

21ST CENTURY FOX, INC. / SKY PLC MERGER INQUIRY

Response to the Provisional Findings

1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1 This submission is made on behalf of 21st Century Fox, Inc. (21CF) in response to the Competition and Markets Authority (CMA)'s provisional findings (the **Provisional Findings**) in relation to 21CF's proposed acquisition of the remaining shares in Sky plc (Sky) (the **Transaction**). It should be read in conjunction with the additional submissions provided as **Annex 1**,¹ prepared by Charles River Associates (CRA), which addresses the Provisional Findings from an economic perspective, and **Annex 2**,² which responds to specific elements of the Provisional Findings in greater detail.
- 1.2 The Provisional Findings purport to show that the Transaction would result in a significant increase in the control of the Murdoch Family Trust (MFT) over Sky News and that, as a result of this increase in control, the diversity of viewpoints to which UK audiences are exposed would be reduced, and the political influence of the MFT enhanced, to such an extent that there can no longer be said to be a sufficient plurality of persons with control of the media enterprises serving UK audiences. Yet on examination, the basis for this claim proves extremely thin.
- 1.3 Most fundamentally, the Provisional Findings fail to engage to any meaningful extent with the *sufficiency* of plurality. The concept of "*sufficient plurality*" is central to the public interest consideration at issue. An adverse public interest finding cannot be justified on the basis that a transaction may reduce plurality. The reduction must be of such a scale that plurality would become insufficient overall. However, nowhere do the Provisional Findings set out a coherent framework for assessing whether plurality is sufficient, notwithstanding the changes resulting from a transaction, or explain even in broad terms how or when plurality becomes insufficient. Instead, they briefly recite various claims regarding the position of Sky News and News Corp (each of which is individually flawed), attempt to fortify these with legally irrelevant analogies with cross-platform ownership restrictions, and assert that "*in the round*", plurality would be insufficient. This approach deprives the concept of sufficiency of any independent limiting effect on intervention and, in practical terms, reads it out of the statute.
- 1.4 This is particularly concerning where, even on the CMA's own case, the size of the effects that the Provisional Findings purport to show is small. Put simply, the case set out in the Provisional Findings is that the Transaction increases the potential for subtle changes in the coverage of less important and/or controversial issues by an outlet accounting for just 6% of news consumption, which is consumed as part of a wide range of sources by at least 70% of its users and which is rarely viewed as a particularly important source by its users. The CMA nevertheless concludes that this is enough to make the overall UK cross-media landscape insufficiently plural. Implicit in this is that plurality in the UK is on a 'knife-edge'. The Provisional Findings make no reasoned case to support this, and therefore do not provide adequate reasoning in relation to the key statutory question.
- 1.5 Moreover, the Provisional Findings assert that these effects may arise because the Transaction will "*significantly increase*" the control of the MFT over Sky News. However, in reaching this conclusion, the Provisional Findings rely on scant evidence and, again, misconstrue important aspects of the legal framework, resulting in significant legal errors.

¹ Charles River Associates, *Fox / Sky: a response to the CMA's Provisional Findings in respect of media plurality*, 9 February 2018.

² Robert Kenny, *A Review of the CMA's Provisional Findings Report*, 9 February 2018.

- (i) The Provisional Findings' claims regarding the effects of the Transaction on the control of the MFT over Sky News are based on the assertion that, at present, the independent directors and non-Fox shareholders of Sky each significantly constrain the MFT's influence over Sky News. There is no foundation for this claim since, as the Provisional Findings acknowledge, neither the independent directors nor the non-Fox shareholders of Sky have any involvement in editorial decisions at Sky News. There is in fact no support anywhere in the record that any independent director or shareholder of Sky has ever been called upon to address, let alone respond to or limit, any effort by the MFT to influence Sky News. At the core of the Provisional Findings is therefore the proposition that Sky News would suffer from the loss of a protection that it does not require.
- (ii) In addition, the Provisional Findings do not show that control *would* in fact be brought to bear on the editorial agenda of Sky News – indeed, they make no attempt to do so, since the CMA apparently considers this irrelevant. 21CF disagrees. The judgment of the Court of Appeal in *Sky / ITV* is clear regarding the need for a detailed and realistic assessment of the extent of control exercisable and *exercised* following the Transaction. This is consistent with the general scheme of merger control in the UK, which assesses not just whether an undertaking would have the ability to act in a particular way, but also whether it would have the incentive to do so. Here, as both 21CF and Sky have previously submitted, there are clear incentives favouring Sky News' continued independence.
- (iii) The Provisional Findings assert that the Transaction will “*significantly increase*” the MFT's control over Sky. This assertion is at odds with the CMA's finding that the MFT's level of control over Sky is already (pre-Transaction) and would remain (post-Transaction) at the level of material influence, the lowest level in statute. This gives rise to a legal error, which infects the Provisional Findings' analysis of the theories of harm. 21CF also questions whether the detail of the CMA's own conclusions regarding the control exercisable by the MFT over Sky News is accurately reflected in its discussion of the two theories of harm. Beyond the bald statement that there would be a “*significant increase*” in control, on the CMA's own analysis, such influence could be exercised only in limited, non-overt ways and largely through indirect means, and would be particularly tightly constrained on matters of greater public importance. Yet in discussing the theories of harm, the CMA assumes a situation in which the MFT could exert a granular degree of control over Sky News, causing it to take an aligned approach with *The Times* – or even the *Sun* – on specific stories.

1.6 These errors are compounded by failings in the Provisional Findings' analysis of the media landscape and the place of Sky News and News Corp within it, which render the CMA's conclusions regarding its theories of harm unsound. The following are some of the more material concerns.

- (i) The Provisional Findings contain repeated inconsistencies of approach. This in itself calls important aspects of the CMA's analysis into question. However, it is particularly troubling that all these inconsistencies operate in the same direction, to enhance the supposed threat of the Transaction to plurality. High trust in *The Times*, the *Sunday Times* and Sky News is said to increase the concerns raised by the Transaction – yet low trust in the *Sun* is said to have little or no bearing on its influence. Similarly, one part of the Provisional Findings repeats the position taken in the Issues Statement, that a greater overlap between the customer bases of Sky News and News Corp would indicate greater plurality concerns. Then, having found that there is only limited overlap, the CMA argues that this *also* raises plurality concerns, on the basis that the Transaction would enhance the MFT's demographic reach. Without comparative analysis, impartiality requirements are said to constrain the BBC from acting as an offsetting influence to the MFT, but to leave substantial scope for the MFT to exercise influence through Sky News. On each of these points, and others, the CMA argues each side depending upon which outlet it is discussing and, apparently, upon which angle would support its case.

- (ii) The Provisional Findings attach great weight to the claim that post-Transaction, the MFT would have a presence across all four news platforms (print, television, radio and online). No adequate explanation is given as to why a presence across platforms should carry this significance. Moreover, this is not a merger-specific effect, since the MFT already has material influence over outlets across all four platforms.
- (iii) In contrast, the Provisional Findings disregard evidence regarding consumer multi-sourcing which undermines the CMA's case. This evidence is of the greatest relevance to the CMA's theories of harm since it directly addresses whether the Transaction could lead to UK consumers being exposed to an unacceptably narrow range of viewpoints; and since the scope for any news outlet, or its owner, to exert influence is very substantially constrained if that outlet is consumed as part of a range of sources. There seems no disagreement that Sky News and News Corp's titles are typically consumed as part of a range of sources (4.5 and 4.9 on average, respectively); that the consumers affected directly by any greater alignment between these sources – those who consume news from both Sky News and News Corp – multi-source pervasively and extensively (6.5 on average, with almost none consuming only from these sources (fewer than 0.04%)); and that consumers generally place more weight on other sources, notably the BBC. Rather than placing weight on these points, the Provisional Findings simply note that a minority of consumers of news from Sky and/or News Corp use “*three or fewer sources*” and move quickly on. In fact, the CMA's own analysis shows that most of these use three sources, which is not an obvious basis for concern.
- (iv) The Provisional Findings draw perverse conclusions regarding the significance of the BBC. They accept that even a full combination of News Corp and Sky News would be dwarfed on any metric by the BBC, but dismiss this on the basis that, due to its impartiality obligations, the BBC cannot directly challenge other news providers. The implication is that impartial news contributes *less* – rather than more – to plurality. This is counterintuitive and contrary to the underlying logic of UK broadcasting regulation, that impartial broadcast news best serves the public interest. It is also inconsistent with the fact that impartiality contributes to the BBC's high levels of public trust – trust which, when it comes to the outlets in which the MFT has an interest, the CMA argues serves only to increase their influence.
- (v) The evidence employed in support of the Provisional Findings' conclusions regarding the alleged influence of the MFT is thin and, to the extent it has any probative value, suggests Sky News is not particularly influential.
- (vi) The Provisional Findings exaggerate the significance of the Transaction in quantitative terms through various means. Amongst these, the CMA proposes upwards adjustments to share of references figures that are inappropriate and even mathematically incorrect (one error, on its own, leads the CMA to propose an adjustment that would overstate the share of references of News Corp by an estimated 1.5 percentage points). Conversely, the CMA declines to make any adjustment that would reduce the share of references of News Corp and/or Sky News – including one which the CMA considers *would* be reasonable to apply to ITN.

1.7 The aggregate effect of these errors is that the Provisional Findings do not engage adequately with the statutory question before the CMA, and do not provide a reasonable basis on which to conclude that the Transaction may be expected to operate against the public interest. Nonetheless, 21CF has proposed a comprehensive package of remedies which, as set out in its separate response to the CMA's Notice of Possible Remedies, would create a ‘firewall’ sufficient to prevent the MFT or any member of the Murdoch family exercising control over editorial matters at Sky News. 21CF believes this represents an effective and proportionate solution to the concerns set out in the Provisional Findings, and looks forward to engaging with the CMA on this proposal.

1.8 Finally, 21CF welcomes the CMA’s provisional conclusion that the Transaction does not raise concerns relating to the broadcasting standards public interest consideration. Some comments on discrete but important factual matters are set out at the end of this submission.

2. THE PROVISIONAL FINDINGS FAIL TO SHOW THAT THE TRANSACTION WOULD MATERIALLY INCREASE THE CONTROL OF THE MFT OVER SKY NEWS

2.1 The Provisional Findings rest on the conclusion that the Transaction will “*significantly increase*” the extent of control that the MFT is able to exercise over Sky News (paragraph 7.94³). The Provisional Findings assert that, as a result, “*Sky News and the newspapers owned by News Corp could take a similar approach on specific topics or issues, push certain stories, or downplay others*” (paragraph 7.95).

2.2 This conclusion appears to be based on three considerations:

- (i) that Sky’s other shareholders currently act as a significant constraint on the control of the MFT over Sky News (paragraph 7.83), which the Transaction will eliminate;
- (ii) that Sky’s independent directors currently act as a significant constraint on the control of the MFT over Sky News (paragraph 7.83), which the Transaction will eliminate; and
- (iii) that 21CF’s independent directors would not effectively constrain the influence of the MFT over Sky News, because of “*closer ties*” with, and a greater likelihood that they would defer to, members of the Murdoch family (paragraph 7.90).

2.3 None of these claims are made out, for the reasons set out below.

The Provisional Findings' conclusions regarding the role of Sky’s independent shareholders are unevicenced and inconsistent

2.4 The Provisional Findings’ claim that Sky’s other shareholders act as a significant constraint on the control of the MFT over Sky News is wholly without evidential foundation. The Provisional Findings admit that the CMA has found no instance in which the other shareholders of Sky have acted as such a constraint (paragraph 7.89). The CMA acknowledges that the day-to-day running of Sky (and therefore Sky News) is not something that would be put to a shareholder vote (paragraph 7.56). The Provisional Findings also acknowledge that non-21CF shareholders told it that Sky News “*was not something they paid any attention to*” (paragraph 7.59). The few examples of shareholder activism to which the Provisional Findings refer have no bearing, since they relate to the management of Sky, not matters relating to Sky News.⁴

2.5 In this light, it is unclear how the Provisional Findings can then assert that the presence of non-Fox shareholders acts as a constraint on the control exercisable by the MFT over Sky News. It appears that the CMA has conflated this with the extent to which non-Fox shareholders act as a constraint on control over Sky generally. Paragraph 7.60 states that “*the presence of non-Fox shareholders acts as constraint on the exercise of control over Sky which is primarily exercised through their votes at the company’s AGMs and indirectly through their discussions and relationships with the independent directors*” (emphasis added). But the extent of control over Sky – as opposed to Sky News – is not the relevant issue.

2.6 As a secondary point, the Provisional Findings take a logically inconsistent approach to the constraint posed by independent shareholders. Were one (wrongly) to conclude that Sky’s non-Fox

³ This is repeated throughout the Provisional Findings – e.g. paragraphs 10.91, 10.103, 11.58, 11.131 and 12.10.

⁴ Paragraph 7.57, referring to shareholder opposition to James Murdoch’s appointment and reappointment as Chairman, and James Murdoch’s resignation as CEO in 2012.

shareholders act as a significant constraint regarding Sky News, it would then be necessary to recognise that equivalent constraints exist from 21CF's non-MFT shareholders. The Provisional Findings do not do so, even though both means by which Sky's other shareholders are said to constrain the MFT apply equally to 21CF's non-MFT shareholders. The CMA has seen evidence of activism on certain votes at shareholder meetings,⁵ and 21CF's independent directors have said that they provide an avenue for 21CF's shareholders to make their views known.⁶

The Provisional Findings do not show that Sky's independent directors contribute to Sky News' independence

- 2.7 As with Sky's non-Fox shareholders, the CMA has found no instance of Sky's independent directors acting as a constraint in relation to influence by the MFT over Sky News.⁷ To the contrary, the Provisional Findings acknowledge that Sky's independent directors gave evidence to the CMA that they have "*very little oversight of Sky News at the board level*" and that the independent directors would have no direct involvement in the appointment of any replacement of the Head of Sky News (paragraphs 7.70-7.71).
- 2.8 Despite this, the Provisional Findings conclude that Sky's independent directors are a significant constraint on MFT editorial influence on the basis that if there were concerns about undue influence by members of the Murdoch family in relation to editorial matters these would be raised to the Sky Board.⁸
- 2.9 The only purported evidence that the CMA provides for this is a reference to paragraph 18 of the summary of the hearing with Sky's independent directors, which clearly relates to the business of Sky in general, rather than editorial decisions at Sky News. So far as those decisions are concerned, there is no support anywhere in the record that any independent director of Sky has been called upon to address any effort by the MFT to influence Sky News.
- 2.10 This should be contrasted with the fact that, post-Transaction, 21CF's independent directors (through the NCGC) would have a formal, clearly-defined role in guaranteeing the editorial independence of Sky News, as a result of the board resolution passed by 21CF, which gives the NCGC oversight of the appointment or removal of the Head of Sky News, any material changes to his or her authority or reporting relationships, and of any future changes to the Sky News Editorial Guidelines.
- 2.11 The correct conclusion from this is that the likely effect of the Transaction is to increase, rather than reduce, the protection given to Sky News' editorial independence by oversight from independent directors.

The Provisional Findings err regarding the independence of 21CF's Board and the effectiveness of oversight by 21CF's independent directors

- 2.12 The Provisional Findings assert that "*the significance of the loss of Sky's independent directors as a constraint on the ability of the MFT to exercise control is magnified by our provisional finding that a number of Fox independent directors have closer ties to the MFT than the independent directors of Sky*". The Provisional Findings also assert that 21CF's independent directors are more likely to defer to members of the Murdoch family on "*issues of media plurality*", than Sky's independent directors, on the basis that Sky's independent directors "*are familiar with the UK media market*" (paragraph 7.90). Neither argument is sound.

⁵ Paragraph 7.13, referring to instances where a majority of non-MFT shareholders voted a different way to the MFT.

⁶ E.g. Jacques Nasser hearing summary, paragraph 10.

⁷ Paragraph 7.89.

⁸ Paragraph 7.74.

- 2.13 In relation to the former, the Provisional Findings state that four independent directors of 21CF have served for a significant period of time on 21CF's or Sky's board and/or have close relationships with members of the Murdoch family (in fact, the Provisional Findings mention only three⁹). But length of service on 21CF's or Sky's Board is not the same as "*closer ties to the MFT*", and no actual evidence is given to show that these directors do not act independently.¹⁰
- 2.14 As the Provisional Findings acknowledge, each of these directors has been duly determined to be independent in accordance with the requirements of NASDAQ rules and Delaware state law, and there is no suggestion that they do not comply with their fiduciary duties. The implication, therefore, appears to be that these requirements are less effective than UK rules in ensuring that independent directors do indeed act as an independent constraint on management.
- 2.15 If so, this is incorrect. As the CMA is aware, 21CF has submitted expert evidence from leading authorities on corporate governance confirming the effectiveness of the rules applicable to 21CF's board, which concludes that "*When one takes into account the strict fiduciary standards imposed by Delaware law, the ready judicial enforceability of those standards, and the rules imposed by the Nasdaq Stock Market, it is clear that the independent directors on Fox's board of directors are subject to fiduciary standards that are as strict, if not stricter, than those applicable to Sky plc*" (emphasis added).¹¹ The Provisional Findings do not challenge this evidence, but simply ignore it.
- 2.16 In relation to the latter argument, that 21CF's independent directors are more likely to defer to the experience of members of the Murdoch family regarding the UK media market than those of Sky, no basis is given for this claim. The Provisional Findings state that the independent directors of Sky are familiar with the UK media market. Based on a review of the directors' biographies, it appears that this is on the footing that they are independent directors of Sky – i.e. an international broadcasting organisation with substantial UK media activities. However, this is also true of 21CF's independent directors: as the CMA is aware, 21CF is an established UK broadcaster in its own right, and 21CF's existing interest in Sky is a very material part of its business.
- 2.17 Moreover, Sky's independent directors themselves value the experience of the media sector that James Murdoch and the other 21CF-affiliated directors bring to the Sky Board. Sky's independent directors gave evidence to the CMA that the Sky Board unanimously nominated Mr Murdoch to be reappointed as Chairman of Sky due to his "*unrivalled level of experience and expertise in global media*"¹², and that the reason for the appointments of other 21CF-affiliated directors was their "*level of experience and expertise*".¹³ Given this, it is unclear how the CMA can assert that 21CF's independent directors are more likely to defer on grounds of experience than those of Sky.

The Provisional Findings do not conduct a realistic assessment of the control that would be exercised post-transaction

- 2.18 A further error in the Provisional Findings' analysis of control is their near-complete focus on the extent of the control *exercisable* by the MFT over Sky News; rather than giving meaningful consideration to the likelihood that control would in fact be *exercised*. This matters because, as

⁹ Jacques Nasser, Sir Roderick Eddington and Viet Dinh. The fourth director mentioned, Chase Carey, is not an independent director of 21CF. See paragraphs 7.19-7.21.

¹⁰ The Provisional Findings' reference to provisions of the UK Corporate Governance Code are no substitute for this, since, as the CMA acknowledges in a footnote, the 'comply or explain' nature of the Code recognises that a board may determine that a director is independent notwithstanding circumstances such as a connection with a shareholder or length of service. 21CF also notes that the basis on which it is implied that Jacques Nasser's appointment would engage the material business relationship or length of service provisions of the Code is unclear, since he ceased to be a director of Sky more than three years ago, and has served on 21CF's board for less than nine years.

¹¹ Professor Roberta Romano (Sterling Professor of Law at Yale Law School and Director of the Yale Law School Center for the Study of Corporate Law) and Professor Jonathan Macey (Sam Harris Professor of Corporate Law, Corporate Finance and Securities Law at Yale University, and Professor in the Yale School of Management), *Re: Fox / Sky Phase II Merger, Corporate Governance opinion on US Law regarding Director Independence*, 23 November 2017 (submitted to the CMA on 27 November 2017).

¹² Sky Independent Directors Hearing Summary, paragraph 13.

¹³ Sky Independent Directors Hearing Summary, paragraph 8.

21CF has previously submitted, there is ample evidence that neither 21CF nor the MFT has any intention of exercising control over editorial matters at Sky News – including the fact that no such control was exercised during periods when James and Rupert Murdoch held senior formal positions at Sky, as well as evidence from 21CF’s public statements and the passage of a board resolution (with the unanimous support of 21CF’s board) specifically designed to guarantee Sky News’ editorial independence.

- 2.19 The Provisional Findings claim that it is appropriate to focus on the extent of control exercisable for two reasons: first, that a media owner’s intentions may change in future (paragraph 6.31) and second, that any increase in control exercised in the future would not be subject to regulatory scrutiny and may be difficult to restore (paragraph 6.32). Accordingly, the Provisional Findings state that an adverse finding can be reached even if it is not possible “*to conclude, on the evidence available, that the control is likely to be exercised in a particular way*” (paragraph 6.34). In fact, the implication of the CMA’s approach is more sweeping: that an adverse finding can be reached even without evidence that control would be exercised *at all*.
- 2.20 21CF respectfully disagrees with the CMA’s position that this is consistent with the judgment of the Court of Appeal in *Sky/ITV* and with the standard that the CMA is required to apply in a Phase II review. The Court made clear that what is required is a detailed and realistic analysis of the likely effect of the Transaction, taking into account the actual extent of control that would be exercised, as well as the control exercisable. To this effect:¹⁴
- “*These considerations favour the submission made on behalf of the Competition Commission [...] that section 58(2C)(a) appears on its face to require a broad assessment of the real or likely effect of the RMS on the relevant market.*” (paragraph 91)
 - “[...] *it would be relevant and necessary to have regard to the practical reality as regards the extent of control exercised or exercisable over B, by each of A and C, in considering the plurality of media controllers.*” (paragraph 99)
 - “*The clear requirement for a detailed and realistic analysis which is inherent in the statute as a whole[...]*” (paragraph 120)
 - “[...] *the Commission may, and should, take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another [...]*” (paragraph 121)
- 2.21 21CF does not accept that an analysis that fails to address whether, on the balance of probabilities, influence would be exercised meets this requirement. This is particularly so in circumstances where, as noted above, there is more than sufficient evidence on which to form a judgment and, as discussed in more detail below, there are clear incentives against the exercise of control over editorial matters at Sky News.
- 2.22 In this respect, 21CF’s view is consistent with the general scheme of merger control in the UK. In considering theories of harm in a competition case, the CMA pays close attention to the likelihood that a particular strategy would be pursued, having regard not only to the ability of an enterprise to act in a particular way, but also its incentives to do so. This is so notwithstanding that unilateral conduct is not subject to regulatory scrutiny (absent a dominant position), and that changes to market structure resulting from such conduct may also be difficult to reverse.

¹⁴ Emphasis added.

The Provisional Findings dismiss clear evidence regarding incentives to maintain Sky News' independence

- 2.23 During the inquiry, the CMA has received clear and unambiguous evidence from Sky as to why it operates Sky News: that as an independent and impartial news source, it contributes brand value to the overall Sky business, which outweighs the fact that Sky News' costs exceed its direct revenues.¹⁵ This is to say that Sky News' commercial value is founded on its independence and impartiality. 21CF recognises this, as reflected in the passage of the board resolution guaranteeing that independence.
- 2.24 It is therefore surprising that the Provisional Findings suggest that 21CF may "*in many instances*" find it in its commercial interests to make decisions regarding Sky News that would give rise to plurality concerns (by impairing that independence and impartiality) (paragraph 8.8). The Provisional Findings provide little explanation of this claim, merely referring to the possibility of unspecified changes to "*make Sky News more commercially successful*", noting that "*Sky News is loss-making*" and asserting that its brand value "*may not persist over time*" (paragraphs 8.8 – 8.9).
- 2.25 This has no basis in the evidence provided to the CMA and is contradicted by the fact that Sky has preserved Sky News as an independent and impartial news service since its foundation. Sky is a commercial organisation, and were it not in its commercial interests for Sky News to operate in this way, changes would have been made. Similarly, it is unclear why the CMA believes that the brand value that has led Sky to operate Sky News in this way for more than two decades is now in question, with repercussions for the overall Sky brand.¹⁶
- 2.26 Further, as noted in CRA's submission (provided as Annex 1), the proposition that such changes would not be in 21CF's commercial interests is entirely consistent with economic analysis. From an economic perspective, the exercise of owner influence for political ends involves a distortion of coverage away from that which would be chosen by an independent profit maximiser. This will always tend to involve a cost, unless it were shown that the service was already not being operated in Sky's commercial interests (which the CMA has not). Moreover, the best available economic evidence indicates that consumers respond to politically-driven changes in editorial output by switching away in significant numbers, which not only undermines the influence of the relevant outlet, but also involves a cost (e.g. in terms of lost advertising revenues).¹⁷

The Provisional Findings err in their analysis of the constraint posed by the Board Resolution

- 2.27 The errors described above regarding commercial incentives to preserve the independence of Sky News in turn contaminate the CMA's analysis of the constraint posed by the board resolution regarding Sky News' editorial independence. The Provisional Findings argue that post-Transaction, changes that undermine plurality could serve 21CF's commercial interests and therefore be consistent with the fiduciary duties of 21CF's independent directors, including those sitting on the NCGC (paragraph 8.8).
- 2.28 As set out above, the evidence is in fact that such changes *would* run contrary to Sky's – and therefore 21CF's – commercial interests, and therefore *would* engage the fiduciary duties of 21CF's independent directors.

¹⁵ See paragraph 3.22 of Sky's initial submission to the CMA: "*Commercially, Sky derives brand value from operating a trusted, independent 24-hour news organisation. Sky News is an important part of Sky's offering. It contributes to Sky's reputation as a high quality broadcaster. Sky's customers value Sky News. They value it precisely because it is a trusted, independent, voice. Sky News makes a commercial contribution beyond that which is quantifiable from direct revenues alone. This explains why Sky continues to invest in Sky News when the costs of running a 24-hour news organisation are material and outweigh the direct revenues it generates.*"

¹⁶ The CMA refers to Sky's submission that the continued provision of Sky News should not be assumed. However, this does not call into question the point that, to the extent it is in Sky's commercial interests to continue operating Sky News, it is because of the brand value it delivers.

¹⁷ For further discussion of these points, and a response to the Provisional Findings' related discussion of audience expectations, see section 5 of Annex 1.

- 2.29 This is confirmed by the testimony of the chairman of the NCGC, Viet Dinh, to the CMA, that (as summarised by the CMA) “*the Board’s decision to adopt the resolution of 20 April 2017 was a “no-brainer” for the Board, because respecting the editorial independence of Sky News involved protecting one of the key assets that contributed to the Sky brand.*”¹⁸
- 2.30 This evidence is also inconsistent with the CMA’s suggestion that the board resolution cannot be relied upon to remain in place (paragraph 8.11). The CMA acknowledges that the revocation of the resolution would require the support of a majority of 21CF’s independent directors. Given the adoption of the resolution was so clearly in 21CF’s interests, it is unrealistic that such support would be forthcoming.
- 2.31 The CMA also asserts that members of the NCGC have no experience of the UK broadcasting sector, will have limited visibility over Sky News (because it will comprise “*a very small part of the overall Fox business*”), and would therefore look to members of the Murdoch family for guidance in discharging their responsibilities regarding the appointment of the Head of Sky News. There are several problems with this claim:
- (i) As noted above, 21CF’s independent directors are directors of a company with substantial UK broadcasting interests, including both 21CF’s own channels and its investment in Sky (which accounts for a substantial proportion of 21CF’s overall business).
 - (ii) The independent directors of the NCGC will have an obligation to maintain visibility over Sky News, both because of their specific role under the board resolution and because, as set out in Mr Dinh’s evidence, Sky News is a key asset contributing to the brand of Sky (which in turn would account for around 1/3 of the revenues of the entire 21CF group post-Transaction).
 - (iii) As noted above, the independent directors are subject to strict fiduciary duties requiring the exercise of independent judgment, not reliance on recommendations from members of the Murdoch family.

The Provisional Findings’ discussion of the Theories of Harm assumes a degree of control that is not supported by the CMA’s own analysis

- 2.32 The Provisional Findings assert that the Transaction will “*significantly increase*” the MFT’s control over Sky. However, this assertion is at odds with the CMA’s finding that the MFT’s level of control over Sky is already (pre-Transaction) and would remain (post-Transaction) at the level of material influence, the lowest level in statute.¹⁹ This gives rise to a legal error, which infects the Provisional Findings’ analysis of the theories of harm.
- 2.33 Moreover, the detail of the CMA’s conclusions regarding control does not appear to be reflected accurately in the discussion of the theories of harm that follows. On the CMA’s own analysis, the control exercisable by the MFT over Sky News would be subject to very substantial limitations:
- (i) the MFT could not attempt to exercise control over Sky News “*in an overt way*” (paragraph 8.42);
 - (ii) the avenue through which influence is exerted may be very indirect, for example the setting of budgets, the commercial direction of the business, or the mix of shows (paragraph 8.41);
 - (iii) any co-ordination would likely relate to “*select matters*” that would not be subject to “*intense scrutiny*” – suggesting those of lesser public importance (paragraph 8.41)

¹⁸ Viet Dinh Hearing Summary, paragraph 40.

¹⁹ Paragraph 7.97.

- (iv) through the Broadcasting Code, Sky News would continue to be required to present news with due accuracy and impartiality, and to maintain due impartiality and exclude views or opinions on matters of political or industrial controversy or matters relating to current public policy (paragraphs 8.27ff);
- (v) Sky News would remain subject to particularly stringent impartiality requirements on matters of major political or industrial controversy and major matters relating to current public policy – i.e. matters of the greatest public importance (paragraphs 8.27ff); and
- (vi) any changes would be in the nature of the differences between other respected broadcast news providers, such as Channel 4, the BBC and ITV (paragraph 8.23, where this appears to be the foundation on which the CMA dismisses the constraint posed by audience expectations).

