, *The Guardian*, 16 April 2013. Available at: <https://www.theguardian.com/media/2013/apr/16/james-harding-times-bbc>

<sup>5</sup> Sorel, E, The Man Who Tried To Manage Murdoch, *Vanity Fair*, June 2010. Available at: <http://www.vanityfair.com/culture/2010/06/times-versus-wall-street-journa-201006>

4. When he wanted to buy Channel 10 in Australia, Rupert Murdoch promised the Australian Broadcasting Tribunal that he would not introduce any changes to the channel, and denied that he was intending to purchase television interests in Melbourne. Yet within weeks of his takeover, the chairman, general manager and finance director at Channel 10 had all been replaced by executives from companies Murdoch owned previously. Within months, Rupert Murdoch was bidding for a Melbourne station. The Australian Broadcasting Tribunal rejected the Melbourne bid and criticised Rupert Murdoch for giving “directly contradictory evidence.”
5. Rupert Murdoch has broken many other significant promises about editorial control and direction, for example one to give the Carr family a continued role determining the direction of *The News of the World*, and one to Dorothy Schiff that *The New York Post* would keep its liberal politics editorial line.<sup>6</sup>

These breaches of promise are of a piece with a less than frank approach to regulation. A serious example of failure to be frank is Fox’s failure to disclose to its US regulator that it had privately settled a \$21million federal fraud suit in 1989. This suit charged Fox with, among other things, earning money unlawfully by cross-promoting Fox films via Fox TV stations when applying to renew a broadcast license. The US Federal Communications Commission’s Review Board condemned this omission, along with other misconduct.<sup>7</sup>

### **The Sky News undertakings are weak and unreliable**

Ofcom has set out the view that the proposed undertakings to insulate Sky News from Murdoch influence are more robust than those set out in the case of the Times and Dow Jones because there is a public reporting requirement and because they are enforceable directly by the Secretary of State. This is not the case. It would be unwise to rely on the ability of the Secretary of State to enforce the current undertakings as a basis for determining that they are more robust than historic undertakings. The fact is that such reliance on the willingness of the Secretary of State to enforce such undertakings could not command public confidence.

That is, in particular, because much of the public concern about the Murdochs centres on their close links to, and ability through their existing media operations to put pressure on, politicians of all parties. No matter how much confidence the public has in your personal determination rigorously to exercise your functions without fear or favour, it is inevitably the case that the public may well not have such confidence in subsequent Secretaries of State, potentially of a different party.

<sup>6</sup> Auletta, K, Promises, Promises, *The New Yorker*, 2 July, 2007. Available at: <http://www.newyorker.com/magazine/2007/07/02/promises-promises-2>

<sup>7</sup> Felons on the Air, FAIR, 1 November 1994. Available at: <http://fair.org/extra/felons-on-the-air/>. See also Applications of Fox Television Stations, Inc., FCC Rcd. 2361 (F.C.C.), 72 Rad. Reg. 2d (P & F) 297, 8 F.C.C.R. 2361, 1993 WL 756116 (1993), p.2406.

A nationally representative opinion poll conducted last week for Avaaz by ICM found that just 6% of British people think Rupert Murdoch can be trusted to keep his promises, and 76% think the government should fully investigate misconduct in his companies before allowing him to own more media.

There are further fundamental flaws with the content of the undertakings and in particular with the idea of a Sky News Editorial Board. For example, the undertakings only protect the Head of News from clear cut cases of interference, not subtle pressure.

Lord Justice Leveson summed up evidence he had heard on how Rupert Murdoch operates by saying, “his editors would not need to ask him for his opinion on any particular topic; they would know his thinking on the issues of the day in general terms, and could work out what it would be likely to be in any specific instance.”<sup>8</sup> One senior Murdoch staff member, Bruce Dover, outlined this method as follows “The thing about Murdoch is that he very rarely issued directives or instructions to senior executives or editors. Instead, by way of discussion, he would make known his personal viewpoint. What was expected in return, at least from those seeking tenure of any length in the Murdoch Empire was a sort of ‘anticipatory compliance’.”<sup>9</sup>

The Head of News, and other Sky News staff, will know what the Murdochs’ views are, and will have an incentive to align with them if they want to be promoted, or recruited by another media property controlled by the Murdoch Family Trust. An analogy can be drawn with Ofcom’s conclusion last month about Murdoch’s political influence. It found “the degree of influence of members of the Murdoch Family Trust over the political process is difficult to evidence” and cited Lord Leveson that “It is the ‘without having to ask’ which is especially important here. Sometimes the very greatest power is exercised without having to ask, because to ask would be to state the blindingly obvious and thereby diminish the very power which is being displayed”.<sup>10</sup>

A further concern for consideration, is whether the Head of News and other staff will feel able to speak out to the Editorial Board. Employees will have their jobs on the line and may face retaliation, as did Jessica Golloher at Fox News when she followed company instructions and emailed Fox’s lawyers saying she wanted to complain about unlawful discrimination. She was fired less than 24 hours later.

