

21ST CENTURY FOX, INC. / SKY PLC

Response of Twenty-First Century Fox, Inc. to the Secretary of State's provisional decision on reference

1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1 This submission is made on behalf of Twenty-First Century Fox, Inc. (**21CF**) in response to the Secretary of State for Digital, Culture, Media and Sport (the **Secretary of State**)'s provisional decision to refer 21CF's proposed acquisition of the remaining shares in Sky plc (**Sky**) (the **Transaction**) to the Competition and Markets Authority (**CMA**) on the grounds of the media plurality public interest consideration set out in section 58(2C)(a) of the Enterprise Act 2002 (**EA 2002**) (the **Media Plurality PIC**).
- 1.2 21CF welcomes the Secretary of State's provisional decision, based on Ofcom's advice contained in its report to the Secretary of State of 20 June 2017 (the **Report**), not to make a reference on the grounds of the broadcasting standards public interest consideration set out in section 58(2C)(c) of the EA 2002 (the **Broadcasting Standards PIC**). 21CF is fully committed to the attainment of these standards, as represented to the Department for Culture, Media and Sport (as it then was) (**DCMS**) at the time of the "minded to" decision to intervene on the grounds of the Broadcasting Standards PIC. 21CF focuses its representations on matters of media plurality.
- 1.3 With regard to the Media Plurality PIC, 21CF recognises that Ofcom's role in media plurality cases is to provide the Secretary of State with advice in the context of a first-stage review, in which the threshold for reference is not set at a high level (a point the Report emphasises (para. 3.7)). 21CF understands that in this context, there may be issues on which Ofcom did not feel able to take a definitive view at this stage (indeed, as discussed further below, the Report does not reach firm conclusions on a number of material points). As a result there are several aspects of the Report on the Media Plurality PIC that lead Ofcom to overstate the possible implications of the Transaction for sufficiency of media plurality in the UK and do not adequately engage with the statutory framework within which Transaction falls to be assessed or the full body of evidence.
- 1.4 Nevertheless, in light of the difficulties in reaching definitive views at Phase I, 21CF has offered undertakings (the **Proposed Undertakings**) with a view to avoiding the delay and expense that would result from a protracted CMA review. The Proposed Undertakings comprehensively address the preliminary concerns raised by Ofcom, and 21CF welcomes that Ofcom recognises in its report that they mitigate those concerns. Under the relevant statutory framework this conclusion provides a clear legal basis on which the Secretary of State could accept the Proposed Undertakings (as the Secretary of State herself has stated).
- 1.5 A decision to refer the Transaction for a lengthy Phase II review and not to accept the Proposed Undertakings, which Ofcom found would mitigate the public interest concerns raised in its Report, would further delay a transaction which has been recommended by Sky's independent directors to its shareholders; which will ensure that Sky remains at the forefront of Europe's creative industries in a rapidly changing global media environment; and which will benefit the UK creative economy as a whole. As part of the Transaction, 21CF has publicly stated its intentions to complete Sky's £1bn investment programme at its UK HQ, to continue investment in employees across all of the UK, to maintain the parties' major investments in TV and film production in the UK (of around £700m per

year), and to continue Sky's standard of excellence in investing in business and community initiatives.¹

1.6 21CF therefore regrets and is disappointed that the Secretary of State is minded not to follow Ofcom's advice in this respect and instead to refer the Transaction to a protracted and unnecessary CMA review.

1.7 As mentioned above and set out in Sections 2 to 5 below, there are several aspects of the Report on the Media Plurality PIC that lead the Report to overstate significantly the possible implications of the Transaction for media plurality. 21CF is confident that an in-depth CMA review would address these issues and conclude that the Transaction will not result in *insufficient* plurality of persons with control of media enterprises (the statutory question to be addressed by the Secretary of State's decision).

(i) Section 2 of this submission responds to the Report's assumption on the basis of which "*Fox, Sky and News Corp* [are assessed] *as a single entity*" (para 2.5):

(A) First, 21CF does not dispute that the statutory framework permits the Secretary of State in assessing the Transaction to take account of activities carried on by companies under common material influence with 21CF. However, that does not mean they can be treated as a "single entity" on the basis of a legal fiction. This is made clear by the judgment of the Court of Appeal in *Sky/ITV*, which requires an **analysis of the actual degree of control exercised and exercisable over media outlets**. Despite purporting to take account of the judgment of the Court of Appeal in *Sky/ITV* there is little evidence of this in the Report.

Instead, it treats the Transaction as combining Sky News and News Corp into a "*single entity*", rather than assessing the actual extent of common control over them before and after the Transaction, in particular in relation to editorial matters. If one were to proceed on the basis of a legal fiction under which 21CF, Sky and News Corp are already considered a single entity because of common material influence, **the Transaction would bring about no change to the status quo**. A review that engaged with the actual (limited) extent of common control of news outlets post-Transaction, and the (limited) extent of the change brought about by the Transaction, would be bound to conclude that the Transaction will not significantly affect media plurality and certainly would not result in insufficient plurality.

(B) Second, and related to this, the Report **does not address the fundamental legal question that any final decision would need to address: whether the Transaction would result in insufficient plurality** of persons with control of media enterprises. This requires consideration not only of the effects of the Transaction, but also a view as to what level of plurality may be sufficient, and on the existing level of plurality in the absence of Transaction and taking into account the existing relationships between the merging parties. 21CF is confident that a review that took into account the high existing levels of plurality and employed an appropriate benchmark (reflecting relevant statutory guidance) would conclude that the Transaction would not result in insufficient plurality.

¹ See the intention statements set out in the Rule 2.7 dated 15 December 2016 (page 14).

- (ii) Section 3 of this submission describes the reasons why **the Report does not fully engage with the effects of the growth of online news and presents those effects as potential changes whilst they are demonstrably already present.** The Report correctly recognises that online news is bringing about change in news consumption and provision, that these changes will continue, and that they are potentially transformative for news consumption and plurality. However, Ofcom appears to have felt unable to draw firmer conclusions regarding the effects of these changes in the course of its review. This caution is not warranted. The transformative effects of online news, in terms of availability, consumption and influence are already clear, and 21CF believes that any more detailed review will recognise this, also in the light of most recent events.
- (iii) Section 4 of the submission identifies **a number of technical flaws and limitations in the Report's assessment of the quantitative evidence** that is cited in support of its conclusion that the Transaction will result in plurality concerns. In particular:
 - (A) Far from providing cause for concern, the cross-platform metrics used in Ofcom's analysis show that the combination of 21CF, Sky and News Corp would in broad terms amount to the moderate strengthening of the third-largest provider. In terms of reach at both retail and wholesale level, the combination would remain in third place (at 30% and 31% respectively), far behind the BBC (at 77% on both levels) and some way behind ITV (at 34% and 39% respectively). This combined reach is less than each of Sky and News Corporation *individually* in 2010. Applying Ofcom's bespoke share of references metric, the combination would be broadly comparable to ITV/ITN (10% vs. 11% at wholesale level; 10% vs. 9% at retail level) and far behind the BBC, which accounts for 42% of news provision at both wholesale and retail level. It is far from obvious why this raises plurality concerns: 21CF is not aware of anyone arguing that ITV/ITN's position is a threat to media plurality.
 - (B) The Report contains a number of errors relating to its assessment of the impact of the shift in news consumption online. In particular, it understates the extent of online multi-sourcing by treating each social media outlet as just a single source, while overstating the importance of online consumption of the *Sun* (for example, by treating someone who clicks on a *Sun* article once a month as equivalent to someone who reads the paper in print every day).
 - (C) The Report repeatedly overstates the position of News Corp through an inappropriate and inconsistent focus on 'UK-wide' newspapers, which omits titles with significant national news coverage (such as the *Evening Standard*, now edited by former Chancellor of the Exchequer George Osborne) while at the same time failing to account for the fact that News Corp's Scottish titles are *not* UK-wide newspapers, but distinct regional titles that take their own editorial lines. (Relatedly and more generally, the Report disregards internal plurality within News Corp, despite concrete evidence of this from the different approaches and editorial lines of the News Corp newspapers – a striking example is that the *Sun* and the *Times* took diametrically opposed views on Brexit, while the *Scottish Sun's* approach differed from that of the *Sun* in England and Wales.)
- (iv) 21CF would expect a more detailed review to correct these errors, and ultimately to reach the conclusion that the available evidence shows a healthily plural landscape,

in which even a full combination of 21CF, Sky and News Corp would be very far from a dominant player and certainly not result in insufficient plurality.

- (v) Section 5 of this submission responds to **the Report's preliminary assessment of the alleged influence of the MFT and members of the Murdoch family on the news agenda and political process.**
 - (A) Related to the points made above, the Report fails to give sufficient weight to the role of online players such as Facebook, Google and Twitter (which receives little attention in the report) in diluting the influence of traditional news outlets. Instead, it relies on evidence (notably from the Leveson Inquiry) that pre-dates much of the transformation of agenda-setting that has resulted from these developments, and is therefore not informative as to the current influence of news outlets and their proprietors. It also fails to draw conclusions from more recent and clear-cut evidence emerging from the 2017 general election.
 - (B) Further, the Report is inconsistent in its approach to influence. It suggests that newspapers (including those of News Corp) may have greater influence than their (modest) share of references might suggest, but does not take into account the corollary that Sky News (and the Wireless Group radio stations) must then have less. This follows from the zero-sum nature of influence: if one organisation has greater influence, the other necessarily has less.
 - (C) An additional point that the Report does not account for is that the possibility of a news story being picked up by other outlets and shaping the wider news agenda tends to enhance the relative share of influence of smaller, rather than larger, players. For example, if the *Mail* breaks a story but it is then picked up by the *FT*, it makes relatively little difference to the overall number of people who see it. Conversely, if the *FT* breaks a story and it is then covered by the *Mail*, this greatly increases its audience.
- (vi) Crucially, by not giving sufficient weight to the legal framework established by the Court of Appeal in *Sky/ITV*, the Report also does not adequately explain how the Transaction would result in the MFT and members of the Murdoch family having an increased ability to influence the news and political agenda. 21CF is confident that a proper consideration of the corporate, regulatory and cultural reasons why the MFT or the Murdoch family would continue to have no ability, or incentive, to influence the agenda of Sky News post-Transaction would result in the CMA identifying no plurality concerns.

1.8 The DCMS letter of 29 June 2017 also provided a second reason why the Secretary of State is minded not to accept the Proposed Undertakings: that they are "behavioural in nature". Drawing an analogy with competition cases, DCMS notes that the CMA "*is highly unlikely to accept behavioural remedies at phase I*". As described in Section 6 of this submission, 21CF considers that this approach, which does not follow Ofcom's advice in the Report, is unwarranted.

- (i) The Secretary of State's 'minded to' decision places undue weight on a rigid distinction between 'behavioural' and 'structural' undertakings, by analogy with guidance that does not itself give such weight to the distinction.
- (ii) The relevant question is not whether the undertakings are behavioural or structural, but whether those undertakings are an effective solution to the specific concerns raised in a particular case. In this case, the concerns Ofcom raised after its first-

stage review related to the possibility of influence being exerted over the editorial agenda of Sky News. The undertakings were tailored to address this issue, by providing substantial safeguards for the editorial independence of Sky News, as Ofcom's advice recognised. Ofcom considered the relative merits of the Proposed Undertakings and structural separation, and concluded that the Proposed Undertakings were more appropriate in this case.

- (iii) In such circumstances, the acceptance of behavioural undertakings – even at Phase I – is expressly envisaged by the CMA guidance to which the Secretary of State refers.
- (iv) Moreover, the Proposed Undertakings are not necessarily capable of a binary classification: they contain a structural component, in that they provide for the creation of a separate editorial board tasked with guaranteeing the independence of Sky News. This would effect a structural separation of governance for Sky News, decisively removing any potential for influence to be exerted over the editorial policy of Sky News.
- (v) It is therefore disappointing that the Secretary of State is nevertheless minded to apply a formalistic distinction, rather than considering 21CF's proposal on its actual merits and, if necessary, communicating to the parties any enhancements she believes are required to fully address her concerns.

1.9 21CF would have expected the Secretary of State to consult in an open and transparent manner with the CMA regarding the appropriateness of the Proposed Undertakings – 21CF believes the CMA would also have supported Ofcom's conclusions without the need for a lengthy and expensive Phase II review, or the consequent delays to a transaction that will benefit not only the parties, but the UK economy as a whole.