- 2.34 In addition, the MFT’s control over editorial matters at News Corp would also remain subject to limitations, notably as a result of the 1981 undertakings relating to *The Times* and *The Sunday Times*.
- 2.35 However, the basis on which the CMA assesses its theories of harm is much starker: as noted above, it asserts that there would be “*significantly increased control*”, which would allow the MFT to cause Sky News to “*take a similar approach on specific topics or issues*” to the News Corp newspapers (the implication being that Sky News could be induced to cover an issue in the same way as *The Sun*), and to “*push certain stories, or downplay others*”; to such an extent that there is a “*material reduction*” in the diversity of viewpoints for UK consumers and “*materially greater influence*” over public opinion and the political agenda (paragraphs 10.2, 10.103 and 11.136).
- 2.36 This assumes a quite granular degree of control – extending to the coverage of particular stories - which appears inconsistent with the more detailed conclusions described above. It also fails to acknowledge the relatively unimportant nature of the stories on which such influence might – on the CMA’s case – be brought to bear.
- 2.37 All in all, the CMA’s discussion of the theories of harm creates the impression that it has done what at the outset of its inquiry it said it would not do: “*assuming that the MFT, Fox and News Corp are to be treated as a single entity*”, over which the “*MFT exercises full control*”²⁰, notwithstanding its assertion to the contrary.
- 2.38 This is particularly apparent from the CMA’s repeated references to the “*combined share of consumption*”, or “*combined share of references*” of Sky News and News Corp, in comparison to those of providers that are, as a matter of fact, owned by a single entity;²¹ and from the CMA’s explicit refusal to make adjustments to that figure to reflect the fact that Sky News and News Corp would remain separate entities over which the MFT has incomplete control.²² The CMA’s rationale for this refusal is striking:

Accordingly, because the statutory question focuses on the plurality of persons with control – and in light of the fact that we have also provisionally found that the MFT is able to exercise significant control over News Corp – we consider it is reasonable to take into account the full combined share of reference of Sky News and News Corp, without any weighting for the degree of ownership as proposed by Fox.

- 2.39 In the same sentence, the CMA acknowledges that the MFT would *not* have full control of News Corp News and Sky (only “*significant control*”), but in effect asserts that a central part of the

²⁰ Issues Statement, paragraph 20.

²¹ See for example, paragraph 10.98, “*Sky News and News Corp have a combined share of reference that is significantly larger than the fourth largest news provider, DMGT*”.

²² Paragraph 10.71.

substantive analysis of the Transaction should proceed without any recognition of this. This appears dangerously close to assessing the substance of the Transaction on the basis of a deemed, rather than actual, level of control – precisely the approach rejected by the Court of Appeal in *Sky/ITV*.

3. THE PROVISIONAL FINDINGS DO NOT SHOW THAT EITHER THEORY OF HARM IS MADE OUT

- 3.1 The Provisional Findings consider two theories of harm: (i) that the Transaction would lead to a reduction in the diversity of viewpoints that are available to and consumed by audiences in the UK; and (ii) that the Transaction would lead to the MFT having too much influence over public opinion and the political agenda. In reality, the two theories of harm are closely linked, since the ability of any outlet or its proprietor to exercise influence is substantially constrained if consumers have access to, and consume, a range of alternative viewpoints.
- 3.2 In assessing these theories of harm, the Provisional Findings rely heavily on a certain claims regarding the UK media landscape and the position of Sky News and News Corp within it, notably including the fact that the MFT would have interests in news outlets across all four platforms (TV, radio and online) and Sky News' status as a commercial 24-hour news channel. However, the weight placed on these matters is not justified or even explained coherently. In addition, the Provisional Findings downplay important factors that go directly to the plausibility of the theories of harm (notably, the roles of the BBC and consumer multi-sourcing). The Provisional Findings also distort quantitative evidence (including through inappropriate, incomplete and even mathematically incorrect adjustments to share of reference figures) and rely on weak and inconclusive qualitative evidence. These key errors of approach are discussed below.
- 3.3 Further comments on certain of these issues are set out in the additional submissions provided as Annex 1 and Annex 2. Section 4 of Annex 2 also reviews a number of additional errors in the detail of the Provisional Findings.

The Provisional Findings fail to justify their reliance on the MFT's presence across news platforms

- 3.4 The Provisional Findings place extensive weight on the claim that the MFT will have control over news providers across all four news platforms (TV, print newspapers, radio and online).²³
- 3.5 As the Provisional Findings briefly acknowledge,²⁴ this is not a merger-specific effect. The MFT already has material influence over providers present on these four platforms, and will continue to have material influence over the same providers post-Transaction. The only change is an alleged increase in control over Sky News within those bounds.
- 3.6 The Provisional Findings provide no adequate explanation as to why a presence across platforms should carry particular significance, in a way that is not already reflected in cross-platform metrics. So far as 21CF can discern, the CMA relies on one or more of the following propositions:
- (i) That a particular platform is especially influential – but this implies that a presence concentrated on the most influential platform or platforms should be of greater concern than a presence spread across all platforms. Moreover, the relevant issue is the influence of the specific new providers concerned, not that of the platform as a whole.
 - (ii) That a presence across platforms allows a media owner to reach a greater number of people – but this is already reflected in cross-platform measures of reach and consumption. In

²³ E.g. paragraphs 82, 83, 93, 95, 101, 10.14, 10.54, 11.131, 12.8, 12.10 and 12.18.

²⁴ E.g. paragraph 84.

placing weight both on the combined cross-platform reach of News Corp and Sky, *and* on presence across platforms in itself, the CMA engages in double-counting.

- (iii) That a presence across platforms increases a media owner’s influence by providing access to different demographics – however, the evidence that combining the News Corp titles with Sky News would result in a material increase in demographic coverage is weak. If the argument is that the Transaction would allow the MFT target a particularly influential demographic (in the higher social classes), this should be seen in the context of the particularly extensive multi-sourcing by this group (as discussed below, consumer multi-sourcing is an important constraint on the influence of any provider, to which the Provisional Findings attach insufficient weight).
- (iv) That control of news outlets across multiple platforms increases the likelihood that a story will set the agenda for other news providers – however, the Provisional Findings provide no evidence that a presence across platforms has particular significance for agenda-setting power (i.e. why news outlets across four platforms should have greater agenda-setting power than a news outlet or outlets of equivalent aggregate size across a smaller number of platforms). Moreover, the Provisional Findings accept that credible empirical evidence of agenda-setting effects is lacking.²⁵

3.7 In fact, the CMA has received evidence that a multi-platform media organisation may be *less* able to exert influence than one of equivalent size concentrated in a single platform, since differences in the nature of broadcast news and newspapers (as well as the regulatory requirement for broadcast news to be impartial) make it difficult to follow a unified approach across platforms.²⁶ The CMA dismisses this evidence on the basis that:

we do not think that these differences [between platforms] mean that the control of media enterprises across different platforms cannot confer increased influence. The very fact that news stories are likely to be told in different ways on TV compared with in newspapers or online means that they can be attractive to different audiences, and could be influential in different ways. (paragraph 11.91)

3.8 This does not answer the point being made, which is that control of media enterprises across platforms gives less influence than cross-platform metrics might suggest, not more (as the CMA claims). In addition, the CMA’s argument has the counterintuitive implication that internal plurality (“*news stories are likely to be told in different ways*”) contributes to plurality concerns rather than mitigates them.

The Provisional Findings attach insufficient weight to consumer multi-sourcing

3.9 As 21CF has previously submitted, evidence regarding consumer multi-sourcing is of the greatest relevance to the CMA’s theories of harm since: (i) it directly addresses whether the Transaction could lead to UK consumers being exposed to an unacceptably narrow range of viewpoints (Theory of Harm 1); and (ii) the scope for any news outlet, or its owner, to exert undue influence (Theory of Harm 2) is very substantially constrained if that outlet is consumed as one amongst a number of sources.

3.10 The Provisional Findings acknowledge a number of points regarding multi-sourcing:

- (i) that consumers of news from Sky News or News Corp multi-source more than the average news user (4.5 and 4.9 wholesale sources on average respectively, compared with 3.1 wholesale sources amongst news users generally) (paragraph 10.78);

²⁵ These points are developed in more detail in section 2 of Annex 1 and section 2 of Annex 2.

²⁶ E.g. the evidence from Sky quoted at paragraph 11.90.

- (ii) that the overlap between those who consume news from Sky News and those who consume news from News Corp is relatively limited (25% of Sky News users used News Corp sources; 28% of News Corp users also used Sky News) (paragraph 10.80) – put another way (using 2016 NCS data), just 4.8% of news consumers consume news from both News Corp and Sky;²⁷
- (iii) that consumers of news from *both* Sky News and News Corp multi-source yet more extensively (6.5 wholesale sources on average, compared with 3.8 amongst respondents using at least any two sources of news) (paragraph 10.82); and
- (iv) a minimal number of consumers use *only* News Corp and Sky News (four out of 11,000 respondents – less than 0.04%) (paragraph 10.81) (the 2016 news consumption survey found *no* such respondents²⁸).

3.11 In addition, as 21CF has previously submitted, consumers who obtain news from Sky News and/or News Corp tend to regard another source (generally the BBC) as their most important source.²⁹

3.12 These are important findings.

- (i) Regarding Theory of Harm 1, only consumers who obtain news from both Sky News and News Corp would see a direct loss in the range of viewpoints consumed in the event of alignment between the two. The data show that this group is small, and is characterised by particularly extensive multi-sourcing. Even treating Sky News and News Corp as single wholesale source, this group would continue to consume news from an average of 5.5 wholesale sources – more than the population at large. Indeed, the CMA recognises that “*we do not find particular concerns in relation to a specific user group of [sic] that obtains news from Fox and/or News Corp and Sky News*” (paragraph 10.82).
- (ii) Regarding Theory of Harm 2, the CMA accepts that multi-sourcing is a constraint on influence (“*In principle, multi-sourcing could act as a constraint on the ability of any particular provider to influence its readers.*”) The data show that multi-sourcing is prevalent amongst customers of News Corp and/or Sky News, and that their customers tend to place greater importance on other sources. This should carry substantial weight in the CMA’s assessment.

3.13 However, the CMA downplays these findings on the basis that “*roughly a third of Sky News and News Corp customers use between one and three sources of news. In other words, a significant minority of Sky News and News Corp’s customers remain relatively reliant on the content they produce*” (paragraph 10.90). This is not a reasonable response.

- (i) The bulk of this group consumes news from three independent wholesale sources – which is around the average amongst all news consumers.³⁰ The Provisional Findings do not explain why this is cause for concern.
- (ii) As noted above, the group at risk of consuming a narrower range of viewpoints is the event of alignment between Sky News and News Corp is the group that consumes news from *both*. The “*roughly a third*” figure relates to consumers of news from *either*. According to the 2016 news consumption survey, only 4.8% of news consumers use both News Corp and Sky, and of this group just 7% consume these and at most one other wholesale source of

²⁷ CRA submission dated 8 November 2017.

²⁸ CRA submission dated 8 November 2017.

²⁹ See page 22 onwards of the CRA submission dated 8 November 2017.

³⁰ According to the analysis presented in Figure 10.12 of the Provisional Findings, 90% of Fox/News Corp consumers consume at least 3 wholesale news sources as compared to 78% of Sky consumers and 53% of news consumers at large.

news.³¹ As noted above, the proportion of consumers who use *only* News Corp and Sky is *de minimis*.

(iii) Even where Sky News and News Corp are consumed as part of a relatively small portfolio of brands, they are rarely identified as consumers' most important source of news. Among consumers who consume Sky News alongside only one other wholesale source, just 24.3% identify Sky News as their most important source of news. Among people who consume Sky alongside two other wholesale sources, the equivalent figure is 27.7%. The equivalent figures for News Corp titles are lower still: 19.5% and 15.5%, respectively.³²

3.14 The result is that any residual concerns regarding consumers who multi-source less extensively must be limited to an extremely small sub-set of consumers. It is therefore unclear how the CMA can conclude that the Transaction would result in a material reduction in the range of viewpoints consumed, or a material increase in the MFT's influence.

The Provisional Findings reach perverse conclusions regarding the contribution of the BBC and ITN to plurality

The BBC

3.15 There is no doubt that the BBC is by far the most important player in the UK news media. On the CMA's own analysis, it reaches nearly four-fifths of news consumers and accounts for around 42% of news consumption. This dwarfs any other player individually: the next largest is ITN (with around half the reach (39%) and a quarter of the share of consumption (11%)), with Sky News well behind that (with just over one-quarter of the reach (21%) and one-seventh of the share of consumption (6%)).³³ Moreover, consumers tend to regard the BBC as their most important source of news – including BBC consumers who also use Sky News and/or News Corp news outlets.³⁴

3.16 For these reasons, there has hitherto been a clear regulatory consensus, developed over multiple rounds of consultation and reflected in Ofcom's measurement framework, that the BBC should be fully included in any assessment of media plurality.³⁵

3.17 Despite this, the Provisional Findings attach little significance to the BBC's contribution to plurality. This is on the basis that, as a result of its regulatory obligations and financing structure, it is limited in its ability to "*directly challenge*" the positions taken by other providers:

Although the BBC is undoubtedly influential and can drive the wider news agenda, we are also conscious that its unique funding structure and governance place special constraints on it to be impartial, in a way which goes beyond the requirements of the Broadcasting Code. We consider that this limits the extent to which the BBC can directly challenge the positions taken by other news providers or materially mitigate or moderate other news owners' influence. (paragraph 12.17)

3.18 The Provisional Findings do not substantiate the factual claim underlying this: that news providers other than the BBC commonly "*directly challenge*" each other, whereas the BBC does not (in fact,

³¹ CRA submission dated 8 November 2017, paragraph 75 and Figure 7. The CMA's related analysis uses NCS data from 2013 to 2016, but does not provide a breakdown for consumers of both Sky and News Corp.

³² These points are discussed in more detail in section 5 of Annex 1.

³³ Figures 10.5 and 10.6.

³⁴ See Figure 11.1 of the Provisional Findings, with 49% of all news users identifying the BBC as their "*single most personally important wholesale news provider*", and page 22 onwards of the CRA submission dated 8 November 2017, showing that individuals who use Sky News or News Corp news outlets most commonly identify the BBC their most important source of news.

³⁵ See for example Ofcom's report to the Secretary of State on measuring media plurality dated 6 June 2012 which concluded on the question of "*Whether or how should a framework include the BBC?*" that "*The BBC's significant scale and leading position in three of the four platforms mean that it must be fully included in any assessment for any review*" (paragraph 5.143).

the likelihood is that stories framed as a direct rebuttal to another news provider's story are rare across the board).

- 3.19 The fundamental point, though, is that the BBC contributes substantially to plurality regardless. The fact that the BBC provides a large majority of the population with impartial and accurate news is itself an important contribution to plurality. Moreover, this constrains the scope for any other provider to promote a particular position or agenda – given consumers' high regard for the BBC, contradictory information from other sources is likely to be viewed with suspicion.
- 3.20 By disregarding this, the CMA reaches a conclusion that runs contrary to the logic of UK broadcasting regulation. The CMA's conclusion implies that impartial news contributes *less*, rather than more, to the public interest objectives underlying media plurality rules. But Parliament's decision to enact legislation requiring that broadcast news – on the BBC and elsewhere – should be impartial must reflect a judgment that the public interest is best served by impartial broadcast news.
- 3.21 The CMA's approach also raises important issues of consistency. The Provisional Findings attach substantial weight to the impartiality requirements that apply to the BBC, but relatively little weight to those applying to Sky News, arguing that they still leave significant scope for the exercise of influence. However, the Provisional Findings make no case for this substantial difference in treatment. It is true that the BBC is subject to a distinct governance regime, but the Provisional Findings do not demonstrate how, or to what extent, this has a material impact on a day-to-day basis that goes beyond the requirements of the Broadcasting Code. Absent such evidence, the CMA's logic requires it to conclude that Sky News also has limited ability to “*directly challenge the positions taken by other news providers*”. In fact, the CMA argues the opposite.
- 3.22 Similarly, the CMA's conclusion is at variance with its assertions regarding public trust elsewhere in the Provisional Findings. The BBC's impartiality is reflected in the high level of public trust that it enjoys. If, as the CMA argues,³⁶ public trust enhances the influence of Sky News (as well as *The Times* and *The Sunday Times*), the same must also be true of the BBC.

ITN

- 3.23 As noted above, after the BBC, ITN is the next largest player in the UK news media, with reach and share of references exceeding that of Sky News and News Corp combined. However, as with the BBC, the Provisional Findings downplay the relevance of ITN on perverse and inconsistent grounds:

In relation to ITN, we note two important distinctions compared to other wholesale providers of news: First, ITN's customers retain some degree of editorial control, and second, in some instances ITN's customers produce their own news content [...] Given the above, it is reasonable to consider splitting out ITN at the wholesale level (paragraphs 10.57-10.58).

- 3.24 First, if it is appropriate to split ITN into several providers at wholesale level, this has the effect of making the cross-media landscape less concentrated, rather than more – in other words, it increases the plurality of persons with control of media enterprises. The implication that this nonetheless increases the concerns raised by the Transaction is puzzling.
- 3.25 Second, on the CMA's logic, the ‘combined share of references’ attributed to News Corp and Sky should be split out as well, since both News Corp and Sky News clearly “*retain some degree of editorial control*” and “*produce their own news content*”. Instead, as discussed above, the CMA refuses even to adjust that figure downwards to reflect the limited extent of control of the MFT.³⁷

³⁶ See further paragraphs 3.33ff below.

³⁷ For further discussion of the Provisional Findings' errors regarding the BBC and ITN, refer to section 3 of Annex 1 and section 4 of Annex 2.

The Provisional Findings rely without evidence on the significance of commercial 24-hour news channels

- 3.26 Another consideration given repeated emphasis in the CMA’s analysis of its theories of harm is Sky News’ status as a 24-hour news channel and, in particular, “*the only UK-focused commercial 24-hour news channel*”.³⁸ However, the Provisional Findings do not justify this emphasis.
- 3.27 The evidence for the claim amounts to two statements, from Andrew Neil, that “*you cannot really now be big in broadcast news unless you have a 24-hour news channel*” and from ITN “*that politicians especially value 24-hour news because there are more opportunities to appear on it*”.
- 3.28 21CF would respectfully suggest that Mr Neil’s comment should not carry undue weight; in particular given its striking implication that, were the BBC to close its 24-hour news channel, BBC News, the BBC would no longer be “*big in broadcast news*” (despite continuing to account for close to 70% of TV news viewing).³⁹
- 3.29 The quote from ITN is a selective one. It omits the following important context from earlier in the hearing, which makes clear ITN’s view that, in fact, the main broadcast news bulletins have far greater impact than 24-hour news:

*[...] do not underestimate the impact of bulletin. By far the most watched television news programmes in this country - by far - are the bulletins on BBC, ITV, Channel 4 and Channel 5. Arguably, far and away the greater impact in terms of awareness of what is going on than 24-hour news, either BBC or Sky News in that regard.*⁴⁰

- 3.30 As discussed below, this is consistent with the “*qualitative evidence on political influence*” set out in Appendix K to the Provisional Findings, which emphasises the importance of these bulletins and, to the extent it addresses 24-hours news, indicates that this is one of the least important forms of news provision.
- 3.31 The significance of the funding model of Sky News (i.e. the reference to it as a “*commercial*” 24-hour news channel) is entirely unexplained. This appears simply a contrived way to distinguish it from BBC News, which on its own accounts for a greater share of television news consumption than Sky News.⁴¹

The Provisional Findings’ evidence regarding influence is weak and inconclusive

- 3.32 Beyond the arguments relating to presence across platforms and the significance of 24-hours news discussed above, the Provisional Findings rely on various additional claims, which are purported to demonstrate the influence of the news outlets in which the MFT has an interest. As set out below, this evidence is weak and does not provide a sufficient evidential basis for an adverse finding. Moreover, to the extent it has any probative value, it suggests a picture in which many other outlets could also be considered influential.

Evidence regarding trust

- 3.33 At paragraphs 11.37 and following, the Provisional Findings review the level of trust placed in various news outlets. The CMA concludes that “*We find that Sky News, The Times and the Sunday Times have relatively high levels of trust. Sky News as a broadcaster is particularly highly trusted.*

³⁸ Paragraph 93. To similar effect, paragraphs 10.33, 10.93, 11.36, 11.93, 11.133 and 12.8.

³⁹ Ofcom, *News Consumption in the UK 2016*, Figure 2.1, showing that the proportion of television news viewing represented by BBC One was 67.2% in 2016, with further small shares accounted for by BBC Two and “Other BBC”.

⁴⁰ ITN hearing transcript, page 15, lines 15-19.

⁴¹ Ofcom, *News Consumption in the UK 2016*, Figure 2.1, showing that in 2016 BBC News accounted for 8.6% of television news viewing compared with 6.7% for Sky News.

This might therefore give these providers a greater level of influence beyond that indicated by their reach, and increase the impact of the Transaction on the MFT's ability to influence public opinion and the political agenda."

- 3.34 It is striking that this conclusion does not mention *The Sun*, which is significantly less trusted by consumers. The Provisional Findings do not directly justify this omission, but appear to suggest (at paragraph 11.42) that low trust scores do not matter significantly for influence. This is logically inconsistent with the CMA's conclusion that *high* trust scores for *Sky News*, *The Times* and the *Sunday Times* do matter. Either differences in trust scores matter or they do not.⁴²
- 3.35 The Provisional Findings' discussion of trust is therefore uninformative, as it does not address the net effect of trust across all relevant outlets. In fact, as CRA demonstrate in section 2 of Annex 1, correcting for this error, the effect of adjusting providers' shares of references to account for trust would likely be to *reduce* the share of references attributable to News Corp and Sky in aggregate.
- 3.36 In addition, as 21CF has previously submitted, trust in Sky News would not continue in the event that the MFT were to exercise influence over its editorial output. This is supported by economic evidence regarding demand-side response to changes in editorial positioning.⁴³

Use by 'opinion formers'

- 3.37 At paragraphs 11.53 and 11.54, the Provisional Findings examine which sources of news are commonly used by a panel of 'opinion formers'. At paragraph 11.58, the CMA concludes that "*consumption of traditional news sources, including those controlled by the MFT (in particular, The Times) is higher among opinion formers*".
- 3.38 This conclusion does not suggest that either Sky News or *The Times* are particularly influential compared with other news outlets. Indeed, the most striking data point is that more 'opinion formers' said that they commonly used the *Guardian* for political news than Sky News and *The Times* combined (54 compared with 52 combined - the *Sun* does not feature). Moreover, as the Provisional Findings acknowledge, this group multi-sources particularly extensively (paragraph 11.58, "*this group appears to consume more news from a wider variety of sources*").
- 3.39 As a factual matter, 21CF also notes that non-traditional news sources - Facebook, the *Huffington Post* and Twitter - appear prominently in the survey results.

Demographic reach

- 3.40 The Provisional Findings then argue that the Transaction would increase the MFT's influence by broadening its demographic reach, on the basis that "*the demographic profile of Sky News viewers (particularly online) is different from that of either The Sun or The Times*" (paragraph 11.60(b)).⁴⁴
- 3.41 As discussed above (paragraph 3.6(iii)) and in Annex 1, the evidence that the Transaction would broaden the MFT's demographic reach is in fact weak. However, the CMA's approach also raises concerns around consistency. Elsewhere, the CMA has argued that the Transaction may raise greater concerns if there was a large degree of overlap between consumers who use News Corp and consumers who use Sky News.⁴⁵ Yet here, the CMA argues that a lesser degree of overlap means that the Transaction is *more* likely to raise concerns.

⁴² At paragraph 11.42(a)-(d) the CMA puts forwards various arguments in support of its claim that lower trust scores do not matter. Beyond the overall logical inconsistency of the CMA's position, these arguments are individually flawed. For discussion of this, see section 4 of Annex 2.

⁴³ See paragraph 29 of Annex 1 and the sources cited therein.

⁴⁴ The related argument that the Transaction would provide the MFT with greater access to particularly influential demographic groups, such as higher social classes, is addressed at paragraph 3.6(iii) above.

⁴⁵ Paragraph 10.79; see also paragraph 43 of the Issues Statement.

- 3.42 As CRA note in Annex 1, *“the Provisional Findings’ approach strikes us as somewhat unscientific. If overlap, whether low or high, is interpreted as an amplifying factor in the plurality assessment then it ceases to be informative to the analysis.”*

Agenda-setting

- 3.43 At paragraphs 11.62 and following, the CMA considers claims that Sky News and/or News Corp have a particularly strong role in setting the news agenda for other providers.
- 3.44 21CF has responded to these claims in detail in previous submissions,⁴⁶ and notes that the Provisional Findings acknowledge many of the points made in those submissions (notably, that the underlying research is not able to control for newsworthiness of items and hence cannot distinguish between genuine agenda setting as opposed to instances where a title was the first to break a story of clear public interest that would have been broadly covered anyway).
- 3.45 Overall, the CMA reaches the conclusion that studies of agenda setting cannot be considered *“representative of the influence of particular news providers”*, and merely provide *“some indication that traditional news providers [...] together play a significant part in leading the news agenda. However, no single provider is particularly important in doing so”* (paragraphs 11.70-71, emphasis added). This says nothing about the specific impact of the Transaction.
- 3.46 The CMA’s overall provisional conclusion regarding Theory of Harm 2 misrepresents this analysis. Paragraph 11.128 states that *“Studies on leading the news agenda show that, even though the reach of print newspapers has been declining, the News Corp newspapers (along with other major national newspapers) still have a significant impact on the wider news agenda.”* This suggests that the News Corp newspapers have a particular significance, which the CMA’s own analysis does not support.

The Leveson Inquiry

- 3.47 At paragraphs 11.96 and following, the Provisional Findings refer to various conclusions reached by the Leveson Inquiry regarding the influence of the press. As 21CF has previously submitted, the CMA should not rely on these conclusions. The Leveson Inquiry concerned only the press, so its findings must be treated with caution in a cross-media context, where the countervailing influence of outlets in other media must also be taken into account.
- 3.48 In addition, the Leveson Inquiry published its report nearly six years ago, based on evidence relating to an earlier time period. Since then, there have been substantial changes in the media landscape – crucially, including the sharp decline in the print circulation of News Corp’s titles, both in absolute terms and relative to other newspaper groups.⁴⁷ The significance of that decline, even accounting for online consumption, is reflected in share of references figures – analysis by Ofcom showed that between 2010 and 2016, News Corp’s share of references halved on a broadly like-for-like basis.⁴⁸ Accordingly, there is clear evidence that whatever conclusions may have held at the time of the Leveson Inquiry would not hold now.

Meetings with ministers

- 3.49 At paragraphs 11.104 and following, the Provisional Findings place weight on the number of meetings between ministers and various media enterprises. 21CF maintains its position that, as

⁴⁶ In particular, CRA’s submission dated 8 November 2017.

⁴⁷ See in particular Annex 2 to 21CF’s initial submission on media plurality, showing that the print circulation of *The Sun* declined by 53% between 2010 and 2016, more than any other national or leading regional (pages 21-22), while the circulation of *The Times* dropped by 33%, more than the *Guardian*, *Telegraph* or *Mail*. This trend continues: in the most recent 15-month period for which NRS data is available (year to Q2 2016 vs. year to Q3 2017), combined readership of the News Corp titles fell by 17%, compared with 13% for national newspaper readership overall.

⁴⁸ See Figure 12 of the Quantitative Working Paper, which is not reproduced in the Provisional Findings.

previously submitted, this information carries no probative value in relation to the Transaction. It is simply too indirect a measure to be meaningful evidence of influence.⁴⁹

- 3.50 The main addition to the CMA’s analysis responds to 21CF’s point that, if the number of meetings is a good proxy for influence, that has the counterintuitive implication that the *Evening Standard/Independent* are substantially more influential than the *Guardian* and similarly influential to the *Daily Mail / Mail on Sunday*. The CMA argues that the low number of meetings for the *Guardian* “is likely to reflect the fact that the government in the analysis period is predominantly Conservative” (footnote 366). However, this is not a clear distinguishing factor between the *Guardian* and the *Independent*, since the latter also tends towards the left of the political spectrum. Moreover, on this reasoning, the fact that the *Evening Standard / Independent* had a similar number of meetings to the right-wing *Mail* becomes even more surprising.

Qualitative evidence regarding political influence

- 3.51 At paragraphs 11.104 and following, and in Appendix K, the Provisional Findings set out ‘qualitative evidence’ regarding political influence. This comprises views expressed by politicians and political advisers to the CMA during its inquiry.
- 3.52 As 21CF has previously submitted, the value of such evidence is doubtful.⁵⁰ The politicians cited cannot be regarded as neutral observers and represent a small, apparently self-selected sample (at least a majority of them having approached the CMA in order to oppose the Transaction). The political advisers cited also represent a small sample, and no explanation is given as to how they were selected, or in what way they would be a representative sample. If (as 21CF understands is the case) the CMA originally sought comment from a larger sample, there is a danger of “selection bias” in the identities or views of those who responded as compared to those who did not.
- 3.53 To the extent this evidence has any value, it does not support the CMA’s case. Nowhere is Sky News described as being particularly influential. In fact, one respondent gave evidence that “24 hour news” is the second-least influential form of news, ahead only of regional and local papers but behind even regional broadcast news.⁵¹ Another respondent told the CMA that “the reaction of broadcasters does not tend to be considered in the same way given the constraints they are under”.⁵² The comments that attach importance to TV news relate to the main terrestrial channels, and in particular the main nightly bulletins.⁵³ As such, whatever the ‘qualitative evidence’ indicates about the MFT’s existing influence through its interests in News Corp, it provides little basis on which to conclude that it would be materially enhanced by the Transaction.

⁴⁹ See paragraph 3.74 of 21CF’s response to the Annotated Issues Statement.

⁵⁰ Response to Annotated Issues Statement, paragraphs 3.71 – 37.2.

⁵¹ Appendix K, paragraph 3(b), evidence from Ms Sue Beeby.

