

Rt Hon Ed Miliband MP
Member of Parliament for Doncaster North



HOUSE OF COMMONS
LONDON SW1A 0AA

Sabrina Basran
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Fox/Sky Merger Inquiry
CMA
Victoria House, Southampton Row
London WC1B 4AD

6th February 2018

Dear Sabrina

Fox/Sky proposed merger

Please find enclosed our submission in response to your remedies notice that you are now consulting upon to address the adverse public interest finding.

We ask that in addition to this written submission, we have the opportunity to give evidence at any oral hearings that the CMA panel might hold on behavioural remedies.

Yours sincerely

Rt Hon Ed Miliband MP
Rt Hon Sir Vince Cable MP

Rt Hon Lord Falconer of Thoroton
Rt Hon Kenneth Clarke MP

The CMA's provisional findings

We welcome the Competition and Markets Authority's findings on media plurality, and in this document reply to its consultation on possible remedies to address the effects adverse to the public interest that would follow from this transaction.

We ask that in addition to this written submission, we have the opportunity to give evidence at any oral hearings that the CMA panel might hold on behavioural remedies.

We welcome the CMA's recognition that the transaction would:

- "enable the [Murdoch Family Trust] to exercise materially greater influence over public opinion and the political agenda through Sky and Sky News" which would "add to the MFT's already significant influence over public opinion and the political agenda through its control of the News Corp titles."¹
- "give the MFT a unique position from which to influence the news agenda."²
- "lead to the MFT holding too great a degree of control over the diversity of the viewpoints consumed by audiences in the UK and would give the MFT too much influence over public opinion and the political agenda."³

We believe the CMA's approach to remedies must be resolutely focused on preventing the harm of 'too much influence over public opinion and the political agenda'. We agree with its finding that "if sufficiency of plurality is lost, it may be difficult or impossible to restore."⁴ This underscores the importance of having a very high degree of certainty that the course of action the CMA recommends to the Secretary of State will not run the risk of allowing a situation of insufficient plurality, in particular through one media owner acquiring 'too much influence', to occur.

As we see it, there are three issues for the CMA to resolve:

1. Should Fox's purchase of Sky's remaining shares be permitted subject to undertakings, before we know the outcome of Disney's deal to buy Fox?
2. If Disney's deal is about to go ahead, or has been completed, what should happen then?

¹ CMA, Provisional findings, paragraph 11.136

² Paragraph 11.135

³ Paragraph 12.20

⁴ Paragraph 37

3. What should happen if the Disney deal falls through?

In answer to question 1, our view is that neither structural nor behavioural remedies proposed are an acceptable answer to the plurality concerns raised by the Fox takeover of Sky. We explain in detail in this document why the remedies are inadequate. Therefore the CMA should recommend that the Secretary of State block the deal.

In addition, in the context of the prospective Disney deal, it would be inappropriate and unrealistic to impose or accept undertakings that may only apply for a short period of time. The right course is to preserve the current status quo until it becomes known whether the Disney deal is going ahead. The right way to do that is to prohibit the deal.

In answer to question 2, in the event that Disney's deal to buy Fox completes, then it should be for the CMA to decide *at that point* on what basis it would recommend allowing the purchase of Sky to proceed. At paragraph 43 of its notice of possible remedies, the CMA canvasses two potential approaches to remedies given the pending acquisition of Fox by Disney.

We believe that the correct way to ensure Disney's acquisition of Fox alleviates the plurality concerns identified is for the CMA to consider, once Disney's acquisition of Fox is about to conclude, whether the deal has obviated those concerns or whether protections are still needed. We still cannot be certain, at this stage, what influence the MFT will have at Disney as a result of this transaction: for instance, whether members of the MFT will join the board of Disney or be appointed to executive positions at Disney. We therefore strongly believe that the CMA should recommend the prohibition of Fox's acquisition of Sky, but on the basis that Fox can apply to the CMA to have the prohibition lifted once it has been acquired by Disney and the issue of the influence, if any, of the MFT over Disney has been clarified.

In answer to question 3, if the Disney deal falls through, then the prohibition on Fox's acquisition of Sky should continue indefinitely, and there should be no ability on the part of Fox to apply to have the prohibition lifted, because, for the reasons set out below, neither structural nor behavioural remedies can provide sufficient protection against the plurality risks of this bid.