1.10 Again, 21CF regrets and is disappointed that that the Secretary of State is minded to instigate a protracted, costly and unnecessary review of the Transaction, despite 21CF's willingness to address the concerns raised by Ofcom in an effective manner (which Ofcom recognised mitigated its concerns). However, 21CF remains committed to working constructively with the UK authorities and will put its case to the CMA, should the Secretary of State so require. 21CF would encourage the Secretary of State to take her final decision on this at her earliest convenience, so as to avoid unnecessary delay, in particular given the review timetable has already been extended significantly as a result of the general election.

2. THE REPORT PROCEEDS AS IF THE TRANSACTION CREATED A “SINGLE ENTITY” COMPRISING 21CF, SKY AND NEWS CORP AND DOES NOT ENGAGE WITH AN ASSESSMENT OF CHANGES OF ACTUAL CONTROL AND IMPACT ON PLURALITY UNDER THE RELEVANT LEGAL FRAMEWORK

2.1 21CF recognises that Ofcom’s role in media plurality cases is to provide the Secretary of State with advice in the context of a first-stage review, in which the threshold for reference is not set at a high level (a point the Report emphasises (para. 3.7)) and in which tighter time constraints apply than in an in-depth review. 21CF understands that in this context, there may be issues on which neither Ofcom nor the Secretary of State feels able to take a definitive view.

2.2 Even recognising this, though, it is nonetheless clear that any analysis of media plurality – whether in a first or second-stage review – should be conducted on the basis of the relevant legal framework. There are material respects in which the Report falls short of this:

- (i) the Report does not analyse the actual extent of control exercised and exercisable by the MFT over news outlets, pre- and post-Transaction; and
- (ii) the Report does not adequately link its conclusions to the fundamental legal question of the sufficiency of plurality of persons with control of media enterprises.

2.3 21CF is confident that a review giving due attention to these points would conclude that the Transaction does not raise plurality concerns.

The Report does not adequately consider the actual extent of control exercised and exercisable by the MFT over news outlets

2.4 As 21CF has previously submitted, a central aspect of the applicable legal framework is that the impact of the Transaction on media plurality is to be assessed on the basis of the actual extent of control exercised and exercisable over the relevant media outlets; not on the premise that media outlets under a degree of common influence present a single voice. This follows from the judgment of the Court of Appeal in *Sky/ITV* that:

*“when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the Commission may, and should, take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control.”*²

2.5 The Report purports to have taken this judgment into account (para. 3.27). However, there is little evidence of this in the Report. To the contrary, the Report proceeds on the basis that the Transaction “brings [News UK and Sky] under the material influence of the Murdoch Family Trust” (para 1.4) and states that Ofcom has “assessed Fox, Sky and News Corp as a single entity” (para. 2.5). This is explained on the basis that the MFT, by virtue of its shareholdings in both News Corp and 21CF and the positions held by members of the Murdoch family at both companies, has material influence over both companies. This approach is said to be consistent with section 26 of the EA 2002 (paras. 2.5, 3.23-3.25).

2.6 21CF does not dispute that the statutory framework permits the Secretary of State in assessing the Transaction to take account of activities carried on by companies under common material influence with 21CF. However, that does not mean they can be treated as a “single entity”.

² Para. 121.

- 2.7 The judgment of the Court of Appeal makes clear that this is not the effect of section 26 of the EA 2002. What is instead required is an assessment of the Transaction in light of the actual extent of control exercised and exercisable by the MFT over news outlets, pre- and post-Transaction. If this were not the case, the review of the Transaction could stop there, since Sky would already be deemed part of that same “single entity” by virtue of 21CF’s existing shareholding. The Transaction would therefore bring about no change to the *status quo*.
- 2.8 The substantive discussion of the effects of the Transaction in the Report does not, however, address this.
- (i) As 21CF understands it, the concern articulated in the Report is essentially that the MFT and members of the Murdoch family would be able to exert influence as a result of the Transaction, principally by aligning the editorial output of Sky News with that of News Corp’s outlets (paras. 9.7 and 9.8). However, the Report does not explain how the Transaction would actually result in the MFT or members of the Murdoch family having the extent of control required to achieve this, or how this would occur in practice, given that it has not occurred in the past despite the existing links with 21CF.
 - (ii) In particular, the Report’s assessment of the Transaction does not acknowledge the structural limitations on the MFT’s ability to influence the news outlets owned by 21CF and News Corp post-Transaction arising from the fact the MFT will remain a minority shareholder in both companies, and that the majority of both companies’ boards are independent and unconnected with the MFT. Notably, this is not even mentioned in section 9 of the Report, which purports to deal with matters of internal plurality. This is despite the weight Ofcom placed in 2010 on the differences between minority and full ownership, and on the continued presence of independent directors and shareholders.³ 21CF would respectfully suggest that the Report cannot be said properly to have analysed the actual extent of control without discussing this in some detail.
 - (iii) Although the Report states that it has taken into account 21CF’s existing shareholding in Sky (para. 13), it does not set out precisely what it is that could be done post-Transaction that cannot be done at present to give rise to plurality concerns. The Report only states that “*Full control would allow Fox to do a number of things it cannot do at present, including taking decisions which are in the exclusive commercial interests of Fox*” (para 3.26). However, no reason is given why decision-taking in 21CF’s commercial interests might lead to alignment of the Sky News editorial agenda with that of News Corp.
- 2.9 In addition to these factors, as described further in Section 5 of this submission, there are other strong, mutually reinforcing reasons why the MFT would not have the ability or incentive to exert influence over editorial decisions at Sky News post-Transaction. These include impartiality requirements under the Broadcasting Code, the strong culture of independence in television news and audience expectations of impartiality (and the editorial board offered as part of the Proposed Undertakings).

³ Ofcom, Report on public interest test on the proposed acquisition of Sky by News Corporation, 31 December 2010, paragraph 2.24 “*Full control will allow News Corp to do a number of things it cannot do at present, for example to take decisions which are in the exclusive commercial interests of News Corp*” and paragraph 5.59: “*The main concern raised has been that, given the proposed acquisition will result in full ownership of Sky by News Corp, internal plurality for Sky News cannot be guaranteed. Representations argue that this is because the proposed acquisition will result in the loss of independent shareholders and the removal of the existing independent directors who currently help protect the independence and diversity of Sky News.*” See further paragraphs. 4.19 – 4.21 of 21CF’s Initial Submission.

- 2.10 It therefore appears that, rather than assessing the actual extent of control exercised and exercisable over the relevant media outlets by the MFT as a result of the Transaction, the Report has for all practical purposes treated it as if it brought Sky under full common control with News Corp. This is neither factually accurate nor consistent with the legal framework set out in the Court of Appeal's judgment. A review that engaged with the actual (limited) extent of common control of news outlets post-Transaction, and the (limited) extent of the change brought about by the Transaction, would be bound to reach more moderate conclusions regarding its implications in respect of the Media Plurality PIC.

The Report does not adequately link its conclusions to the fundamental legal question of the sufficiency of plurality

- 2.11 A further gap in the Report is that it does not explain how any change brought about by the Transaction could result in *insufficient plurality*. As the Report recognises, the fundamental legal question before the Secretary of State is whether the Transaction may be expected to result in insufficient plurality of persons with control of the media enterprises in the UK (para. 11.1), reflecting the formulation of the Media Plurality PIC.

the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience (emphasis added.)

- 2.12 Despite this, the Report's conclusions are couched not in terms of the sufficiency of plurality, but in terms of the supposed risk that the MFT members of the Murdoch family will hold increased influence as a result of the Transaction (paras. 1.9-1.10).
- 2.13 21CF recognises that the extent of any one media owner's influence forms part of Ofcom's definition of media plurality. However, an adverse public interest finding cannot be based simply on a finding of increased influence, without going on to consider whether that change results in insufficient plurality. This involves both forming a view, at least in broad terms, on the level of plurality that is sufficient, and taking account of existing levels of plurality. Since the Report does not address these questions, its analysis is necessarily incomplete.
- 2.14 21CF is confident that a review that did address these questions would conclude that the Transaction poses no risk of insufficient plurality. 21CF has provided substantial evidence in previous submissions that levels of plurality in the UK are high and increasing, as further discussed below. In addition, the applicable statutory guidance makes clear that the purpose of the Media Plurality PIC is to ensure a "minimum level of plurality" and guard against "unacceptable levels of media and cross-media dominance",⁴ not to prevent any increase in influence.

3. THE REPORT DOES NOT FULLY ENGAGE WITH THE EFFECTS OF THE GROWTH OF ONLINE NEWS

The Report does not take sufficient account of the positive effect that online news has already had on plurality by supplementing and complementing traditional news outlets

- 3.1 In the Report, Ofcom recognises the significant effects that the growth in the use of the internet for news has had on the news market, and in addition acknowledges the "*transformative*" potential of this growth for news consumption and plurality in the future (para. 6.55). However, 21CF believes that, even within the confines of a first-stage review, the Report's conclusions do not take sufficient account of these effects, and is confident that a full review by the CMA would allow different conclusions to be drawn.

⁴ DTI Guidance, paragraph 7.7 (emphasis added).

- 3.2 The Report makes clear that the rapid growth in the provision and use of online news has “*disrupted the news market*” (para. 6.54). In particular, Ofcom recognises that “*a wide range of providers, offering a diverse range of viewpoints, is now available online*”, and that “*intermediaries are changing the way news is discovered, and social media has played a significant role in disrupting the news cycle*”. It also notes that it expects these changes to continue in the future (paras. 6.54 and 6.57).
- 3.3 Despite this, however, Ofcom stops short of drawing conclusions regarding the effects of these changes on plurality. The Report repeatedly characterises the impact of developments online as uncertain. For example, it states that it expects news provision and consumption to continue changing in future, but that this only “*may affect plurality*”, and then states that “*the exact nature of these changes is uncertain*” (para. 6.57, emphasis added). In a similar vein, the Report suggests that, in the near to medium term “*it is not clear that the data presented in this report would change to any meaningful extent*” (para. 6.61, emphasis added). The Report goes on to say that online consumption of news “*does not appear to have resulted in traditional news outlets being replaced by new entrants with online only models*”, and that it cannot be said “*with any certainty that the rise of online and development of news commercial models will undermine traditional models in the near to medium term*” (para 6.61, emphasis added).
- 3.4 While recognising the constraints of a first-stage review, 21CF considers this aspect of the Report to be unduly cautious, and that it fails to give due weight to substantial evidence of the significant effects that the shift of news consumption online have already had.
- 3.5 It appears this may reflect a misapprehension as to the nature of these effects and/or the use of too high a standard in considering them. The Report concludes that online provision has not “*replaced*” traditional providers, and that it cannot be said with certainty that the rise of online will “*undermine*” traditional models in the near to medium term. But it is not necessary for online services to “*replace*” or “*undermine*” traditional providers to be significant. They also contribute to plurality by supplementing and complementing them, and by affecting how consumers access traditional providers’ content.
- 3.6 21CF’s concern that the Report has not fully engaged with these issues is reinforced by the way in which it mischaracterises 21CF’s previous submissions. The Report summarises 21CF’s argument as being that “*the ‘extraordinary expansion of online news provision’ has undermined the reach of traditional news outlets*” (para. 6.27, emphasis added). 21CF’s argument is not that the expansion of online has reduced the proportion of the population reached by traditional news outlets. In fact, the rise of the internet and mobile devices has made it easier for consumers to find access a wide range of outlets. This is a positive contribution to plurality, and one that the Report does not sufficiently address, since it understates the true extent of online multi-sourcing by treating each social media outlet as just a single source (see Section 4 below).

The Report does not give sufficient weight to the role of social media and intermediaries in diluting the influence of traditional news outlets

- 3.7 What *has* been undermined is the *influence* of traditional news outlets and their proprietors. As explained in detail in previous submissions (and in Section 6 below), this results from the role of social media and intermediaries in shaping online consumption and connecting the public directly with key opinion-formers and political figures. This has already substantially weakened the ability of traditional media to exert influence, by diluting the extent to which they can determine which stories form part of the news agenda, and by removing their power as gate-keepers for mass communication.
- 3.8 21CF believes that a more detailed review would give greater weight to the impact of online news provision and consumption, because it would take full account of such subtler, but nevertheless

critical, ways in which online affects the news landscape. While the Report engages to some extent with 21CF's previous submissions regarding these developments, 21CF would respectfully suggest that the Report's analysis is both too limited and flawed in material respects.