⁵² Appendix K, paragraph 2(b).

⁵³ Appendix K, paragraph 3(b) (“terrestrial bulletins in particular as they picked up viewers watching other programmes”), 3(c) (“with the most attention paid to the BBC and ITV”), 3(d) (“particularly the 6.00pm and 10.00pm BBC and ITV bulletins”), 4(e), “Lord Falconer noted that ‘the thing that really absorbs politicians is how does the 6 o’clock and the 10 o’clock news on the BBC and ITV cover things’”.

The Provisional Findings distort quantitative data regarding the position of Sky News and News Corp

Selective and inappropriate adjustments to the share of references

- 3.54 The Provisional Findings propose a range of sensitivity adjustments to the share of references of News Corp and Sky News. On the basis of these adjustments, the CMA concludes that the combined share of references of News Corp and Sky “*should be higher than the 10% estimated by Ofcom, and is likely to be between 10 to 14% once all these adjustments are made*” (paragraph 10.68).
- 3.55 The CMA’s approach in this regard is seriously flawed. As discussed in detail in section 5.2 of Annex 1 and section 3 of Annex 2, the adjustments that the CMA makes are inappropriate, while at the same time, the CMA refuses to make adjustments for which the case is stronger. In particular:
- (i) The CMA’s proposed adjustments in relation to duration and intensity of use are vitiated by multiple, substantial errors – including a simple mathematical error that, on its own, leads the CMA to overstate the share of references of News Corp by an estimated 1.5 percentage points.
 - (ii) The CMA’s redistribution of consumption via intermediaries is conceptually and analytically incorrect. Conceptually, it assumes that consumption of a source via an intermediary is equivalent to direct consumption of the source. In fact, there are important differences, including the fact that the underlying outlet has no control of the ‘news agenda’ for consumption via an intermediary. Analytically, the CMA is incorrect to redistribute consumption via intermediaries pro-rata to the share of references of non-intermediaries since, as the CMA acknowledges, this will underweight online-only providers strong on social media (such as BuzzFeed), and, as the CMA does *not* acknowledge, this approach underweights traditional sources that are particularly strong on social media (such as the Guardian) and ignores entirely sources of news that are *only* available via social media.
 - (iii) The evidential basis for the CMA’s allocation to Sky at wholesale level of part of Global’s and Bauer’s supply of news is unclear. It does not seem to reflect the evidence from commercial radio’s trade body that more than 95% of radio news scripts provided by IRN are re-written by local editorial teams. In any case, if the CMA persists in making this adjustment it should, in order to be consistent, make similar adjustments to the share of reference of newspaper publishers (including News Corp) to reallocate some of their share of references to newswires, such as Bloomberg, Reuters and the Press Association. It has provided no explanation for not doing so.
 - (iv) At the same time, the CMA dismisses countervailing adjustments that are entirely reasonable. As 21CF has previously submitted, these include adjustments for the editorial independence of the *Times* and the *Sunday Times*, the MFT’s lack of complete control of Sky post-Transaction and the likelihood of demand-side responses by consumers were the editorial position of Sky News to be altered. As discussed in Annexes 1 and 2, the CMA’s rationale for rejecting these adjustments is wholly unsatisfactory. In addition, adjustments could reasonably be made to account for levels of trust (provided this is done consistently across all relevant titles – see paragraph 3.35 below) and to reflect more recent data showing the continued decline of newspaper readership.
- 3.56 21CF remains concerned that the CMA has taken such a selective approach, making adjustments that serve only to increase the Parties’ share of references, even where the case for these is weak. It is particularly concerning that the CMA refuses to make downwards adjustments that logically follow from upwards adjustments that the CMA considers reasonable.

Use of rankings

- 3.57 The Provisional Findings misuse statements regarding the ranking of News Corp and/or Sky within or across platforms, in a way that exaggerates their importance in the provision of news. For example:
- (i) While it is strictly accurate to say that “*Sky News has the third highest level of consumption on TV, behind the BBC and slightly less than ITV News*”, (paragraph 10.43), it overlooks the scale of the gap between the BBC and Sky News. The BBC has a share of almost 80% of TV news viewing – more than 10 times that of Sky.
 - (ii) Similarly, the Provisional Findings describe the Sky News’ website as “*the second largest news website in the UK in terms of time spent on news websites*” (paragraph 10.43) – This claim is wrong as a matter of fact – it is based on the CMA’s fundamentally flawed analysis of ‘channels’ within comScore.⁵⁴ But even setting this aside, the CMA’s approach again hides the scale of the gap with the largest online player, the BBC. The Provisional Findings illustrate Sky News’ position with a diagram that omits the BBC entirely (Figure 10.9), which is liable to make Sky News seem far more significant online than it is. Adding the BBC back into the diagram presents a very different picture (as Figure 4 of Annex 1 shows).
 - (iii) The Provisional Findings state that “*The Sun newspaper has the highest daily readership*” (paragraph 10.43). However, DMGT’s *Mail* and *Metro* titles make it the largest newspaper publisher in terms of readership (as well as share of references). In combination, the readership of the *Mail* and the *Metro* is 32% higher than that of the *Times* and the *Sun*.

Mischaracterisation of the increment resulting from the Transaction

- 3.58 At paragraph 10.50, the Provisional Findings state that “*We note that the combination of a share of reference of Sky News at over 6% and News Corp of over 3% is not an insignificant increment in terms of share of reference and media plurality. The MFT will be increasing its control over Sky News which has a share of reference of 6%, significantly larger than established news providers such as DMGT, GMG and Trinity Mirror*”.
- 3.59 This suggests that the CMA has assessed the Transaction on the basis that it results in an increment of 6 percentage points to the share of references of attributable to the MFT. However, as discussed in more detail in section 3 of Annex 2, this implies that what matters for the purposes of the plurality assessment is how much larger it makes the *MFT*, rather than how much larger the ‘combined entity’ is than the largest individual provider pre-Transaction – here, Sky News. This is a departure from the conventional understanding of how a transaction’s effects on concentration of ownership should be assessed.
- 3.60 Approaching the Transaction on the more appropriate basis that the increment is 3% (News Corp’s share of references) allows its effects to be put into proper context. The CMA at various points questions whether a significant alternative provider could emerge through organic growth (e.g. paragraph 10.61). However, Facebook recently gained a greater increment in its share of references in a single year, growing by 4 percentage points between 2014 and 2015. The Guardian gained roughly 1 percentage point in the same year. (21CF also notes that even allocating News Corp’s share of references to a ‘combined entity’ overstates the effects of the Transaction, given the CMA’s own theory of harm posits only a risk of selective alignment on selected stories.)

⁵⁴ See page 29 of Annex 2.

Inconsistencies of approach in the Provisional Findings

- 3.61 The inconsistencies discussed above in the Provisional Findings’ analysis of the CMA’s theories of harm raises an overarching concern – that the inconsistencies all operate in the same direction, to enhance the supposed threat of the Transaction to plurality.
- 3.62 High trust in *The Times*, the *Sunday Times* and Sky News is said to increase the concerns raised by the Transaction – yet when it comes to the low trust in the *Sun*, which more than offsets this, the CMA claims that this has little or no bearing on its influence. Similarly, in one part of the Provisional Findings, the CMA repeats the position taken in the Issues Statement, that a greater overlap between the customer bases of Sky News and News Corp would indicate greater plurality concerns. Then, having found that there is only limited overlap, this is also said to raise plurality concerns, on the basis that the Transaction would enhance the MFT’s demographic reach. Likewise in relation to impartiality requirements: the CMA asserts that these prevent the BBC from acting as an offsetting influence to the MFT; yet leave substantial scope for the MFT to exercise influence through Sky News. No comparative analysis is presented to support this distinction.⁵⁵
- 3.63 Trust either increases influence or it does not; breadth of demographic reach either matters or it does not; impartiality either limits influence or it does not. The CMA needs to take a position on each of these three questions. But regardless of the three choices the CMA makes, a substantial part of its case against the Transaction will fall away - because on each of these, the CMA has argued both sides, depending upon which news outlet it is discussing. Further, each time it has changed position, it has changed in such a way as to maximise the supposed threat of the Transaction. This is neither coherent nor fair.

4. THE PROVISIONAL FINDINGS’ DO NOT MEANINGFULLY ASSESS THE SUFFICIENCY OF PLURALITY

- 4.1 For the reasons set out above and in the accompanying annexes, 21CF considers that the Provisional Findings fail to substantiate either of the CMA’s two theories of harm. However, on any reading, the effects that the Provisional Findings purport to show are small.
- 4.2 Put simply, the case set out in the Provisional Findings is that the Transaction increases the potential for subtle changes in the coverage of less important and/or controversial issues by an outlet accounting for just 6% of news consumption, which is consumed as part of a wide range of sources by at least 70% of its users and which is rarely viewed as a particularly important source by them.
- 4.3 Despite the small size of the purported effects, the CMA concludes that they would be enough to make the UK media insufficiently plural, on a cross-media basis. The unstated implication of this is that plurality in the UK is currently on a knife-edge.⁵⁶ Despite this, the Provisional Findings barely address the overall sufficiency of plurality in the UK.
- 4.4 The Provisional Findings’ discussion of this question is brief, occupying around three out of more than 300 pages. Strikingly, it does not set out a coherent framework for assessing whether plurality is sufficient, notwithstanding the changes resulting from a transaction. Instead, it simply recites various claims regarding the position of Sky News and News Corp and asserts that “*in the round*”, plurality would be insufficient, on the basis that the MFT would hold “*too great a degree of control*”

⁵⁵ Other examples discussed above include the CMA’s decision to allocate a portion of commercial radio news consumption to Sky via IRN (increasing Sky’s share of references), but not to adjust News Corp’s share of references downwards to reflect its use of material from wire services; and its contention that ITN’s share of references should be disaggregated to because its customers have some influence over its news provision, while assessing the Transaction on the basis of the full combined share of references of News Corp and Sky News without any adjustment for the MFT’s limited control or the separate editorial functions at each.

⁵⁶ The alternative explanation is that the CMA believes the current level of media plurality is *already* insufficient. However, the CMA has not made this claim.

over the diversity of viewpoints consumed by audiences in the UK”, and “too much influence over public opinion and the political agenda” (paragraph 12.20).

- 4.5 Nowhere do the Provisional Findings explain (even in broad terms) the thresholds at which such control becomes “*too great*”, or such influence “*too much*”. At most, the Provisional Findings claim that the threshold is not a high one, and is lower than in a conventional competition assessment.⁵⁷ This provides no guidance as to whether a given transaction crosses that threshold, which is clearly unsatisfactory having regard to the need for merger control to operate in a predictable, evidence-based manner.
- 4.6 Moreover, each claim on which the Provisional Findings’ overall conclusion regarding sufficiency rests is in itself flawed.
- (i) The Provisional Findings highlight that the MFT would have control over media enterprises across all four platforms (paragraphs 12.8(c) and 12.10(c)). However, the Provisional Findings fail to show why this is significant (see paragraphs 3.4 to 3.8 above).
 - (ii) The Provisional Findings emphasise that “*Sky News is the only UK-focused commercial 24-hour news channel*” (paragraph 12.8(b)). But nowhere do the Provisional Findings set out a reasoned case why this should carry weight (see paragraphs 3.26 to 3.31 above).
 - (iii) The Provisional Findings note that Sky News is the “*third highest-consumed TV news provider, behind the BBC and ITV*” and “*The Sun has the largest readership of all daily national newspapers*” (paragraph 12(b)). Both claims are misleading, as discussed above. The former downplays the vast gap between the BBC and Sky News, while the latter conceals that the largest newspaper publisher in terms of readership and share of references is in fact DMGT (see paragraph 3.57 above).
 - (iv) The Provisional Findings state that “*traditional news providers, particularly newspapers and broadcasters, continue to play a key role in leading the news agenda*” (paragraph 12.10(b)). However, this says little about the role of News Corp and Sky – as noted above, the CMA acknowledges that the evidence for agenda-setting is weak, implying at most a role for “*traditional news providers*” in aggregate, with no individual source playing a disproportionate role (see paragraphs 3.43 to 3.46 above).
 - (v) The Provisional Findings claim that “*Sky News and The Times in particular are highly trusted and therefore likely to be more influential than raw audience numbers indicate*” (paragraphs 12.10). In fact, adopting a consistent approach that takes into account lower trust in the *Sun*, adjusting the share of references of News Corp and Sky to account for trust serves to *lower* rather than increase it (see paragraphs 3.33 to 3.36 above).
 - (vi) The Provisional Findings claim that members of the Murdoch family and News Corp executives have historically had greater access to ministers, and the scope for access and influence could be increased following the Transaction (paragraph 12.10(d)) – but this evidence is of little probative value (see paragraphs 3.49 to 3.50 above).
 - (vii) The Provisional Findings argue that the existence of statutory limits on cross-platform ownership suggest that “*combinations of TV and newspaper organisations should be placed under close scrutiny*” (paragraph 12.13). However, this reads into statute something which is simply not there. The ownership restriction – the 20/20 rule – relates to one specific type of transaction: one involving an owner of newspapers with an aggregate market share of 20% or more acquiring a Channel 3 licence or a 20% interest in a company which holds a

⁵⁷ Paragraphs 6.68-6.70.

Channel 3 licence. This is not such a transaction. Parliament could have legislated for broader restrictions, but it did not. In fact, the same Act that retained this restriction in relation to Channel 3 licensees (the Communications Act 2003) *removed* it in relation to Channel 5 – which at that time had a comparable volume of news viewing to Sky News today.⁵⁸

(viii) Finally, the CMA states that “*it is only established news providers with a substantial presence in TV and newspapers who might be in a position to mitigate or moderate the increased influence of the MFT*”. What is meant by this is unclear. The logic of the following paragraphs suggests that it means “*both TV and newspapers*”. If so, this is wholly unsubstantiated, and sets aside all other providers as a constraint – which cannot be correct. If it means “*TV or newspapers*”, there is no shortage of providers in both categories – including ones which are substantially larger than News Corp or Sky News.

4.7 Overall, despite their length, the Provisional Findings do not set out a case that addresses the relevant statutory question coherently and on an accurate presentation of the relevant evidence. The concept of ‘sufficiency’ is central to the media plurality public interest consideration, and makes clear that the effects of a transaction must be set within a realistic assessment of the overall market context. Instead of doing this, the Provisional Findings simply point to assorted features of the Transaction – above all, its cross-platform nature – and dismiss the many other players that contribute to the plurality of the UK news landscape on entirely superficial grounds. This approach deprives the concept of sufficiency of any independent limiting effect on intervention and, in practical terms, reads it out of the statute. Accordingly, the Provisional Findings do not provide a reasonable or legally sound basis on which to conclude that the Transaction may be expected to operate against the public interest.

5. THE CMA’S PROVISIONAL FINDINGS REGARDING BROADCASTING STANDARDS

5.1 21CF welcomes the CMA’s provisional finding that the Transaction may not be expected to operate against the public interest taking account of the need for persons carrying on media enterprises, and those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003 (the **Broadcast Standards Consideration**).⁵⁹

5.2 21CF’s response to the CMA’s Provisional Findings in relation to the Broadcast Standards Consideration is therefore limited to significant factual inaccuracies and mischaracterisations that it considers the CMA should correct in the final report that it provides to the Secretary of State under Article 8 of the Order.

The Provisional Findings err in concluding that Fox News’ compliance record is on par with RT and worse than CNN

5.3 The Provisional Findings conclude that Fox News’ compliance record is on a par with RT and worse than CNN. However, if the CMA conducted a correct and objective quantitative and qualitative analysis it would have to conclude that Fox News’ compliance record is better than each of RT and CNN, and indeed other established broadcasters, including public service broadcasters.

The methodology for counting breaches in the Provisional Findings is flawed

5.4 Without prejudice to 21CF’s position that a purely quantitative analysis is not meaningful, if the CMA is to maintain a quantitative analysis to compare Fox News to other broadcasters it needs to do so on a clear, consistent and logical basis.

⁵⁸ See further section 2 of Annex 2.

⁵⁹ As set out in section 58(2C)(c) of the Enterprise Act 2002.

- 5.5 As 21CF noted in its response to the CMA’s annotated issues statement there is no agreed methodology for ‘counting breaches’.⁶⁰ It is of concern that the framework or methodology that the CMA has used in the Provisional Findings is not clear. The CMA, for example, has not provided a full list of breaches of all those broadcasters it has assessed in its comparison analysis. It is also inconsistent with the approach generally taken by Ofcom.
- 5.6 Paragraph 14.59(b) of the Provisional Findings states:
- “while Ofcom will, in its content standards compliance decisions, consider a broadcaster has breached a rule (or rules) in connection with a particular programme (or programmes), for the purposes of compiling the compliance record of a broadcaster, it will count the outcome of each investigation into potential breaches of the relevant rules, as published in its Broadcast and On Demand Bulletin, as the applicable decision. This means that, regardless of whether an investigation covers single or multiple programmes, issues and/or rules, Ofcom records one decision, taken as a whole, at the end of its investigation. Accordingly, when considering the compliance history of a broadcaster, where Ofcom has published one decision about a breach or breaches by that broadcaster, it would count this as one breach.”*
- 5.7 21CF assumes that the CMA has relied on Ofcom’s stated approach for its analysis. However, an examination of Ofcom’s approach to these matters since its inception in 2003, demonstrates that, in practice this is not how Ofcom approaches these issues. Any plain reading of Ofcom’s published adjudications and sanction decisions will demonstrate that it views a breach of content to mean one individual and distinct piece of content (such as a programme or advertisement) found to be in contravention of its code. Any decision Ofcom publishes about an individual item (such as a programme) will have its (i) own introduction or background; (ii) the licensee’s response to the alleged infringement; and (iii) a decision by Ofcom explaining precisely why that item is in breach. This is the case irrespective of whether Ofcom’s published adjudication contains analysis and a decision(s) on one programme or many programmes.
- 5.8 Any examination of Ofcom’s published adjudications will see that one published adjudication may contain decisions against multiple programmes or items. It may be correct, depending on the circumstances, to say that multiple (and similar) rule breaches recorded against a single programme or item would count as a single breach⁶¹. However, individual and discrete items of content (transmitted at different times, frequently on **different dates** and covering **different subject matters**) although contained and published in a single adjudication (as part of the same investigation) must be counted as more than one breach (or ‘applicable decision’). For a number of reasons, Ofcom may group breached decisions against programmes in a single adjudication but it would be manifestly unfair and distortive to state that simply because these decisions were published together (or even because they contained the similar subject matter) that they only counted for one breach. Even where Ofcom has grouped decisions together it gives clear reasoning for each and every content item breach – evidently assessing each item as an individual case and an individual breach.
- 5.9 By way of examples:
- (i) Ofcom’s investigation into ‘Funded Factual Programmes’ (Broadcast Bulletin, Issue 285, published 17 August 2015) was the result of what Ofcom referred to as a “*far reaching project*”. Ofcom published all its findings in one bulletin covering CNN International, BBC

⁶⁰ 21CF response to CMA’s annotated issues statement, paragraph 4.12. In fact, the current investigation appears to be the first time that such a methodology has been employed. In addition, Ofcom, the sector regulator, (as far as 21CF is aware) has never conducted such an evaluation before (not least because it is evidently so subjective since not all breaches are equal).

⁶¹ This may be the case, for example, where a broadcaster has transmitted material unsuitable before the Watershed and Ofcom has recorded a breach of both Rule 1.4 and Rule 2.3 (of the April 2017 Ofcom Broadcasting Code) but the breaches relate directly to the same problematic material.

World News and CNBC. These were significant and important findings where Ofcom had found, over a matter of years, some broadcasters had taken funding from inappropriate sources and/or current affairs programmes had been sponsored in breach of the European Directive. As a result, a number of programmes were found in breach.

- (ii) In one published adjudication, Ofcom found four RT news bulletins in breach (Broadcast Bulletin 261, published 8 September 2014). Ofcom was clear that four breaches were recorded against four separate and distinct items of content. In its decision Ofcom stated, *“For all the reasons set out above, Ofcom concluded that the Licensee failed to preserve due impartiality as required by Section Five of the Code and the four news bulletins detailed in this finding therefore breached Rules 5.1, 5.11 and 5.12 of the Code.”* (emphasis added). These bulletins concerned distinct and separate content transmitted on different days in different programmes. These cannot be treated as one breach or applicable decision.
- (iii) The Investigation Discovery channel (licence held by Discovery Communications Europe Ltd) was found in breach of several programmes for the transmission of Deadly Women in August 2013 (Broadcast Bulletin Issue 246, published 20 January 2014). The material was too graphic for daytime broadcast and therefore found in breach of Rule 1.3, 1.11 and 2.3. While it is accepted that the three Broadcasting Code rules relate to the same issue since they concern unsuitable material broadcast before the watershed (see footnote [49]),⁶² the licensee transmitted different episodes (on different days) containing completely different storyline and images. A separate compliance decision would (or should) have been made for each episode. Each separate programme that was transmitted was in breach of the Code and therefore this should count as six breaches or applicable decisions. It is clear that Ofcom considered this to be more than one breach since it decided to impose a statutory sanction (a fine of £100,000) against Discovery. In its decision Ofcom refers to “breaches” of the Code, meaning breaches against a number of programmes. It also refers to these “on-going breaches” and added:

“Further, these breaches of the Code were repeated because the material was not contained in a single or isolated programme, but broadcast in a number of programmes shown on three separate days over a five day period. The breaches of the same three Rules of the Code (1.3, 1.11 and 2.3) occurred in each of these eight separate programmes.” (emphasis added)

Ofcom clearly did not consider this case to concern a single breach but breaches against a number of programmes over a period of time.

- (iv) Comedy Central (licence held by Paramount UK) broadcast a number of trailers for its programmes. These trailers all promoted different programmes and contained different content. Ofcom (Broadcast Bulletin Issue 294, published 7 December 2015) found five of these trailers in breach of its Code. As with the other examples cited above, Ofcom considered each piece of content individually and gave specific reasons in each case why it breached the Code. In this case, there were clearly five breaches recorded against Comedy Central. Broadcast Bulletin Issue 290 (published 12 October 2015) also contained a ‘joint’ decision where Ofcom had found 14 Comedy Central trailers in breach of the Code. In its Decision, Ofcom stated *“Ofcom prepared a Preliminary View in this case, which recorded 14 separate breaches of Rule 1.3 as regards pre-watershed trailers”* (emphasis added). Each case is given an introduction; the broadcaster’s response; and an individual decision. It is clear that Ofcom considered these items as separate and distinct pieces of content and there are no circumstances where such an approach by Ofcom could be viewed as anything other than 14 breaches. It is of note that in Broadcast Bulletin Issue 293 (published 23 November 2015), Ofcom published two breach decisions against Comedy Central for two trailers.

⁶²

Note that the relevant version of the Ofcom Broadcasting Code at the time was the version published in October 2008.

These decisions were contained in two separate adjudications. There appears to be no evident reason why in this case the published adjudications were separated and the decisions in Bulletin 294 were grouped together. Logic dictates that breaches recorded against individual and separate items of content should be viewed as one breach irrespective of whether or not the actual published adjudication examines the programmes separately or together.

- 5.10 It is counter-intuitive and plainly incorrect in any of the above examples to consider the separate breaches identified by Ofcom as a single breach together, as the CMA's methodology does.
- 5.11 Overall, it appears that there is no substantive reason why Ofcom may decide to publish cases together or separately. It is more than likely that the reasons are administrative rather than anything else, for example if the complaints came in the same time, so Ofcom requested representations from the broadcaster in the same letter and publishes all the cases investigated in one adjudication. Alternatively, it is the manner in which the case officer dealt with the content, or simply it makes sense from a presentation point of view to deal with the content in one detailed adjudication since the issues raise in the Code are similar. Where it concerns a wider and broader investigation (as with the examples above), Ofcom may publish a full adjudication covering a large amount of material. By counting these investigations as one breach, it seriously diminishes the importance of larger investigations and underplays the compliance failures of broadcasters who have breached the Code many times, over a long period, in many programmes. The result is that these broadcasters who have been subject to these larger investigations would have a better compliance record than others, even though they have had more individual programmes in breach.

A consistent, fair and logical method of counting breaches shows that RT and CNN have committed significantly more breaches than the Provisional Findings suggest.

- 5.12 Given the flaws in the Provisional Findings' methodology described above, 21CF submits that for an individual breach to be recorded (and used in any comparative study), one breach should be counted against any one item of individual content which has been found in breach and where Ofcom has requested specific representation and made a reasoned decision against that piece of content. This should be irrespective of whether or not it appears alongside a number of similar breaches or is part of a wider investigation.
- 5.13 Provided at **Annex 3** is a record of RT and CNN programmes that Ofcom found to be in breach between January 2013 and November 2017. This shows that, when properly counted (and even completely excluding COSTA breaches which in 21CF's view is wrong)⁶³ in the time period covered by the CMA's analysis, RT was found to have 16 programmes in breach of the Broadcast Code (rather than 10, under the CMA's analysis) and CNN was found to have 27 programmes in breach (rather than 3, under the CMA's analysis).
- 5.14 If the CMA is to persist in a quantitative comparison, it should adopt the proper methodology as described above (while taking account of the relevant qualitative considerations, as described below). This will show that RT and CNN had significantly more programmes found to be in breach in the period considered by the CMA than Fox News.

Any comparison between Fox News and other broadcasters should include a qualitative analysis, which will show that Fox News' record is better than RT, CNN and many established broadcasters

- 5.15 As 21CF has submitted previously to the CMA, any assessment of Fox News' broadcast compliance record needs to be qualitative rather than quantitative. This is consistent with the approach taken by

⁶³ While 21CF notes that Ofcom considers breaches of COSTA to be less serious than other breaches such as those of the Broadcasting Code, 21CF does not believe that the CMA should simply ignore breaches of COSTA, since these contraventions still go to the compliance history and record of a licensee.

Ofcom, the sector regulator, which considers some breaches to be more serious than others. As described in 21CF's response to the CMA's annotated issues statement, Ofcom will take into account a number of factors in assessing the seriousness of a breach, including: (i) the nature of the breach; (ii) the duration of the breach; (iii) the degree of harm that may have been caused; (iv) whether any financial gain has been made by the contravention; (v) whether the breach was deliberate or reckless; (vi) whether steps have been taken to remedy the contravention; and (vii) whether this breach was repeated. Where a breach is considered to be particularly serious in itself and/or where the licensee has deliberately, recklessly or repeatedly breached the codes, Ofcom will consider the imposition of a statutory sanction or the issuance of a warning.

- 5.16 In contrast to the record of RT and CNN International (as well as public services broadcasters and other international broadcasters, such as Viacom and Discovery), none of the breaches recorded against Fox News (or indeed any other 21CF channel) have been considered by Ofcom to be serious enough that 21CF has been required to attend a meeting with Ofcom or been threatened with a statutory sanction, let alone sanctions being imposed.⁶⁴
- 5.17 In the Provisional Findings the CMA attempts to compare Fox News' compliance record in the UK with that of other international news broadcasters on a quantitative basis, which ignores the subtleties of content regulation and results in a misleading characterisation of the relative strength of Fox News' record of compliance with Broadcast Standards. By simply adding up the number of breaches recorded against a broadcaster over, say, a five year period, the seriousness or otherwise of breaches is simply lost. For example, the CMA makes comparisons between Fox News and RT (formerly Russia Today), and concludes, "*Fox News' compliance record is on par with RT*" (paragraph 14.91). This is because the CMA believes (incorrectly – see below) that the same number of breaches has been recorded between January 2013 and November 2017. However, and more importantly, the CMA has completely ignored the fact that RT received a statutory sanction (a direction to broadcast a summary of Ofcom's finding) for a breaching i) Rule 5.5 ("due impartiality") and ii) Rule 2.2 (for broadcasting misleading material). The programme in breach claimed that the BBC has 'staged' or 'fabricated' a chemical weapons attack in Syria for its news. This breach, in itself, is more serious than any contravention found against Fox News and demonstrates the importance of actually applying a qualitative analysis as well as quantitative. The Provisional Findings make no reference to, or take account of, this sanction against RT when comparing it to Fox News and finding Fox News to be 'on par' with it.

The CMA's 'breaches per 100,000 viewers' metric is irrelevant and an inaccurate reflection of a broadcaster's compliance record

- 5.18 In an attempt to carry out a qualitative analysis of the breaches of Fox News and other international broadcasters, the CMA continues to use the irrelevant measure of breaches per 100,000 viewers. The CMA attempts to justify this by noting that "*the size of the audience is part of the context that Ofcom considers in its approach to monitoring and enforcing the Broadcasting Code*". This fundamentally misunderstands the context of the statement. Ofcom has always, and rightly, taken the view that the greater harm is likely to come from a larger audience. This is because more viewers are likely to suffer harm from the problematic material. Less harm will result from smaller audiences. For example, Ofcom frequently uses child-index figures (from BARB) in assessing what harm may come to e.g. children from inappropriate material transmitted before the 9pm watershed. The larger number of children in the audience the more serious or potentially harmful the breach may be considered. By contrast, comparing two channels that have the same number of breaches by the 'breaches per 100,000 viewers' metric would lead to the result that the channel which had the greater audience would seem less problematic than the channel where fewer viewers were likely to suffer harm from the breaches. This metric cannot be used as a meaningful measure of the seriousness of a broadcaster's breaches.

⁶⁴ As submitted in 21CF's response to the CMA's annotated issues statement.