Again we would stress the CMA's finding that "if sufficiency of plurality is lost, it may be difficult or impossible to restore." We would add that if the independence of Sky News is lost, it would be difficult or impossible to restore. This central fact should mandate an extremely cautious and sceptical view of remedies. In our view, this bid must be prohibited by the Secretary of State, with Fox able to apply to have that prohibition amended if and only if Disney's deal completes.

Before examining structural and behavioural remedies in detail, we would point out that the focus of the remedies has been exclusively on Sky News. We believe there remain

unanswered questions around the plurality risks in the non-Sky News areas of the transaction.

In particular, the power to cross-promote across a fully owned Internet Service Provider (ISP) as well as TV, radio, press and online will allow for significantly greater commercial and corporate as well as political power. Full access to the second largest ISP in the country would enable 21st Century Fox to exploit user data from subscriber bases which could both distort the market and influence public opinion.

This is particularly significant given that online political advertising remains unregulated and, as Lord Puttnam along with five other peers have noted in a letter, “the temptations and opportunities for misuse become great” when such data are in the hands of an owner “with an appetite for political leverage”.⁵

We believe that these risks, outside the area of Sky News, offer additional plurality concerns about this transaction, and further reason to prohibit it.

Structural remedies

The CMA’s notice of possible remedies sets out two ‘structural’ remedies:

- A ‘carve-out’ of Sky News, with Fox retaining a 39% stake in the Newco.
- Full divestment of Sky News.

Carve-out

A carve out proposal, similar to what was proposed in 2011, would simply fail to address the powerful findings of the CMA about the dangers of MFT control. While the new company, Sky News, would effectively have the same degree of Fox ownership, 39%, as today, it would be utterly dependent as a company on Sky, of which it would be a subsidiary, which would be 100% owned by Fox. We contend this would give the Murdochs a degree of control which engages similar plurality concerns that the CMA has found with the proposed takeover without remedy.

First, the Newco would be dependent on Sky’s resources in order to function. It would need agreements with Sky to use its production and distribution resources, and its brand. The 2011 undertakings required News Corp to ensure that Sky entered into a carriage agreement, a brand licensing agreement and a series of operational agreements with the proposed Newco. As the 100% owner of Sky, Fox would have all the commercial cards.

⁵ Letter to The Observer, “Data danger lurking in Sky deal” 16 July 2017

There is also the practical possibility that Fox could fail to fulfil the agreements at times. The undertakings required Sky to provide facilities and support services to the Newco on terms that were 'fair and reasonable'; plainly interpretations of what was fair and reasonable could differ considerably in practice. The Newco would then be faced with the prospect of having to take Fox to court in order to force it to honour the agreements, which would be costly.

In practice, the Newco would be dependent on the continuing goodwill of Fox, far more so than Sky is at present. Although Fox is an important shareholder, Sky does not rely on agreements with Fox for its basic operations. The Newco's extensive dependence on Fox would undoubtedly affect the willingness of the Newco's board to run the company in a manner Fox would not like. This effect on the board would be inevitable and would mean that the Newco board would take the company, including in editorial matters, in the direction that Fox wanted without Fox necessarily having to ask. This would not be obviously detectable by a monitoring regulator.

Second, the agreements between Fox and Sky News would be up for renewal after a period of time and Fox would inevitably have the greater bargaining power in these negotiations, as the provider of resources without which the Newco would find it difficult or impossible to operate. In the 2011 undertakings, the agreements required only needed to be for 'up to' a certain number of years, e.g. an advertising sales agreement between the Newco and Sky lasting 'up to 3 years'. Plainly this offers Fox the ability to conclude an agreement lasting fewer than 3 years, and thereby to exert more influence over the Newco. But even if an advertising agreement was agreed for the full 3 years allowed for by the undertakings, knowledge of the need to secure a favourable agreement in looming negotiations with Fox would plausibly have an ongoing influence on the Newco's ability to be truly independent of Fox's influence.

Third, the undertakings agreed in June 2011 provide for the appointment of directors by ordinary resolutions of shareholders in the Newco. Fox would have a powerful and potentially decisive influence in votes on those resolutions, including resolutions on the appointment or reappointment of 'independent' directors. Moreover, unlike now, independent directors of the Newco will be keenly aware that the company is entirely dependent for its future and its success on its relationship with Fox, through its ownership of Sky. It is not plausible to believe that in these circumstances they can operate truly independently of the wishes of Fox and the Murdochs.