3.9 The Report summarises 21CF's previous points regarding the impact of online on traditional providers as follows:

- (i) audiences influence which stories are covered, and how;
- (ii) intermediaries reduce the impact of tone, prominence and selection decisions by news outlets, and consumers can access individual stories directly, not via an outlets homepage; and
- (iii) news outlets are being disintermediated, by politicians and others reaching mass audiences directly through social media and other routes

(21CF had also made the point that consumers can and do cross-check and use a breadth of sources online.)

3.10 Notwithstanding the evidence provided by 21CF, Ofcom asserts "*[i]t is not clear that the impact of traditional news providers has been significantly weakened by the growth in use of online news*" (page 74). This conclusion reflects several errors, discussed below.

Audience influence on which stories are covered and how

3.11 The Report argues against the influence of audiences by saying that traditional providers retain control over the news they produce and its tone; the prominence they give to stories; and what stories they promote (via social media or otherwise) (para. 7.23).

3.12 21CF accepts that news outlets make editorial choices, but the point is that those choices are increasingly influenced by audience considerations, not the owner's views. This is positive for plurality, *even if* each outlet retains ultimate control of story selection, tone and so on.

3.13 There is widespread recognition that the dynamics of online consumption are indeed altering the story choice and the nature of content from traditional outlets. For example, in the Weimann & Brosius paper cited by Ofcom, the authors say:

*"News organizations often monitor and react to online search trends ... which leads to 'reverse agenda setting'"*⁵

3.14 Stephen Glover (a founder of the Independent and more recently a contributor to the *Mail* and the *Oldie*) has said:

"The question is how powerful online newspapers are as propaganda vehicles. I suggest they are much less powerful as political vehicles than their print counterparts because that's not what they are there to do.

*"They are not about views and columnists, they are about other things. The press is as biased as it has ever been but it is much less important and social media has become more important."*⁶

⁵ Weimann, G. and Brosius, H. "A New Agenda for Agenda-Setting Research in the Digital Era" in *Political Communication in the Online World: Theoretical Approaches and Research Designs*. Ed. Vowe, G. & Henn, P., December 2015, p. 31.

⁶ Dominic Ponsford, "[Stephen Glover interview: 'Detestation for the Mail has risen enormously but it's based on a misconception of the Mail's power'](#)", *Press Gazette*, 30 June 2017.

- 3.15 According to the Report, in their submission to Ofcom Ed Miliband, Ken Clarke, Sir Vince Cable and Lord Falconer suggested that:

“the use of intermediaries may affect the type of news consumed and produced, arguing news providers are increasingly focusing on types of content that are better suited to sharing through intermediaries, such as opinion pieces, commentary and entertainment content, instead of news reporting.”⁷

- 3.16 Indeed, media organisations are increasingly feeling obliged to create different versions of their product adapted to the nature of each online social media outlet. According to the New Statesman:

“Of course all these newspapers have digital operations - in the case of The Daily Mail's online sister title Mail Online, the largest English language news site in the world. But being part of a digital news consumer's varied diet of articles is very different to being a print reader's main, or sometimes only, source of information. And in search of digital readers, most right-wing newspapers have moved into more frivolous subject matter. It's entirely possible for a regular reader of The Mail's sidebar of shame to never see one of its Corbyn bashing front pages.”⁸

- 3.17 In describing the Sun's move onto Snapchat, Digiday said:

“the Sun promises to not simply replicate the paper onto Snapchat, instead covering more positive, uplifting news and celebrity gossip with that British self-deprecating sense of humour. The Snapchat editions will be highly visual by necessity.”⁹

- 3.18 Indeed, the Report itself, in arguing that traditional players retain their impact online, says:

“Many news providers now employ staff whose role is to ensure headlines appear prominently on search engines. For example, The Sun recently advertised a job for an ‘SEO [search engine optimisation] Editor’, whose responsibilities would include recommending relevant keywords to journalists to drive traffic”¹⁰

- 3.19 This is certainly a way in which outlets (both traditional and new) are seeking to capture traffic – but the key point is that the Google algorithm is now a driving factor in the content produced by news outlets. A headline (for example) is no longer the creation just of the editor, but is distorted to incorporate relevant keywords.

Reduced impact of prominence decisions

- 3.20 The Report notes that news outlets still determine the position of stories on their home page, and that using the home page or apps are still *“the most popular ways ... to access news content”* (para. 7.23.2).¹¹ Ofcom's evidence for this is its news survey, which found that 46% mostly or often did so.

- 3.21 However, this is not an entirely accurate characterisation of the survey results. The relevant question is *“How often, if at all, you do each of the following when you want to get news?”* (emphasis added). The ‘when you want to get news’ is a crucial narrowing of the question. It implies occasions when the respondent is actively seeking news, and certainly on such occasions going to a news site is an obvious response.

⁷ Para. 4.41.

⁸ Jasper Jackson, *“Labour's success shows the political hegemony of the right-wing press is ending”*, New Statesman, 10 June 2017.

⁹ Lucinda Southern, *“The Sun launches on Snapchat Discover, plans a dozen pieces of content daily”*, Digiday, 26 April 2016.

¹⁰ Para. 7.23.5.

¹¹ Para. 7.23.2.

3.22 However, the critical importance of social media is that it delivers news to audiences even when they are not seeking it. Users may check Twitter or Facebook, and see news, even if that was not their purpose. A question focused on what consumers do ‘when you want to get news’ will inevitably miss this effect, and therefore cannot be used to determine how consumers access news in general (as the Report tries to do).

3.23 Moreover, according to the Reuters Institute:

“Users of search, social media, and online aggregation services are significantly more likely to see sources they would not normally use.”¹²

3.24 This is a particularly important form of multi-sourcing, in that it may be more likely to take a consumer to conflicting views than would deliberately sourcing from a set of (perhaps) concordant sources. Further, if a consumer is taken to a source they would not normally use, then the option of going to the home page of that source does not arise in the first place.

Disintermediation

3.25 While the Report acknowledges the reality of disintermediation, it largely sets it aside. The basis given is that *“people often look to traditional providers to help them navigate the range of news content now available online, as well as to help them contextualise and validate stories provided by other sources.”¹³* However, the Report offers just one source for this claim – a paper from 2012. Since that date, there has been ever-increasing evidence that disintermediation is an important factor, diluting the influence of traditional news providers. Today 42% of those using social media for news follow at least one politician.¹⁴

3.26 Moreover, the 2017 election has provided a clear case study of the importance of disintermediation. This has already been widely recognised, and the Report’s hesitancy to draw lessons from this is unduly cautious. A much cited example is the video of Jeremy Corbyn in conversation with Grime star Jme, widely available via social media. This single video had 2.2m views on Facebook, and over 350,000 on YouTube.¹⁵ This is reach that would simply have been impossible for a politician in the past, other than via major media outlets. However this was just part of Corbyn’s reach online. For example, his Facebook page saw 4.4m engagements in the last month of the campaign.¹⁶

3.27 Momentum used Facebook to reach even larger audiences. In just the last week of the election, their videos were watched 23m times by 12.7m unique users.¹⁷

3.28 While Labour had the advantage online in 2017, the Conservatives too were able to reach mass audiences this way. For example, a video attacking Jeremy Corbyn on Facebook has been viewed 8.2m times.¹⁸

3.29 The FT, under the headline *“Labour’s slick online campaign outguns Tory press”* recently wrote:

“Nearly 10m people watched leftwing videos on Facebook that appear to have turbo-charged Jeremy Corbyn’s campaign. The cost to make them was less than £2,000.”

¹² Reuters Institute, *Digital News Report 2017*, June 2017.

¹³ Para. 4.39.

¹⁴ Reuters Institute, *Digital News Report 2017*, June 2017.

¹⁵ *When JME Met Jeremy Corbyn*, YouTube; *Grime star Jme and Labour don Jeremy Corbyn talk about the importance of a high youth turnout in this election*, Facebook [accessed 1 July 2017].

¹⁶ Liam Corcoran, *“How Labour And Jeremy Corbyn Won The UK Social Media Election. In Three Charts”*, *Newswhip*, 13 June 2017.

¹⁷ Adam Peggs [Momentum], *“How Momentum changed British politics forever”*, HuffPost UK, 13 June 2017.

¹⁸ Conservatives, *On June 9th, this man could be Prime Minister*, Facebook.

“At the same time, a campaign by traditional rightwing newspapers seems to have fallen flat with voters, even when the Daily Mail attacked Labour’s leadership over 13 pages for spending ‘their careers cosyng up to those who hate our country’.

“The persuasiveness of online media, and the apparent decline in influence in this election of Britain’s newspapers, will be picked over in the aftermath of the shock result.”¹⁹

3.30 According to Enders Analysis (quoted in the same article):

“The content discovery mechanisms on Facebook in particular are shaking up the UK’s partisan press landscape. Highly opinionated, pro-Labour online publications with no direct print equivalents are reaching larger Facebook audiences... than most national news brands.”

3.31 According to the *New Statesman*, discussing media and the 2017 election:

“As of December 2016, the Sun had 1,611,464 readers every day. That’s a lot. But nowadays, people don’t need Rupert Murdoch and a printing press to wield political influence According to Twitter’s -analytics tool, [an anti-Theresa May tweet by a 21 year old administrative assistant] reached over 2.9 million people. Everyone now has the potential to have the reach and influence of a tabloid.”²⁰

3.32 While the impact of disintermediation has been particularly stark in the 2017 campaign, it is a long-running and fundamental shift, and therefore it is a material error for the Report to set it aside.

4. THE QUANTITATIVE EVIDENCE CITED IN THE REPORT DOES NOT INDICATE PLURALITY CONCERNS AND THE REPORT’S ASSESSMENT OF IT IS SUBJECT TO A NUMBER OF FLAWS

Quantitative data shows the limited impact of the Transaction in the context of the UK media landscape

4.1 While recognising that quantitative data is only part of a plurality assessment, 21CF would respectfully suggest that the data set out in Ofcom’s Report does not support the conclusion that the Transaction may result in insufficient plurality.

4.2 As regards the availability of news sources, Ofcom’s conclusion is that *“the transaction would not result in a significant change in the range or number of providers across the different platforms”* (para 5.18). This is clearly correct, given the highly diverse news landscape.

4.3 As regards consumption:

- (i) the cross-platform metrics used in Ofcom’s analysis show that the combination of 21CF, Sky and News Corp would be far from a dominant player in the UK news landscape. In terms of reach at both retail and wholesale level, the combination would remain in third place (at 30% and 31% respectively), far behind the BBC (at 77% on both levels) and some way behind ITV (at 34% and 39% respectively) (para. 6.43 and Figures 6.8 and 6.9). This combined reach is less than each of Sky and News Corporation *individually* in 2010.²¹

¹⁹ David Bond, *“Labour’s slick online campaign outguns Tory press”*, *Financial Times*, 9 June 2017.

²⁰ Amelia Tate, *“Thanks to social media, ordinary people can now influence elections more than tabloids”*, *The New Statesman*, 19 June 2017.

²¹ Ofcom, Report on public interest test on the proposed acquisition of Sky by News Corporation, 31 December 2010, Figure 22, giving Sky wholesale cross-media reach of 33% and News Corporation 32%.

- (ii) Applying Ofcom's bespoke share of references metric, the combination would be broadly comparable to ITV/ITN (10% vs. 11% at wholesale level; 10% vs. 9% at retail level) and far behind the BBC, which accounts for 42% of news provision at both wholesale and retail level (Figures 6.10 and 6.11).

4.4 In broad terms, these figures suggest that a combination of 21CF, Sky and News Corp under full common ownership (which is not the result of the Transaction) would amount to a moderate strengthening of Sky's position as the third-largest news provider. This hardly indicates plurality concerns. As explained above, given that the Transaction does not actually do this – its implications for plurality are considerably more limited than even these figures suggest.

The Report's focus on presence across four platforms is not explained or meaningful

4.5 The Report's conclusion that the Transaction raises plurality concerns appears in large part based on the fact that, taken together, 21CF, Sky and News Corp are present across all four platforms – radio, television, print and online. Ofcom's overall conclusion set out following para. 1.10 refers to the MFT's "*unique presence on radio, television, in print and online*". Likewise, para. 8.28 of the Report claims that "*The strength of voice of Fox/Sky and News Corp in this respect may be more significant than the quantitative data suggests, owing to the ability to follow a similar editorial agenda across television, radio, print and online*".