<sup>8</sup> An inquiry into the culture, practices and ethics of the press: report [Leveson] Volume 1, 29 November 2012. Available at:

[http://webarchive.nationalarchives.gov.uk/20140122145618/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780\\_1.asp](http://webarchive.nationalarchives.gov.uk/20140122145618/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_1.asp)

<sup>9</sup> Dover, B, Rupert’s Adventures in China: How Murdoch Lost a Fortune and Found a Wife, April 9, 2008. Available at:

[https://books.google.co.uk/books?id=LtqUk6XzNHUC&pg=PT36&pg=PT36&dq=bruce+dover+%27anticipatory+compliance%27+rupert%27s+adventures+in+china&source=bl&ots=37rNln-ilH&sig=DambBeLIT\\_w1p5MKCKAXOWCRFc&hl=en&sa=X&ved=0ahUKEwi-4P1fPbUAhVIF8AKHXQjCoIQ6AEINjAE#v=onepage&q=bruce%20dover%20anticipatory%20compliance%20rupert%20adventures%20in%20china&f=false](https://books.google.co.uk/books?id=LtqUk6XzNHUC&pg=PT36&pg=PT36&dq=bruce+dover+%27anticipatory+compliance%27+rupert%27s+adventures+in+china&source=bl&ots=37rNln-ilH&sig=DambBeLIT_w1p5MKCKAXOWCRFc&hl=en&sa=X&ved=0ahUKEwi-4P1fPbUAhVIF8AKHXQjCoIQ6AEINjAE#v=onepage&q=bruce%20dover%20anticipatory%20compliance%20rupert%20adventures%20in%20china&f=false)

<sup>10</sup> The Leveson Report, accessible version: <http://leveson.robertsharp.co.uk//chapter8/>, official version:

[http://webarchive.nationalarchives.gov.uk/20140122145618/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780\\_1.asp](http://webarchive.nationalarchives.gov.uk/20140122145618/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_1.asp)

Rupert Murdoch could also control the output of Sky News in more direct ways. For example, he would be able to give commercial targets on revenue or viewership to lead the Head of News in a certain direction. In addition there are a series of loopholes in any such behavioural undertakings that Rupert Murdoch could exploit, ranging from a lack of regulation on how well the board must be resourced to the fact that Sky's online output is not subject to Broadcasting Standards and could be moved to a separate division.

## Conclusion

You confirmed to the House of Commons that you will take your decision "only on the basis of the evidence that is relevant to the specified public interests" and that you will set aside wider political considerations going beyond the scope of the legislation.

Media companies controlled by the Murdoch Family Trust have an outsized political impact due to their willingness to provide positive coverage to politicians who further their business interests and Ofcom found that their influence on our political and news agendas looms materially larger than what the raw data of a plurality analysis indicates.

The undertakings offered by Rupert Murdoch raise significant concerns in terms of monitoring and enforceability and his track record suggests that he lacks the good faith to follow through on them. Indeed he is on the record as stating "you tell these bloody politicians whatever they want to hear and once the deal is done you don't worry about it."<sup>11</sup>

In the face of such overwhelming evidence of likely threats to the public interest, we respectfully submit that the only correct and reasonable course is to refer the Sky deal to a full Phase Two investigation. We do not see how accepting any undertakings at this stage, let alone undertakings as ambiguous and limited as those so far offered, could be consistent with your legal duties. We will urgently look at launching a legal challenge if you endanger the public interest by accepting paper promises from the Murdochs. As a former Conservative member of the House of Commons put it "Mr. Murdoch has strewn assurances and safeguards on newspaper and television ownership like confetti, all over the world, and in far too many instances they have proved to be worthless".<sup>12</sup>

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<sup>11</sup>Puttman, D, News Corporation has sought to undermine elected governments, *The Guardian*, 28 April 2012. Available at:

<https://www.theguardian.com/commentisfree/2012/apr/28/news-corporation-governments>

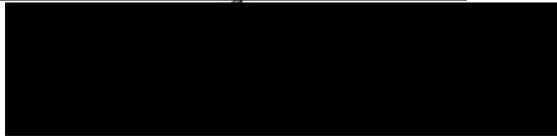
<sup>12</sup><http://www.nytimes.com/1981/02/01/world/murdoch-is-gaining-in-bid-to-buy-paper.html>



Yours faithfully,  
Ingrid Gubbay



**Hausfeld & Co. LLP**



*Copy to Sharon White, CEO, Ofcom*