Even a short description of the balance of power in such a scenario shows the mismatch between the power of Fox, and the Murdochs, and a stand-alone Sky News. The CMA is clear in its intention, that remedies must "address effectively the concerns we have identified". We do not believe this option would or could do so.

Nor do we believe anything like the 2011 undertakings could represent a secure future for Sky News. In its initial review of this bid Ofcom said "we would have significant concerns that an undertaking based on structural separation may lead to the risk of the scale of Sky News

decreasing over time, given the inherent difficulties in sustaining a loss-making unit outside of the Sky corporate structure.”⁶ We agree.

Divestiture

Turning to the possibility of divestiture, we believe it would be highly unlikely, perhaps impossible, to find a suitable buyer for Sky News; all the more so if Fox retains a 39% stake in the new company. A buyer would have to fulfil a series of conditions which, in practice, no one media company is likely to. A buyer would need to:

- Be able to satisfy Ofcom and the CMA that its ownership of Sky News would not itself generate plurality concerns. This prevents the largest and most well-resourced UK media companies from bidding for Sky News, since their acquisition of it would effectively reduce the number of different UK media owners and be likely to reduce the diversity of views available to and consumed by the public. In some cases it may also lead to one media owner or ‘voice’ acquiring too much influence over public opinion and the political agenda by adding Sky News to the influence they already have.
- Either be able to supply those resources for which Sky News currently relies upon Sky - such as IT support, premises, studios, broadcasting facilities and so on - or be prepared to rely on Sky (or whichever company comes to own Sky) to provide those resources on an ongoing basis. In the latter case, the less Fox pledges to provide Sky News with on an ongoing basis, the smaller the range of prospective buyers with the existing TV production, advertising sales and other resources (in the UK) necessary to operate Sky News. But conversely, the more Fox is pledged to provide Sky News with on an ongoing basis, the more the buyer would be dependent on continuing good relations with Fox, for the reasons set out above, including the need to renew the agreements. The prospect of entering continuing commercial relations with Fox may be one many media companies would find uninviting.
- Be interested in acquiring a business whose brand is effectively tied to a larger company over which it would have no control. The alternative would require a rebranding of Sky News, inevitably reducing its value.

The attraction of owning shares in the Newco would plausibly be even less in the scenario where Fox retained a 39% stake because that stake could give Fox an ability to frustrate the will of the new owners, for instance by blocking special resolutions of the Newco.

The most fundamental question is, why would any company want to acquire this asset? The primary commercial benefit to Sky from Sky News is the brand and marketing benefits from

⁶ Ofcom, *Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc* 20 June 2017, paragraph 11.22, p. 104

having a Sky-branded quality news service available to the whole public. These benefits necessarily would not accrue to the new owner of the divested company, which would, if it kept the Sky branding, effectively be paying for the privilege of delivering commercial benefits to a Fox subsidiary. It is therefore hard to see what commercial reasons a company might find for acquiring a large stake in, or the entirety of, the new company.

For these reasons, we do not believe that divestiture is a practical option, nor one which would guarantee a secure future for Sky News.

There is also reason to doubt, even if it was practical, that divestiture would address the plurality concerns expressed by the CMA. The acquisition of Sky *as a whole*, even without Sky News, significantly enhances the MFT's ability to influence public opinion and the political agenda.

Whatever happens to Sky News, Fox would still be free to launch a new news channel, and create new news and current affairs programming. With the considerable investment that Fox would be able to channel into these, there is the very real prospect of the MFT materially increasing its influence - which the CMA recognises is "already significant" - over public opinion and the political agenda.

Control of Sky through Fox would increase the ability of the MFT to pursue this course, by giving it:

- control of the Sky platform and the ability to dictate the prominence of channels in the Sky electronic programme guide
- access to Sky's considerable data on UK households and their viewing habits
- the ability to benefit from production of original news and current affairs content not only through TV advertising sales but also incremental Sky subscription revenue
- control over how to spend Sky's revenues, more of which could be allocated to news and current affairs production

Having to divest Sky News would be a temporary setback, which could be made up for by setting up a new news channel and commissioning more news and current affairs content. We therefore contend that even requiring the complete divestment of Sky News is not sufficient to prevent this transaction materially increasing the MFT's ability to influence public opinion and the political agenda.

Behavioural remedies

In cases where structural remedies are not viable, the CMA's guidance recommends consideration of behavioural remedies. However, the guidance also notes that in general structural remedies are to be preferred because of the difficulty in implementing and

monitoring the effectiveness of behavioural remedies. The CMA's notice of possible remedies highlights that the effectiveness of a behavioural remedy would be particularly challenging to monitor in this case, given "the subtle ways in which influence can be exerted".⁷ We strongly agree with this assessment.