4.6 However, nowhere does the Report explain why a presence across all four platforms is of particular significance, or why this is not sufficiently reflected in the cross-platform metrics discussed above. In 21CF's view, there is no reason to believe that a presence across all four of these platforms gives greater influence than that held by an entity with the same reach and share of consumption concentrated in fewer platforms, and Ofcom's Measurement Framework does not mention this as a relevant consideration.

4.7 To the extent any significance does attach to presence across platforms, this emphasises the overwhelming influence of the BBC in the UK media landscape, with its leading position in each of three platforms – radio, TV and online.

The Report's treatment of quantitative data is flawed in other material respects

4.8 In addition to its unexplained focus on presence across platforms, 21CF believes that the Report errs in its treatment of the quantitative data, or in the conclusions it draws from such data, in other material respects. Some of these are set out below.

The Report underplays the importance of ITN

4.9 The Report notes that the merged entity would have no greater share of references than ITN, but seeks to downplay the significance of ITN, saying:

*"We note that there are commercial reasons that suggest that the share of reference of Fox/Sky and News Corp may understate the strength of its voice compared to ITN, which has a similar share of reference. The difference in their respective strength of voice is partly due to the business need for ITN to reflect the preferred styles, tones and editorial approaches of the retail news providers with which it provides news under contract (ITV, Channel 4 and Channel 5), which limits its ability to harmonise one editorial voice across its services."*²²

²² Para. 6.5.

- 4.10 This is a highly one-sided assessment, which ignores the significant constraints on any supposed ability for the MFT to harmonise news output across Sky, the *Sun*, the *Times* and the Wireless Group radio stations. Such limits include: the very different natures of these outlets; their different target audiences; the different platforms on which they operate (and associated differences in regulation); and the limited ownership which MFT will continue to have in 21CF and News Corp. It is hard to imagine that a neutral observer would see (say) the *Times* and the *Sun* as more similar products than ITV and Channel 4 news.
- 4.11 Moreover, the significance of different editorial voices for ITV, Channel 4 and Channel 5 is minimal, since even if the latter two are entirely set aside, ITV itself has a share of references (9%) which is roughly equivalent to that of that of 21CF, Sky and News Corp in aggregate (10%). Moreover, clearly the harmonisation within ITV news is far greater than that across Sky, the *Times* and the *Sun*.
- 4.12 More generally, it is striking that (to 21CF's knowledge) neither Ofcom nor any other commentator has ever suggested that ITN represents a threat to plurality. No concerns were raised, for example, when ITN increased its share of voice by winning the contract to provide Channel 5 News. Yet Ofcom's own survey finds that – as a result of substantial developments in the news market – a combination of 21CF, Sky and News Corp would be a less important provider than ITN. Given the focus of plurality regulation is on concentration of ownership, if a given 'share of voice' for ITN is unproblematic, there should be no concerns about a similar share held by 21CF/Sky and News Corp.

Inappropriate and inconsistent focus on 'UK wide' newspapers

- 4.13 The Report repeatedly refers to News Corp as the largest 'UK wide' newspaper group, and appears to attach particular importance to this. In the fourth paragraph of the entire report, Ofcom offers as its second 'key finding':

"[The Transaction] would bring the largest UK-wide newspaper group and one of only three significant providers of television news under the material influence of the Murdoch Family Trust",²³

- 4.14 Thereafter, when discussing newspapers the Report focuses on UK wide titles.²⁴ (On one occasion it asserts - incorrectly – that News "*has the widest reach of any newspaper group*", without any 'UK wide' qualification (page 56). This is not correct either from a print perspective, or on a cross-media basis.)
- 4.15 However, it is wrong in principal to set aside non-UK wide sources. Moreover, even if it *were* correct, the Report has not done so consistently.

'UK-wide' is not a relevant consideration

- 4.16 It may be reasonable, in an assessment of plurality of national news, to set aside sources whose primary focus is local news (such as local newspapers). However, the Report has gone much further than this. It has set aside titles such as the *Metro* and the *Evening Standard*, even though (as the Report acknowledges²⁵) these titles provide substantial national news.

²³ Para. 1.4. 21CF would also question the characterisation of Sky News as "one of only three significant providers of television news". Given the BBC and ITN enjoy reach seven and five times that of Sky respectively, it is not appropriate to group these together with Sky.

²⁴ See, for example, paras. 2.10.2, 4.43, 6.12, 6.16, 6.2, 6.14, 6.18, 8.26.1, 11.5.

²⁵ Para. 5.13.

4.17 The Report does not offer any rationale for treating these titles differently. It makes a passing reference to the fact that the *Metro* “is only distributed in cities and towns”,²⁶ but the Report elsewhere makes clear that Ofcom has not identified specific concerns in other (i.e. rural) areas:

“Our view is that no particular subgroup would be significantly more affected as a result of the transaction to the extent that it would alter our overall recommendation”²⁷

4.18 Further, while it is true that the *Metro* is ‘only’ distributed in over 50 cities across the UK,²⁸ it is not clear why this targeting would render it irrelevant. Firstly, with the sole exception of Northern Ireland, its reach across all nations, all English regions, and in both rural and urban areas is at least as high as (say) the *Sun*’s website, according to Ofcom’s news consumption survey.²⁹

4.19 The *Evening Standard* has narrower distribution, but is nonetheless influential in national news, both because of its own substantial readership and because most other news outlets are based in London and so their editors and journalists see it regularly. During the 2017 election, for example, the *Telegraph* published over 50 articles mentioning the *Evening Standard* (or more than one per day).³⁰

4.20 Its profile has been increased by the appointment of George Osborne as editor, who is also helping it reach national audiences by promoting it on Twitter (where he has over 200,000 followers). His presence makes the *Standard* part of the Westminster story, and led to significant coverage elsewhere.³¹

4.21 The *Metro* and *Standard* target particular geographic audiences, but other titles (and outlets in general) also target particular audiences. For instance, the *Times*’ readership is 88% ABC1,³² but the Report has (rightly) not set aside its contribution to plurality by focussing on ‘socio-economic-group wide’ titles. Online-only outlets are by definition only available to those with internet access, but similarly the Report does not set them aside on the basis of this targeting. Fox News is only available on the Sky platform, but again the Report does not set it aside on this basis.

4.22 As the Report notes, there is no issue of availability of news sources. All citizens – even those offline, in particular socio-economic groups, on certain TV platforms or in rural areas – have a plethora of sources available to them.

4.23 In the context of “preventing too much influence over the political process being exercised by any one media owner”, the fact that a particular title has (somewhat) limited geographic distribution is simply not relevant, if it nonetheless has substantial readership. The *Metro* does indeed have substantial readership – the third highest of any title in the UK. (The *Evening Standard* ranks fifth.)

4.24 Finally, while both these titles have geographically limited distribution *in print*, they are universally available online. Indeed, per Ofcom’s news consumption survey, the *Metro*’s website is used by as many people as a source of news as is the *Sun*’s.³³

²⁶ Para. 4.43.

²⁷ Para. 3.43.3.

²⁸ [East Midlands](#), Metro [Accessed 30 June 2017]

²⁹ Kantar Media [for Ofcom], [Ofcom News Research 2016](#), 30 June 2017.

³⁰ [Google Search](#)

³¹ See, for example: Joe Watts, “[George Osborne's London Evening Standard labels Theresa May's manifesto 'most disastrous in history'](#)”, *The Independent*, 30 May 2017; Jane Martinson, “[Osborne's first Evening Standard edition shows resolve to take on May](#)”, *The Guardian*, 2 May 2017; “[All of George Osborne's anti-Theresa May Evening Standard front pages](#)”, *The Telegraph*, 26 June 2017; BBC, [Brexit leads first Evening Standard under George Osborne](#), 2 May 2017;

³² NRS, [Newsbrands April '16 – March '17](#).

³³ Kantar Media [for Ofcom], [Ofcom News Research 2016](#), 30 June 2017, p. 458- 459.

The Report applies a 'UK-wide' criterion inconsistently

- 4.25 Even if there were some particular significance to UK-wide availability, the Report is inconsistent in how it has treated the issue. It appears to have only applied it to newspapers, and indeed only to the *Metro* and the *Evening Standard*.
- 4.26 Crucially, it has not applied this approach to the *Sun* and the *Scottish Sun*. These titles are frequently bracketed together, and this may be entirely appropriate from the perspective of advertisers (the key parties interested in NRS data, for example). However they take quite different editorial lines, and this is the relevant perspective for a plurality assessment.
- 4.27 For example, at the 2017 election the *Sun* endorsed the Conservatives, and the *Scottish Sun* the SNP, as they did in 2015. (This fact contradicts the assertion by Ed Miliband, Ken Clarke, Sir Vince Cable and Lord Falconer that “*The Sun, the Times and the News of the World always [back] the same political parties at elections over the last 20 years*”).³⁴

Figure 1: Election-day front pages, Sun and Scottish Sun



- 4.28 The papers also take different editorial approaches day-to-day. For example, at 6pm on 30 June 2017, there were five ‘above the fold’³⁵ stories on each of the two paper’s websites. However, only two stories were common to both titles. Further, one of these stories was treated quite differently on the two sites, with different headlines, body text, photos and so on. These titles have substantial differences, even if certain stories are shared between them.
- 4.29 Thus, neither the *Sun* (with limited availability in Scotland in print) nor the *Scottish Sun* (with similarly limited availability in the rest of the UK) are ‘UK wide titles’. Just like the *Metro*, both have geographically limited print distribution.
- 4.30 Accordingly, if special significance attaches to certain titles being ‘UK wide’ it is not just the *Metro* that should be set aside, but also the *Sun* and *Scottish Sun*. Moreover, looking beyond newspapers, most of the stations in the Wireless Group (owned by News Corp) are local, but the Report has not made any attempt to set them aside on the basis that they are not ‘UK wide’.

Implications

- 4.31 21CF does not suggest that these various sub-national titles *should* be set aside – it is right to include them. But equally, it is right to include the *Metro* and the *Evening Standard*, with readerships of 3.0m and 1.7m respectively. In combination with the *Mail*, the *Metro* means that DMGT is a considerably larger print provider of national news than News Corp. DMGT’s total readership is 6.2m, compared to 4.7m for News.

³⁴ Para. A2.91.

³⁵ I.e. appearing on screen when the site is loaded on a desktop, without the need to scroll down.

- 4.32 21CF acknowledges that in its share-of-reference analysis, the Report does appear to include the *Metro*. But the Report's repeated positioning that News Corp is the "largest UK-wide newspaper group" (and the great significance it attaches to it) is both inappropriate and misleading.

The Report disregards internal plurality within News Corp

- 4.33 Just as the Report fails to take account of differences between the *Sun* and the *Scottish Sun*, it also disregards the substantial differences between the approach and editorial lines of the News Corp newspapers more generally. Section 8 of the Report, which purports to deal with internal plurality, does not even address this. There is also little acknowledgement of the structural guarantees of editorial independence at the *Times* and *Sunday Times* arising from the governance arrangements of Times Newspaper Holdings Limited (including the presence of independent national directors with control over the appointment and dismissal of editors).
- 4.34 The Brexit referendum provides a striking illustration of the scope for internal plurality between these outlets. The *Times* and the *Sun* took diametrically opposed views on Brexit – the *Sun* in England and Wales publishing a front-page editorial strongly in support; the *Times* opposing Brexit.³⁶ Meanwhile, the *Scottish Sun* did not carry the *Sun*'s editorial.³⁷

Ofcom underestimates multi-sourcing in an online environment

- 4.35 In its discussion of online news, the Report states:

*"Despite the significant developments in the availability of news online, many people still rely on a limited number of news sources. For example, our News Consumption Survey found that in 2016, 38% of those who use the internet for news use only one source on that platform."*³⁸

- 4.36 However, it seems likely that much of this 38% who supposedly single-source are in fact using sources such as Facebook, Google, YouTube, and Twitter (which comprise four out of the top seven sources in Ofcom's survey). Such sources are inherently plural, and expose users to multiple underlying sources. Ofcom found that 47% of all internet news users used one or more intermediaries of this type.³⁹
- 4.37 For these users, concern that they "still rely on a limited number of news sources" is inappropriate. (21CF also notes that the largest portion of the 38% not making use of intermediaries is likely sole-sourcing from the BBC, used by 56% of all online news users.)