The Provisional Findings rightly recognise the strengths of 21CF's compliance programme, but understate the scope of the compliance enhancements introduced in 2012

- 5.19 The Provisional Findings correctly note that wider corporate governance issues are not of central relevance to its assessment of the Broadcast Standards Consideration. Since 21CF is already involved in broadcasting in the UK, the issue of central relevance is “*its record of complying with the Broadcasting Code and other regulatory requirements*”.⁶⁵ The CMA rightly does not allow the issues that it provisionally raises with certain aspects of 21CF's compliance programme to “*displace [the CMA's] assessment of the evidence relating more directly to the commitment of Fox (and the MFT) to the attainment of broadcasting standards in the UK.... [which] supports [the CMA's] provisional conclusion that Fox has (and MFT controlled companies have) a genuine commitment to the attainment of the broadcasting objectives in the UK*”⁶⁶
- 5.20 Without prejudice to the lack of relevance of these issues to the CMA's assessment of the Broadcast Standard Consideration, 21CF considers that CMA has mischaracterised aspects of 21CF's compliance programme. In particular, while the CMA rightly calls out the significant, evolving enhancements to 21CF's compliance programme since 2012 and praises specific instances of timely handling of issues (including HR issues) under the programme, it does not give sufficient weight to the ways in which 21CF's compliance programme from 2012 covered issues other than corruption, including HR, legal and finance issues.
- 5.21 The CMA briefly acknowledges 21CF's submission that “*the enhancements to the compliance programme in 2012 and 2013 included measures to increase the visibility of division-level HR issues to Fox centrally, as well as including HR related compliance, training and reporting requirements*”. However, this is mentioned only in passing as something that 21CF ‘has submitted’ without giving proper weight to the evidence that the CMA has been provided with to support that statement. In addition the CMA criticises what it describes as “*limited requirements for [HR, legal and finance functions] to report upward*” in the enhanced compliance programme.
- 5.22 21CF disagrees with the CMA's characterisation of its compliance programme. In its final report, the CMA should accurately reflect the fact that the compliance enhancements introduced in 2012 did increase compliance, training and reporting requirements relating to HR, legal and finance issues at 21CF:
- (a) As the Provisional Findings note in passing and without drawing a link to its statements on reporting in relation to HR, finance or legal functions, as part of 21CF's enhanced compliance programme, “*the board directed that all allegations... that go to the integrity of the business be reported immediately to Group General Counsel or the CSC*”⁶⁷. This direction mandated business units to escalate such allegations whether they related to corruption, HR, financial controls or any other topic.
 - (b) The compliance policies introduced in 2013 (referred to in paragraph 16.38 of the Provisional Findings) significantly strengthened 21CF's legal and financial controls. See, for example, the policies on cash, gifts, entertainment, conflicts of interest, due diligence over vendors.⁶⁸
 - (c) The annual certification process introduced by 21CF in 2013 included certification of having read, understood and complied with 21CF's Standards of Business Conduct which at included workplace HR issues, as well as financial and other legal issues.⁶⁹

⁶⁵ Paragraph 13.21 of the Provisional Findings.

⁶⁶ Paragraph 16.85 of the Provisional Findings.

⁶⁷ Paragraph 16.39 of the Provisional Findings.

⁶⁸ Submitted as Annex 15 to 21CF's response to the CMA's first day letter request.

⁶⁹ As described in Annex 2.1 to 21CF's response to RFI-1.

- (d) Anonymous whistleblower complaints made through the Alert Line are received by all members of the CSC through an automated email and allow individuals at any level of the business to raise concerns on any topic to the CSC. This is briefly mentioned by the CMA in its outline of 21CF's compliance programme but is not mentioned elsewhere.

6. CONCLUSION

- 6.1 21CF welcomes the CMA's provisional conclusion that the Transaction may not be expected to operate against the public interest in terms of the Broadcast Standards Consideration.
- 6.2 As regards media plurality, 21CF considers that the Provisional Findings do not provide a reasonable basis on which to conclude that the Transaction may be expected to operate against the public interest. The analysis presented in the Provisional Findings is vitiated by a series of errors of law, analytical flaws and factual inaccuracies. Correcting these would lead to the conclusion that plurality will remain sufficient following the Transaction.
- 6.3 Without prejudice to this, 21CF has proposed remedies that would comprehensively address the concerns set out in the Provisional Findings, and looks forward to engaging with the CMA on this proposal.

Allen & Overy LLP
9 February 2018

Fox/Sky

A response to the CMA's provisional findings in respect of media plurality

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INTRODUCTION AND SUMMARY

1. We have been asked by Allen and Overy, counsel for 21st Century Fox (21CF) to provide an economic assessment of the CMA's Provisional Findings (**PFs**) in respect of Media Plurality issues in its investigation into the Fox/Sky transaction (**The Transaction**). This follows on from our two previous submissions to the CMA's inquiry dated 8 November 2017 and 1 December 2017.¹
2. Rather than consider every point raised by the PFs, the goal of this third submission is to assess the high-level methodological decisions made in the PFs and to focus in particular on arguments that were not present (or were given less prominence) in the CMA Working Papers responded to in our second submission. We also analyse in detail the more quantitative aspects of the PFs (in particular, the analysis of multi-sourcing patterns and the PFs' adjustments to the Ofcom Share of Reference (**SoR**) figures).
3. Overall, our assessment is that the PFs significantly overstate the potential for media plurality concerns around the Transaction and do not properly evidence their conclusion either that media plurality will be significantly reduced or that the resulting level of media plurality will fall below the sufficient level. The report proceeds in five sections from which the main conclusions are as follows:
4. **The PFs do not contain a proper analytical framework to assess sufficiency (Section 1).** As in the Working Papers, the PFs do not define any threshold at which plurality concerns would arise and do not properly explain why the key effects of the Transaction it identifies (which, overall, seem modest) are such as to result in an insufficient level of media plurality. Furthermore, the PFs do not consider the broader implications of their findings. If it is indeed the case that subtle changes in the coverage of an outlet accounting for 6% of cross-platform news consumption (Sky News) which is typically consumed alongside a wide range of alternative sources would threaten the overall sufficiency of media plurality in the UK, then the implication is that the UK is currently on a knife-edge.²
5. **The PFs do not evidence or justify the emphasis on the combined cross-platform presence of Sky News and News Corp (Section 2).** The PFs repeatedly point to the combined cross-platform presence of Sky News and News Corp and the fact that no other media organisation has a presence across all four platforms (TV, radio, online and print). However, this cross-platform presence would be a separate cause for concern only if there was reason to believe that a given level of media consumption confers greater influence if it is spread across platforms than if it is concentrated on a subset of platforms. The PFs put forward four mechanisms by which such an "amplification effect" might arise, but our assessment is that none is supported by the data.
6. For example, the PFs' concern that Sky News and The Times have relatively high levels of trust is incomplete because it fails to consider the low level of trust in The Sun and the

¹ See "Plurality Implications of the Fox/Sky Transaction" (our **first submission**) and "Assessment of the CMA's Working Papers on Media Plurality" (our **second submission**).

² An alternative explanation for the PFs' assessment would be that it views the *current* level of media plurality as already insufficient. However, this claim does not appear to be made in the PFs.

- comparatively high levels of trust in rival outlets (most notably rival broadcasters and broadsheet newspapers). We show that if one fully takes these effects into account by computing a “trust adjusted share of reference” the effect is to marginally *reduce* the combined SoR of Sky and News Corp.
7. Similarly, the PFs’ view that the Transaction is particularly concerning because Sky News reaches a broader demographic than News Corp’s titles and because The Times and Sky News both disproportionately reach high income individuals is based on inconsistent data. Comparing demographic information for Sky News and News Corp using a common source and looking at News Corp as a whole rather than on a title-by-title basis shows that the demographic breakdowns of their audiences are similar. Furthermore, and as is noted briefly in the PFs, multi-sourcing behaviour is particularly concentrated among the high-status groups identified in the PFs as being of particular concern and this is likely to significantly mitigate concerns on this dimension.
 8. We also note that the PFs place significant weight on the possibility that cross-platform presence will give greater ability to influence the news agenda. We explain that this effect is pure conjecture given that the PFs accept that the two empirical studies of this effect are seriously flawed leaving just a handful of anecdotes remaining in support of amplification effects through this channel.
 9. **The PFs’ assessment of the constraint generated by the BBC and ITN is counterintuitive. In particular, it makes little sense to argue that a greater commitment to impartiality on behalf of the BBC makes it a weaker constraint on broadcasters seeking to influence the news agenda (Section 3).** The PFs make repeated reference to Sky News’ *ranking* on various metrics (e.g. the third largest news broadcaster and the largest commercial rolling news channel) while downplaying the importance of ITN and, in particular, the BBC as higher ranked sources of news. We find the PFs’ rationale for doing so wholly unsatisfactory.
 10. In respect of the BBC, the PFs argue that its commitment to impartiality makes it a weaker constraint and prevent it from directly challenging rival news brands. Our primary objection to this argument is that it works in the opposite direction to that identified by the PFs: the presence of a highly-trusted organisation with a strong commitment to impartiality surely reduces concerns around the Transaction rather than increases them.
 11. Furthermore, we do not accept the PFs’ finding that the BBC cannot challenge rival news brands. First, we do not see why the BBC cannot act in this way and indeed we are aware of instances where the BBC has rebutted factual claims made in other news outlets. Second, even if the factual premise were correct, the existence of a large and highly-trusted news brand with a reputation for impartiality will act to discipline rival media outlets, as they will be aware that coverage which contradicts that of the BBC or fails to give prominence to stories reported there is likely to be interpreted by consumers as less reliable.
 12. The PFs argue that ITN’s combined share is overstated due to the degree of editorial independence exerted by ITV, Channel 4 and Channel 5. However, we note that, rather than weakening the position of ITN, this differentiation can be regarded as increasing media plurality. Moreover, the existence of such differentiation underlines the importance of demand-side factors in shaping coverage.
 13. **The PFs’ dismissal of demand-side constraints is unfounded and will tend to overstate concerns around the Transaction (Section 4).** The PFs dismiss both the role

- of audience expectations in constraining Sky News post-Transaction and the relevance of differences in editorial positions across News UK titles as evidence of demand-side factors. In Section 4 we reiterate that the economic literature shows demand-side constraints are likely to be significant and also identify instances in which the PFs' reasoning for rejecting these constraints rests on unreliable evidence or errors of logic.
14. **The PFs continue to downplay the evidence on multi-sourcing and overstate the influence Sky News and News Corp might have on consumers consuming three or fewer sources of news (Section 5.1).** We explained in our response to the Working Papers that data on multi-sourcing represents the most direct evidence on media plurality and expressed concerns that the CMA appeared to place greater emphasis on consumption-based metrics such as reach and SoR. Unfortunately, the PFs use a similar approach and significantly downplay the evidence that Sky News and News Corp are typically consumed as part of a broad portfolio of news brands.
 15. The PFs' argument that the role of multi-sourcing is limited by the fact that a material proportion of Sky and Fox consumers make use of "three or fewer" sources seems misplaced. First, we explain that these statistics are somewhat misleading as Fox/News Corp and Sky News consumers are significantly more likely to use three sources of news (the average level of multi-sourcing amongst news consumers as a whole) than they are just one or two sources. Second, we reiterate the finding in our first submission that, even among consumers who consume Sky News or News Corp titles alongside just one or two other sources, the vast majority identify another news brand (typically the BBC or ITN) as their most important wholesale source of news.
 16. **The PFs' computation of adjusted shares of reference systematically overstates the combined share of news consumption of Sky News and News Corp. In particular, the adjustment for the time spent consuming news on different platforms delivers results which are clearly implausible and, according to the PFs' own logic, either erroneous or irrelevant (Section 5.2).** The PFs make further changes to the adjusted SoR data presented in the Working Papers, restricting attention to three adjustments: an adjustment for intermediated consumption, a reallocation of a proportion of consumption of Bauer and Global to Sky and an adjustment for duration of consumption of media across different platforms. This results in the estimate of SoR rising from 10% to up to 14%.
 17. While we have concerns with all three adjustments, in our view the most egregious is the adjustment for duration. The PFs' adjustment has the effect of giving 32 times more weight to each reported instance of newspaper consumption than to each reported instance of online consumption. This results in the highly implausible proposition that newspapers account for 43% of news consumption with online news representing just 6% of consumption (compared with 9% and 37% respectively in Ofcom's original SoR). The PFs' explanation for this inconsistency is unconvincing and, even if true, would imply that duration weighting would result in SoR figures that were *less* informative than those originally produced by Ofcom.
 18. In respect of the reallocation of Bauer, Global and intermediated consumption, we explain that each adjustment is likely to be overstated, thus the true SoR is likely to be closer to 10% than 14%. We also reiterate our critique, made previously in respect of the CMA's Working Papers, that the PFs' adjustments focus only on adjustments that work to increase the combined SoR and ignore important constraining factors such as demand-side responses to changes in editorial positioning.

1. THE PROVISIONAL FINDINGS DO NOT CONTAIN A PROPER ANALYTICAL FRAMEWORK TO ASSESS SUFFICIENCY

19. In our second submission responding to the CMA's Working Papers we concluded that "the CMA's assessment of plurality is undermined by the absence of an analytical framework to determine what constitutes a sufficient level of plurality and guide the assessment of whether there may be a material increment in influence".³ Unfortunately, our assessment is that the same is true of the PFs.
20. The PFs acknowledge the need to determine whether plurality levels will remain at a sufficient level post-Transaction.⁴ However, little analysis is provided to determine the appropriate threshold except to say that it is not a high one⁵ and that it is lower than in a conventional competition assessment.⁶ Nonetheless, the PFs provisionally conclude that "the Transaction may be expected to result in insufficient plurality of persons with control of media enterprises serving audiences in the UK because it would lead to the MFT holding too great a degree of control over the diversity of viewpoints consumed by audiences in the UK and would give the MFT too much influence over public opinion and the political agenda."⁷
21. We find the lack of a quantitative framework to reach this conclusion and the lack of discussion as to what it implies troubling. If it is indeed the case that subtle changes in the coverage of an outlet accounting for 6% of news consumption⁸ and for which at least 70% of consumption takes place as part of a wide portfolio of news sources would take the level of media plurality below a sufficient level, then this implies that the current UK media landscape is on a knife edge.⁹ The PFs do not in our view present a framework or evidence to make such a finding.
22. With this high-level concern in mind we now turn to our specific concerns about the analysis put forward in the PFs.

3 Paragraph 2 of our second submission.

4 Paragraph 6.64 of the Provisional Findings. From here on in, paragraph references refer to the Provisional Findings unless otherwise stated.

5 Paragraph 6.68.

6 Paragraph 6.70.

7 Paragraph 103.

8 According to Ofcom's estimate of Sky's SoR: "News Consumption in the UK" (2016), Figure 8.2. A split between Sky News and News Corp's SoRs is not provided after adjustments are made to Ofcom's original SoRs in the PFs in Section 10.

9 The alternative explanation is that the PFs view the *current* level of media plurality as already being insufficient. However, the PFs do not appear to make such a claim.

2. THE PROVISIONAL FINDINGS DO NOT JUSTIFY THE FOCUS ON CROSS-PLATFORM PRESENCE

23. The PFs make repeated reference to the combined cross-platform presence of Sky and News Corp and the fact that there is no other news provider with a presence across print, television, radio and online.¹⁰ Indeed, this cross-platform presence is one of the three headline reasons given for concluding that the Transaction will result in insufficient plurality in the UK media market.¹¹
24. It is not at all clear to us why, in itself, presence across platforms should be raised as an additional and separate issue from a media outlets' overall share of cross-platform news consumption (e.g. as measured by SoR). Such a focus would only be justified if there was evidence that cross-platform presence had an amplifying effect such that a given level of SoR would confer more influence if it was spread across platforms than if it was concentrated on a subset of platforms. While the PFs hypothesise potential mechanisms for such an effect we do not believe any has been sufficiently evidenced.
25. The PFs point to four channels via which increased cross-platform reach as a result of influence over the output of Sky News might "amplify the MFT's influence":¹² (1) an intrinsic issue with being able to publish across different media; (2) the fact that Sky News has a higher level of trust; (3) the possibility that breadth of presence across platforms allows for targeting of different audience groups; and (4) the possibility that there are interactive effects across different platforms as a result of agenda setting effects.¹³ We consider each of these channels in turn and explain why we do not find the arguments put forward convincing.

An intrinsic ability to exert greater influence through different media platforms?

26. The PFs state that "cross-media ownership can enable a person with control of media enterprises to appeal to a wider set of people than would be possible through a single channel."¹⁴ While it is certainly true that presence on an additional platform offers the ability to reach new consumers, it is not clear to us why reaching a new customer via a different platform is any more or less concerning than reaching a new customer via a platform on which an outlet already has a presence. In other words, it is not clear to us why this effect constitutes an additional concern beyond that identified by examination of consumption metrics such as SoR.
27. While the PFs puts forward reasons why news sources might be able to exert more influence through some platforms than others (e.g. paragraphs 11.30-11.34 argue that newspapers and online sources of news may be more influential than TV news for a given unit of consumption because they are not constrained by the Broadcasting Code), this does not in itself justify the emphasis on cross-platform presence. A view that some

10 See, for example, Paragraphs 10.11, 10.14, 11.4 and 11.9.

11 See Paragraph 93: "the MFT will be the only person with control of media enterprises across all four platforms – broadcasting, newspapers, online and radio."

12 Paragraph 11.14.

13 Paragraph 11.15.

14 Paragraph 11.47.

platforms are more influential than others would imply that SoR might understate the influence of outlets that were more concentrated on the most influential platforms, but it would not imply any special significance to the fact that, between them, Fox Sky and News are present on all four platforms (print, radio, television, and online).

Trust?

28. The PFs argue that “more trusted news providers are more influential and the addition of a trusted news provider will increase the influence of the MFT.”¹⁵ It is then argued that more trusted sources may be more likely to be able to influence the news agenda and that this will enhance the combined influence of Sky News and News Corp.¹⁶ We consider that the analysis in the PFs is incomplete on two dimensions.
29. First, and as discussed further in Section 4, the PFs do not incorporate the fact that trust levels are likely to be impacted by any post-Transaction changes to editorial output and that any attempt to significantly alter Sky News’ coverage post-Transaction would likely result in demand-side response as consumers switched to alternative outlets. As set out in our previous submissions, the available evidence is that these demand-side effects can be significant.¹⁷
30. Second, the PFs’ discussion of trust is incomplete because, while it identifies Sky News, The Times and The Sunday Times as outlets with “relatively high levels of trust”,¹⁸ it does not consider whether, given the lower level of trust in The Sun and the levels of trust in rival news brands, the net effect of accounting for trust is to increase or reduce the influence that could be exercised by the MFT post-Transaction. Put another way, the PFs put forward no evidence to show that the combined level of consumption for Sky and News Corp (e.g. as measured by SoR) understates their level of influence because of a failure to incorporate information on consumer trust.
31. In order to look into this further we outline in Appendix B how one can use the trust information presented in the PFs to re-weight individual news outlets and compute a “trust-adjusted” SoR. We show that the net impact of accounting for trust is to *reduce* Sky and News Corp’s combined share of reference and that this result is robust to a number of sensitivities. Figure 1 below illustrates the impact of this adjustment under our baseline analysis: the primary impact is to raise the SoR of the BBC and ITN. Sky’s SoR stays broadly constant (reflecting Sky News’ relatively high levels of trust) while News Corp’s declines significantly (reflecting the extremely low levels of trust in The Sun).

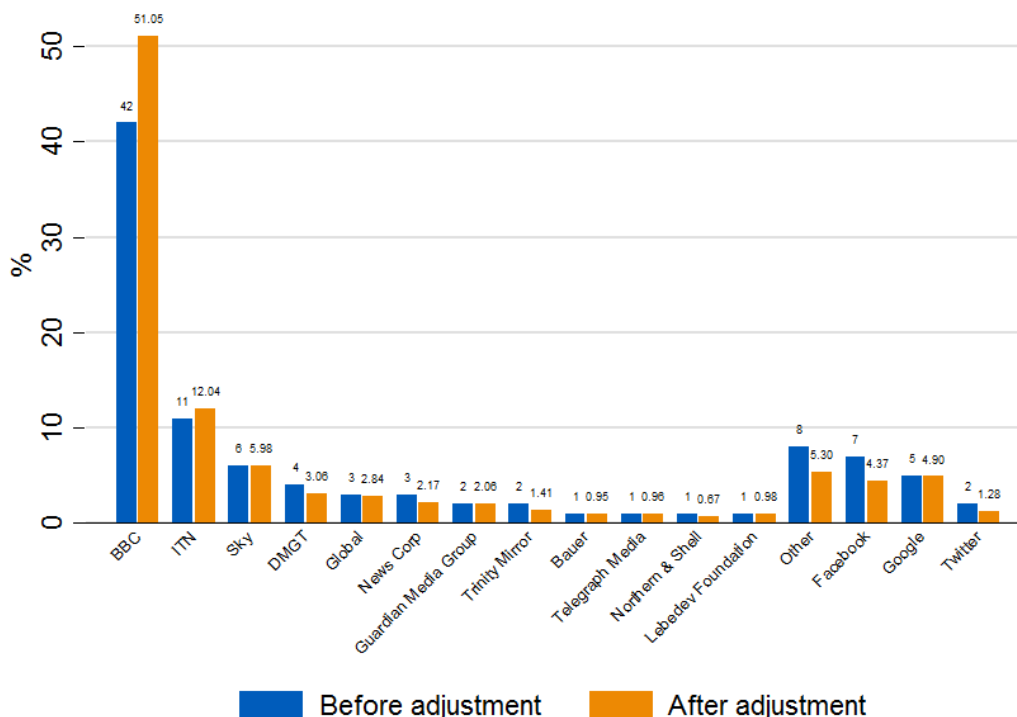
15 Paragraph 11.15(b).

16 See Paragraph 11.37: “[being more trusted] may mean both that it is more likely to be picked up by other news providers and so lead the news agenda and that it may have more influence on its audience”.

17 See, for example, Paragraph 26 of our first submission which refers to the academic work of Durante and Knight who find that consumers’ demand-side responses to changes in editorial output acted to significantly mitigate the effect of changes to TV coverage in Silvio Berlusconi’s Italy and Paragraphs 53-55 of our second submission which explain how these effects can be incorporated into an adjusted SoR calculation. Durante, R., and Knight, B. 2012. “Partisan Control Media Bias and Viewer Response: Evidence from Berlusconi’s Italy”. *Journal of the European Economic Association*, 10(3): 451-481.

18 Paragraph 11.44.

Figure 1: Wholesale share of reference before and after adjusting for reported trust levels



Source: CRA analysis based on Ofcom’s “News consumption in the UK” report (2016) and Ipsos MORI for the BBC (Figure 11.3 of provisional findings report).

32. Overall, we do not think that the data on consumer trust levels supports the PFs’ view that the “relatively high levels of trust” for Sky News, The Times and Sunday Times “might therefore give these providers a greater level of influence beyond that indicated by their reach”.¹⁹ Rather, we consider that, if anything, a failure to account for levels of trust means that consumption metrics such as reach and SoR will tend to *overstate* the potential influence at issue as a result of the Transaction.

Ability to reach different demographics?

33. The third factor considered by the PFs is that an increase in control over Sky News might amplify the MFT’s influence by “enabling the MFT to target different groups of customers who might have preferences for consuming news through different platforms”.²⁰ In particular, the PFs state that “cross-media ownership can enable a person with control of media enterprise to appeal to a wider set of people than would be possible through a single channel”.²¹ The PFs raise concerns on the basis that, in combination, News Corp and Sky have a “wider customer base” and a “broader demographic reach”.²²

19 Paragraph 11.44.

20 Paragraph 11.15(c).

21 Paragraph 11.47.

22 Paragraphs 11.48 and 11.50.

34. **The PFs interpretation of the fact that there is limited overlap between customers of News Corp and Sky News is counterintuitive and unscientific.** The PFs concur with our finding that there is only limited overlap between consumers of Sky News and the News Corp titles.²³ However, rather than seeing this as a mitigating factor in assessing the Transaction (as it implies that few consumers will experience a decline in the range of views and news sources they currently consume), the PFs instead conclude from this that “the Transaction would give the MFT greater influence across a wider customer base”.²⁴
35. As well as not being based on a clear model of consumer behaviour (which, as discussed in our previous submissions, would point to reduced overlap being a mitigating factor) the PFs’ approach strikes us as somewhat unscientific. If overlap, whether low or high, is interpreted as an amplifying factor in the plurality assessment then it ceases to be informative to the analysis. The CMA’s original issues paper appeared to concur that greater overlap in consumption would trigger a greater cause for concern than widening of customer base.²⁵
36. Indeed, we note that the PFs at paragraph 11.51 appear to contradict the emphasis on the complementary demographic coverage of Sky and News Corp by identifying the (small) subset of consumers for whom the two outlets overlap as a particular cause for concern. This paragraph states that “further analysis of the NCS showed that of the 14% of population that consume news from News Corp, 25% of the time they consume news is from News Corp and 5% is from Sky News” before concluding that “[the Transaction] would increase the share of times that news is consumed by MFT controlled outlets by five percentage points for a certain proportion of the population”. As well as being somewhat inconsistent in identifying both the existence and absence of audience overlaps as cause for concern, this paragraph in our view loses sight of the magnitude of the effect being contemplated considering, as it does, a five-percentage point increment impacting 30% of the 14% of consumers who consume News Corp titles.²⁶
37. **The evidence that Sky News will contribute an “additional demographic” is not robust.** The PFs argue that, for a given level of consumption, the Transaction might be more concerning if this concentration is focussed on consumers who have more influence on the political process (e.g. because they are more influential or more likely to vote). It also argues that it will be more concerning if it results in News Corp and Sky together having an audience profile that is more reflective of the population at large.²⁷

23 Section 3.4 of our first submission presented extensive analysis of the degree of overlap between Sky News and News Corp consumers. The CMA’s conclusion at Paragraph 11.48 is that “there is relatively limited overlap between consumers of Sky News and readers of the News Corp titles”.

24 Paragraph 11.48.

25 Paragraph 43 of the CMA’s issues statement dated 10 October 2017 states that “we might also be more concerned about a loss of diversity where the audiences of Sky News and the news and current affairs offerings owned by News Corp overlap to a significant extent (for example, if a significant number of The Sun readers watch Sky News) and do not consume news from many other sources.”

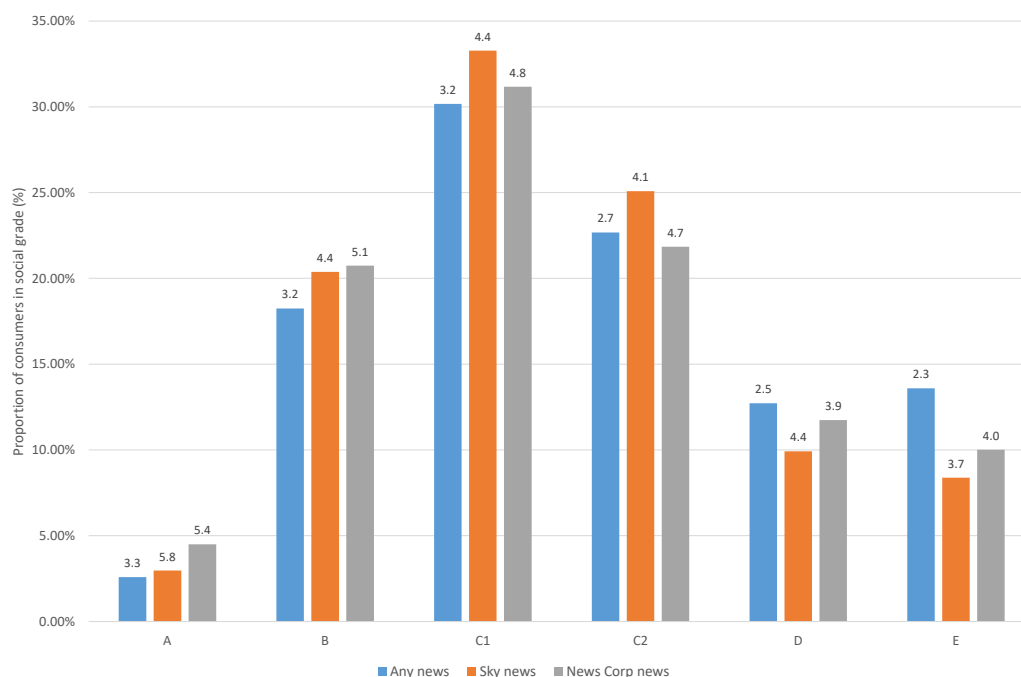
26 We discuss the extent of the overlap between Sky News and News Corp in more detail in Section 3.4 of our first submission before explaining in Section 3.5 the further mitigating factor that, in those instances where Sky and News Corp overlap, they are rarely identified as consumers’ most important news source.

27 See, for example, Paragraph 11.58-9.

38. The primary conclusions of the PFs' analysis on these dimensions are that: (1) a disproportionately high share of opinion formers and those from higher social classes read The Times and Sunday Times, with this group also being somewhat overrepresented among viewers of Sky News; and (2) a more balanced audience of social classes consumes Sky News than does News Corp.²⁸ It also identifies that consumers of Sky News tend to be somewhat older than readers of News Corp newspapers. When coming to these conclusions it uses demographic information for Sky News based on BARB data and information for News Corp titles based on the NCS.
39. We have two main concerns with this analysis. First, and as we show below, the finding that News Corp and Sky News have significantly different demographic coverage is not robust to using a common data source (the NCS) for both outlets and considering News Corp's overall demographic coverage rather than conducting the analysis on a title-by-title basis. Second, concerns around "new demographics" or particular strength in accessing influential consumer categories will have merit only if the composition of these consumers' news consumption is such that the Transaction can be expected to grant a significant ability to influence these consumers. Thus, assessing the demographic information alongside information on consumption patterns is key.
40. We have used the 2016 NCS data to compare the demographic profile and consumption patterns of Sky and News Corp consumers on a comparable basis. Figure 2 below presents, based on the NCS data, the proportion of consumers in each of six socioeconomic categories from A (the highest) to E (the lowest) for news consumers in general, Sky consumers and News Corp consumers. Each bar is then labelled with the average number of wholesale news sources consumed by NCS respondents in each category:

28 Paragraph 11.56.

Figure 2: Multi-sourcing and proportion of customers in each social class



Source: CRA analysis based on NCS 2016 survey data (Ofcom's weights have been applied).