The remedy offered by Fox in mid-2017 was the creation of a majority 'independent' editorial board. Our view is that neither this remedy nor a version of it strengthened in the ways the CMA canvasses in paragraph 38 of the remedies paper can properly address the plurality concerns arising from this transaction.

The fundamental reason for this is that whatever undertakings are given or safeguards are put in place, Sky News will be, in this scenario, a wholly-owned division of Sky, which would now be wholly owned by Fox. That means Sky News is wholly dependent for its resources and brand on Sky, and therefore Fox, and its employees are ultimately dependent on satisfying the wishes of Sky, Fox and the Murdochs.

The only sensible course for those running Sky News in this scenario is to seek the greatest possible co-operation with Sky, Fox and the Murdochs - in circumstances where there is a huge imbalance of power. This is borne out by the cases of Times Newspapers and the *Wall Street Journal*, where similar attempts were made to safeguard against Murdoch interference, which demonstrably failed.

Indeed, it is striking how similar many of the undertakings being offered today in the case of Sky are to those made in the case of Times Newspapers. For the benefit of the Panel, we attach a copy of those undertakings.

These include the following: "The Editors...may be appointed or removed only by the agreement of a majority of the Independent National Directors...Mr Murdoch undertook to bind himself to preserve the separate identities of the Times and The Sunday Times, and to maintain the independence and authority of their Editors...They will be subject to no restraint or inhibition either in expressing opinion or reporting news that might directly or indirectly conflict with the commercial interests or political concerns of the Proprietor...Their Editors will not be subject to instruction from either the Proprietor or the Management on the selection and balance of news and opinion." (see attached document)

Looking back now at these very strong undertakings, even Mr Murdoch's greatest supporters would be hard put to suggest he has abided by them. The two cases of editors Andrew Neil and James Harding, alone, are instructive. Although under the 1981 Times undertakings, both were technically protected by an independent board of directors from being fired by Rupert Murdoch, both stood down when it became clear to them they had lost his

⁷ CMA, Notice of possible remedies, paragraph 38 (a), p. 11

confidence. Similar promises were made in the case of the Wall Street Journal and broken as our previous submissions have shown, including through the replacement of the editor.

We urge the CMA to learn the lessons of history. In any scenario where Sky News is wholly owned by Sky and Fox, the Murdochs will wield ultimate control through resources, brand and the unspoken power deriving from ownership, and the way they use that ownership. That is why these behavioural remedies cannot prevent the plurality harms identified by the CMA. We now explain why in more detail.

First, on the crucial question of resources, Sky News will be wholly dependent on Sky. A five year arrangement is clearly a relatively short time-frame, less even than was proposed in the 2011 carve-out. Whatever the time period chosen, and even with a resources guarantee in that period, those running Sky News will be constantly aware that changes in the revenue they generate for themselves, or changing news demands, may well mean they have to seek extra resources from their parent company. It is obvious they will not, in these circumstances, want to bite the hand that feeds them.

Andrew Neil's eloquent explanation to the House of Lords Communications Committee in 2008 about why he resigned from his job speaks to this precise point: "...He [Rupert Murdoch] would have found ways of making life pretty intolerable for the editor. It would not have been a case of just being fired right away, but it would have been a case of money drying up, budgets not appearing. This already happened to me in the final months anyway when I wanted to expand the paper into other areas and that was denied for no good reason other than we had fallen out of love. I do not think a newspaper group or a title can survive and prosper if the editor and the proprietor are in a state of civil war, and *that is why arrangements, such as the trusts that The Times and The Sunday Times have, I think, are a complete waste of time, effort and regulatory effort (emphasis added).*"⁸

None of the protections being canvassed ultimately change the fact that it is the parent company that provides the resources on which Sky News depends, just as the *Sunday Times* under Andrew Neil depended on the resources of News Corp.

Second, on close examination the undertakings on the appointment of the Head of Sky News and non-interference in 'editorial choices' are currently fraught with potential loopholes, and, in practice, very hard to design effectively

Fox propose that the Head of News will be hired and fired by the editorial board, that the "Head of Sky News will retain editorial control over the selection of news stories and any political comment..." (35e in CMA remedies document) and that "employees and officers of Fox, or members of the Fox board that are trustees or beneficiaries of the MFT, will not

⁸ House of Lords Communications Committee, *The Ownership of the News - Volume II: Evidence*, p. 343, Q1678

attempt to influence the editorial choices of the Head of Sky News” (35f in CMA remedies document).