- 4.38 The Report also underplays the importance of the internet in saying:

*"According to our News Consumption Survey, people use an average of 3.8 different news sources, measured across all platforms. This figure has remained broadly the same since 2013, despite the wide range of sources available online."*⁴⁰

- 4.39 Again, this misses the point that the survey treats consumption via Facebook (say) as one source rather than a path to multiple sources. Moreover, it misses the shift in sources used. Since 2013 there has been a 0.3-source drop in the number of newspaper sources used by the average person.

³⁶ [Sun says: We urge our readers to beLEAVE in Britain and vote to quit the EU on June 23](#) (13 June 2016); *Times*, *Why Remain is best for Britain* (18 June 2016).

³⁷ See e.g. Roy Greenslade, the *Guardian*, [The Sun's pro-Brexit campaigning doesn't cross borders](#), 14 June 2016.

³⁸ Para. 4.31.

³⁹ Ofcom, [News Consumption in the UK: 2016](#), 29 June 2017.

⁴⁰ Para. 6.49.

However, there has been a 0.5-source *increase* in the number of online sources used per person, even treating social media and aggregators as single sources.⁴¹

- 4.40 The number of people using the internet for news, and the number of online sources accessed by these users are both increasing year after year. Thus the internet has made (and will continue to make) a vital and growing contribution to multi-sourcing, more than offsetting the downward pressure on multi-sourcing due to the collapse of print newspapers.

Ofcom significantly overstates the importance of online to the Sun

The Report does not show that digital consumption has offset the Sun's print decline

- 4.41 The Report claims:

*"The Sun and The Sun on Sunday have more than offset their declining print readership through the growth of online readers. Overall readership has increased from 15 million in 2015 to 26 million in 2016."*⁴²

- 4.42 However, the Report here is using numbers for monthly reach, taking no account of the regularity of use. There is a very substantial difference in influence associated with a daily *Sun* print reader compared with someone online who happened once in a month to click on a *Sun* link sent by a friend.

- 4.43 Since 2010, the *Sun's* average issue readership has fallen by over half, or over 4m readers.⁴³ To offset this decline, the 19m people⁴⁴ who happen to see the *Sun* online at least once in a given month would have to visit the site an average of four times, and spend as long reading it each time as a typical print reader spends with the physical version. This is not plausible.

The Report attaches too much significance to the Sun website

- 4.44 The Report also makes much of the high reach of the *Sun* online. It uses ComScore data to show that the *Sun* is visited by 27m people, comparable to the *Mail* and the *Telegraph* (para. 6.28-6.33).⁴⁵

- 4.45 However, in placing such weight on this, the Report is in essence seeking to rebut Ofcom's own survey data. The news consumption survey found that just 0.8% of news consumers said they used the *Sun* website or app - a figure lower than the number saying they used Al Jazeera, MSN, the CNN website, the LAD Bible or Russia Today. By contrast, 10.3% said they used the *Mail* online,⁴⁶ and 3.5% the *Telegraph* online.

- 4.46 The survey is based on the question "*which of the following do you use for news nowadays*". This is entirely appropriate, and much more revealing of potential influence than would be the simpler question "*which do you use*". However, "*which do you use*" is essentially the question comScore answers. It picks up (for example) people who are going to the *Sun* website purely for celebrity gossip or football. Ofcom's survey excludes such people, and this is the right basis for analysis of plurality.

⁴¹ Communications Chambers calculations based on figures from Ofcom, *News Consumption in the UK: 2016*, 29 June 2017. Blended figures across all news users.

⁴² Para. 6.17.

⁴³ NRS. Note that while 4m people read the average issue, over 9m see at least one issue per month.

⁴⁴ NRS PADD, *Print/PC/Mobile & Tablet*, 29 June 2017.

⁴⁵ Note that this 27m figure is for a later date than the 26m figure from Ofcom discussed above.

⁴⁶ The sharp difference with the *Mail* suggests that the low figure for the *Sun* is unlikely to be a research effect caused by respondents being hesitant to report use of certain titles.

The Report overstates the importance of distribution via aggregators and social media for News Corp and Fox outlets

Sky and Yahoo News

- 4.47 In discussing aggregators (para. 6.37.1), the Report focuses on distribution of Sky News via Yahoo News. As noted in previous submissions to Ofcom, this is not a particularly compelling example of Sky's supposed enhanced reach, given that just 2% of respondents in Ofcom's news consumption survey say they use Yahoo News.⁴⁷
- 4.48 The Report also relies on an MRC submission that argued that (in February) Sky provided Yahoo News with a quarter of all its stories and more than 60% of its headlines. However, it is not clear that this is reflective of the current situation, or representative more generally. For example, as at 7am on 3 July 2017, there were no Sky stories in the top 10, and just 4 in the top 50.

The Sun on Facebook

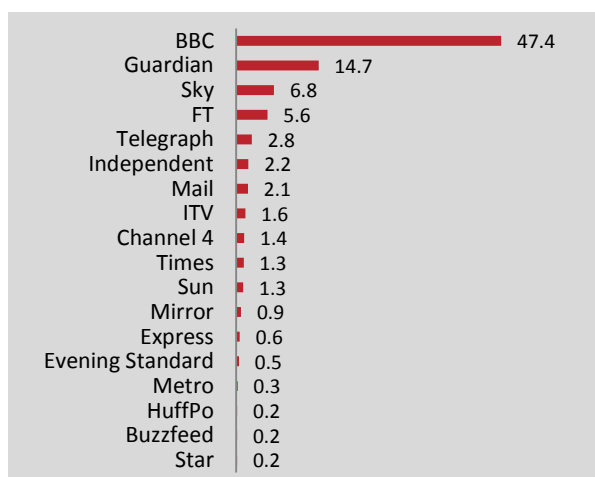
- 4.49 The Report says that "*The Sun is the second most popular news and current affairs related page among UK Facebook users*" (para. 6.37.2). In Ofcom's data, the Sun is positioned between BBC News and the *Guardian*.
- 4.50 However, it is stretching a point to describe the *Sun's* Facebook content as "news and current affairs", at least as pertains to plurality. As distributed via social media, the *Sun* is a very different product.
- 4.51 An analysis of the top 100 stories in the *Sun's* Facebook newsfeed as of 10am on 30 June 2017 shows that just 6 related to politics or current affairs.⁴⁸ Sport and human interest stories were more than half the total, with roughly a quarter in the categories crime and celebrity & entertainment.
- 4.52 By contrast to the *Sun's* 6 stories, the BBC and the *Guardian* had 36 and 38 politics and current affairs stories in their top 100. Thus the *Sun's* reach via Facebook is less significant than it might seem.
- 4.53 21CF also notes that the Report's discussion of social media omits to mention Twitter – a news source used by 5.3% of respondents in Ofcom's news consumption survey, only slightly behind the *Sun* in print (6.7%).⁴⁹ As 21CF has previously submitted, neither the *Sun* nor the *Times* have particularly significant followings on Twitter (Figure 2).

⁴⁷ Kantar Media [for Ofcom], *Ofcom News Research 2016*, 30 June 2017, p. 415. 21CF noted in Annex 2 of its Initial Submission to Ofcom (p. 11) that focusing on Yahoo News is uninformative, given its position as one, relatively minor aggregator.

⁴⁸ Covering immigration, Brexit, school funding, circumcision in Turkey, the Hyde Park Justice Campaign, and Jon Snow at Glastonbury.

⁴⁹ Kantar Media [for Ofcom], *Ofcom News Research 2016*, 30 June 2017, p. 413.

Figure 2: Twitter followers (m), April 2017⁵⁰



Consumption via social media is less 'influencing'

- 4.54 Social media and aggregators extend reach for the *Sun*, the *Times* and Sky to some degree. However, there are several reasons to believe that this matters less to influence than the Report suggests.
- 4.55 First, social media and aggregators extend the reach of *all* media outlets, and the critical question is the relative redistribution of influence as a result. For example, Ofcom's figures suggest similar numbers of Facebook likes for the *Sun* and the *Guardian*. However, given their starting points, this would suggest that the incremental benefit of Facebook distribution would increase the influence of the *Guardian* relative to the *Sun*'s.
- 4.56 Second, as noted above, content distributed via social media is often lighter (at least for the *Sun*), with less potential for influence.
- 4.57 Third, such distribution takes place in an inherently plural environment, with greater potential for consumption of opposing views (from other media outlets or otherwise). According to Charlie Becket, director of LSE media think-tank Polis:

*"Social media means that whenever The Sun or Mail comes out with something, there's thousands of people coming out saying 'oh go away'. People can see other people being much more sceptical. It's now cool to say 'get lost' to the mainstream press. I think generally people are much less vulnerable to that manipulation."*⁵¹

The Report draws inappropriate conclusions regarding share of references

- 4.58 The above points are particularly important given the Report's later claim that:

*"evidence suggests that Sky News and The Sun in particular may have significant reach through their website and through intermediaries, which may not be reflected in our News Consumption Survey. The true share of reference of Fox/Sky and News Corp may therefore be significantly higher than is reflected in our analysis."*⁵²

⁵⁰ Communications Chambers analysis of Twitter data, excluding individual accounts with fewer than 100,000 followers (such as @guardianweekly), and those aimed at an international audience (such as @bbcworldservice and @GuardianAus). Totals are not duplicated – for example, an individual who follows both @SkyNews and @SkyNewsBiz counts as two followers for Sky's total.

⁵¹ Jasper Jackson, *"Labour's success shows the political hegemony of the right-wing press is ending"*, *New Statesman*, 10 June 2017.

⁵² Para. 6.46.

4.59 This is entirely speculative. Share of references – as with influence – will not be redistributed by via mechanisms which extend the reach of *all* players equivalently.

4.60 Further, the question that underlies share of references is “*which of the following do you use for news nowadays*”. In making the claim above, by implication the Report is asserting – without any evidence whatsoever – that it knows better than respondents why they use outlets such as the *Sun* website.

5. THE REPORT OVERSTATES THE ABILITY OF THE MFT AND MEMBERS OF THE MURDOCH FAMILY TO INFLUENCE THE NEWS AGENDA AND POLITICAL PROCESS, AND FAILS TO DEMONSTRATE HOW THE TRANSACTION WILL INCREASE THIS ALLEGED INFLUENCE

5.1 The Report suggests that the transaction may give MFT greater influence over public opinion via greater control of the news agenda and the political process. In particular, the Report argues that:

- (i) news providers can set the wider news agenda by breaking stories, amplifying their influence;
- (ii) traditional providers retain much of their ability to set the news agenda;
- (iii) the press is particularly influential;
- (iv) the transaction may amplify the ability of the News Corp titles to set the news agenda; and
- (v) the transaction may increase the influence of members of the MFT over the political process.

5.2 21CF would respectfully disagree with each of these contentions, for reasons set out in turn below. In particular when more recent evidence is taken into account, it is clear that the Report substantially overstates the ability of the MFT and the Murdoch family to influence the news agenda and political process. Further, the Report fails to demonstrate how the Transaction will increase this alleged influence.

The Report does not demonstrate that ‘agenda-setting’ enhances the influence of the News Corp titles or the MFT

5.3 Influence is necessarily a zero-sum game. If two organisations are competing to influence an individual’s opinions or votes, then if one organisation gains greater influence, the other necessarily has less.

5.4 An implication of this is that if there is a particular effect that enhances the reach of a certain organisation, it only matters for influence if it does not equally enhance the reach of all organisations. For example, as set out above, if online distribution doubled the reach of all media, then it would not change the influence of any one organisation.

5.5 Similar logic applies to agenda setting. A given media organisation may, on occasion, be able to set the agenda of other outlets. However, if those other outlets in turn occasionally set the agenda of the first media organisation, then agenda setting may have limited impact on the share of influence of the various organisations.

5.6 In practice, agenda setting is of particular importance to smaller news outlets, since they are in greater need of the amplification it provides. For example, if the *Mail* breaks a story but it is then

picked up by the *FT*, it makes relatively little difference to the number of people who see it. Conversely, if the *FT* breaks a story and it is then covered by the *Mail*, this greatly increases its audience. Put another way, agenda setting mitigates the share of influence of more powerful news providers, and enhances the power of smaller providers.