41. **Once one uses a common data source and considers the News Corp titles collectively, the evidence for the Transaction resulting in a material increase in demographic coverage according to social class is weak.** Comparing the breakdown of Sky and News Corp consumers across socioeconomic class using a common data source (the NCS) shows that the demographic breakdown of consumers across News Corp and Sky News is relatively similar. While News Corp has a somewhat higher proportion of consumers in the highest socio-economic class than Sky News, the difference is quite small. As well as the use of a common data source, the key driver for this change relative to the PFs' analysis is that the PFs considered the individual News Corp titles separately and thereby masked the fact that The Times' greater coverage of higher socio-economic groups is largely offset by the Sun's greater coverage of lower socio-economic groups.
42. **The NCS data confirms that consumers in the highest social class are particularly likely to multi-source and this will significantly mitigate any concerns about the MFT being able to target the most influential demographics.** The data in the Figure above shows that, regardless of whether one looks at Sky News consumers, News Corp consumers or consumers at large, the average number of wholesale sources consumed is highest for the higher socio-economic categories (e.g. for News Corp consumers it is equal to 5.1-5.4 for the top two categories and 3.9-4.0 for the bottom two categories). This would suggest that the fact that Sky News and News Corp have somewhat higher coverage of higher socio-economic groups is a cause for *less* concern around the Transaction rather than more. The PFs briefly allude to this possibility, stating "consumption of traditional news sources...is higher among opinion formers, although this

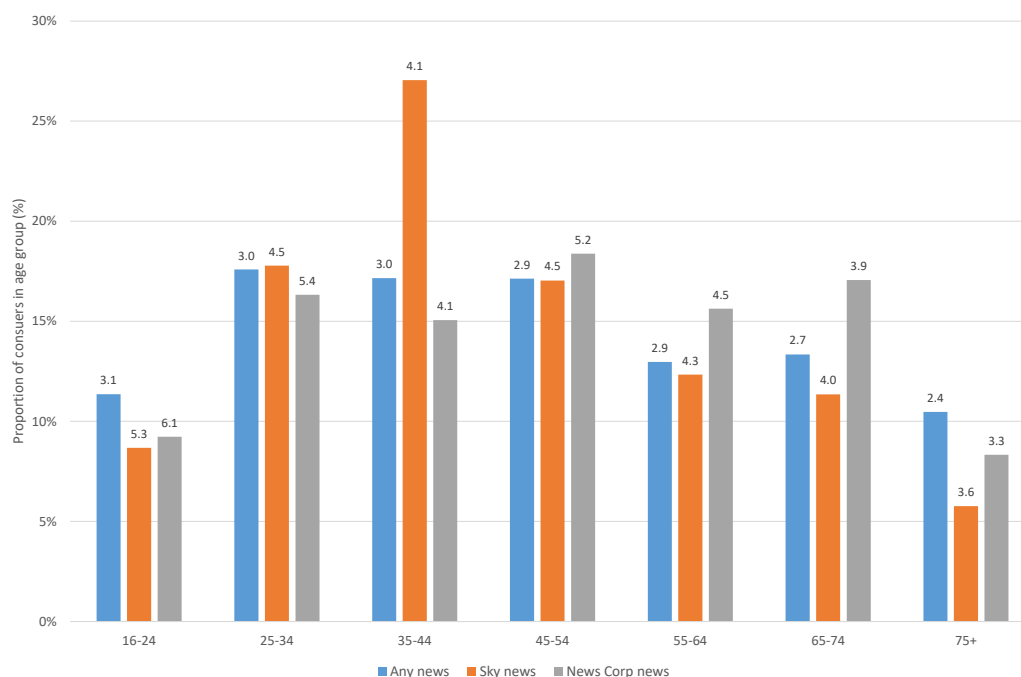
group appears to consume more news from a wider variety of sources²⁹ (emphasis added), but this finding appears to be lost in the PFs' ultimate conclusion that this demographic breakdown of consumption represents an additional cause for concern.³⁰

43. **The fact that other titles have more limited demographic reach is not a cause for concern provided consumers in general have access to a range of views.** At paragraph 11.59 the PFs argue that individual titles such as the Guardian and Telegraph “each appeal to the same respective groups, compared to the diverse groups to which The Times, The Sun and Sky News each appeal”. Unfortunately, the PFs do not properly explain why this is in itself a cause for concern. As long as consumers in each demographic category can and do consume alternative news sources we do not see how the fact that these alternatives are more focussed in their demographic coverage reduces the constraint they place on the coverage and influence of Sky and News Corp. Put another way, we think that the fact that the Mirror and Guardian are independent titles with different consumer demographics rather than a single title is something that contributes to more plurality rather than less.
44. Figure 3 below presents an equivalent analysis splitting the NCS respondents into different age brackets. While there are some differences in demographic coverage (Sky consumers are generally younger with a particularly large share in the 25-44 year old age bracket) we do not see any ex-ante reason for this to represent an additional cause for concern in respect of the Transaction or a reason why the combined SoR of Sky News and News Corp will understate their combined influence (the only condition under which demographic differences could have the “amplification” effect identified as a concern in the PFs).

29 Paragraph 11.58.

30 At Paragraph 11.60 the PFs conclude the discussion of audience characteristics by stating that “the MFT already reaches a particularly influential audience through its broadsheet titles, and Sky News will add to this audience set”. No reference is made to the offsetting impact of higher levels of multi-sourcing in this segment.

Figure 3: Multi-sourcing and proportion of customers in each age group



Source: CRA analysis based on NCS 2016 survey data (Ofcom's weights have been applied).

45. Overall, our assessment is that a like-for-like comparison of demographic coverage that considers differences in consumption patterns across demographic categories rejects demography as an “amplifying factor” in the assessment of the Transaction.

Cross-platform agenda setting?

46. The final amplification effect considered by the PFs is the potential for cross-platform agenda setting where the potential concern put forward by the PFs is that “running the same story or promoting the same issue across different media platforms can extend the reach of the particular person with control of media enterprises. This may suggest that cross-media ownership has a much wider impact”.³¹
47. It is important to recognise that the mere existence of agenda-setting effects is in itself insufficient to generate an amplification effect of the sort necessary to conclude that cross-platform presence is a cause for concern that is not adequately reflected in measures such of SoR. Rather, it would be necessary to show either that Sky News or individual News Corp titles were *disproportionately* able to influence the news agenda or that presenting a story across multiple platforms simultaneously makes it more likely to be picked up elsewhere. No such evidence has been provided.
48. Indeed, the PFs largely accept that the existing studies on cross-platform agenda setting (a study by Cushion et. al. and a submission by the Media Reform Coalition) provide little if any information as to the scale of these effects. In particular, the PFs echo many of the concerns raised about these studies in Section 5 of our first submission, concluding that “neither study was carried out over a long enough period of time for us to consider the

31 Paragraph 11.9.

results to be representative of the influence of particular news providers³² and, crucially, concurring with our assessment that “the research is not able to control for newsworthiness of items” and hence cannot distinguish between genuine agenda setting as opposed to instances where a title was the first to break a story of clear public interest that would have been broadly covered anyway.

49. In the absence of a credible body of empirical analysis the PFs’ provisional conclusion that “the News Corp newspapers (along with other major national newspapers) still have a significant impact on the wider news agenda³³ is largely based on anecdotes and, in our view, not robust.
50. Overall, we do not think that any of the PFs’ four arguments provide a valid basis on which to conclude that there is an amplification effect such that the combined consumption levels for Sky News and News Corp would understate their potential combined influence. Consequently, we do not think that the PFs adequately support the repeated emphasis given to the fact that no other media organisation has presence across television, radio, print and online.

3. THE PROVISIONAL FINDINGS’ TREATMENT OF THE BBC AND ITN IS COUNTERINTUITIVE AND MISLEADING

51. The PFs significantly downplay the role of the BBC and ITN (the two largest news outlets by SoR in the UK).³⁴ This leads to a number of surprising statements throughout the text about the *ranking* of Sky News in consumption statistics with limited attention to its size relative to these other providers (in particular the BBC).
52. First, Sky News is repeatedly referred to as the “only commercial provider of a 24-hour news service³⁵ and the “third largest” TV news provider.³⁶ These statements, while true, understate the level of disparity within these segments with the BBC accounting for upwards of 70% of television news consumption (compared with 7% for Sky News).³⁷
53. Second, in several cases the BBC is omitted from the PFs’ data and analysis in a way which acts to overstate the relative importance of Sky News. For example, Figure 10.9 (replicated in the left panel in Figure 4 below) uses comScore data to identify Sky News as having “the largest share of consumption online behind the BBC News”. While the same paragraph acknowledges the BBC’s approximately 60% share of online news

32 Paragraph 11.70.

33 Paragraph 11.129.

34 See Paragraph 10.73 which states “In terms of other news providers that may mitigate or moderate the combined SoR controlled by the MFT, we note that there are two large providers of TV news (the BBC and ITN), both of which have particular characteristics that constrain them: the BBC as a result of its regulatory and funding model; and ITN as it provides not one significant voice, but three separate voices as demanded by the TV channels for which it provides news content.”

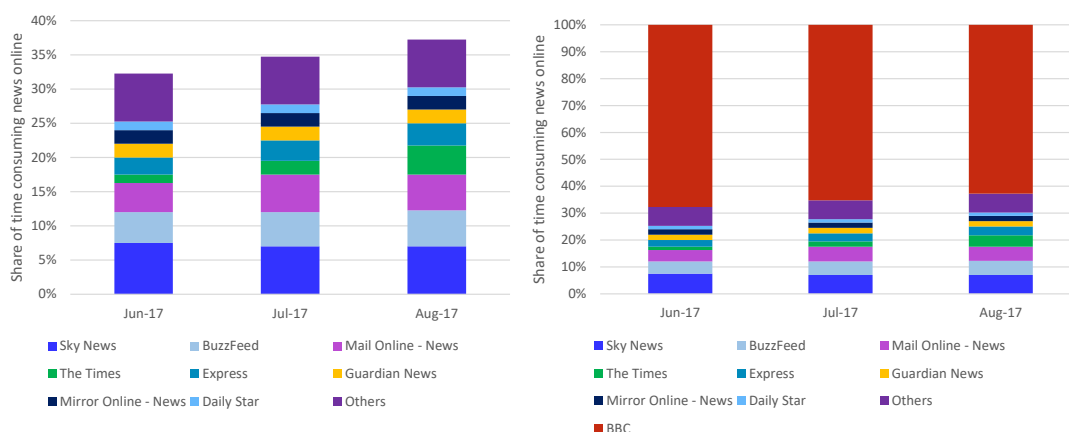
35 Paragraph 10.33.

36 See, for example, Paragraph 10.94.

37 Paragraph 10.32 and accompanying graphic.

consumption, reinserting the BBC into this figure (as we have done in the second panel below) displays a qualitatively different picture of the relative position of Sky News.

Figure 4: Share of time spent consuming news online: BBC excluded against BBC included (left-hand panel replicated from the PFs)



Source: CMA Provisional Findings, Figure 10.9.

Notes: Values were read off the graphic Figure 10.9 and the excluded share of the BBC calculated accordingly.

54. We now explain why the PFs justification for downplaying the role played by the BBC and ITN is misplaced.

The PFs' assessment that the BBC has a greater commitment and requirement to report impartially should act to reduce concerns, not increase them

55. The PFs argue that the BBC is a more limited constraint on other news providers than its share of consumption would suggest because "its funding structure and governance place special constraints on it to be impartial, in a way that goes beyond the requirements of the Broadcasting Code", which, the PFs consider, "limits the extent to which the BBC can directly challenge the positions taken by other news providers and mitigate or moderate the influence of other news providers and the controllers of those other news providers."³⁸
56. The PFs' reasoning appears to be that, because the BBC is committed to impartiality, it provides a weaker constraint on the influence of other news providers than it would without such a commitment. This strikes us as contradictory: if the BBC is committed to impartial reporting then, given that its coverage constitutes the bulk of news consumption, this is likely to inhibit the ability of other media owners to influence the political agenda. This is especially true given that the BBC is by far the source most frequently identified as consumers' most important source of news³⁹ and records higher levels of trust than any other news outlet.⁴⁰

³⁸ Paragraph 10.56.

³⁹ See Figure 11.1 which shows that 49% of respondents to the 2016 News Consumption Survey identified the BBC as their most important wholesale news provider. This is broadly comparable to the 53% identified in Figure 2 of our second submission (the differences arise because our analysis made use of demographic weights intended to make the NCS sample more representative of the underlying population).

⁴⁰ See Figure 11.3 which reports that the BBC had an average trust score of 7.2 (the highest of the sources shown) compared to 6.0 for The Times, 5.9 for Sky News and 3.2 for The Sun.

57. The only rationale put forward in the PFs is, as above, that the BBC may not be in a position to directly rebut positions put forward by other news outlets. We do not find this convincing.
58. First, this argument seems to be based on supposition rather than factual evidence. We are aware of instances in which the BBC has contradicted or clarified factual claims made by other news outlets and there does not seem to us to be any obvious reason why a commitment to impartiality would preclude such interventions.⁴¹
59. Second, even if the BBC were restricted from directly rebutting rival media outlets it is nonetheless likely to act as a significant constraint on their behaviour simply through its own provision of accurate and impartial coverage. The presence of a large news provider with an unmatched reputation for public trust will tend to act as a disciplining device on other outlets. If consumers have a high regard for the accuracy of the BBC's reporting they are likely to view with suspicion contradictory information published by other sources, undermining the reputation of those outlets. This will act to discipline coverage by other players who will want to safeguard their reputation with consumers.⁴² For example, given extensive discussion of the NHS winter crisis on the BBC, rival media outlets will be conscious that any attempt to downplay these concerns will be met with significant scepticism from consumers.

The PFs' dismissal of ITN is also unconvincing

60. The PFs' rationale for downplaying the constraint resulting from the presence of ITN (the second largest wholesale provider of news by SoR) is that its output is tailored to its customers (ITV, Channel 4 and Channel 5) and, in some instances, its customers produce their own news content. The PFs report, "there is a degree of editorial control held by the customers of ITN ... and a degree of differentiation in news services provided by these channels".⁴³
61. We again find this reasoning puzzling. First, the finding that ITN's coverage is differentiated across customer segments would seem to be a factor contributing to more media plurality rather than less. Second, the fact that ITN's customers apparently wish to differentiate their content would seem to underscore the importance of demand-side factors in shaping news coverage and hence limit the scope for owner influence (an issue we return to below).

41 See for example, BBC online articles clarifying the scale of the UK's EU budget contributions both during and after the referendum campaign: <http://www.bbc.co.uk/news/uk-england-40860657> and <http://www.bbc.co.uk/news/uk-politics-eu-referendum-36110822>

42 Such results would arise in the theoretical framework of Gentzkow and Shapiro (2006). In this model, consumers receive reports from media organisations and use them to update their belief both about the "state of the world" and the "quality" of the news organisation (i.e. their ability to correctly observe the true state of the world). In circumstances where two media organisations produced contradictory reports consumers would rationally place more weight on the organisation they deemed more likely to be high-quality ex ante. It then follows that the second media organisation would have an incentive to "mirror" the reporting of the more trusted media organisation to avoid alienating the consumer and have them believe them to be low quality. This would act as a constraint on the second media organisation's incentive to distort its reporting in a particular policy direction as doing so would make it more likely to be placed in contradiction to the more trusted outlet.

43 Paragraph 10.57(a).

4. THE PROVISIONAL FINDINGS' REJECTION OF DEMAND-SIDE CONSTRAINTS IS UNFOUNDED

62. The PFs take the provisional view that the MFT's influence over Sky News would not be constrained by demand-side effects or "audience expectations".⁴⁴ In addition, evidence of differences in News UK titles' editorial positions are dismissed as irrelevant to this assessment.⁴⁵
63. We find this provisional conclusion troubling from an economic perspective. As set out in our previous submissions, the economics literature suggests that these constraints are substantial, with the most rigorous available study showing that consumer switching may reduce the impact of changes in coverage by 20-50%.⁴⁶ Consumer preferences are unlikely to be affected by the Transaction and will continue to constrain editorial positioning. Hence it would seem essential to incorporate demand-side constraints into the assessment of the impact of the Transaction on the range of views and the sufficiency of plurality.
64. As well as this first-order issue we also notice a number of specific issues with the PFs' discussion of demand-side constraints.
- **The PFs' explanation that the similar levels of trust for Channel 4, ITV and the BBC despite differences in their editorial focus may be due to self-selection by consumers would suggest that demand-side constraints are important and therefore need to be accounted for.** The PFs postulate (as one possibility) that Channel 4 News' comparable trust levels to the BBC and ITV could reflect that "members of an audience of a particular broadcast news provider...are broadly sympathetic to the editorial positioning of their chosen channel".⁴⁷ However, this explanation suggests that a change in editorial positioning would be liable to induce consumers to switch to an alternative news provider that was closer to their preferences and would therefore prove costly to the broadcaster. This constraint would act to reduce concerns about the Transaction, not the increase them.

44 See Paragraph 8.25 "viewer expectations can change over time and that even if changes result in the loss of some viewers, it may result in gaining others" and Paragraph 8.26 "our provisional view is that audience expectations do not provide a significant safeguard".

45 See Paragraph 8.39 which states that "We do not dispute that there is editorial diversity within News UK's newspaper titles. However, the media plurality consideration is directly concerned with the plurality of persons with control of media enterprises. In that regard, we consider that the significant increase in the extent of the MFT's control over Sky and Sky News may give rise to a concern based on the potential for increased editorial alignment and the fact that the MFT could use its increased control to influence the editorial position of Sky News, and consequently potentially align its position with that of the newspapers owned by News Corp."

46 See Paragraph 55 of our second submission which discusses the source for the figures used in this adjustment.

47 Paragraph 8.24.

- **The PFs' suggestion that changes to Sky News' positioning could be costless or even profitable are not properly explained and are inconsistent with an economic definition of "supply-side bias" and the available empirical evidence.**

The demand-side constraint discussed in the previous paragraph is briefly discussed in the PFs but is dismissed on the basis that "even if changes result in the loss of some viewers, it may result in gaining others. This means that there may not be a significant commercial impact outweighing any gain in influence".⁴⁸ This same argument is also put forward as a reason why 21CF's board members' fiduciary duties might not prevent changes in coverage.⁴⁹

These arguments are inconsistent with economic analysis. The most natural economic definition of "owner influence" or "supply-side bias" is a willingness to distort editorial positioning (e.g. for political motives) away from that which would be chosen by a profit maximiser. Unless it could be shown that Sky is not already acting in its own best interests pre-Transaction, any change in the coverage of Sky News post-Transaction is likely to reduce Sky's profits.⁵⁰ Furthermore, the PFs' empirical prediction that consumer responses are such that any cost will be small, non-existent or even negative, is not supported by the available evidence: as documented in our previous submissions, academic work to date shows that consumers may respond to coverage changes by switching in significant numbers and in a way that weakens the ability of owners to exert influence.⁵¹

65. Overall, our view remains that demand-side constraints are an important mitigating factor for media plurality concerns and excluding them from the analysis is likely to significantly overstate the potential for concerns around the Transaction.

5. ISSUES WITH THE PROVISIONAL FINDINGS' QUANTITATIVE ANALYSIS

66. Section 3 of our second submission discussed in detail the various quantitative metrics analysed in the CMA's Working Papers. While some of our comments have been taken on board in the PFs, we remain concerned that they place too little weight on the most relevant available data – that on multi-sourcing by UK news consumers – and that the PFs' analysis of adjusted SoR relies on adjustments which are both selective and flawed in their implementation.

48 Paragraph 8.25.

49 See Paragraph 8.8 which states that "we consider that in many instances a decision that might give rise to a plurality concern would be in the commercial interest of Fox (and its shareholders) and therefore consistent with these fiduciary duties."

50 Note that profit maximisation takes account of the brand value that Sky News contributes to the overall Sky business, not just the stand-alone value of Sky News, thus Sky's operation of Sky News is profit-maximising even though the channel on its own incurs a loss.

51 See the Durante and Knight study cited in paragraphs 53-55 of our second submission.

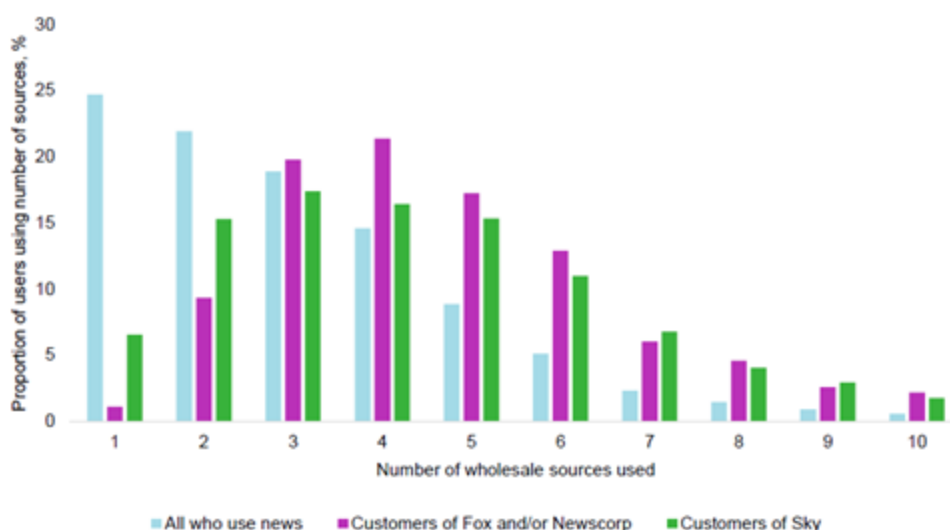
5.1. The PFs place too little weight on the extent of multi-sourcing and overstate the proportion of consumers who significantly rely on Sky News and News Corp for information

67. In our previous submissions we have presented extensive analysis of news consumption patterns and explained how: Sky News and News Corp titles are typically consumed as part of a broad range of news sources produced by a selection of wholesale providers; that there is limited overlap between Sky and News Corp consumers; and that consumers rarely identify Sky News or News Corp as their most important source of news. In our second submission we explained how the CMA appeared to concur with these findings but that its Working Papers failed to place sufficient weight on the evidence of multi-sourcing patterns despite this representing, in our view, the most relevant available data.
68. Unfortunately, our high-level critiques of the Working Papers apply also to the PFs. The PFs accept that “in principle multi-sourcing could act as a constraint on the ability of any particular provider to influence its readers”⁵² and acknowledges the high levels of multi-sourcing among Sky and News Corp consumers on average.⁵³ However, it still appears to place greater emphasis on measures of reach and consumption: multi-sourcing levels are not addressed as a factor in sufficiency or constraint on the MFT’s ability to exercise influence when coming to a provisional finding on sufficiency and of the media plurality consideration in Section 12.
69. The main new piece of analysis of multi-sourcing in the PFs is a greater emphasis on the sub-set of consumers who display relatively lower levels of multi-sourcing. In particular, paragraph 10.78 and the accompanying Figure 10.12 (replicated below) focusses attention on the “30% of Fox and/or News Corp customers” and “39% of Sky News” customers who use “three or fewer news sources”.

52 Paragraph 10.74

53 The PFs report at Paragraph 10.78 that the average Fox/News Corp consumer consumers 4.9 sources and the average Sky News consumer uses 4.5 sources.

Figure 5: Number of wholesale sources used by Fox and Sky consumers (replicated from Figure 10.12 of the CMA's provisional findings)



Source: CMA Provisional Findings, Figure 10.12

70. We have a number of concerns with this analysis:

- **The bulk of consumers in the category identified as problematic by the PFs consume news from three wholesale sources with few relying on just one or two sources.** The “three or fewer” definition and the resulting 30 and 39% figures cited by the PFs are, in our view, somewhat misleading. As can be seen in the Figure above, very few Fox/News Corp customers rely on just these sources with the bulk of consumers in the “three or fewer” category in fact consuming three independent sources.⁵⁴ While this picture is less stark for Sky, only around 5% of consumers rely on Sky News for all of their news consumption. To further put this figure in context, it should be reiterated that the CMA finds that three sources of wholesale news is about average for any news consumer.⁵⁵
- **The analysis in the PFs ignores the fact that, even when Sky News and News Corp are consumed as part of a relatively small portfolio of news brands, they are rarely identified as consumers’ most important source of news.** Even if a title is consumed as part of a relatively small bundle of news sources it may be limited in its influence by the fact that consumers primarily rely on another news source for information. As set out in our first submission, even among those consumers who consume Sky News or News Corp as part of a relatively small range of sources, Sky News and News Corp titles are rarely identified as consumers’ most important source of news:⁵⁶

⁵⁴ According to the analysis presented in Figure 10.12 of the PFs 90% of Fox/News Corp consumers consume at least 3 wholesale news sources as compared to 78% of Sky consumers and 53% of news consumers at large.

⁵⁵ Paragraph 10.77

⁵⁶ See Table 1 of our first submission.

- Among Sky consumers who consume Sky News alongside only one other wholesale source, just 24.3% identify Sky News as their most important source of news. Among people who consume Sky alongside two other wholesale sources, the equivalent figure is 27.7%.
 - The equivalent figures for News Corp titles are lower still: among News Corp consumers who consume just one other wholesale source of news, 19.5% identify News Corp as their most important source. The equivalent figure for News Corp customers who consume two other sources of news is 15.5%.
- **The PFs do not consider the implications of this multi-sourcing behaviour for sufficiency.** As explained in Section 2, the PFs do not properly assess the question of whether the remaining level of media plurality will be sufficient. Given that the vast majority of Sky and News Corp's customers rely on a range of news sources and rarely identify Sky or News Corp as their most important news source one needs to ask whether the very small subset of consumers for whom this is not the case constitute a sufficiently large population to result in the overall level of media plurality post-Transaction becoming insufficient.
71. One can also expect the extent of multi-sourcing behaviour to increase going forward: the PFs acknowledge that multi-sourcing is "more prevalent online than on other platforms"⁵⁷ and, given the upward trends in online news consumption, one would expect consumers' news consumption habits to become more diverse over time.⁵⁸ We also note that, as discussed in Appendix A, the PFs' analysis of multi-sourcing data online using comScore data appears to contain an error which, once corrected, shows that online users of Sky News, The Times and The Sun have very high propensities to multi-source.

5.2. Issues with the PFs' adjusted shares of reference

72. The PFs put forward a number of adjustments to Ofcom's baseline SoR figures calculated from the NCS. These adjustments differ somewhat from those put forward in the CMA's working paper to which we responded in our second submission. The PFs provisionally conclude in light of these adjustments that the combined SoR of Fox, Sky and News Corp is between 10 and 14%.⁵⁹
73. However, we consider that the PFs' approach remains upwardly biased both because it focusses on adjustments that act to raise the combined SoR without properly considering alternative adjustments and because the individual adjustments it proposes (in particular, the adjustments in respect of duration of usage) suffer from flaws in their implementation which lead to an overstated combined SoR.
74. **The PFs are wrong to dismiss concerns that all of the adjustments they make work in the same direction.** In our previous submission we explained how only applying adjustments which have the effect of increasing the combined SoR of Sky and News Corp would be likely to give a misleading picture even if (contrary to what we actually found)

57 See Paragraph 50.

58 See Figure 1 which shows the proportion of NCS respondents using at least one online source of news increasing from 32% in 2013 to 48% in 2016.

59 This compares to 14-18% in the CMA's Working Papers.

each of the individual adjustments was reasonable.⁶⁰ We then proposed a *non-exhaustive* set of adjustments in relation to: the editorial independence of The Times and Sunday Times; the incomplete control the MFT would have over Sky; and the demand-side response that would result if there was a significant change in Sky's editorial position post-Transaction (where we used a quantitative adjustment based on the academic work of Durante and Knight 2009).