Quite apart from a distinct lack of clarity about who can and cannot influence editorial choices in this scenario (it appears from 35f that members of the Fox board who are not trustees or beneficiaries of the MFT can do so), analysis of the meaning of terms like ‘editorial choices’ or ‘editorial control’ shows how porous this supposed firewall will be.

Nothing in these words would prevent Sky operating in most respects like any other division of Fox. It would be able to set a corporate strategy for its component parts, which includes Sky News and it would be for those running Sky News to meet it. It is simply not credible, realistic or mandated by the proposed remedies, that Sky - and Fox - should leave major strategic decisions - such as target audience or overall programming strategy - for a key part of their company, Sky News, to an independent editorial Board. Sky will also have a Chief Executive, appointed by the Board of Fox, to whom, it must be assumed, the Head of Sky News will report day to day on most issues.

All this means that Sky would still be able to set a clear direction for Sky News, under the control of the Murdochs, whatever the wording about day to day ‘editorial choices’. It is also hard to see how the remedies could be written in a way which prevented this.

Furthermore, whatever the detail of the remedies themselves, huge unspoken power would inevitably be wielded by the Murdochs, without it ever needing to be spelt out. Sky News journalists and editors would know that the Murdochs expect their employees to follow the editorial line they want, and they would also know that those expectations continue to exist irrespective of whatever undertakings it may have been necessary for the Murdochs to accept in order to acquire Sky. Indeed, this is part of the reason why previous attempts at undertakings at Murdoch outlets have failed.

This was explicitly set out by Lord Justice Leveson in relation to Mr Murdoch’s power over his newspapers “His [Rupert Murdoch’s] 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. Some have likened this process to the workings or metaphorical radiations of the Sun King, but, in fact, it is no more than basic common sense. Editors at The Sun, and probably also the News of the World, could form a pretty good idea of what their proprietor wanted without having to ask...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.”⁹

⁹ The Leveson Report, Part I, Chapter 8, paragraphs 2.8-9

Nor is the Murdochs' unspoken power of influence over, or means of securing compliance from, their employees limited to negative sanctions as we saw in the cases of Mr Neil and Mr Harding. There is also the positive prospect of promotion within Fox or hiring at another MFT-controlled news outlet, a prospect that deviating from the Murdochs' preferred editorial line would imperil.

Many journalists who have worked for the Murdochs have moved upwards or sideways. Through Fox and News Corp, the MFT has control over a very large number of news outlets, and therefore a very large number of job opportunities. To cite some recent examples, Rebekah Brooks edited both the *Sun* and the *News of the World* and was then promoted to become CEO of News UK (and later re-hired to the same job after resigning in 2011). Robert Thomson worked as a journalist at the *Times*, eventually rising to become editor - he is now CEO of News Corp. Gerard Baker was US editor of the *Times* but was promoted to editor of the *Wall Street Journal*, part of a separate News Corp subsidiary. Stig Abell was managing editor of the *Sun* but became editor of the *Times Literary Supplement*.

Promotions such as these would clearly be unlikely for Sky News journalists or editors who displeased the Murdochs. Moreover, the possibility of not just new jobs but complements to existing ones like having a column in a News UK newspaper or securing a book deal with News Corp's subsidiary HarperCollins could also be lost. In these ways, there could still be considerable career costs for a journalist or editor who displeased the Murdochs, without them losing their job.

In addition to the weakness of the undertakings and the difficulty of adequately specifying them because of the unspoken power of the Murdochs, the behavioural remedies proposed also fail because of the issues surrounding the editorial board itself.

The selection mechanism proposed by Fox for a majority of so-called 'independent directors' - appointment by a sub-committee of its board - is wholly inadequate. The CMA is clear in its provisional findings about the problems inherent in the Fox Board Resolution which suggested that so-called independent directors of Fox could be trusted to be a protection against plurality concerns in approving the appointment or removal of the Head of Sky News: "While we expect the independent directors on the NCGC [Nominating and Corporate Governance Committee] to act in accordance with their fiduciary duties in respect of Fox, we consider that in many instances a decision that might give rise to a plurality concern would be in the commercial interest of Fox (and its shareholders) and therefore consistent with these fiduciary duties."¹⁰

Applying exactly the same logic, it cannot meet CMA plurality concerns to propose, as Fox has done, that the same Fox 'independent directors' should appoint the 'independent members' of the Editorial Board who choose the Head of Sky News. The Fox directors'

¹⁰ Provisional findings report, paragraph 8.8

interests will be to appoint people who will uphold the interests of Fox not protect editorial independence. This concern is further amplified by the provision to allow the rest of the Editorial Board to be composed of Fox executives.