- 5.7 The Cardiff University study Ofcom cites⁵³ reflects this. The newspapers whose stories received the *least* coverage on TV news were the *Mail*, the *Sun* and the *Express*. The *Sun*'s stories received coverage at a third of the rate of the *Telegraph*'s, for example. This is empirical evidence of 'agenda setting' acting to *dilute* the *Sun*'s influence vis-à-vis other newspapers, not enhance it.

The Report overstates the agenda-setting power of traditional news providers

- 5.8 The Report relies on two sources in support of the claim that traditional providers retain much of their ability to set the news agenda. The first is a paper by Weimann & Brosius.⁵⁴ The Report quotes:

*"though the traditional media lost some of their agenda-setting potential, their impact is maintained in the new media environment"*⁵⁵

- 5.9 However, the same paper also states or quotes others as stating:

"The flow from Twitter to the media agenda has been revealed in several studies" (p. 29)

"weblogs contributed to setting the agendas of the traditional media elite" (p. 29)

"alternative online media played a decisive role in setting mainstream media agendas [in the aftermath of a Chinese rail accident]" (p.29)

"agenda setting processes can now regularly intersect and cross amateur and professional boundaries" (p. 30)

"The dynamic nature of the current agenda setting process may also be explained by the reduced impact of traditional gatekeepers" (p. 30)

"Twitter messages commenting on political parties followed different dynamics from the coverage of the same actors in traditional media." (p. 31)

"Today, journalists cannot ignore the fact that the most important news on the web is the one that most people are searching for ... this fact is creating a shared agenda of news that can no longer be separated into a media and a public agenda, a really new (and maybe alternative) agenda-setting paradigm" (p. 32)

"There is still evidence of a direct media effect on the public agenda, but the causal, one-way relationship should be replaced by more multifaceted and multidirectional flow ... Moreover, it is not a two way street, but in fact a multilane highway when audiences are exposed to a multitude of sources, including online and offline media and/or online and offline personal communications. Thus instead of media agenda shaping public agenda, we often see more of "agenda bleeding" from various sources" (p. 35-36)

"online news does not simply follow the lead of traditional sources" (p. 36)

⁵³ Cushion et al, *Newspapers, Impartiality and Television News*, 28 April 2016.

⁵⁴ Weimann, G. and Brosius, H. "A New Agenda for Agenda-Setting Research in the Digital Era" in *Political Communication in the Online World: Theoretical Approaches and Research Designs*. Ed. Vowe, G. & Henn, P., December 2015.

⁵⁵ Paras.8.11.

“the agenda itself is altered by user behaviour, and users and journalists are part of a collective gatekeeping process; the audience determine the prominence of issues” (p. 38)

5.10 This fuller set of quotes from the paper Ofcom cites suggest that the agenda-setting power of traditional providers has been significantly diluted, by new actors online; by the ways in which news is consumed and shared online; and by how traditional media’s output is in turn influenced by these changes.

5.11 The Report’s second source for its claim that traditional media retain much of their ability to set the news agenda is a study from King’s College.⁵⁶ Ofcom suggested that according to the study:

*“the news agendas of ‘political influencers’ on Twitter closely mapped that of the mainstream media during the General Election 2015”*⁵⁷

5.12 However, the relevant key findings of the study were actually:

“The press rarely altered the news agenda of the lead parties during the campaign; few stories significantly disrupted or subverted the issues put forward by one or both of the two main parties. ...

“Political influencers also kept closely to the agenda of issues set by the parties and mainstream media.”

5.13 This is an entirely different picture from that painted by the Report. Political influencers’ agenda was not the same as that of the traditional media because the former followed the latter, but rather because *both* were driven by the political parties.

5.14 Further, as the Report acknowledges, these influencers often critiqued or subverted the agenda. According to the King’s College report:

“influencers – many of whom were themselves mainstream journalists – were more likely to challenge the narrative of the parties and of mainstream media. They were more likely to bring attention to inconsistencies between party claims and independent analysis, to point people to original sources that contradicted party or press claims, and to satirise stage managed announcements and events.”

5.15 If mainstream media’s power over the online news agenda is simply to select which of their stories are debunked on the internet, this is a particularly feeble form of influence.

The Report does not demonstrate that the press is particularly influential

5.16 The Report argues that:

*“evidence suggests newspapers may have greater influence over public opinion than consumption metrics alone might suggest, through the ability to set the wider news agenda.”*⁵⁸

5.17 However, the Report does not make the case for this proposition and, in particular, does not demonstrate that the News Corp newspapers are more influential than their (small) share of references suggests.

⁵⁶ Martin Moore & Gordon Ramsay, *UK Election 2015 - Setting the agenda*, October 2015.

⁵⁷ Para. 8.12.

⁵⁸ Para. 2.25.

Opinion of Lord Justice Leveson

- 5.18 Ofcom's first evidence for this claim is a statement from Lord Justice Leveson that the press can "*set the news agenda, shape culture and change perceptions*". However, the Leveson Inquiry dates from 2011-12 with its evidence from even earlier – certainly predating much of the transformation of agenda-setting discussed above. Moreover, in Lord Justice Leveson's view, this agenda setting power derived from "*the authoritative quality of the press, combined with its access to mass audiences*" (emphasis added).⁵⁹ However, since his Inquiry, the access of the press to mass audiences has greatly diminished. Since 2011 print readership is down 38%.⁶⁰ According to Ofcom's news consumption surveys, the cross platform reach of the News Corp titles (for example) has fallen from 32% in 2010 to 14% in 2016.⁶¹ It follows that – on Lord Justice Leveson's logic – the agenda setting power of the press must have fallen.

Newspaper reviews of broadcasters

- 5.19 Ofcom's second piece of evidence is the fact that some broadcasters' news programmes include press reviews. Such reviews certainly are an easy and cheap way to fill a few minutes of airtime. Ofcom notes that The Andrew Marr Show has such a review, and has an audience of 1.6m viewers (para. 8.15). However, viewing of this press review comprises just 0.3% of TV news viewing, and thus is essentially irrelevant as evidence of newspaper agenda-setting via TV. Sky News' Press Preview programme may well have even smaller share than this.
- 5.20 Further, such reviews are inherently plural. They compare and contrast many titles, necessarily limiting the influence of any one. They also dilute any power derived from circulation (as with agenda setting more generally). Such reviews do not spend time with different titles in proportion to their circulation, but rather will give equal prominence to smaller titles, notably the broadsheets. Again, this acts to reduce the influence of News Corp vis-à-vis other newspaper groups.

Cardiff study of agenda setting for TV

- 5.21 In arguing for the agenda setting power of the press, the Report also cites the Cardiff University study,⁶² claiming that the study found that "*morning newspapers continued to share a similar agenda to the evening television news bulletins during the General Election 2015*". In fact, the study found that of the 140 policy stories covered by TV, just 31% had appeared in newspapers previously. This suggests that broadcasters are making highly independent agenda decisions.
- 5.22 Further, this 31% includes many items that it would be hard to imagine TV *not* covering, regardless of whether they had previously appeared in print, such as: a Conservative promise not to increase tax; the parties' plans for the NHS; and the launch of Labour's manifesto. To see TV coverage of such stories as evidence that TV has its agenda set by the press is clearly incorrect.
- 5.23 An additional issue with the Cardiff study is that it focused on policy stories that *could* have been previously covered by the press. It set aside process stories carried by TV which could not have been previously covered. In so doing, it inherently overstates the influence of the press, since it ignores the portion of the TV news agenda which *could not* be set by newspapers. In other words, it ignores the fact that on any view, TV news will set a portion of its news agenda unaffected by newspapers.

⁵⁹ [The Leveson Inquiry into the culture, practices and ethics of the press](#), November 2012, p. 77.

⁶⁰ NRS. Net national dailies. (*Metro* and similar titles excluded since net figures including these are unavailable).

⁶¹ Ofcom, [Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation](#), December 2010; Kantar Media [for Ofcom], [Ofcom News Research 2016](#), 30 June 2017. p. 458- 459.

⁶² Cushion et al, [Newspapers, Impartiality and Television News](#), 28 April 2016. 21CF previously highlighted a number of the limitations of this study in its Initial Submission to Ofcom ((Annex 2, p. 14).

- 5.24 Moreover, the study starts with TV and works backwards. That is, it examined TV items to see which had previously been in the press. However, since the press in aggregate cover very many stories each day, it is unsurprising that a percentage of TV items had indeed been previously covered somewhere.
- 5.25 Not only is the study limited, the Report also appears to misunderstand what it did. For example, Ofcom claims that of TV election related items “23% originated from News Corp titles” (para. 2.26). This simple claim is wrong or misleading in three ways:
- (i) the scope of the study is only *policy* items on TV, not all election related items;
 - (ii) ‘originated’ implies that these were all cases where the News Corp coverage led to the TV coverage. But as we have seen, it may be that a significant story was bound to be covered by TV, regardless of whether or not it had previously been in newspapers;
 - (iii) the 23% is a share of story/prior newspaper coverage combinations. For instance, if a single TV story had appeared previously in the *Mirror*, *Mail*, *Telegraph* and *Times*, this would give News Corp a 25% share of ‘originations’. But in such a scenario is it meaningful to say that any one paper has set the agenda of TV? (The average story in the study that had previously been covered by a newspaper had been covered by 2.4 print titles – suggesting that many stories were of such a nature that they would have been covered by TV news regardless).
- 5.26 Finally, the Report claims the study “explored agenda setting between newspapers and television broadcasters” (para. 8.24). But in fact it was narrower – it only examined how TV might be influenced by newspapers, not vice-versa. Without any examination of influence in the other direction, the study says little about the relative power of different media in agenda setting.

No consideration of agenda-setting online

- 5.27 The Report also narrowly focuses on the influence of press on TV, but has not considered its (limited) influence online.
- 5.28 BuzzFeed has conducted a study of the sharing of election-related items in 2017, and this demonstrated the limits of the newspapers’ ability to set the agenda. For example, it found that Facebook users shared more stories about fox hunting than about Brexit during the campaign, despite the latter getting far more press attention. On Facebook, Brexit only ranked 8th as a topic.⁶³
- 5.29 In a study earlier in the campaign, BuzzFeed found that:

“six of the 20 most-shared election-related links on Facebook during the first fortnight of the election were from media sources that sit well outside the mainstream media.”⁶⁴

- 5.30 These sources were bloggers and The Canary. Of the fourteen links from mainstream media, the only newspapers represented were the *Independent* and the *Guardian*. Larger newspapers, and in particular the *Sun* and the *Times*, were conspicuous by their absence. According to BuzzFeed:

“Political stories published on the sites of traditional right-leaning newspapers such as The Daily Telegraph, The Daily Mail, and The Sun have also struggled to reach mass audiences

⁶³ Tom Phillips, *“People On Facebook Didn't Think This Was The ‘Brexit Election’”*, BuzzFeed, 8 June 2017.

⁶⁴ Jim Waterson & Tom Phillips, *“People On Facebook Only Want To Share Pro-Corbyn, Anti-Tory News Stories”*, BuzzFeed, 7 May 2017.

*online, and have often been dwarfed in terms of social media readership by alt-left sites such as The Canary and Evolve Politics.*⁶⁵

Inconsistency in treatment of agenda-setting

- 5.31 In any event, the Report adopts an inconsistent approach to agenda-setting. It suggests that through agenda-setting, newspapers (including those of News Corp) may have greater influence than their share of references might suggest. However, given the zero-sum nature of influence discussed above, if one accepts the Report's assertion that TV news agendas are set by newspapers, this also implies that the impact of the acquisition of Sky News is *less* than quantitative data might indicate. If Sky is not in control of its own news agenda (and of course must apply impartiality to the stories it does cover), then ownership of Sky brings its proprietor little additional influence. This is not reflected in the Report.

The Report does not show that the Transaction will increase the MFT's influence over the news agenda

- 5.32 The Report begins its discussion of its claim that the Transaction will increase MFT's influence over the news agenda by further discussing the Cardiff study, to make the case that News Corp titles already have significant influence. However, whether one takes the Cardiff study (and the interpretation of it in the Report) at face value or not, it is clear whatever influence newspapers provide to the MFT, this is not changed by the Transaction. The proposed acquisition is of Sky, not News Corp.