75. The PFs' response to this analysis is to refer back to its previous dismissal of internal plurality considerations and the impact of audience expectations.⁶¹ Our concerns with this are two-fold.
76. First, and as we have already set out in Section 5, demand-side responses are an important constraint on any attempt by news organisations to distort their coverage. While there is a question as to the precise size of these effects there can be no doubt that failing to incorporate them will lead to combined SoR overstating the impact of the Transaction. Similarly, if, as the PFs provisionally conclude, any influence on Sky's coverage would be restricted to more "subtle" changes in editorial output rather than wholesale changes to its coverage, this is something that will again lead to the combined SoR being overstated.
77. Second, the PFs' dismissal of our objection ignores that these three adjustments represented just a subset of the potential adjustments one might make to the SoR. Because the analysis does not look exhaustively at the full range of potential adjustments, the selective application of a handful of adjustments which all act to increase the combined SoR of Sky and News Corp will inevitably tend to overstate the true underlying picture. For example, in Section 2 we showed that adjusting for different levels of trust across media outlets would act to reduce the combined SoR of Sky and News Corp by an amount comparable to some of the upward adjustments made in the PFs.
78. **The PFs' duration adjustment is based on flawed data and delivers clearly inaccurate results.** In Section 3.2.1 of our previous submission we set out our concerns with analysis in the CMA's Working Papers which adjusted reported consumption on different platforms (online, TV, radio, and print) in accordance with the CMA's estimates of the time spent consuming media on each of these platforms each time they were accessed (28 minutes for newspapers; 15 minutes for TV; 6 minutes for radio; and 2 minutes for online).⁶² We showed that this adjustment, which significantly increased the combined SoR of Sky and News Corp, delivered highly-implausible results. Most notably,

60 See Paragraph 24 of our second submission.

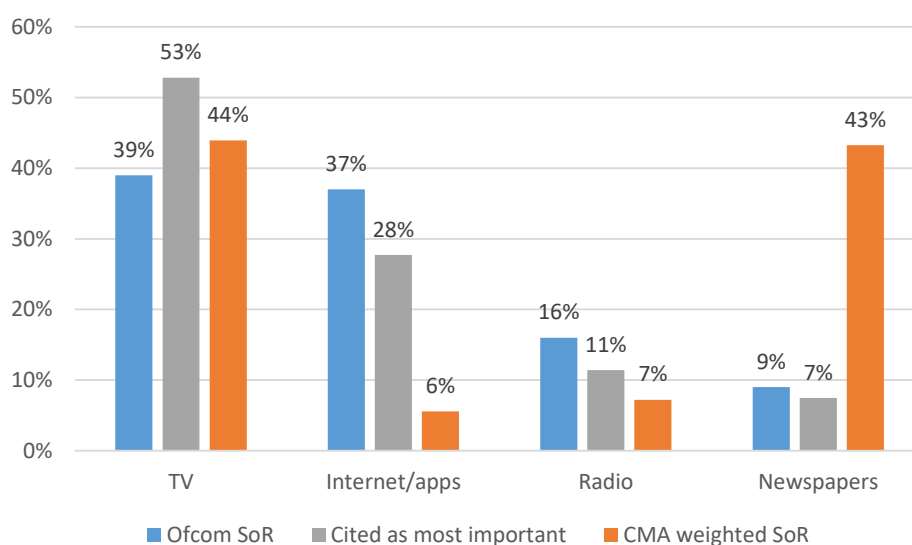
61 See Paragraph 10.71 which states that "We note that Fox's first two proposed adjustments are of a different type to those considered in our analysis because they relate largely to internal plurality rather than external plurality. We do not consider these adjustments to be valid within the SoR measure on the basis that, as set out previously in chapter 7, we have provisionally found that the Transaction will significantly increase the extent of control that the MFT will be able to exercise over Sky News. Accordingly, because the statutory question focuses on the plurality of persons with control – and in light of the fact that we have also provisionally found that the MFT is able to exercise significant control over News Corp – we consider it is reasonable to take into account the full combined SoR of Sky News and News Corp, without any weighting for the degree of ownership as proposed by Fox. In relation to the third proposed adjustment, we have considered the impact of audience expectations in paragraphs 8.21 to 8.26 and found that viewer expectations can change, and the loss of some customers may result in the gain of others."

62 See Paragraphs 26 to 34 our second submission.

it resulted in adjusted SoR which had no bearing on the platforms identified as most important by consumers with this being particularly acute in the case of newspapers.⁶³ We concluded that the most likely explanation for these erroneous results was that the adjustment exacerbated existing issues with recall bias around online consumption.

79. Unfortunately, the analysis in the PFs is, if anything, more egregious than that presented in the Working Papers. Rather than adjust the methodology in a way that gave more plausible results, the PFs actually *doubles* the weight given to newspapers by changing its estimate of the average time consumers spend reading a newspaper per sitting to 64 from the 28 minutes stated in the Working Papers.⁶⁴
80. As can be seen in Figure 6 below (analogous to Figure 1 of our second submission) the result of these weightings is an even more obvious inconsistency with existing survey evidence on consumers' most important source of news. Whereas 7% of NCS consumers identify a newspaper as their most important source of news (roughly similar to the 9% unadjusted SoR accounted for by newspapers) the adjustment in the PFs results in newspapers accounting for 43% of cross-platform news consumption.⁶⁵

Figure 6: Impact of the PFs' duration weightings on share of reference by platform



Source: CMA analysis applying platform duration weights as listed in CMA Provisional findings (see Appendix F, paragraph 21) to Ofcom's presented platform SoR as found in "News Consumption in the UK" (2016), Figure 8.1.

⁶³ For example, while 7% of individuals said a newspaper was their most important source of news the CMA's adjusted SoR gave newspapers 25% weight (as compared to 9% in the unadjusted SoR). Similarly, the adjusted SoR reduced the weight given to online sources from 37% to 7% even though 28% of consumers identified an online source as their most important source of news.

⁶⁴ This difference arises from a change in the CMA's stated "NCS average frequency measure for reading a newspaper" figure falling to 4.4 from 10.5 times per week. No explanation has been made about what has caused the more than doubling of this figure.

⁶⁵ This adjustment results in the combined SoR of News Corp and Sky increasing from 10 to 15%.

81. These figures are clearly implausible on their face and particularly so given the marked decline in newspaper circulations that has occurred in recent years: it is incredible that newspapers could in fact account for 43% of news consumption while only being identified as the most important source of news by 7% of respondents (and only used at all by 29%).
82. A potential explanation for these implausible platform consumption shares is that the PFs' duration adjustments are based on data collected using an inappropriate survey instrument. The PFs' 64-minute figure is based on a 40-minute figure for the average daily time spent reading a newspaper presented in Thurman 2016. This is based on the following survey question: "How long do you usually spend in total reading or looking at [the publication] by the time you've finished with it, including all the times you look at it and all the parts and sections?" It is easy to imagine this phrasing pushing respondents to estimate how long it takes them to read a publication cover-to-cover: something which will drastically overstate the overall average time people spend reading a newspaper in each sitting and, when combined with the SoR data, will result in an overstatement of the share of newspapers.
83. Unfortunately, rather than reacting to the analysis in the Figure above by dismissing the duration adjustment as incredible and pointing to this or other issues with the survey data, the PFs argue that the Figure above does not constitute a discrepancy at all. In particular, Paragraph F24 states that "we do not consider there is any reason why a respondent cannot identify online news as being important to them while using it for only short periods of time. The adjustments are made for duration and as such we have used the information available to it in relation to duration. Furthermore, we have no evidence on any relationship between duration and importance".
84. Even if one were to accept that the PFs' proposed adjustments accurately reflect relative levels of cross-platform news consumption (which we do not), this line of argument is incoherent. Presumably, the goal of the re-weighted SoR is to deliver a more accurate representation of the level of influence held by different titles across the four platforms (i.e. we are interested in the length of duration because it is informative as to the level of influence held by different media outlets not because it is something that is intrinsically important in its own right).⁶⁶ Therefore, if one were to believe that the discrepancies displayed in the Figure above are due to online news being able to convey more information to consumers in a shorter period of time, re-weighting SoR for duration of influence will result in SoRs which are *less* informative than the unadjusted figures.
85. In other words, either the analysis in the Figure above represents an inconsistency between the PFs' analysis and the NCS data (in which case the PFs' duration adjustment is incorrect) or it does not (in which case it is uninformative).
86. **Role of intermediaries.** The second category of adjustment put forward in the PFs is to reallocate consumption on intermediaries (e.g. Facebook and Google) to individual news brands. The approach in the PFs is to reallocate this consumption in proportion to wholesale sources' share of reference. While the impact of this adjustment is small (the

⁶⁶ Indeed, the CMA elsewhere is elsewhere explicit that one should be interested in frequency and duration of consumption on the basis that these are indicative of influence. See Paragraph 10.29 which states "We would expect the extent to which consumers are influenced by a particular media source to depend on the frequency with which they access it and the length of time they spend reading or viewing it".

combined share of reference rises from 10 to 11%) we consider that it is likely to be overstated.

87. First, the NCS does not capture the full long tail of online providers and hence, as discussed in paragraph 38 of our second submission, reallocating the totality of intermediated consumption to the outlets covered by the NCS will tend to overstate the share of traditional news brands such as Sky News and the News Corp titles.⁶⁷ Second, and more importantly, any reallocation of intermediated consumption is likely to overstate traditional news brands' influence because it will fail to account for the fact that intermediated consumption ensures that consumers consume information from multiple news brands while also reducing news brands' ability to determine which articles achieve prominence. In the latter respect we note that the PFs present (heavily redacted) information on multi-sourcing on the Facebook platform and that the overall conclusion is that "it is plausible that online users use a greater range of news sources on average".⁶⁸
88. **Adjustment in relation to Bauer and Global.** The final category of adjustment made to the SoR is to "reallocate" a proportion of consumption of Bauer and Global to Sky. This is similar to the analysis proposed by the CMA in its Working Papers (the one exception being that the precise level of reallocation in the PFs is redacted and the PFs do not conduct an analysis in which *all* of this consumption is reallocated).
89. As a result, our assessment is similar to that presented in our second submission. Our over-riding comment is that, given the very particular effects under consideration (e.g. the issue of radio stations using IRN content to fill schedules overnight when in-house teams are unavailable)⁶⁹ it seems implausible that the upper bound effect reported in the PFs (to increase the combined SoR of Sky and News Corp by two percentage points or around 20%) is likely to give an informative picture of the influence granted by control of IRN.⁷⁰
90. **Other comments.** As well as the issues with the three categories of reallocation discussed above, we also note the following additional issues with the analysis put forward in the PFs:

67 It is difficult to gauge how much difference this would make. In our first submission we reallocated intermediated consumption in proportion to Facebook Likes (a proxy for consumption). This analysis allowed one to consider a broader range of news outlets (albeit not the full long tail of small providers). The impact of this analysis was to deliver a comparable (1.3%) increase in Sky and News Corp's combined SoR. See Section 4 of our first submission.

68 Paragraph E50.

69 See paragraph F10 which discusses the factual basis on which the PFs conduct this reallocation.

70 We note that the PFs themselves appear to view the upper bound adjustment on this dimension as conservative. See Paragraph F.14 which states that the adjustments represent "an upper limit on any adjustment to reflect Sky's input via IRN."

- **The discussion of trends in SoR erroneously refers to News Corp's SoR as "broadly constant" when in fact they have declined materially.** At paragraph 10.60 the PFs argue that wholesale shares of reference have been "broadly constant", pointing only to the 20% reduction in ITNs share of reference since 2013. We consider that this understates the scale of the decline in News Corp's SoR: while this fell by only a percentage point, this constitutes an approximately 25% reduction given the low base from which News Corp began the period and results from a secular decline in newspaper consumption. Indeed, Figure 10.2 of the PFs documents how the Sun in particular has seen a significant reduction in reach from around 15% in 2010 to less than 8% in 2016.
- **References to cross-platform presence.** At the outset of its SoR analysis at paragraph 10.53, the PFs state that "MFT is the only person with control of media enterprises with a presence across all four news platforms". However, and as discussed in more depth above, the PFs have not properly evidenced the significance of this fact and, as a result, there is no basis for considering that this will lead to SoR understating the influence of these titles.⁷¹

91. Overall, our assessment is that the PFs' adjustment for intensity of usage is clearly not fit for purpose while there are question marks around both its reallocation of intermediaries and its reallocation of the SoR accounted for by Bauer and Global. This, combined with the fact that the PFs have not fully explored the potential for other effects working in the other direction and has, unreasonably in our view, rejected adjustments in relation to internal plurality, mean that we consider its 10-14% range for the combined SoR of Fox, Sky and News Corp to be significantly overstated.

⁷¹ Indeed, the CMA states at Paragraph 10.47 that "while imperfect, the SoR approach is recognised as the best available methodology of comparing news consumption across platforms" (although it subsequently qualifies this by saying at Paragraph 10.48 that SoR needs to be considered alongside platform-specific consumption shares).

APPENDIX A: ISSUES WITH THE COMSCORE DATA REPORTED IN APPENDIX E OF THE PROVISIONAL FINDINGS

92. The PFs report that multi-sourcing online is “difficult to measure”⁷² and notes some inconsistencies and oddities in the comScore data it uses to conduct its analysis. However, we note that a likely explanation for certain aspects of the PFs’ findings is that it has mis-interpreted the data presented in Table 6 of Annex E.
93. When discussing this table, the PFs reports that “the number reported in each cell of the table is the percentage of users of the “row title” who have used the “column title”. It observes that this interpretation delivers certain implausible results (e.g. that 86% of Sun users also use the Guardian and 100% of Guardian users also use the Times). While we do not have access to the underlying data the most likely explanation in our view is that the rows and columns should be reversed such that each cell shows the percentage of users of the *column* title who have used the *row* title”. This would deliver far more intuitive results it would show, for example that the vast majority of users of each title make use of the BBC website (consistent with the PFs’ findings elsewhere that the BBC website accounts for two-thirds of online news consumption, implying that consumers must frequently consume it without consuming also other news websites).⁷³
94. Under this alternative interpretation of the table, the indication is that users of Sky News, The Sun and the Times display a high probability of consuming various other sites. This would tend to reduce their ability to exert influence via their online coverage:

⁷² The PFs report at paragraph 50 that “We have found it difficult to measure the exact extent of multi-sourcing online, and even more difficult to make comparisons with multi-sourcing in the general population. The comScore data indicates that multi-sourcing is more prevalent online than on other platforms. The Facebook data shows [Redacted]. On balance, it is plausible that online users use a greater range of news sources on average. It is also consistent with the observation that most publishers achieve a broader reach online than on more traditional platforms.”

⁷³ A contrary reading, that high proportions of BBC users consume each of the other tracked titles could not be reconciled with other data sources as, in order for the BBC to account for such a high share of consumption online, it must be that a significant number of people use it for the sole or main source of online news and hence don’t consume it alongside other sources.

Figure 7: Analysis of cross-usage online (replicated from Table 6 of Annex E to the provisional findings)

	<i>Sky News</i>	<i>The Sun</i>	<i>The Times</i>	<i>BBC</i>	<i>Mail Online</i>	<i>Guardian</i>	<i>Telegraph</i>	<i>Independent</i>	<i>BuzzFeed</i>	<i>Huffington Post</i>
Sky News	100%	69%	38%	27%	28%	64%	27%	27%	22%	32%
The Sun	67%	100%	95%	30%	50%	86%	37%	64%	58%	92%
The Times	11%	27%	100%	8%	10%	33%	9%	11%	8%	16%
BBC	77%	88%	79%	100%	74%	87%	74%	80%	68%	75%
Mail Online	45%	84%	60%	41%	100%	78%	47%	54%	47%	56%
Guardian News	52%	73%	100%	25%	40%	100%	31%	53%	44%	94%
Telegraph	60%	84%	71%	56%	64%	83%	100%	70%	62%	70%
Independent	30%	73%	43%	31%	37%	72%	35%	100%	32%	38%
BuzzFeed	25%	70%	34%	27%	34%	62%	33%	33%	100%	36%
Huffington Post	15%	45%	27%	12%	16%	53%	15%	16%	15%	100%

Source: comScore data, CMA analysis.

Notes: Data for each news title relates to the media title/channel/sub-channel specified in Table 1.

Source: CMA provisional findings Appendix F

APPENDIX B: ADJUSTING THE SHARE OF REFERENCE DATA TO TAKE ACCOUNT OF LEVELS OF TRUST

95. This Appendix explains how we generated the trust-adjusted SoR data presented in Section 2.

B.1 Data on trust

96. We used Figure 11.3 “*Mean trust score of different news providers*” from the PFs to readjust the SoR so that it takes into account the extent to which consumers trust particular news sources.
97. Trust scores were assigned to news providers the following way:
98. *First*, BBC, Sky, Guardian Media Group, Telegraph Media Group, Lebedev Foundation as well as the intermediaries Facebook, Google, Twitter were given trust scores as reported in Figure 11.3⁷⁴.
99. *Second*, the trust score of “Commercial Radio” in Figure 11.3 was assigned to both Global and Bauer.
100. *Third*, the trust score for ITN was calculated as a weighted average of trust scores for ITV and Channel 4 News, using as weights their respective SoR.
101. *Fourth*, for wholesale news providers operating multiple newspaper titles we weighted the trust scores for individual titles using the relative number of consumers each title was recorded as having in the NCS 2016 survey data (as SoR by individual source was not available).⁷⁵ The affected titles were:
- “The Daily Mail” and “The Metro” (DMGT);

⁷⁴ Trust score of “The Independent” was used for Lebedev Foundation.

⁷⁵ NCS weights have been applied to reflect the UK population.

- “The Times” and “The Sun” (News Corp);
- “The Mirror” and “The People” (Trinity Mirror);
- “The Daily Express” and “The Daily Star” (Northern & Shell).

102. *Lastly*, since it is not known which news providers are hidden inside the category “Other”, several sensitivities were applied to approximate the trust scores for this category:
1. a simple average of 8 lowest trust scores of non-intermediary news providers (1/3 of total 23 providers);
 2. a simple average of 12 lowest trust scores of non-intermediary news providers (1/2 of total 23 providers);
 3. a simple average of trust scores of all 23 non-intermediary news providers;
 4. a simple average of trust scores of all 28 news providers (including intermediaries such as Facebook, Twitter, Google, Yahoo, and MSN).

103. Table 1 below shows the trust scores assigned to each of the news providers:

Table 1: Trust scores by brand

Brand	Trust score
BBC	7.20
ITN (ITV + Channel 4)	6.48
Sky	5.90
DMGT	4.53
Global	5.60
News Corp	4.29
Guardian Media Group	6.10
Trinity Mirror	4.18
Bauer	5.60
Telegraph Media	5.70
Northern & Shell	3.97
Lebedev Foundation	5.80
Other	4.99
Facebook	3.70
Google	5.80
Twitter	3.80

Source: CRA analysis based on Ofcom's "News consumption in the UK" report (2016) and Ipsos MORI for the BBC (Figure 11.3 of provisional findings report).

B.2 Readjusting shares of reference by trust scores

104. After defining trust scores for each news provider, including intermediaries, we readjusted the shares of references. The readjusted SoR for a particular news provider is equal to its initial SoR multiplied by its corresponding trust score and divided through by total sum of [SoR x trust score] for all news providers.
105. As a result, for 2016, the combined SoR for Sky/News Corp decreased from 9% to the range between 8.02% and 8.15% depending on the chosen sensitivity. Table 2 below shows the detailed numbers for each of the sensitivities:

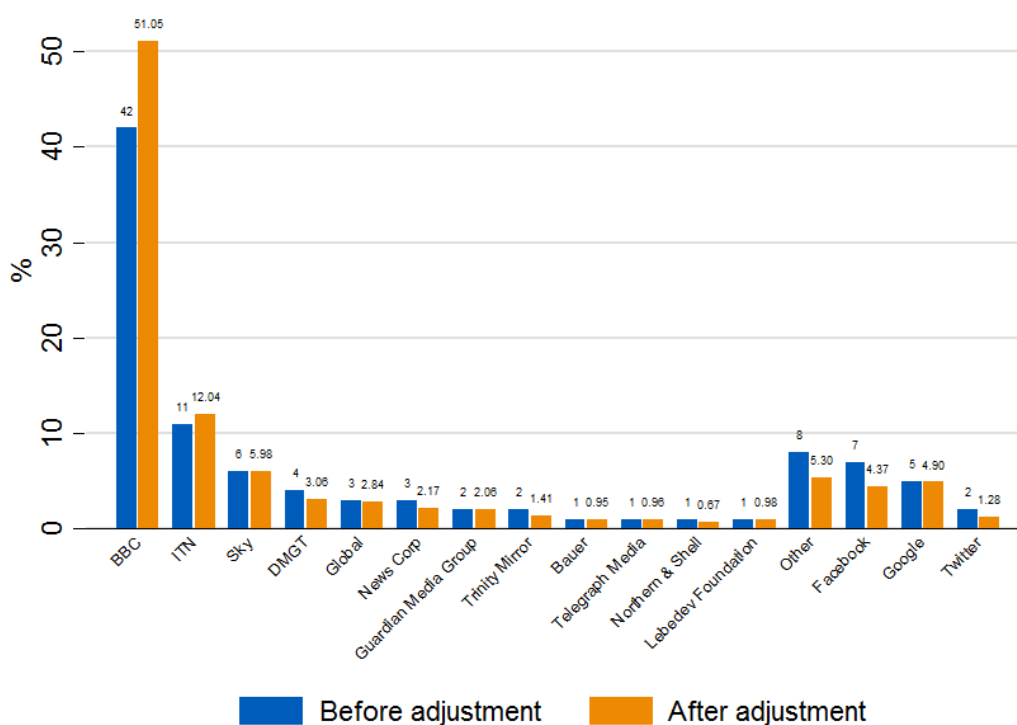
Table 2: 2016 Share of reference before and after the trust-level readjustment

	Before	After			
		Sensitivity 1	Sensitivity 2	Sensitivity 3	Sensitivity 4
Sky	6%	5.98%	5.95%	5.88%	5.89%
News Corp	3%	2.17%	2.16%	2.14%	2.14%
Combined	9%	8.15%	8.11%	8.02%	8.03%

Source: CRA analysis based on Ofcom's "News consumption in the UK" report (2016) and Ipsos MORI for the BBC (Figure 11.3 of provisional findings report).

106. The Figures below show the detailed allocation of readjusted SoR for all news providers under each methodology. Figure 1 in the main text is based on sensitivity 1.

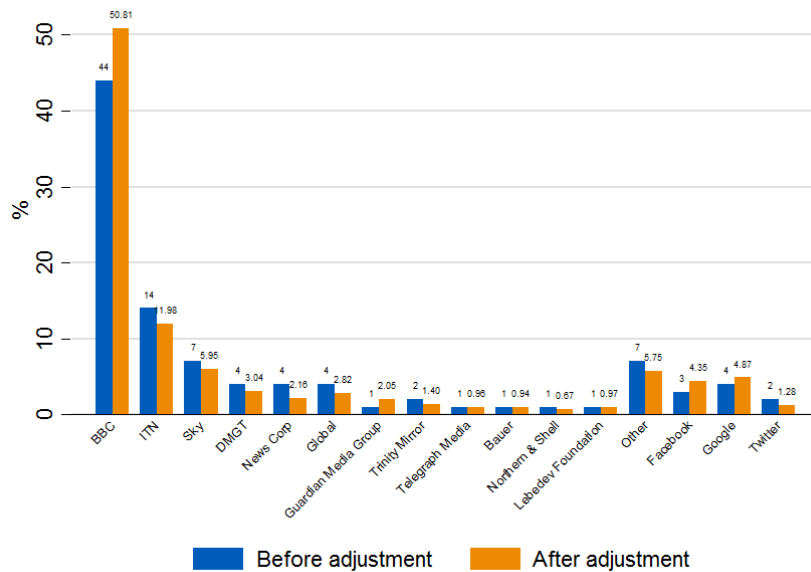
Figure 8: Sensitivity 1: 2016 Wholesale provider share of reference before and after adjusting for trust level



Source: CRA analysis based on Ofcom's "News consumption in the UK" report (2016) and Ipsos MORI for the BBC (Figure 11.3 of provisional findings report).

Note(s): For category "Others" trust score is taken as a simple average of 8 lowest trust scores of non-intermediary news providers (1/3 out of total 23 providers).

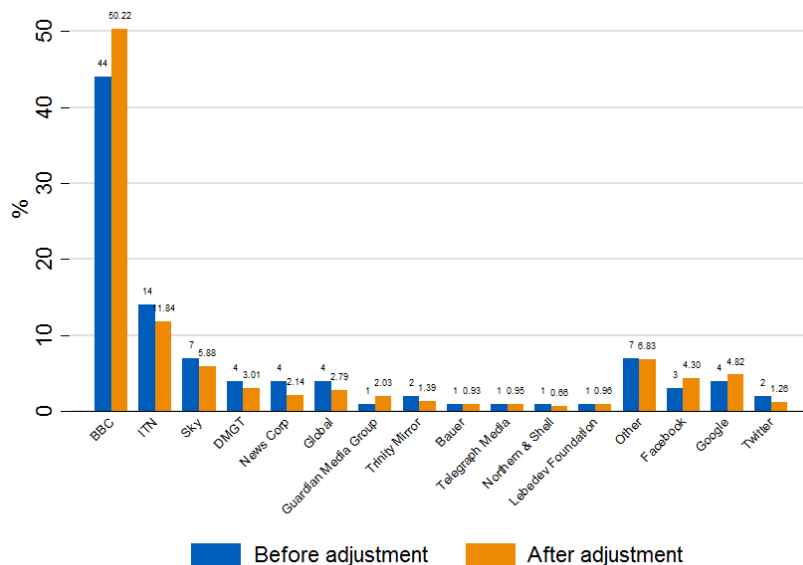
Figure 9: Sensitivity 2: 2016 Wholesale provider share of reference before and after adjusting for trust level



Source: CRA analysis based on Ofcom's "News consumption in the UK" report (2016) and Ipsos MORI for the BBC (Figure 11.3 of provisional findings report).

Note(s): For category "Others" trust score is taken as a simple average of 12 lowest trust scores of non-intermediary news providers (1/2 of total 23 providers).

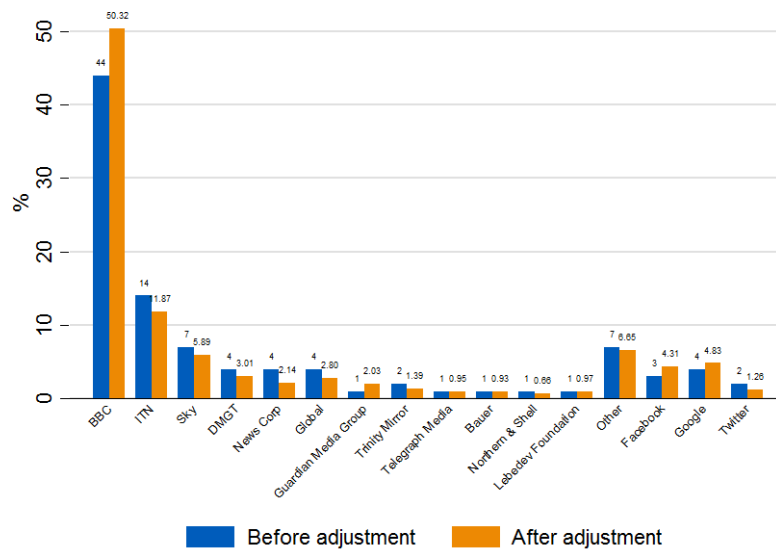
Figure 10: Sensitivity 3: 2016 Wholesale provider share of reference before and after adjusting for trust level



Source: CRA analysis based on Ofcom's "News consumption in the UK" report (2016) and Ipsos MORI for the BBC (Figure 11.3 of provisional findings report).

Note(s): For category "Others" trust score is taken as a simple average of trust scores of all 23 non-intermediary news providers.

Figure 11: Sensitivity 4: 2016 Wholesale provider share of reference before and after adjusting for trust level



Source: CRA analysis based on Ofcom's "News consumption in the UK" report (2016) and Ipsos MORI for the BBC (Figure 11.3 of provisional findings report).

Note(s): For category "Others" trust score is taken as a simple average of trust scores of all 28 news providers (including intermediaries such as Facebook, Twitter, Google, Yahoo, and MSN).

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A review of the CMA's Provisional Findings Report

9 February 2018

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Disclaimer

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1. Introduction

This paper reviews the CMA's Provisional Findings Report regarding the proposed acquisition of Sky by 21st Century Fox.

I first consider the CMA's contention that cross-media ownership has special significance for plurality. I then turn to the CMA's sensitivity analysis. Finally I provide a point-by-point review of a number of other issues in the Provisional Findings Report.

This paper is not an exhaustive review of errors and misconceptions in the Provisional Findings Report. In particular, it does not address issues related to levels of control, nor those related to 'sufficient' plurality.

2. Significance of cross-media ownership

Introduction

In its Provisional Findings Report the CMA places great weight on the fact that the acquisition would create a cross media entity, with outlets across (in particular) print and TV. The Report returns almost 30 times to this issue,¹ suggesting that a cross-media entity will have particular influence that cannot be matched by narrower entities, and that this influence goes beyond that suggested by the quantitative data on consumption.²

This implies that the CMA sees cross-media ownership as a key plank of its provisional finding against the transaction. However, while the CMA repeatedly asserts the importance of cross-media ownership, it does relatively little to evidence this importance. Moreover, where it attempts to do so, its logic is flawed.

This section reviews the CMA's case for the importance of cross media ownership. In particular, I demonstrate that the Provisional Findings Report:

- Inappropriately conflates TV news and Sky News
- Makes a deeply flawed case that a cross-media presence brings particular agenda setting power
- Misconstrues trust as a driver of cross-media significance
- Double counts reach in cross-media context
- Sees repetition as enhancing cross-media influence, whereas in reality it dilutes it
- Draws a false conclusion from the retention of the 20/20 rule in the Communications Act
- Downplays countervailing factors

Unless specified otherwise, in this section paragraph numbers refer to the Provisional Findings Report.

¹ This point is made roughly 30 times, in paragraphs 75, 83, 87, 88, 89, 93, 95, 98, 101, 10.54, 10.93, 10.99, 10.100, 10.102, 11.5, 11.9, 11.47, 11.84, 11.93, 11.95, 11.132, 11.133, 11.134, 12.8, 12.10, 12.13, 12.18 and 12.19. This list is not necessarily exhaustive, and excludes instances where the CMA uncritically quotes third parties making a similar assertion

² I acknowledge that the CMA makes a brief disclaimer: "we agree that the combination of TV and newspaper assets does not in and of itself necessarily mean there is a plurality concern" [¶16.75]. However, all of the rest of the discussion in the paper regarding cross-media issues argues the opposite

Conflation of TV news and Sky News

Reach of TV vs Sky News

In a number of instances, the CMA takes comments made regarding the power of TV, and simply assumes that these can be applied to Sky News specifically. For instance, in discussing concerns regarding cross-media ownership, the CMA writes:

“One news provider and, to an extent, political advisers, noted the broader audience of TV news”³

Certainly TV news *as a whole* has a broader audience, with 69% of adults using it. The BBC by itself has a reach of 56%, for example, and BBC One alone has 50%. However, the reach of Sky News (on TV) is far more moderate, at just 15% (a figure comparable to News Corp’s current reach, at 14%).⁴ Thus it is clearly wrong for the CMA to extrapolate from general comments about the importance of TV’s reach to a specific conclusion regarding cross-media control of Sky.

A similar confusion is evident in the CMA’s argument that TV is particularly significant in politicians’ eyes. In support of this assertion it quotes Lord Falconer as follows:

“the thing that really absorbs politicians is how does the 6 o’clock and the 10 o’clock news on the BBC and the ITV cover things”.⁵

Quite clearly, Lord Falconer is making a specific point about the BBC and ITV, an understandable point given their substantial audience and wide reach. But it is entirely wrong to extrapolate from this that ownership of Sky News (or TV channels in general) gives influence.