The question then arises, who else could nominate the members of the Editorial Board? We contend that it would be plainly unacceptable for the Secretary of State to nominate editorial board members, because it is wrong in principle for government to make such decisions and indeed, politicians are themselves capable of being influenced by the Murdochs, whom the CMA has provisionally concluded already have significant political influence.

However, it is very difficult to envisage any alternative mechanism to ensure these individuals could be satisfactorily appointed in a way that made them genuinely independent. The CMA asks if appointments should be 'subject to regulatory oversight, for example the approval of Ofcom'? We do not believe this is a solution.

While Ofcom might be able to discern lack of independence in the most clear-cut cases, such as family members, current or former Murdoch employees, or longstanding vocal supporters of the Murdochs, there may be individuals whose affinity for the Murdochs or congruence with their aims is less obvious to Ofcom but no less real.

Indeed, potential candidates for the job of independent editorial board member would know Rupert Murdoch's long history of exerting close editorial control over the news outlets his companies own, and conclude that he expects to have similar control over Sky News, undertakings notwithstanding. They would know that supporting board decisions Rupert Murdoch does not like could be viewed as the "metaphorical declaration of war" Lord Justice Leveson suggested going against Rupert Murdoch's wishes involves.¹¹ This knowledge would likely put off many truly 'independent' potential candidates from even applying to be board members in the first place.

For these reasons, the likelihood would be high that even nominally 'independent' board members would be appointed who would in fact run Sky News in accordance with the Murdochs' wishes, and who would fail - as the Times Independent Directors transparently have - to stand up for the editorial independence of the entity they are responsible for protecting.

At an even more fundamental level, *whoever* is appointed will have to operate on the basis of close co-operation with Sky, Fox and the Murdochs as indicated above. The flaw in the editorial board as a protection therefore is not simply about the particular individuals who might be appointed and is about the financial, operational and corporate circumstances in which they will find themselves operating.

¹¹ The Leveson Report, Part I, Chapter 8, paragraph 2.10

To aid the CMA's deliberations, we wish to specifically summarise our answer to each of its suggestions and questions in paragraph 38 of the remedies paper around behavioural measures:

- a) We do not believe behavioural measures can constitute an effective remedy because of the fundamental dependence Sky News and its employees would have on Sky, Fox and Murdoch resources, brand and unspoken but very real power.
- b) The editorial board composition proposed by Fox is deeply flawed but no editorial board will be an effective buttress against the power of Sky and Fox management and owners. In particular, no board can realistically prevent journalists and editors at Sky News being subtly influenced by the Murdochs in the ways we have outlined above.
- c) There is no obvious genuinely independent appointment route which answers plurality concerns and the Murdochs have shown a consistent ability to get around 'independence' criteria, illustrated by the Boards of News Corp and Fox.
- d) The approval of Ofcom does not guarantee either that appointees will be genuinely independent, or that even genuinely independent appointees will be immune to influence by Sky, Fox or the Murdochs once appointed. The fundamental problem is the structural position of Sky News and its reliance on Sky, Fox and the Murdochs.
- e) The question of what lies within the purview of the Editorial Board illustrates the insoluble problem with behavioural remedies. It is simply not credible, realistic or indeed reasonable to believe that Sky—and Fox—will leave major strategic decisions on a key part of their company to an independent editorial Board. Sky will set a corporate strategy which includes Sky News and it will be for those running Sky News to meet it. Whatever the formal undertakings, in practice decisions at Sky will powerfully influence the strategic direction of Sky News.
- f) The proposal for a Board of wholly 'independent' directors raises again the problem of maintaining a genuinely independent board, immune to outside influence, on an ongoing basis. Moreover, even a truly independent board with a wide remit including business functions would still need to maintain a good working relationship with Sky, and therefore Fox. Fox would have a strong incentive, and indeed ability through its control of resources, to influence the board in order to secure compliance with the editorial strategy it wishes to set for Sky News
- g) The Panel asks how long Fox's commitment to Sky News should remain and the period for investment. Five years is a relatively short period, but in a world where news is changing so fast, it seems hard to plan ahead with certainty. The latter part of g) appears to suggest that the CMA or Ofcom would have to rule on the correct level of resources if the Parties asked it to do so on review. We do not believe this is an appropriate decision for a public body.