The Report does not show that the Transaction will increase the influence of members of the MFT over the political process

- 5.33 One of the Report's key findings was that:

*"The transaction may increase the influence that members of the Murdoch Family Trust have over the political process. Respondents to our invitation to comment argued that members of the Murdoch Family Trust already hold significant political influence, citing evidence that includes the Leveson Inquiry. The transaction could increase the perception among some politicians that members of the Murdoch Family Trust are more able to shape the editorial direction of Sky News, in order to favour one side of a political debate over another. Our assessment, therefore, is that there is a risk that the transaction may increase the political influence of members of the Murdoch Family Trust."*⁶⁶

- 5.34 This concern is unwarranted. In relying on out-dated evidence, it significantly overstates any political influence attributable to members of the MFT. In addition, the Report does not convincingly explain how the Transaction would increase this influence to any significant extent.

The Report relies on out-dated evidence regarding political influence

- 5.35 As noted above, the Leveson Inquiry was held in 2011-12, and much of the evidence presented to it pertained to events even longer ago. However, the Report simply says:

"[T]he news market continues to develop since the Leveson Inquiry's findings were published, with decline in the circulation of the major national newspapers. That decline

⁶⁵ Jim Waterson & Tom Phillips, *"Not Even Right-Wingers Are Sharing Positive Stories About Theresa May On Facebook"*, BuzzFeed, 3 June 2017.

⁶⁶ Para. 1.10.

*may have affected the relationship between the press and politicians but on the basis of current evidence this cannot be determined.*⁶⁷

5.36 A critical development has been the 2017 election, but here too Ofcom has taken a highly cautious approach, saying:

*“We are aware of the discussion suggesting that print newspapers had a reduced influence, and that social media had a greater influence (especially among young people), in the General Election 2017. It is in our view too early to make a definitive judgement.”*⁶⁸

5.37 21CF would respectfully suggest that Ofcom’s caution in this regard is unwarranted. In particular, there is near-universal agreement that the 2017 election provided further evidence that the influence of newspapers is on the wane. (As discussed in 21CF’s previous submissions, the 2016 London mayoral election told a similar story.)⁶⁹

5.38 According to Suzanne Moore, writing in *The Guardian* under the headline “*The Sun and Mail tried to crush Corbyn. But their power over politics is broken*”:

*“[V]ast numbers of voters took no notice of the rightwing tabloids. Young voters were not put off Labour by the rightwing press, or they just don’t read it. This is huge: part of the readjustment of power now having to be made. The sudden thrust in the direction of the future, youth and possibility means that the dictum that politicians have to crawl to the Sun or the Mail is overturned.”*⁷⁰

5.39 Media commentator Ray Snoddy makes a similar point:

*“The whole point about Murdoch’s “power” over the general election outcome is how diminished it now is compared with 1992. The entire national newspaper industry, with the exception of the Daily Mirror and the Guardian, came out against Jeremy Corbyn and Labour - and a lot of good it did them.”*⁷¹

5.40 Similarly, according to Roy Greenslade (quoted in the *New Statesman*):

“Spending basically two weeks demonising a man, a leader, and still they don’t pull off a victory for their chosen one, suggests they are out of touch, out of touch with the electorate as a whole, though not necessarily their readers. It’s the end of the hegemony of news print from the right. ...

*“It’s a tipping point. No one will be able to take for granted their power again. It has leaked away, this election shows it at its lowest ebb”*⁷²

5.41 George Monbiot in the *Guardian* said:

*“The election was a crushing defeat – but not for either of the major parties. The faction that now retreats in utter disarray wasn’t technically standing, though in the past it has arguably wielded more power than the formal contestants. I’m talking about the media. The rightwing press threw everything it had at Jeremy Corbyn, and failed to knock him over. In doing so, it broke its own power.”*⁷³

⁶⁷ Para. 8.40.

⁶⁸ Para. 2.15.

⁶⁹ See p48, Robert Kenny, *News Plurality in the UK, 2017*, 17 March 2017 (Annex 1 to 21CF’s Initial Submission to Ofcom).

⁷⁰ Suzanne Moore, “*The Sun and Mail tried to crush Corbyn. But their power over politics is broken*”, *The Guardian*, 9 June 2017.

⁷¹ Ray Snoddy, “*The decline of Murdoch’s influence*”, *MediaTel*, 14 Jun 2017.

⁷² Jasper Jackson, “*Labour’s success shows the political hegemony of the right-wing press is ending*”, *New Statesman*, 10 June 2017.

⁷³ George Monbiot, “*The election’s biggest losers? Not the Tories but the media, who missed the story*”, *The Guardian*, 13 June 2017.

- 5.42 Peter Peston, also in the *Guardian*, wrote under the headline “*This election proves that media bias no longer matters*”:

“The printed press ... has seldom seemed more overwhelming. Labour cries of “fix” and “grotesque” were rising again as a reason/excuse for defeat, with the BBC added to that hate list. In the end, though, it didn’t matter ...

“In the changed world of 2017, this ought to kill many media preconceptions for good. Print circulations have shrunk and shrunk again even since 2015. Fewer faithful to read the tablets from on high. More balky floaters bent on doing their own thing ...

“[T]here are also signals, in an era of startling swings, that the old ways of press hegemony, just like those of party loyalty, have had their day.”⁷⁴

- 5.43 Will Gore, for the *Independent*, spoke directly to plurality, saying:

“So what conclusion should we draw [from the election]? One is that the readership of the right-wing tabloids has declined to the degree that partisan headlines simply don’t influence the number of people they once did. Another is that readers don’t make judgements purely on the basis of their preferred newspaper’s editorial line. In this era of ever-greater media plurality, people are better equipped to make political decisions because they can examine a range of views and sources. ...

“[M]ake no mistake, this is an extraordinary moment for Britain’s right-wing press, which for so long has been perceived to have a hold over the electorate. The Express is on the ropes. The Daily Mail is bruised. The “Currant Bun” is crumbling”⁷⁵

- 5.44 According to Prof James Curran of Goldsmiths, University of London (a founder of the Media Reform Coalition and a strong opponent of the Transaction):⁷⁶

“[T]he reign of the tabloids is over. For weeks, the ancient bazookas controlled by Murdoch, Dacre and other press oligarchs were trained on Corbyn and McDonnell ... The campaign failed because the British press is more distrusted than any other press in Europe (as revealed by the 2016 Eurobarometer survey), its circulation is in freefall, and young people in particular get their news and political information from the internet.”⁷⁷

- 5.45 Mick Temple, Professor of Journalism and Politics at Staffordshire University, summed up his views as follows:

“The future looks bleak for printed newspapers and, after 2017, perhaps even bleaker for their political influence via any medium.”⁷⁸

- 5.46 James Rodgers, Senior Lecturer in Journalism at City University, wrote:

“In an age when so much more opinion is shared on social media, 2017 may well come to be seen as the election which ended the ‘Sun wot won it’ era.”⁷⁹

- 5.47 *Vanity Fair*’s UK editor, Henry Porter, put it this way:

⁷⁴ Peter Peston, “*This election proves that media bias no longer matters*”, *The Guardian*, 11 June 2017.

⁷⁵ Will Gore, “*The right-wing press no longer wields absolute power in modern Britain. This election proves it*”, *The Independent*, 9 June 2017.

⁷⁶ See, for example, Dr Justin Schlosberg et al, “*UK news plurality and Fox-Sky merger*” [Letter], *The Guardian*, 5 March 2017

⁷⁷ Prof James Curran, “*The day the myths of press power and the centre ground died*”, *The Guardian*, 11 June 2017.

⁷⁸ Prof Mick Temple, “*It’s the Sun wot lost it*”, *Election Analysis*, June 2017.

⁷⁹ James Rodgers, “*The election wot The Sun (and the rest of the UK tabloids) never won*”, *The Conversation*, 9 June 2017.

*“[A]mong the biggest losers were the tabloids themselves, whose influence at election time, along with their sales, is on the wane. ... Like everyone else, I assumed the impact of the coverage in the Daily Mail, Daily Express, and Rupert Murdoch’s Sun would be crucial, but it turns out I was wrong.”*⁸⁰

5.48 Una Mullally, writing in the *Irish Times*, said:

“With such a large array of information available to people, the conservative British tabloids are now the equivalent of an aul fella shouting in the corner of a pub.

“Sure, they make a lot of noise and occasionally cause enough controversy for other punters to shout “Ah, here!” in response to their ramblings. But ultimately they are irrelevant. No one is listening, no one is paying attention, their influence has waned and they are out of touch and unfashionable.

“Tabloid screaming may have worked at a time when the dominant force in information was the old media across press, radio and television. But now it’s the internet, and Photoshopping Corbyn in a bin on a front page doesn’t actually have an impact.

*“It’s worth mentioning that Rupert Murdoch’s papers are the ones that have struggled the most to carve out a relevant online presence.”*⁸¹

5.49 While none of these analyses represent a forensic examination of the election, their certainty and consistency is striking. At a minimum they suggest that the *perception* of the power of the press has changed radically.

5.50 Thus, it is entirely inappropriate for Ofcom to give such weight to the report of the Leveson Inquiry in its consideration of influence over the political process, when it has substantial and far more recent evidence regarding perceptions of press power available.

The Report does not show that the Transaction will increase political influence

5.51 As with influence over the news agenda, any existing political influence derived from newspapers is entirely separate from the impact of the transaction. MFT’s control of newspapers is not changed by the transaction.

5.52 As regards the incremental influence gained by the acquisition of Sky – which is the critical issue – the Report has remarkably little to say. It simply asserts:

“First, the addition of another important news provider may raise questions in the mind of politicians as to whether the level of “personal and political support” which may be offered by members of the Murdoch Family Trust is increased.

*“Second, the ability to choose the relative importance given to stories on Sky News may be capable of further influencing the political process through the implied threat of negative or no coverage and the prize of positive coverage for politicians.”*⁸²

5.53 Crucially, the Report also fails adequately to explain how the Transaction will result in the MFT or members of the Murdoch family having an increased ability to influence the news agenda, taking into account the actual extent of their control. In reaching this conclusion, the Report relies on the fiction that the Transaction will bring together news outlets owned by News Corp and Sky (in

⁸⁰ Henry Porter, *“Strong and stable my arse”: How Theresa May blew the British general election*”, *Vanity Fair*, 9 June 2017.

⁸¹ Una Mullally, *“Corbyn’s success is a result of youth discontent”*, *Irish Times*, 12 June 2017.

⁸² Para. 8.37-8.38.

particular, News Corp's newspaper titles and Sky News) under common control. As described in detail above, this approach entirely disregards the judgement of the Court of Appeal in *Sky/ITV* by failing to engage with the actual extent of control that the MFT will exercise over these news outlets post-Transaction.

5.54 In addition to the points discussed above concerning the safeguards that will exist post-Transaction as a result of the legal structure and governance of 21CF and News Corp, there are other strong, mutually reinforcing reasons why the MFT would not have the ability or incentive to exert influence over editorial decisions at Sky News post-Transaction, including:

- (i) impartiality requirements under the Broadcasting Code;⁸³
- (ii) the strong culture of editorial independence in television news, which means that editors would resist any intervention from the board or shareholders, and would be likely to bring any breach of impartiality requirements caused by shareholder influence to Ofcom's attention (a point noted by the CC in *Sky/ITV*); and
- (iii) audience expectations of impartiality, which make the commercial success of TV news providers dependent upon providing a service which meets these expectations.

5.55 The Report largely dismisses each of these constraints, concluding that none of them "*are sufficient of themselves*" to ensure that the editorial stance of Sky News does not become aligned with that of other news outlets under the influence of the MFT (para. 9.12). However, the Report fails to consider the *cumulative* effect of these factors and the corporate/governance safeguards described above. 21CF is confident that when these issues are examined in more detail by the CMA, it will conclude that, even if no one factor is sufficient on its own, together, they provide powerful safeguards against influence by the MFT over Sky News.

5.56 The Report also suggests that the concerns around the influence of the MFT are more acute because the Transaction involves Sky News than would be the case for a news provider with a lower level of trust (para. 7.16). However, again, this concern is not developed further or substantiated. 21CF submits that a more detailed consideration of this point would highlight the following:

- (i) one of the reasons TV is powerful is because TV news providers are trusted as impartial news sources (demonstrating the potency of impartiality rules). Sky News is highly trusted, albeit (per Ofcom's news consumption survey) slightly less so than the BBC, ITV and Channel 4;
- (ii) there are also multiple outlets across other media which enjoy higher trust than Sky, including the BBC (radio and online) the Guardian (in print and online), the Telegraph and the Independent; and
- (iii) the Report takes an asymmetric approach in considering the potential relevance of consumer trust. If consumer trust in Sky News is important, Ofcom must also factor in the more sceptical approach taken by readers of the Sun, which would work in the other direction (para. 7.14).