Amplification of stories by TV

The CMA makes the same mistake in arguing TV could ‘amplify’ news stories. In support of this claim, the CMA writes:

“Mr Gallagher stated that getting a story broadcast on the nightly news would increase the chances of people buying the newspaper that broke the story the next morning”⁶

However, the natural interpretation of ‘nightly news’ is that it refers to the nightly bulletins of BBC One and ITV (as in Lord Falconer’s

³ ¶11.5

⁴ Ofcom NCS

⁵ ¶11.86

⁶ ¶11.85

comment), as opposed to the rolling news channels, which have rolling, rather than nightly, news programming.

Further, even if the meaning of ‘nightly news’ were stretched to include Sky News programming at this time, Sky would have very little relevance to Mr Gallagher’s point. TV’s ability to (on occasion) nudge people to buy a newspaper is dependent on its reach. As we have seen, TV’s reach is high in aggregate, but Sky News’ much less so. But this is doubly true in the evening. For BBC One, the great portion of its news reach comes from the evening bulletins, since they represent the great bulk of news programming on the channel. However, Sky News is on throughout the day, and consequently its reach in the evening is far less significant relative to its total reach. Thus *even if* it were included in ‘nightly news’, it would have little relevance to Mr Gallagher’s point.

The other evidence the CMA offers for its amplification by TV is that:

“one non-broadcast online news provider told us about how it partnered with a TV news provider to amplify the impact of its investigative journalism”.⁷

However, the broadcaster in question was the BBC. Clearly the BBC has the ability to amplify a story – it is by a significant margin the largest supplier of news in the UK. But equally clearly, it is incorrect to conclude from this that *any* TV provider has some special power to amplify a story.

Inter-media agenda setting

The CMA claims:

“traditional news providers (whether on their established print or broadcast medium or online) together play a significant part in leading the news agenda. The relationship between newspapers and TV broadcasters can be particularly important in this regard – for example TV news broadcasters often report on newspaper stories and vice versa. Having control of news outlets across multiple platforms could therefore increase the likelihood that a particular story could lead the wider news agenda of other news providers.”⁸

However, this argument is not coherent. Certainly broadcasters report on newspaper stories and vice versa. However, newspapers

⁷ ¶11.85

⁸ ¶11.84

also frequently cover stories from other newspapers, TV news may pick up TV news stories, all news outlets may pick up stories first carried online, and so on. There is therefore no logic to the CMA's assertion that the nexus between TV and newspapers has particular significance.

Put another way, if two newspapers covered a particular story as opposed to one newspaper and one broadcaster of similar size, would we expect the newspapers to have much lesser agenda setting power? There is no particular reason to think they would, and by extension, there is no reason to attach significance to being cross-media in assessing agenda setting power.

Double-counting of reach

That a notional Sky+News would have greater reach than either would alone is not in doubt, and this point is clear from the quantitative data the CMA considers. The CMA reports (per the NCS) that Sky has a reach of 21%, News has a reach of 14% and a combined entity would have a reach of 31%. The CMA notes that these reach figures show:

“there is currently relatively limited overlap between consumers of Sky News and readers of the News Corp titles”.⁹

If there was more substantial overlap, the combined reach would be less than 31%. To take an extreme case, if all of News' consumers also watch Sky, the reach of Sky+News would be no greater than that of Sky.

The CMA attaches significance to the 31% figure, noting that it is the third largest amongst news providers, and double that of DMGT.¹⁰ It reiterates this point in its conclusions.¹¹

However, in the context of cross media ownership, the CMA argues:

“As different media platforms may reach different audiences, running the same story or promoting the same issue across different media platforms can extend the reach of the particular person with control of media enterprises. This may suggest that cross-media ownership has a much wider impact, as it means that a media owner can influence

⁹ ¶11.48

¹⁰ ¶10.28

¹¹ ¶10.94

a much broader audience that might otherwise not choose to read that media owner’s newspapers.”¹²

This statement may be true as far as it goes. However, the problem with it is that it ‘double counts’ reach as an issue. The very reason Sky+News has a reach of 31% (rather than a lesser figure) is because “different media platforms may reach different audiences”. The fact that this reach figure is a result of a cross-media merger has no additional significance.

To put this another way, the CMA makes no case here that a given level of reach achieved through multiple platforms is any more or less threatening than the same reach achieved on a narrower set of platforms. Thus it cannot claim that there is an inherent amplification effect from being cross-media that would give influence beyond that indicated by the quantitative evidence.

The ‘repetition effect’

A similar problem arises with the CMA’s assertion that a “the repetition of a story across-platforms may have an amplification effect”.¹³ To attach significance to this is to once again double count, since this is effectively picked up in the Share of Reference analysis. The aggregate share of references imputed for Sky+News already includes consumption across platforms, and (in the CMA’s analysis, if not reality) assumes a common news agenda is being pursued across these platforms.

Certainly the existence of a cross-media provider would (in this hypothetical) increase the prospect some consumers were exposed to repetition of a story. But for a given total share of reference, this could only happen if another consumer *didn’t see the story at all*.

To take a simple illustration – imagine in two providers. Provider A is a print publisher with ten consumers, each reading the newspaper daily. Provider B is a cross-platform provider, with five consumers reading its paper daily, and five watching its TV daily. Finally, assume two of these customers of Provider B take both TV and print from it.

The share of references of these two notional providers is identical. However, the cross-platform provider has greater potential for repetition. Those two customers may see the same story in print and TV. However, this overlap means fewer customers overall see that

¹² ¶11.9. The CMA makes essentially the same argument at ¶11.5 and ¶11.91

¹³ ¶11.9

outlets' news. Since there is repetition, only eight customers see provider B's output, as opposed to the ten who see provider A.

Thus, for a given share of references, it is not clear that repetition enhances influence – on the contrary, it likely dilutes it, by 'overkilling' a given audience member rather than seeking to persuade a wider group. (As a parallel, advertisers pay higher cost-per-thousand for channels such as ITV. They know that if they had to assemble the same audience across multiple smaller channels, they would risk inefficient duplication).¹⁴

By extension, the CMA should not see repetition as an enhancement to the SoR assessed in the quantitative evidence, but rather as a fact that acts to *reduce* Sky+News' influence relative to that suggested by the SoR figures.

The significance of trust

Regarding repetition, the CMA goes on to say:

*“the repetition of a story across-platforms may have an amplification effect, especially if one of the media platforms is seen as more trusted than others.”*¹⁵ [emphasis added]

Again, this is confused reasoning. Consumers don't attach trust to particular platforms, they attach it to particular outlets. For example, within newspapers, they clearly distinguish between the *Times* and the *Sun*, with much higher trust in the former (as the CMA has noted). Within TV, the BBC, ITV and Channel 4 are significantly more trusted than Al Jazeera.

Certainly TV providers on average are more trusted than newspapers on average, but this tells us little. Levels of trust for the *Times* and *Sky News* are almost identical. Thus there no reason to think that endorsement of (say) a story in the *Sun* by Sky News is more convincing than an endorsement by the *Times*. By extension, there is no reason to focus on the happenstance that the Sky/Sun endorsement is cross-media. This has no inherent significance.

¹⁴ See, for example, PWC [for Ofcom], [Economic Analysis of the TV Advertising Market](#), December 2004

¹⁵ ¶11.9

The Communications Act 2003

The CMA states:

“as reflected in the statutory limits on cross-platform ownership, combinations of TV and newspaper organisations should be placed under close scrutiny”.¹⁶

The CMA is referring to the Communications Act 2003, which (as it says):

“prohibits a newspaper operator with a market share of 20% or more of newspaper circulation from holding a Channel 3 licence or a stake in a Channel 3 licensee that is greater than 20% (the 20/20 rule).”¹⁷

However, the Act is self-evidently not addressing cross-media mergers *in general* with the 20/20 rule – it is addressing one particular type of cross-media merger. Indeed, the same Act relaxed the rules on other cross-media mergers, by removing the application of the 20/20 rule to Channel 5, imposed by the Broadcasting Act 1990.

It is notable that at the time of the Communications Act, the volume of viewing of Channel 5 news was four hours per year per individual.¹⁸ This is not far off the six hours per year that Sky captures today.¹⁹ (For comparison, in 2003 the Channel 3 licences captured 33 hours per year). Further, in 2003 newspaper readership was 39m.²⁰ Twenty percent of this would have been 7.8m readers. This compares to 4.5m as the summed readership of the *Times* and the *Sun* today (albeit with share above 20%).²¹

Thus the Communications Act *removed* an explicit restriction on cross-media transactions of a scale very similar to (or larger than) that of Sky and News today (if we were to treat them as a single entity).

Certainly the Act retained the legacy 20/20 restriction for Channel 3. But given the scale then of both newspapers and Channel 3, the case against such a merger would have been strong, quite apart from the fact from that such a merger would be cross-media.

¹⁶ ¶12.13

¹⁷ FN406

¹⁸ Ofcom, [Public Service Broadcasting: Annual Report 2007](#), 22 March 2007

¹⁹ Ofcom, [PSB Annual Research Report 2017 – TV Viewing annex](#), July 2017

²⁰ [NRS](#)

²¹ NRS, [NRS Readership Estimates - Newspapers and Supplements, October 2016 - September 2017](#), 18 December 2017

This, coupled with the fact that the 20/20 rule was removed for transactions of a scale similar to Sky+News means it is illogical for the CMA to call upon the 20/20 rule for Channel 3 as an indicator that cross-media presence has particular significance in the current transaction.

Finally, restrictions on cross-media mergers may be imposed in plurality rules, not because they are uniquely threatening, but because they are not already addressed by existing competition law. Such mergers need not lead to concentration in any particular market.

By contrast, a significant intra-media merger would likely be blocked on competition grounds (quite apart from any plurality issues), since it *would* result in market concentration. Certainly any combination of entities within one media that was substantial enough to affect *overall* plurality would almost certainly represent significant concentration within that media.

Thus there is greater need for plurality-specific rules for cross-media mergers, but that does not mean that cross-media mergers are inherently more worrying, only that other legal limits are weaker in this area.

Countervailing factors

Not only does the CMA make unsubstantiated claims regarding the benefits of being cross-media, it downplays the countervailing evidence which suggests that cross-media organisations may be *less* effective at having a unified and influential voice than a single media organisation of the same size.

The different nature of print and TV mean that there are significant challenges to a co-ordinated approach across the two media. The fundamental characteristics of the media force different choices on which stories to cover and how to cover them. For example:

- Television naturally favours stories with a visual element
- TV bulletins cover far fewer stories than a typical newspaper
- Newspapers can generally go into greater depth
- The expense of covering a story for TV pushes broadcasters to collaborate and share resources (such as footage or satellite uplinks) and this acts to push the agendas of different broadcasters closer together

(These issues are in addition to those caused by the impartiality regulations on TV.)

These fundamental characteristics of the two media mean that it would be more challenging to co-ordinate across them than it would be within them. By implication, a cross-media transaction is *less* likely to threaten plurality than a similar scale transaction within media.

The CMA dismisses this issue, saying:

“we do not think that these differences [between platforms] mean that the control of media enterprises across different platforms cannot confer increased influence”.²²

But the CMA here argues against a claim no-one is making. No-one has suggested that control of a TV channel plus newspapers confers *no* increase in influence. Rather the point is that the whole is less than the sum of the parts, because of the co-ordination challenges. Put another way, the influence of a media organisation that straddles print and TV is less than its aggregate share of references suggests.

This is directly contrary to the CMA’s contention that the transaction is concerning specifically because it is multiplatform.

Conclusion re cross-media ownership

The CMA appears to believe that the cross-media nature of Sky+News is one of the key arguments against the transaction. However, it has failed to make the case that a given level of consumption reached across media represents a greater threat to plurality than the same level of consumption reached by fewer media. There is no inherent significance to the fact that an entity is cross-media, and thus this is not a sound basis on which to reject the transaction.

²² ¶11.91

3. The CMA's sensitivity analysis

Introduction

I now turn to the CMA's sensitivity analysis of Ofcom's Share of Reference (SoR) figures. The CMA's analysis is discussed in its Provisional Findings Report at ¶10.62 onwards, and in more detail in Appendix F.

I first review the approach the CMA has taken in its three adjustments (for use via intermediaries, for wholesale supply to IRN and for duration of use). I then consider a number of countervailing adjustments that would be appropriate in any balanced approach to adjusting the SoR.

Unless specified otherwise, in this section paragraph numbers refer to those within Appendix F.

Allocation of consumption through intermediaries

The first step in the CMA's sensitivity analysis is to redistribute the SoR of intermediaries to other news providers, on the basis of those news providers' 'direct' SoR. There are two problems with this approach. One is conceptual – it incorrectly treats the intermediaries as mere vessels to consumption of other news providers' content. The second is analytical – it effectively ignores the long tail of other news sources that can only be consumed via social media.

Intermediaries as mere vessels

Implicitly, the CMA's approach assumes that consumption of (say) the *Sun* via Facebook (and other social media) is equivalent to direct consumption of the title. There are myriad problems with this assumption. These include:

- An outlet's content on Facebook may be very different from that of its other products. As I have previously noted, the *Sun*'s content on Facebook is particularly heavy on soft news, for example
- An outlet's content may be shared via social media specifically to reject or mock it, inevitably reducing that content's influence
- The underlying outlet has no control of the 'news agenda' for consumption on social media. Rather this agenda is the joint creation of users (through their choices of what to share or

follow²³) and of social media platforms (though the algorithmic decisions as to ranking of items)

These factors (and others I have discussed in greater length elsewhere²⁴) mean that it is quite wrong to treat the intermediaries as mere vessels, which contribute nothing to news plurality and which can be ‘assumed away’ by redistributing their SoR to other providers.

The fact that the CMA sets aside the distinct news agenda offered by Facebook and others is particularly striking given the significance it attaches to a provider’s news agenda elsewhere. In discussing the importance of MFT’s control over Sky, notwithstanding the limits of the Broadcast Code, the CMA says:

“an important limitation on the ability of the Broadcasting Code to prevent or inhibit editorial alignment is the fact that the Broadcasting Code does not generally seek to regulate editorial prioritisation or the editorial agenda adopted by a broadcaster”.²⁵

The CMA goes on to quote Ofcom approvingly as follows:

“The provisions of the Broadcasting Code cannot address editorial decision making in terms of which stories may be prioritised. The Broadcasting Code does not seek to influence such editorial decisions and to do so would raise serious concerns around freedom of speech. In any event, such influence may take subtle forms which would not be picked up by the Broadcasting Code, for example through the selection or omission of particular news items”.²⁶

But if, as the CMA contends, editorial prioritisation and the selection and omission of items are important routes to influence, it is inappropriate to ignore the prioritisation, selection and omission of items that are fundamental to the provision of news via intermediaries. Put another way, if the CMA believes this *doesn’t* matter, and intermediaries can be treated as mere vessels, then it should set aside the issue of agenda setting as a route to influence for MFT via Sky.

²³ Even if a user chooses to follow the Sun on Twitter, they may choose the @TheSunFootball, for example, meaning that the news agenda they experience is very different from that of the Sun as a whole

²⁴ Robert Kenny, *News Plurality in the UK and, the impact of 21CF’s acquisition of Sky*, 27 September 2017 (page 29 onwards)

²⁵ ¶8.28, Provisional Findings

²⁶ ¶8.29, Provisional Findings

Ignoring the long tail

The second problem with the CMA's approach is that it inherently sets aside sources that are primarily consumed via social media. The CMA redistributes the SoR of intermediaries pro-rata to the SoR of non-intermediaries. The CMA acknowledges that this will

“underweight online only news providers or those providers strong on social media (for example, BuzzFeed)”.²⁷

This by itself is a significant problem with the CMA's approach. But a further issue is that the CMA's approach ignores entirely sources of news that are *only* available via social media.

For example, a respondent to the NCS might say that they use Twitter for news because (say) they follow Jeremy Corbyn and the Canary. However, the effect of the CMA's approach is to reallocate this user's news consumption to the BBC and other traditional sources, since these have a high SoR outside social media. This is entirely inappropriate.

The CMA has noted that the entities with the largest number of impressions via intermediaries are generally larger media organisations.²⁸ This may be true, but it ignores the aggregate usage of the long tail, which the CMA's methodology redistributes to these larger media organisations.

I note that the CMA provides data on impressions for the twenty largest providers on various stories on Twitter, for example, but does not indicate what percentage of total consumption this represents.

For Google news searches, the CMA reports:

“Table 3 shows the result of this analysis for the ten sites with the largest shares of impressions. The shares of impressions and clicks are low. This might be because there are tens of thousands of sites listed on the Google News Corpus, including some sites that have only a weak association with news (eg nme.com, comicbook.com, skysports.com, etc).”²⁹

²⁷ ¶14

²⁸ Appendix E

²⁹ ¶132, Appendix E

The fact that the share of the top ten sites are low underlines the importance the long tail. Indeed, the CMA goes on to say:

“a long tail of small publishers contribute a significant share of the content impressed by Google”.³⁰

As I have noted, the effect of the CMA’s approach is to reallocate this significant share of usage to the larger media organisations, thus artificially inflating their SoR, and, by extension, that of News+Sky.

Confusion of importance of traditional media and importance of individual outlets within traditional media

Even if we entirely set aside the long tail issue, and assumed that all news consumption via intermediaries was of traditional sources, the CMA’s approach would still be invalid. This is because shares of consumption of these traditional sources within intermediaries is so different from their shares via other routes.

To take one example, the *Guardian* is a top 3 source (and sometimes #1) for all the Google and Twitter impressions data. This compares to a #6 ranking on an SoR basis.³¹ Thus if the CMA allocates the Google and Twitter SoR to traditional sources on the basis of their general SoR, it is appreciably understating GMG’s performance. By extension, it must be overstating other parties.

Conclusion

For the reasons set out above, the CMA’s approach is both wrong in principle (since it treats intermediaries as mere vessels, when they are not) and wrong in practice (since its allocation methodology greatly overstates the importance of traditional players, and is not even accurate within this group).

Allocation of wholesale supply to IRN

I note that it is challenging to comment on the CMA’s treatment of wholesale supply of IRN, since the CMA have not only redacted all the figures in this section, but also the rationale for making the adjustment in the first place. It states:

“it is unlikely that Sky has a high degree of control at the wholesale level over the news content provided by Bauer and Global to listeners. However, we consider that there is some control given that these stations tend to [☒], and, as

³⁰ ¶134, Appendix E

³¹ Retail basis, excluding intermediaries

such, it is appropriate to allocate some wholesale supply to Sky.”³²

However, I make the following observations.

First, it is not clear if the CMA has made any adjustment for *when* IRN content is used. Generally stations will use it late at night when audiences are small, whereas bulletins in peak periods (such as breakfast time) will be created by stations’ own teams. If the CMA has ignored this issue (and instead worked off an overall percentage of content from IRN with no adjustment for audience) then it has greatly overstated the impact of IRN on news consumed by audiences.

Second, it is not clear if the CMA has taken into account evidence from RadioCentre (the trade body for commercial radio) which has reported that:

[I]ndustry estimations are that more than 95% of the radio news scripts received from IRN [provided by Sky] are re-written by local editorial teams. ... In the vast majority of stations, IRN is not used for the broadcast ready-made scripts and audio services it offers, but for facts and figures to support independent editorial.”³³

If 95% of scripts are rewritten, then the level of ‘control’ available to Sky (to use the CMA’s language) is minimal.

Third, if the CMA does feel that being a wholesale provider of this type gives control, notwithstanding the independence of the retail outlets, it begs the question why the CMA is not also making this adjustment for other wholesale suppliers. The level of ‘control’ that IRN has over radio stations would appear to be rather less than that which wire services have over newspapers. This is an issue I have raised in previous submissions, but which the CMA has not addressed, so I repeat my discussion here.

According to one journalist quoted by Roy Greenslade:

“The reality of a modern digital newsroom is complete reliance on the wires and PA. I have worked for three national newspaper websites, and all of them want copy thrown online with a photo. No journalism required. It is basically admin.”³⁴

³² ¶13

³³ RadioCentre, [Measurement Framework for Media Plurality](#) (letter to Ofcom), 19 May 2015

³⁴ Roy Greenslade, [“The reality of digital newsrooms: ‘copy thrown online with a photo’](#), *The Guardian*, 14 January 2014

According to another journalist quoted in the Press Gazette:

“[E]very news website relies heavily on wire copy to break news”.³⁵

As long ago as 2008, an investigation by John Lewis et al of Cardiff University found that 49% of newspaper stories (in print) were entirely or mainly from agencies or other media.³⁶ A further 19% came entirely or mainly from PR. It seems likely these figures would be even higher today, given continuing pressure on newsroom budgets.

If the CMA believes that it should be adjusting down the SoR of radio to account for IRN, then equally it should be adjusting down the SoR of newspapers to account for Bloomberg, Reuters, PA and so on – but it has not. The CMA has offered no rationale for its inconsistent approach.

Intensity and duration of use

Finally the CMA attempts a sensitivity based on an adjustment for time spent with different media. However, there are six serious problems with this analysis. Even without allowing for these, the CMA notes that:

“the results reported are solely indicative and should be seen in the context of providing the direction of any bias caused by differences in the duration of use of different types of news”.³⁷

I also note this caveat is not offered in the main body of Provisional Findings Report.³⁸ On the contrary, the Summary simply states:

“We have considered sensitivity adjustments to reflect alternative assumptions. These adjustments could increase the combined share of reference of Sky News and News Corp to as much as 14%”.³⁹

In particular, the idea that the time-spent analysis is focused on identifying the direction of any bias, rather than its magnitude, is entirely lost. This is significant, since the time-spent analysis appears

³⁵ [“Byline bandits at The Independent accused of taking credit for agency copy”](#), *Press Gazette*, 29 July 2013

³⁶ Justin Lewis, [“A compromised fourth estate?”](#), *Journalism Studies*, 6 February 2008

³⁷ ¶16

³⁸ Other than a bland and general statement that the overall impact of the various adjustments “relies on a number of assumptions” in ¶10.68 of the Provisional Findings. Even this limited statement comes over 120 pages after the first, uncaveated use of the 14% figure in the Summary

³⁹ ¶69

to be responsible for half the uplift from the Ofcom figure of 10% to CMA's upper bound of 14%.

As we will see, once these six problems with the CMA's analysis are taken into account, it is clear that it should be disregarded entirely.

These problems are:

- An error in the calculation of time spent with newspapers
- A failure to use available data at a title level
- No allowance for non-news content
- Implausible results for online usage
- An error in the combination of comScore and NCS data
- An error in the treatment of time spent with Facebook, Google and Twitter

Error in calculation of time-per-session for newspapers

The most serious problem with the CMA's analysis is a mathematical error related to its calculation of time spent per session with newspapers. The CMA calculates this at 64 minutes (which it notes is "high compared to other duration estimates").⁴⁰

The CMA sets out its methodology for this figure as follows:

"NRS data in Thurman (2016) suggests that the average time spent reading a newspaper per day is 40 minutes. The NCS average frequency measure for reading a newspaper is 4.4 times a week. If the average time reading a newspaper per day is 40 minutes, this suggests that readers are spending 280 minutes a week reading the paper (40 minutes multiplied by 7). We estimate that the average duration per sitting is 64 minutes when reading a newspaper $(40*7)/4.4$."

The CMA here implicitly assume that the 40 minutes figure is an average across days when the paper is read, *and days when it is not*. It is on this basis that it multiplies the 40 minutes by 7 to get to total weekly reading of 280 minutes.

This is a serious error. The 40 minute figure is not the average across the week (including days when the paper is not read) – it is the consumption *on days when the paper is read*.⁴¹ In other words, to get

⁴⁰ ¶123

⁴¹ The Thurman paper reports that the source for the 40 minutes figure is NRS (and does not record any adjustments to that figure). However, the NRS survey does not ask respondents their time spent with a newspaper over a week. Rather it (implicitly) asks them to say how long they spend with it on the days they look at it. It is also evident that Thurman has the same interpretation, since his methodology multiplies this figure (or more specifically the equivalent figure for individual titles) by the 'average issue readership', the number of people looking at a paper on a typical day. If, per the

to weekly consumption, the CMA should be multiplying by 4.4 (the weekly frequency of use), not by 7. The effect of this error is to overstate the importance of print newspapers in the CMA's analysis by almost 60%.

By extension, the error results in a substantial overstatement of the importance of News Corp, because of its relative strength in newspapers.

The CMA has not made available the data for us to exactly replicate their methodology. However, my calculation is that this error alone means the CMA's sensitivity for News+Sky's share of references is overstated by 1.5 percentage points. Consequently, the upper bound of their sensitivity becomes 12.5% rather than 14% (compared to Ofcom's 10%).

Failure to use available per-title data

According to the CMA:

“We do not have complete data that would allow us to calculate measures for each individual source in the NCS. As this is an indicative exercise, we have decided to apply an average duration per sitting uniformly across sources on a platform (ie all TV channels are weighted at 15 minutes per sitting). The estimates of duration are therefore 15 minutes for each time news is watched on TV, 64 minutes for each time news is read in a newspaper, six minutes for radio listening and two minutes for online use.”

The use of a single figure for all outlets on a given platform might be an acceptable simplification, except that the *Sun* – which is absolutely central to the CMA's time-based sensitivity – has materially lower than average usage, compared to other newspapers. The figures from Thurman which the CMA uses show that while the average time spent across all newspapers is 40 minutes per day, for the *Sun* it is 32 minutes. Consequently, by using the average minutes for the *Sun*, the CMA is materially overstating its importance. (The *Times* is higher than the average, at 47 minutes, but this does not offset the overstatement of the *Sun*, because the *Sun* has so many more readers).

CMA, the figure was a daily average for anyone who read a newspaper in the course of a week, it would need to be multiplied by the weekly reach of the newspaper, not the average issue readership. (Neil Thurman, [“Newspaper Consumption in The Mobile Age”](#), *Journalism Studies*, 1 Feb 2017)

I calculate this issue alone represents an overstatement of just under one percentage point in the CMA’s time-based sensitivity – that is, correcting it would reduce the CMA’s upper bound from 14% to 13%.

No allowance for non-news content

In Footnote 129, the CMA acknowledges that

“the estimate [of time spent on news] for newspapers is likely to be an overstatement given newspapers may contain a range of non-news content”.

This is a serious flaw in the CMA’s analysis, since it effectively treats as news consumption time spent with the crossword; the style section; obituaries; book reviews; TV and film reviews; the food section; advertising; and so on. Such items are clearly not relevant to news plurality, and have no equivalent within the time the CMA attributes to other media.⁴²

Failing to treat this issue means that the CMA’s analysis inflates the importance of newspapers, and by extension inflates the importance of News. My calculations suggest that if we assume that 25% of time spent with newspapers is with such non-news content, then this would reduce the adjusted Share of References attributed to Sky+News by approximately 1 percentage point.

Implausible results for online usage

One of the most striking – indeed implausible – results of the CMA’s time-based analysis is that it renders online consumption virtually irrelevant. Facebook’s Share of Reference is reduced to approximately 1%, for example. It is (to say the least) difficult to reconcile the CMA’s view that Facebook is de minimis for influence with the profound angst across western democracies regarding Facebook’s impact on elections and political discourse, the views of newspapers that Facebook is an existential threat, and so on.

Indeed, almost regardless of the details of methodology, this one output argues for setting aside the CMA’s approach.

Fox has previously argued that the CMA’s approach was inconsistent with consumers’ statements about which media were most important – in the NCS, 28% reported that online was their most important source. The CMA dismisses this, saying that “we have no

⁴² While there clearly may be advertising on TV and radio, it is in practice excluded from the time the CMA attributes to news on these platforms

evidence on any relationship between duration and importance”, and thus the inconsistency was not problematic.⁴³

However, if importance and duration are unrelated metrics, this begs the question which is most relevant for an assessment of plurality. Surely the answer is importance (in consumers’ eyes), *not* duration.

Indeed, one might equally say “we have no evidence on any relationship between duration and *influence*” – which would render the CMA’s entire time-based adjustment nugatory, since its purpose is ultimately to assess influence of different media owners.

Error in combination of comScore and NCS data

One of the reasons that the CMA arrives at such incredible results regarding online usage is that it has made two errors in calculating duration of usage.

The first relates to how it has combined Comscore and NCS data. The CMA describes its approach to time per visit for online as follows:

“Analysis of comScore data shows a weighted average of two minutes’ use per visit across the 20 news sites listed in Table 1, Appendix E. We have not needed to use frequency measures from the NCS to calculate this as comScore provides a measure of duration per visit.”⁴⁴

Here the CMA is effectively assuming that the news users as captured by comScore are the same as the news users as captured by the NCS. However, this is not the case. As I have previously discussed,⁴⁵ the two methodologies are very different and do not identify a consistent user base. comScore consistently reports appreciably higher user numbers than the NCS. For instance, it reported a reach of 30.6m for the *Mail* online, whereas the NCS reported 2.5m – a difference of 28.1m

As I explained, this does not invalidate the NCS results. For example, the NCS asks which sources “do you *use for news* nowadays”, whereas comScore will be picking up visitors who (for instance) visited for the weather or celebrity gossip.

Further, comScore will pick up a very long tail of visitors who perhaps only visited once in a month, and have a very insubstantial relationship with the site. NCS, as a recall-based survey, may omit

⁴³ ¶24

⁴⁴ FN132

⁴⁵ Robert Kenny, *News Plurality in the UK and, the impact of 21CF’s acquisition of Sky*, 27 September 2017 (page 29 onwards)

these users (for online and other media). Such fleeting visitors may not remember the visit, and even if they do, may not consider it as using the site 'nowadays'.