In sum, the proposal for behavioural remedies amounts to a significantly weaker version of the 2011 carve-out proposal. That proposal fails because it doesn't fundamentally deal with the problem of Murdoch influence and control. This is even more true of the proposition on behavioural remedies and it should be rejected by the CMA.

Closure of Sky News

At times during the merger scrutiny process, Sky and others have sought to imply that the future of Sky News within Sky is not guaranteed. It is thereby implied that the course of action least damaging to plurality is to allow Sky to be acquired by Fox, with limited remedies, since otherwise the UK will lose an independent provider of news and current affairs content.

We are deeply sceptical about the credibility of what amounts to an attempt to blackmail the regulator. We do not believe it stands up to scrutiny and urge the CMA not to succumb to such a threat. Moreover, what was an implausible threat before the prospective Disney takeover has, we suggest, become a vanishingly unlikely one.

First, we would remind the CMA of what Sky said in their initial submission in October:

“Commercially, Sky derives brand value from operating a trusted, independent 24-hour news organisation. Sky News is an important part of Sky’s offering. It contributes to Sky’s reputation as a high quality broadcaster. Sky’s customers value Sky News. They value it precisely because it is a trusted, independent, voice. Sky News makes a commercial contribution beyond that which is quantifiable from direct revenues alone. This explains why Sky continues to invest in Sky News when the costs of running a 24-hour news organisation are material and outweigh the direct revenues it generates.”¹²

There was no mention in this submission of the possibility of closing Sky News. If this was a real and credible possibility, it is peculiar, to put it mildly, that it did not feature in the submission to the CMA, nor had it featured in any previous submission to Ofcom. It is much more plausible to believe that this threat was a tactical ruse in response to the CMA’s issues paper.

Second the importance of Sky News to the Sky brand has been reaffirmed in testimony to the CMA by the Sky independent directors: “The independent directors said that Sky News held a significant brand value to Sky”¹³. The CMA has concluded that the Murdochs do not exert full control over Sky with Fox’s 39% stake. Taking the independent directors testimony

¹² Sky, Initial submission to the Competition and Markets Authority on plurality and broadcasting standards, paragraph 3.22, p. 6

¹³ Testimony of Sky independent directors, paragraph 22

at face value would suggest they would be loathe to close Sky News simply to increase the chances of a successful resubmitted bid, even if the Murdochs suggested such a course.

The testimony you received from Viet Dinh, an independent director at Fox, echoed that of the Sky independent directors. Mr Dinh described Sky News as “one of the key assets that contributed to the Sky brand”¹⁴. If Mr Dinh is taken at face value, such a decision would undermine the Sky brand.

Thirdly, we question whether closing Sky News to secure this acquisition is in Sky’s or the Murdochs’ interest at all. Although plurality concerns should prohibit its acquisition by Fox, few other plausible acquirers of Sky as a whole- and there are a number - would generate these concerns. This is most obviously true of Disney, which will end up acquiring Sky if its acquisition of Fox is concluded. Why would it be in Sky’s (or the Murdochs’) interest to shut a commercially valuable part of its business in order to enable itself to be acquired by Fox, when it is quite likely not to be necessary to shut Sky News in the event of the Disney acquisition of Fox?

Finally, as well as finding the threat to close Sky News not to be credible, we contest the assumption that if Sky News were to be closed, it would remove all the concerns raised by this transaction. The CMA cannot be certain that if Fox owned Sky minus Sky News, it would not go on to produce news and current affairs content that would increase the MFT’s influence over public opinion and the political process. Accompanying the Disney deal has come much commentary and some statements indicating that the Murdochs believe news is a content genre of continuing value and interest to them.

This suggests an important point about the CMA’s power in this process. By making clear that the CMA’s plurality concerns arise from the prospect of the MFT’s control over the whole of Sky, not simply control over the Sky News channel and its existing production resources, the CMA would in effect eliminate any incentive Sky might even claim to have to shut Sky News in order to enable it to be acquired by Fox.