⁸³ As set out in the opinion of leading counsel previously provided to Ofcom, while impartiality is not absolute: *Nonetheless, a very great deal of the mischief which the public interest consideration of plurality seeks to achieve is addressed by the regulatory requirement of due impartiality... the provisions in the 2003 Act and the Code governing impartiality help to ensure that, in practice, the owner of a television station (or the news editor) could not intervene to require news items on their own television news service to receive lesser (or indeed greater) prominence, or no coverage, for political reasons.*" (Legal opinion of Lord Pannick QC and David Lowe dated 15 December 2010, submitted as Annex 1 to News Corporation's response to Ofcom's Issues Letter in relation to the News Corporation / Sky bid, paras. 30 and 33.)

5.57 Thus in practice Ofcom has provided no convincing evidence that the Transaction will increase the MFT's political influence. Moreover, by focussing on historic evidence and ignoring more recent data, it has greatly overstated the existing influence of the MFT. 21CF believes that a detailed review by the CMA would confirm that these concerns are without merit in today's media landscape and, *a fortiori*, going forward; in particular given the role of online intermediaries in diluting the agenda-setting role of news outlets, and the cumulative effect of the commercial and cultural safeguards that will exist post-Transaction to ensure the editorial independence of Sky News.

6. 21CF'S PROPOSED UNDERTAKINGS REPRESENT AN EFFECTIVE MEANS TO ADDRESS THE CONCERNS IN OFCOM'S REPORT

6.1 Notwithstanding 21CF's view that the Transaction does not raise public interest concerns in relation to the Media Plurality PIC, 21CF was prepared to offer undertakings to the Secretary of State in order to avoid a protracted reference to the CMA for an in-depth review. 21CF put forward draft undertakings to Ofcom for its consideration, and subsequently offered the Proposed Undertakings formally to the Secretary of State in lieu of reference. These undertakings included:

- (i) a commitment to maintain Sky's current arrangements for complying with broadcasting standards;
- (ii) a commitment to maintain a Sky-branded news services in the UK for at least five years (including similar levels of operational net investment in the service to those currently made by Sky, taking into account inflation);
- (iii) a commitment to establish a Sky News Editorial Board to guarantee the editorial independence of Sky News, comprised of a majority of independent members (initially selected by the independent directors of Sky, and subsequently by the Nomination and Corporate Governance Committee of the 21CF board). The approval of a majority of the independent members of the Editorial Board will be required for the appointment, removal or any material changes to the authority or reporting relationship of the Head of Sky News;
- (iv) a commitment to ensure that, subject to general compliance procedures and oversight, no employee or officer of 21CF, or a member of the 21CF Board who is a trustee or beneficiary of the MFT, will influence or attempt to influence the editorial choices made by the Head of Sky News (including the selection of news stories or the political comment and opinion to be broadcast on the Sky News channel); and
- (v) a commitment to enhance Sky News' Editorial Guidelines, to contain provisions ensuring that the Head of Sky News will retain control over editorial matters and the instructions given to editorial staff (including journalists), and to maintain those Guidelines.

6.2 The Report recognises that the Proposed Undertakings mitigate its concerns in relation to the Plurality PIC, and provides a clear legal basis on which the Secretary of State could accept the Proposed Undertakings in lieu of a reference. For the reasons described further in the remainder of this section, the Secretary of State's provisional decision not to accept them is unwarranted.

Ofcom's Report provide the Secretary of State with a clear legal basis to accept the Proposed Undertakings in lieu of a reference to the CMA

6.3 21CF believes that the Proposed Undertakings comprehensively address the plurality concerns identified by Ofcom, and welcomes the Report's conclusion that they "*mitigate the public interest concerns*" (pages 6 and 8). In particular, Ofcom considered that:

- (i) the Proposed Undertakings “*would insulate the Head of Sky News (and therefore the Sky News editorial position) from other bodies within the merged entity*” (para. 11.18);
- (ii) the Proposed Undertakings thereby mitigate the concerns identified in respect of the ability to influence public opinion by maintaining internal plurality through the editorial independence of Sky News (para. 11.18);
- (iii) the provision in the Proposed Undertakings for 21CF to ensure that employees of 21CF and members of the board of 21CF which are trustees or beneficiaries of the MFT will not influence the editorial position of Sky News mitigates concerns that the Transaction risks increasing the influence over the political process which members of the MFT may enjoy (para. 11.19); and
- (iv) the provision in the Proposed Undertakings for transparency by clear lines of reporting to Ofcom and public reporting, as well as enforceability directly by the Secretary of State, means that the undertakings are more robust than the commitments that were made binding in the context of the acquisitions of The Times and Dow Jones (paras. 11.20-11.21).

6.4 As recognised in her provisional decision, it is sufficient for the Secretary of State to consider that undertakings in lieu mitigate public interest concerns in order for her to accept those undertakings in lieu of a reference to the CMA. As such, Ofcom’s conclusions provide a clear legal basis on which the Secretary of State could accept the Proposed Undertakings, and Ofcom advised that this is a course open to her.⁸⁴

The Secretary of State’s provisional decision places undue weight on a distinction between ‘behavioural’ and ‘structural’ undertakings

6.5 The Secretary of State’s provisional decision not to accept the Proposed Undertakings places undue weight on a rigid distinction between ‘behavioural’ and ‘structural’ undertakings. The relevant question is not which of these labels attaches to a given set of undertakings (which in any event is not necessarily binary), but whether those undertakings are an effective solution to the specific concerns raised in a particular case.

6.6 Indeed, this is clear from guidance adopted by the CMA, which acknowledges that it “*does not inevitably refuse behavioural undertakings*” at Phase I, and that such remedies may indeed be suitable at that stage, depending upon the facts.⁸⁵ It is further confirmed by the existence of several examples of UK merger control decisions where, in specific circumstances, the CMA/OFT found that its concerns with the transaction were able to be addressed with behavioural remedies at Phase I.⁸⁶ Nor is the use of such remedies excluded in other developed jurisdictions. Taking an international perspective, the number of behavioural remedies being accepted at Phase I has in fact risen in recent years, with 51% of Phase I conditional clearances in the last year including behavioural remedies, indicating that authorities are increasingly viewing Phase I as an appropriate forum for agreeing this type of commitments.⁸⁷

6.7 In this case, the concerns Ofcom raised related to the possibility of influence being exerted over the editorial agenda of Sky News. The Proposed Undertakings were tailored to address this issue, by providing substantial safeguards for the editorial independence of Sky News, as Ofcom’s advice

⁸⁴ “Overall advice and recommendation”, page 6.

⁸⁵ OFT Guidance “*Mergers: Exceptions to the duty to refer and undertakings in lieu of reference*”, December 2010, paragraph 5.43.

⁸⁶ See, for example, *Regus / Avanta* (2016); *InterCity Railways / InterCity East Coast (ICEC) franchise* (2015); *Arriva plc / Wales and Borders Rail Franchise* (2004); and *IVAX International GmbH / 3M* (2004).

⁸⁷ Allen & Overy, ‘Global trends in merger control enforcement’ (2016), pages 10-11. (Based on analysis of 26 jurisdictions, including the UK.)

recognised. It is therefore disappointing that the Secretary of State is nevertheless minded to apply a formalistic distinction, rather than considering the specific merits of 21CF's proposal, as well as the specific analysis carried out by Ofcom, in this light.

- 6.8 In addition, guidance adopted by the CMA makes clear that behavioural remedies will often be considered (both at Phase I and Phase II) in situations where pure divestment or structural separation is not possible.⁸⁸ This is precisely the view reached by Ofcom in this case, who expressed significant concerns that the structural separation of Fox News from Sky “*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*” (para. 11.22). Ofcom went even further to say that a degradation or loss of Sky News could potentially present risks to plurality “*equal to or greater than those presented by the transaction itself*” (para. 11.22). Once again, and without prejudice to 21CF's views as to a possible structural undertaking, it is surprising that the Secretary of State has based her decision not to accept undertakings in lieu of a reference on the fact that the Proposed Undertakings offered are not purely structural, but behavioural, despite Ofcom's advice and in reliance upon a superficial and formalistic reading of CMA guidance.
- 6.9 21CF would have expected the Secretary of State to consult in an open and transparent manner with the CMA regarding the appropriateness of the Proposed Undertakings – 21CF believes the CMA would also have supported Ofcom's conclusions without the need for a lengthy and expensive Phase II review, or the consequent delays to the Transaction.
- 6.10 Moreover, the distinction between structural and behavioural undertakings is not always clear cut or binary, and remedies packages increasingly constitute a “hybrid” solution containing elements of both types of undertakings. In this case, the provision in the Proposed Undertakings for the creation of a separate editorial board, tasked with guaranteeing the editorial independence of Sky News, goes beyond a simply “behavioural” remedy, in that it provides for a specific structural separation of governance for Sky News, decisively removing any scope for influence to be exerted over the editorial policy of Sky News.
- 6.11 What these considerations highlight is that the Secretary of State's decision regarding the Proposed Undertakings offered by 21CF should not be made on the basis of arbitrary distinctions between the labels of ‘behavioural’ and ‘structural’ formats. The relevant question, as set out by the CMA, is whether the Proposed Undertakings are clear cut, effective and capable of ready implementation.⁸⁹ It is clear from the nature of the concerns identified by Ofcom, the undertakings offered, and Ofcom's assessment of them, that the undertakings meet all of these criteria.
- 6.12 In its Report to the Secretary of State, while confirming that the Proposed Undertakings mitigated its concerns in relation to the Media Plurality PIC, Ofcom left open the possibility that the Proposed Undertakings may be further strengthened in relation to the following two areas: (i) the on-going arrangements for the appointment of independent board members of the Sky News Editorial Board; and (ii) the duration of 21CF's commitment to maintain its investment in Sky News (para. 11.23).
- 6.13 In relation to the on-going arrangements for the appointment of independent board members, the Proposed Undertakings currently provide that the independent board members of the Sky News Editorial Board will initially be appointed by the independent directors of Sky. Selection of subsequent independent board members will be by the 21CF Nomination and Corporate Governance Committee which comprises solely independent board members of 21CF. 21CF is of the view that this committee is well equipped and best placed to make these appointments based on the requirements for independent board members as set out in the Proposed Undertakings, in particular due to the fact that all of its board members are independent.

⁸⁸ OFT Guidance “*Mergers: Exceptions to the duty to refer and undertakings in lieu of reference*”, December 2010, para 5.43. Competition Commission Guidance on Merger Remedies, 2008, para 4.1.

⁸⁹ CMA Jurisdictional Guidance, para 8.3.

6.14 With regard to the duration of 21CF's commitment to maintain its investment in Sky News, 21CF believes that the current duration of five years is more than sufficient in such a dynamic and fast-moving market.

7. COMMITMENT TO BROADCASTING STANDARDS

7.1 21CF welcomes the Secretary of State's intention not to make a reference on the grounds of the Broadcasting Standards PIC, consistent with Ofcom's conclusion, as the expert regulator with responsibility for monitoring and enforcing broadcasting standards, that "*we consider there are no broadcasting standards concerns that may justify a reference by the Secretary of State to the Competition and Markets Authority*" (para. 1.13).

7.2 As a long-standing holder of broadcasting licences in the UK, 21CF is fully committed to the attainment of broadcasting standards objectives. 21CF values Sky's excellent track record of compliance and intends to ensure that this is maintained in future.

8. CONCLUSION

8.1 For the reasons described above, a reference of the Transaction to the CMA is wholly unnecessary. 21CF regrets and is disappointed that the Secretary of State is minded to instigate a protracted and costly review of the Transaction, despite 21CF's willingness to address the concerns raised by Ofcom in an effective manner. As a result, the benefits of the Transaction – to the UK creative economy as a whole, as well as to the parties and their shareholders - will be unnecessarily delayed.

8.2 However, 21CF remains committed to working constructively with the UK authorities and will put its case to the CMA, should the Secretary of State so require. 21CF would encourage the Secretary of State to take her final decision on this at her earliest convenience, so as to avoid unnecessary delay, in particular given the review timetable has already been extended significantly as a result of the general election.

Allen & Overy LLP
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