Conclusion

The CMA has produced strong and clear conclusions about the danger of Fox acquiring 100% of Sky. We urge the CMA to follow through the logic of its provisional findings and recommend to the Secretary of the State the prohibition of this deal. We urge it not to be satisfied with ineffective and implausible structural or behavioural remedies which will fail to protect the public interest, or guarantee a secure future for Sky News. In particular, we suggest that the CMA should not go down the same path that has failed before: undertakings given and broken, by the Murdochs.

¹⁴ Testimony of Viet Dinh, paragraph 40

Set against the threat to the public interest, we see no credible public interest argument for this bid. Empty threats to close Sky News only demonstrate the weakness of the case. The current ownership structure is successfully sustaining Sky News. If the Murdochs are true to the stated intention to go ahead with the Disney/Fox deal, it is not at all clear why it would be in anyone's interest to close down Sky News. We urge the CMA not to succumb to these threats and to act to protect the public interest.

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THE FUTURE OF TIMES NEWSPAPERS

UNDERTAKINGS BY MR. RUPERT MURDOCH

SIR DENIS HAMILTON, CHAIRMAN AND EDITOR-IN-CHIEF OF
TIMES NEWSPAPERS HOLDINGS LIMITED, READ THE
FOLLOWING STATEMENT TO A PRESS CONFERENCE TODAY,
THURSDAY, JANUARY 22, 1981 AT THE PORTMAN HOTEL,
PORTMAN SQUARE, W.1.

A series of specific formal undertakings were given last night by Mr. Rupert Murdoch to, and were approved by, the Editorial Vetting Committee of Times Newspapers, chaired by Sir Denis Hamilton and comprising the Independent National Directors (Lords Roll, Dacre and Greene) and the Editor of The Times, Mr. William Rees-Mogg, and the Editor of The Sunday Times, Mr. Harold Evans. Lord Robens was abroad but has been fully informed, and has agreed.

These undertakings, concerned with protecting the editorial quality and integrity of The Times, The Sunday Times and The Times Supplements and their future ownership, will be incorporated in Articles of Association and, additionally, deposited with the Secretary of State for Trade. The principal undertakings are:-

1. Independent National Directors

The system of Independent National Directors serving on the Board of Times Newspapers Holdings Limited will be preserved and enhanced. There will be an increase in the number of Independent National Directors. They will be required to approve subsequent appointments to their membership.

continued.....

2. Appointment and dismissal of Editors.

The Editors, to be appointed by the Board, may be appointed or removed only by the agreement of a majority of the Independent National Directors. The Independent National Directors will be available for arbitration on unresolved issues.

3. Disposition of titles

Any future sale of any of the titles will require the agreement of a majority of the Independent National Directors.

4. Maintenance of Editorial Independence

Irrespective of these rights of the Independent National Directors, Mr. Murdoch undertook to bind himself to preserve the separate identities of The Times and The Sunday Times, and to maintain the independence and authority of their Editors in the appointment and control of their staff; over the political policy of the separate newspapers; and in all respects to maintain the titles as editorially independent newspapers of high quality. Each of the two Editors would be free to make his own decision on matters of opinion and news and each would be free to disagree with the other and with any other newspaper in which Mr. Murdoch may have an interest.

In particular Mr. Murdoch subscribes to and undertakes to observe the following principles relating to editorial integrity.

- (a) The Times and The Sunday Times are free from party political bias and from attachment to any sectional interest. They will be subject to no restraint or inhibition either in expressing opinion or in reporting news that might directly or indirectly conflict with the commercial interests or political concerns of the Proprietor. The Times is recognised to be a paper of record.

continued.....

- (b) In accordance with the traditions of the papers, their Editors will not be subject to instruction from either the Proprietor or the Management on the selection and balance of news and opinion. They have the right to refuse to publish any advertisement.
- (c) Instructions are to be given to journalists only by their Editor and by those to whom he has delegated authority.
- (d) The Editors of each of the Supplements should have the same responsibilities and prerogatives in relation to their paper as the Editors of The Times and The Sunday Times.
- (e) The Board of Times Newspapers Ltd. is to be responsible, after consultation with the Editors, for fixing an annual budget for editorial space and expenditure. The Editors are to be responsible for the allocation of space between editorial and advertising day by day, within the strategic framework set by the Board.

The Editors will continue to make all appointments to the journalistic staff, subject to the constraints of the editorial budget.

NOTE:

The Articles of Association of Times Newspapers Holdings Limited and Times Newspapers Limited will be altered as appropriate to reflect the above undertakings in the event that the sale to Mr. Murdoch becomes unconditional.