What is most important for our current purposes is that comScore figures for time per visit (and by extension the CMA's) *include this long tail of fleeting visitors*. The CMA then applies this figure to the users as identified by the NCS, a far smaller group with a deeper relationship with the outlet in question, who are likely to spend more time per visit.

It is simply not reasonable to assume that (in the case of the Mail, for example) the time per visit for the 30.6m is the same as that for the 2.5m. Consequently, the CMA has no solid basis for using the 2 minute figure for online visit length, even as an estimate.

Error in treatment of Facebook, Google and Twitter

In assessing online usage the CMA makes a further error. As noted above, the 2 minute figure was based on "the 20 news sites listed in Table 1, Appendix E". These 20 sites are newspapers, broadcasters and few online-only news sites such as BuzzFeed.

However, this list does not include Facebook, Google or Twitter. On an SoR basis, these are the #2, #3 and #4 sources for online news respectively, behind only the BBC. In aggregate they represent almost 40% of online news usage on an SoR basis. The CMA is simply assuming that the time per visit on the 20 news-specific sites (which it has anyway underestimated) carries over to these other providers.

This is not a safe assumption. These three sites represent 35% of all time spent online – for comparison, the Mail Online represents 0.6%.⁴⁶ Clearly not all the usage of these three sites will be news. However, there is room for the time per visit for Facebook (say) to be materially different from the 2 minutes the CMA has derived from pure news sites.

I acknowledge that there is (to my knowledge) no data available on time spent consuming news on Facebook and these other sites. But that does not justify making an entirely arbitrary assumption, particularly one that leads to such counter-intuitive results for Facebook.

⁴⁶ UKOM, [UK Digital Market Overview - Sept 2017](#)

Countervailing adjustments

It is striking that all the adjustments made by the CMA act to increase the Share of References assessed for News+Sky.

As the CMA notes elsewhere, the (unadjusted) SoR methodology has been developed and refined by Ofcom over several years, and has been subject to considerable consultation and discussion. As the CMA found in its own hearings, it is “recognised as the best available methodology”.⁴⁷

This is not to say there are no possible adjustments to SoR – but it is puzzling that the SoR approach would be so widely accepted if it substantially underestimated the impact of precisely the transaction that has been most in people’s minds in considering plurality and its measurement. However, this is effectively the CMA’s contention, in considering only adjustments that increase the SoR.

As we have seen, the CMA’s assessment of the upward adjustments has been deeply flawed. But also, the CMA should also properly consider downward adjustments. In fact, such consideration has been limited to dismissing out of hand adjustments proposed by Fox.

Adjustments rejected by the CMA

In its Provisional Findings the CMA notes that Fox has previously argued that the Sky+News SoR should be adjusted down to reflect:

- The editorial independence of the Times
- The lack of full control over Sky post transaction
- The potential loss of customers if there were editorial changes.

The CMA dismisses the first two on the basis that:

“because the statutory question focuses on the plurality of persons with control – and in light of the fact that we have also provisionally found that the MFT is able to exercise significant control over News Corp – we consider it is reasonable to take into account the full combined share of reference of Sky News and News Corp, without any weighting for the degree of ownership as proposed by Fox”.⁴⁸

This is flawed logic. Firstly, even if we accepted that the transaction provided ‘significant’ control (which I do not), this is clearly different from the absolute control available to – say – the BBC or DMGT,

⁴⁷ ¶10.47, Provisional Findings

⁴⁸ ¶10.71, Provisional Findings

which have 100% control over their outlets, with unfettered discretion (regulation aside) to determine editorial agendas, select editors and so on. A downward adjustment for the lesser level of control available to MFT is entirely appropriate.

In relation to the potential loss of customers, the CMA says:

“we have considered the impact of audience expectations ... and found that viewer expectations can change, and the loss of some customers may result in the gain of others.”⁴⁹

However, this is highly speculative – “can change”, “may result” – and certainly does not justify dismissing this issue entirely.

Adjustment for the different nature of news in different outlets

There are also other issues which a serious attempt to consider both upward and downward adjustments to Sky+News’ SoR would take into account.

Notably, the nature of news content is very different in different outlets. For example, the Sun carries substantial soft news, related to celebrities and entertainment, human interest stories and so on. Clearly the BBC *News at Ten*, the *Today* show, and the *Guardian* (for example) carry a much greater percentage of hard news, and thus are far more relevant for the public interest in news plurality.

A study by Harcup & O’Neill⁵⁰ of the content of print newspapers found that 38% of the stories they reviewed in the *Sun* related to celebrities, and 59% to entertainment.⁵¹ (Some may have related to both). This compares to averages of 14% and 30% for the broadsheets. Though the study did not consider TV bulletins, it seems likely that the percentages would be even lower for them.

Even if we exclude only entertainment stories, this suggests that the *Sun* should be down-weighted by 41% relative to the broadsheets, and by an even greater amount relative to TV news.⁵²

These differences are even starker in the online environment. As the CMA has noted

“the content of tabloid newspapers online, and particularly the online content consumers engage with, can be

⁴⁹ ¶10.71, Provisional Findings

⁵⁰ Tony Harcup & Deirdre O’Neill, “[What is News?](#)”, *Journalism Studies*, 1 March 2016

⁵¹ Entertainment was defined as “Stories concerning sex, showbusiness, human interest, animals, an unfolding drama, or offering opportunities for humorous treatment, entertaining photographs or witty headline”

⁵² Non-entertainment stories are 41% of the Sun, and 70% of the broadsheets. $41\%/70\% = 59\%$, implying a 41% down-weight for the *Sun*. (This figure is only coincidentally the same as the percentage of non-entertainment stories in the *Sun*)

substantially different from the print versions and tends to involve less news content”.⁵³

However, the CMA has not offered a sensitivity for these issues.

Adjustment for more recent data

The CMA’s analysis is based on the most recent NCS. However, the fieldwork for this survey was conducted in late October / early November 2016, or almost 15 months before the Provisional Findings report.

This matters, because of the steady and steep decline in newspaper readership. Any analysis which relies on historical data will inevitably overstate the importance of newspapers. Over the most recent 15-month period for which NRS data is available (year to Q2 2016 vs year to Q3 2017), national newspaper readership fell by 13%. Combined readership of the News titles fell by 17%. While this 15-month period is not an exact match for the period between the NCS and the CMA report, there is no reason to believe the decline in newspaper readership has slowed.

I calculate that correcting for just this issue would reduce the assessed share of reference for News+Sky in the CMA time-weighted analysis by one percentage point. In other words, it is an issue at least as significant as the CMA’s (misconceived) increase in SoR for consumption via intermediaries. It is not clear why the CMA has chosen to include only the upward adjustment.

Conclusion

The CMA has made three upward adjustments in its sensitivity analysis. However, as we have seen each of these adjustments is seriously flawed, both in concept and in execution.

Further, the CMA has not considered any countervailing adjustments – not even one as unimpeachable as an adjustment for more recent data on newspaper consumptions.

Given this, not only can no reliance be placed on the sensitivity analysis the CMA has provided, but further it seems likely that a properly formulated sensitivity analysis would see a skew to *reduced* SoR for News+Sky, not an increase.

⁵³ ¶11.41, Provisional Findings

4. Point-by-point review

In this section I turn to a point-by-point review of a number of items from the Provisional Findings Report. Quotes from the Findings are shown in red boxes (with paragraph numbers from the main Report), with my response below.

Sub-headings in this section match those in the Provisional Findings Report.

Summary

[W]e have carried out a qualitative assessment of the actual extent of the control exercised and exercisable by the MFT over Sky and News Corp. We have therefore not assumed that the MFT, Fox, Sky and News Corp are to be treated as a single entity following the Transaction. [¶34]

In practice, treating Sky and News as a single entity is exactly what the CMA has done. To take one example, in its share of reference analysis, the CMA makes no allowance for the separation between Sky and News, but rather treats the combination as a monolithic entity similar to the BBC or DMGT.

[T]he board resolution passed by Fox may not over time (given it is an internal governance mechanism) prevent Fox taking decisions that are within the commercial interests of Fox and Sky, but which would impact on the independence of Sky News. [¶45]

This is the first of numerous examples where the CMA suggests that concerning effects of the transaction may arise over time. For example:

- “[W]e provisionally conclude that the degree of control actually exercised by the MFT over Sky and Sky News in the future may increase over time” [¶8.3]
- “A greater focus on advertising revenue ... would not necessarily create a conflict with editorial independence but could create a tension which over time would change the culture of Sky News.” [¶8.18]
- “[W]e provisionally consider that there is no inherent reason for [Sky News’] culture to persist and that it could be changed over time” [¶8.19]

- “[L]onger term and more subtle changes in position as a result of the MFT’s increased influence would not necessarily engage or be prevented by any of these safeguards” [¶8.42]

Thus the CMA’s thinking appears to be based on a prospective, rather than immediate harm.

However, if this is the case, it is reasonable to ask what offsetting effects may arise over time, that would mitigate any such notional harm when (in the CMA’s analysis) it came to pass.

Most obviously, a forward-looking analysis would consider the continuing decline in newspaper readership. For example, in the last 12 months, the *Sun*’s readership has fallen by 18% (continuing a long-term trend).⁵⁴ There is no suggestion that the contraction of newspapers will stop, and this continuing decline will continue to reduce News’ share of reference, mitigating any future negative aspect of the transaction.

Our view is that although the MFT will not have full ownership of Sky following the Transaction, the significantly increased control it will be able to exercise over Sky and Sky News is sufficient to give rise to concerns that, as a result of the Transaction, there could be increased editorial alignment of Sky News and the newspapers owned by News Corp. [¶48]

The claim of ‘significantly increased control’ is entirely at odds with the much more nuanced language the CMA uses in the preceding paragraphs, such as:

- “The [Board] resolution therefore does not *necessarily* prevent the MFT having influence over future appointments” [¶45]
- “[Audience] expectations provide less of a constraint where editorial influence is *subtle* and *not immediately obvious*” [¶45]
- “*longer term* and *more subtle* changes in [Sky’s] position as a result of the MFT’s increased influence would *not necessarily* engage or be prevented by any of these safeguards” [¶47]

Thus even in the CMA’s own analysis, the transaction may provide the ability to make subtle changes over the long term. It is hard to reconcile this with ‘significantly increased control’. If this passes the

⁵⁴ NRS

threshold of ‘significant’, what, in the CMA’s view, would represent ‘moderately increased control’?

The online-only providers have established a more limited presence. For example, one of the largest online-only providers is HuffPost UK, which despite offering a news service in the UK for six years still has a consumption level by some way smaller than traditional organisations’ online operations. [¶157]

In the preceding paragraph, the CMA uses monthly unique visitors as its metric to establish the Sun’s significant presence online. HuffPost has 12.2m such visitors, considerably above the Times [5.8m] and ITV [7.2m], and not far behind Sky [15.5m].⁵⁵

On a share of reference (SoR) basis, HuffPost is of the same size as ITV, the *Telegraph* and the *Mirror* online.

Thus it is quite wrong to say it is “some way smaller than traditional organisations’ online operations”.

[T]raditional news providers continue to be among the largest contributors by number of impressions and click throughs [via intermediaries] [¶159]

The traditional providers may be largest, but this is very different from saying they (as a group) are the most important and other providers can be set aside. As the CMA itself notes later regarding Google (for example):

“a long tail of small publishers contribute a significant share of the content impressed by Google”.⁵⁶

The development of online news has increased the availability of a wide range of news sources and has provided a platform for a wider range of voices. However it has not yet significantly diminished the impact of traditional news providers [¶160]

This conclusion is presumably based (in part) on the misapprehensions identified above. But even if it were true, it

⁵⁵ comScore, June 2017

⁵⁶ ¶134, Appendix E

ignores the fact that online news has significantly redistributed share *amongst* traditional providers – making the *Guardian* much more important, for example.

Consumption measures attempt to track the actual amount of time that a consumer has spent engaging with a particular news source. The most detailed measure of cross-platform consumption is a bespoke 'share of reference' metric devised by Ofcom [¶167]

The Share of Reference metric does not in fact track time spent, but rather frequency of use.

Sky News has the largest share of online news consumption behind the BBC, followed by The Mail Online, BuzzFeed and The Times. [¶168]

This claim is inconsistent with comScore minutes of usage data, which rank Sky #5; comScore reach data, which rank it #8; and Ofcom's SoR data, which rank it #5.

The CMA appears to be basing the claim on its 'channel' based analysis of comScore data.⁵⁷ comScore allows (but does not require) news publishers to identify particular categories (or channels) of content within their site. However, analysis at this level is fraught with risk.

First, not all sites provide channels. Any comparison of such a site to the channel of another site is an apples-to-oranges comparison, since it will put the total usage of the former site against select usage on the latter. The CMA has fallen into exactly this trap with the *Times*, which (as it notes in Appendix E) does not provide channels and so will be overstated. To state in the Summary (per the paragraph quoted above) that the *Times* is fifth largest site is simply wrong.

Second, even the sites which provide categories do not do so on a consistent basis. They may provide a different collection of channels (for instance, some include a 'politics' category and some do not), and even if they have the same set of channels, they will not use a consistent methodology to allocate stories between them.

These issues mean that using data at the category level to compare different outlets can often lead to perverse results -as it has in the

⁵⁷ See page E7 onwards in Appendix E

case of the CMA's analysis. To take an example, in June 2017 comScore data shows that usage of the *Guardian* website was 717m minutes, and that of the *Express* was 109m minutes. However in the CMA's analysis the two are roughly equal.⁵⁸ The CMA has compared the entirety of the *Express*' consumption to the news channel within the *Guardian*. This is another example of the apples-to-oranges comparison described above. But further, it would imply that the *Guardian*'s 'news' channel is around one-seventh of total consumption on the site. Given that the *Guardian* is a hard-news-heavy site, this is counterintuitive. Possible explanations are that the CMA's analysis may have omitted other relevant channels within the *Guardian*, or that the *Guardian* is not comprehensively tagging its data.

The CMA's analysis also suggests that the *Guardian* is smaller than the *Times* in terms of time spent.⁵⁹ Given that the *Guardian* (as a whole) has roughly four times the reach of the *Times* and ten times the minutes of usage, this too is a completely implausible conclusion.

Thus the CMA's channel-based analysis is methodologically flawed and produces results that are self-evidently wrong. On this basis it should be set aside.

On a cross-platform basis, Sky News and News Corp together represent at least 10% of total news consumption using Ofcom's share of reference measure. [¶69]

This is incorrect. Sky and News together represent *less* than 10% share of reference. (The CMA repeats this error at ¶84, but at ¶10.49 notes that the "share of reference of Sky News and News Corp will round *up* to 10%" – emphasis added).

I calculate that on Ofcom's basis, the SoR of Sky+News is 9.6%. However, there is an anomaly in Ofcom's approach. For a respondent who says they use a daily newspaper 'daily', they assign a frequency of '7' for this respondent. However, a more natural interpretation is that the respondent is using the paper 6 times per week, that is, on the 6 days it is available. (The NCS treats Sunday newspapers separately).

⁵⁸ Page E13

⁵⁹ In August 2017, after the inclusion of the Times mobile app

This anomaly means that Ofcom's SoR figures overstate the importance daily newspapers. If we correct this anomaly, News' SoR drops from 3.1% to 2.8%, and the SoR of Sky+News drops from 9.6% to 9.4%.

While the average customer of Sky News and News Corp uses between four and five different sources of news, roughly a third of their customers uses between one and three sources of news. In other words, a significant minority of their customers remain relatively reliant on the news content they produce. [¶70]⁶⁰

To assess this claim I have analysed the news consumption of this minority – Sky or News customers using three or fewer sources. Even amongst this select group, the BBC dominates consumption. On an SoR basis, the BBC represents 46% of their consumption, with Sky+News representing 34%.⁶¹ This hardly suggests this group are 'reliant' on Sky+News. By some margin it wouldn't even be their largest source of news.

The shares of reference of news providers have been relatively stable over time [¶71]

This is not true. In 2010 Ofcom assessed the combined SoR of Sky+News as being 22%. As of 2016 it had fallen to less than 10%. Certainly there were methodological changes between these dates, but nowhere near significant enough to explain such a dramatic drop. Declining newspaper circulation and Sky's loss of wholesale contracts were key underlying factors.

Even in the three years since 2013 (when Ofcom's methodology stabilised) there have been material changes. ITN and News have lost roughly a quarter of their SoR, and GMG and Facebook have doubled.

⁶⁰ Also discussed at ¶10.78

⁶¹ Communications Chambers analysis of NCS respondent level data

ITN would have a similar share of consumption to Sky News and News Corp following the Transaction. However, we note that there is a commercial need for ITN to reflect the preferred style, tone and editorial approach of the retail news providers to which it provides news under contract (ITV, Channel 4 and Channel 5). [¶73]

The CMA here takes an inconsistent approach to internal plurality. While ITN does need to take these factors into account, they are far less significant constraints than the issues constraining Sky+News (not least, distinct ownership, newsroom culture, the requirements of different media and so on). However, the CMA has entirely set aside these more significant issues.

Further, even if one were to disaggregate ITN, it would make little practical difference. ITV by itself has a share of references of 9%, virtually identical to that of Sky+News.

The Times, The Sunday Times, The Sun and The Sun on Sunday together are one of the most read group of newspapers, and that readership covers a broader audience than any other media enterprise involved in the supply of newspapers [¶78]

Ofcom NCS and NRS figures both show that DMGT is appreciably larger than News (in SoR and readership respectively). For instance the readership of the *Mail* and the *Metro* is 32% higher than that of the *Times* and the *Sun*.

It is possible that the CMA's 'broader audience' refers to demographic spread. But both DMGT and News have demographic mix (of SEG) that is quite close to the national average. Of Mail readers, 22% are SEG AB, compared to a national average of 23%.

Further, the CMA has made no case that demographic spread matters for an assessment of influence. Indeed later it argues to the contrary, by saying that appealing to higher SEGs will bring advantage. The CMA says at ¶11.56:

"[Sky News] outperforms with the higher social classes, meaning that the MFT will benefit from greater access to a more influential audience segment".

News Corp's newspapers (both print and online) still have a significant impact on the wider news agenda, including the stories that are carried by TV and radio broadcasters [¶179]

This contrasts with the CMA's conclusion at ¶11.71:

[T]hese studies provide some indication that traditional news providers (whether through their established print or broadcast medium or online) together play a significant part in leading the news agenda. However, no single traditional news provider is particularly important in doing so. This was supported by a number of news providers who told us that, while they monitored other news providers for stories, no one news provider was considered particularly important in generating news stories".

Sky News is the only UK-focused commercial 24-hour news channel [¶193]

This is true, but the CMA has made no case that being commercial has any particular significance for an assessment of plurality. (One might as well say "Sky News is the only UK-focused 24-hour news channel called Sky"). The implication that this uniqueness has some particular significance is unfounded.

The Sun has the largest readership of all daily national newspapers and The Times also has significant reach and influence [¶193]

Here the CMA provides a misleading impression by looking at the title level. At the group level DMGT is an appreciably larger newspaper group, because of the combined strength of the *Mail* and the *Metro*.

The Times [has a] significant and growing online brand [¶193]

The Times' reach online is (per comScore) well below that of the Manchester Evening News. On a share of reference basis it ranks #21 with less than 1% share of online news consumption.

Sky News and The Times in particular are highly trusted and therefore likely to be more influential than raw audience numbers indicate [¶95]

A balanced assessment would go on to say “conversely, the Sun scores very poorly for trust, and so likely is less influential than raw audience numbers indicate”.

[W]e consider it is only established news providers with a substantial presence in TV and newspapers who might be in a position to mitigate or moderate the increased influence of the MFT [¶98]

This is a radical and entirely unsubstantiated assertion. It essentially sets aside all other news providers as a constraint on News+Sky, which is clearly wrong.

Although the BBC is undoubtedly influential and can drive the wider news agenda, we are also conscious that its unique funding structure and governance place special constraints on it to be impartial, in a way which goes beyond the requirements of the Broadcasting Code. We consider that this limits the extent to which the BBC can directly challenge the positions taken by other news providers or mitigate or moderate other news owners’ influence. [¶100]

These are assertions which the CMA does not substantiate.⁶² It may be that the additional rules applicable to the BBC mean that the editor of BBC News is somewhat more fettered than the editor of Sky News, and this may reduce the relative influence of that editor *as an individual*, but that is quite different from saying it limits the influence of the BBC. Whatever the method for setting the order and angles of stories on the *News at Ten* (say), they will be very influential in shaping the perceptions of the millions of people watching.

The CMA has also not justified the contention that a BBC inability to ‘directly challenge’ other providers means it can’t mitigate their influence. First, little news coverage in *any* outlet is a direct challenge to other news providers. The *Telegraph* generally does not say ‘the

⁶² The issue is addressed again at ¶10.56, but the CMA essentially just repeats the language used in the Summary

leader in yesterday's *Guardian* was nonsense'. The BBC may not be allowed to do this, but since it is so rare across all outlets, this is hardly a material handicap.

However, the BBC certainly can (and does) indirectly challenge other outlets. For instance, if a pro-Brexit newspaper ran a story saying 'All experts agree – Brexit will be great for the economy', then the BBC could run a story interviewing two experts, one for and one against Brexit. This would be utterly impartial, but would rebut the claim of the newspaper. Equally, *Question Time* could (and does) have participants arguing strongly against positions put forward by (say) a *Times* journalist

These are of course just examples, but more fundamentally an outlet with a strictly impartial approach will *inherently* act as a rebuttal to partisan news providers.

I also note that while it is true that the BBC operates under additional rules regarding impartiality, the CMA has made no case that these rules have material impact day-to-day beyond the requirements of the Broadcasting Code. But this notional material incremental impact is essential to the CMA's logic. If the impact is only moderate, then the CMA has no justification for treating Sky differently from the BBC, and should therefore say that Sky too has limited ability to "directly challenge the positions taken by other news providers". In fact, the CMA argues the exact opposite.

Finally, regardless of the restrictions on the BBC, as a well-funded, well-loved provider with strong audience relationships, it displaces consumption that might otherwise have gone to other news providers. In this way alone, it is a major limiting factor on the influence of other outlets.

Internal plurality and other contextual factors

The Transaction would also increase the MFT's ability to set the commercial direction and priorities of Sky and Sky News. This may, for example, be in the form of a greater focus on advertising revenue. This would not necessarily create a conflict with editorial independence but could create a tension which over time would change the culture of Sky News [¶8.18]

The relevance of this point is not clear. Conceivably the culture of Sky News might become more commercially driven – but why would we

expect that to lead to some form of alignment with the *Times* or the *Sun*? If it does not, then there is no relevance to plurality.

[T]he protection against alignment afforded by the Broadcasting Code is, in our view, limited [¶8.36]

The CMA uses an ambiguous term here – ‘limited’. Certainly the protection is limited in the sense of ‘not absolute’. But it is certainly *not* limited in the sense of ‘not great’. The kind of highly partisan, campaigning political advocacy that is fundamental to most newspapers would be utterly impossible for a broadcaster.

As the CMA notes elsewhere, this leaves the possibility for ‘subtle and not immediately obvious’ influence – but such subliminal changes hardly allow for much alignment with a newspaper (or influence for an outside owner).

Coordination of editorial outlook could arise in relation to select matters which may not, unlike Brexit or the outcome of a general election, be those subject to such intense scrutiny. [¶8.41]

If influence is limited to items that are little regarded by the public, then it is much less relevant to the public interest in plurality.

Assessment of diversity in the viewpoints that are available and consumed

Consumption of news online [¶10.36 onwards]

For detail on issues raised in this section, see:

- The discussion in the previous section regarding consumption via intermediaries (p12)
- The discussion above (p29) re ¶68 of the Provisional Findings Report, where online consumption is discussed.

On each platform-specific measure of consumption, a significant proportion of the news consumed in the UK comes from either Sky News or News Corp:

- (a) Sky News has the third highest level of consumption on TV, behind the BBC and slightly less than ITV news,
- (b) The Sun newspaper has the highest daily readership,
- (c) The Sky News website is the second largest news website in the UK in terms of time spent on news websites, and,
- (d) The Sun and Sky News do relatively well in terms of engagement and presence on various intermediaries. [¶10.43]

While the rubric here talks about the *proportion* of consumption, the subpoints talk about the *rank* of consumption. This is misleading, since the wide array of providers coupled with the strength of the BBC means that even highly-ranked suppliers can have a low share of consumption.

Turning to the more detailed points:

- Sky's 'third highest level of consumption' of TV is a share of just 7%.
- The Sun's #1 ranking as a paper is, for a plurality assessment, much less significant than DMGT's #1 ranking as an owner of newspapers
- The view that Sky is the second largest website is based on the CMA's deeply flawed channel-based analysis. In reality both the *Guardian* and the *Mail* have higher usage, and Sky represents less than 3% of time spent with news sites.⁶³

We note that the combination of a share of reference of Sky News at over 6% and News Corp of over 3% is not an insignificant increment in terms of share of reference and media plurality. The MFT will be increasing its control over Sky News which has a share of reference of 6%, significantly larger than established news providers such as DMGT, GMG and Trinity Mirror.²⁷⁸ [10.50]

²⁷⁸ We also note that the Transaction will specifically increase the control of Fox and the MFT over Sky, which has a share of reference of 6%. [FN 278]

In this paragraph and associated footnote, the CMA reveals a fundamental misconception in its assessment of the transaction. It appears to believe (implicitly) that a plurality review of a transaction

⁶³ Comscore, June 2017

has ‘direction’, by which I mean that the outcome will depend on whether party A is acquiring party B, or conversely party B is acquiring party A.

The CMA focuses on the 6% increment Sky represents to MFT, and certainly the legal structure of the transaction is that MFT is increasing its influence over Sky. But this is not relevant to an overall assessment of plurality. The public interest test is (or should be) blind to which owners hold a given distribution of media assets, and by extension the results of the plurality review should be same whether MFT acquired Sky or *vice versa*.

A simple thought experiment shows the danger of focusing on the incremental gain *relative to the smaller party to a merger* (as the CMA does). Imagine the *Wandsworth Guardian* were to acquire ITV. As an incremental gain, this would be enormous for the *Wandsworth Guardian*. The 9% SoR it would acquire would be much greater than the incremental 6% associated with Sky. Further, the combined SoR of ITV and the *Wandsworth Guardian* would be comparable to that of Sky+News.

Would we therefore conclude that the acquisition of ITV represented a threat to media plurality? Certainly not. Clearly the transaction would leave the plurality of the market virtually unchanged, because it had not made the *larger* party to the transaction materially bigger.

This is the proper basis for a consideration of the impact of a transaction on plurality – not to consider if it makes the acquiring party larger (as the CMA has done), but rather on the basis of whether the merged entity is materially greater than the larger of the two parties.

Once the plurality assessment is properly framed this way, many of the CMA’s concerns fall away. For instance, the final sentence in the paragraph quoted above becomes:

“Sky+News will have an incremental share of reference of 3% over Sky alone, far smaller than the BBC and ITV, smaller than DMGT, Facebook and Google, and only slightly greater than GMG, Trinity Mirror and Channel 4.”

Further I might add that Facebook organically gained 4 percentage points of SoR in a single year (2014-15), which puts in context the 3%

increment associated with the transaction. The Guardian gained roughly 1 percentage point in the same year.⁶⁴

Finally, I note that while discussion will inevitably focus on the incremental change associated with the transaction, this is not strictly relevant to the public interest test. In effect, this says that transactions must not create insufficient plurality. But a given post-transaction level of plurality either is or isn't sufficient. How big a step the transaction took to create that post-transaction level should not change the assessment.

Ofcom's Public Interest Report states that ITN has a 11% share of reference. The majority of this is from ITV (8%) [¶10.53b]

This is incorrect. Ofcom report that ITV has a 9% SoR, and thus represents the great majority of ITN's SoR. This renders the CMA's question as to whether ITN should be disaggregated moot – by itself, ITV is almost as large.

The MFT's control of Sky News and News Corp means that it controls a group of assets that taken together comprises one of the three largest news providers in the UK. [¶10.54]

In attaching significance to this the CMA again falls into the trap of assuming that the impact of transactions has direction. News+Sky would indeed be one of the three largest news providers, but *before* the transaction Sky by itself is one of the three largest news providers. In other words, the transaction means the third largest provider becomes bigger, but it does not 'overtake' any other providers.

The combined share of reference of Sky News and News Corp would be significantly larger than that of the next largest non-intermediary provider, DMGT [¶10.54]

This is true, but irrelevant. One could equally say of a merger involving Trinity Mirror that it would mean that it was significantly larger than the next largest non-intermediary provider (since Trinity Mirror by itself is twice the size of Bauer, the next largest player).

⁶⁴ Based on the rounded figures provided by Ofcom – the true figure could be somewhat higher or lower

Ofcom assessed news content on ITV, Channel 4 and Channel 5 to have been provided at a wholesale level by ITN. ... However, evidence we have obtained indicates that there is a degree of editorial control held by the customers of ITN (ITV, Channel 4 and Channel 5) and a degree of differentiation in the news services provided by these channels;²⁸⁶ [F]urthermore, ITV and Channel 5 have also told us that they produce their own news and current affairs content ... Given the above, it is reasonable to consider splitting out ITN at the wholesale level. [¶10.57-10.58]

²⁸⁶ ITN told us that while some common costs are shared between the customers of ITN, each customer of ITN has its own newsgathering operation with dedicated staff to each channel, and each contract has a detailed editorial specification [FN286]

Here the CMA takes an approach that is entirely inconsistent with its approach to MFT. The various MFT outlets have their own editors, newsgathering operations and dedicated staffs (under different roofs, unlike ITN) and – for Sky and News – different ownership. In practice the degree of separation is appreciably greater than that for ITN’s customers.

This is evident in the products themselves. While I do not deny there are some differences between (say) ITV News and Channel 4 News, the differences between the *Sun* and the *Times* as products are surely far greater.

If the CMA believes that ITN’s customers should be treated as distinct, it is unclear why it believes Sky+News should be treated as a monolithic entity.

[The NCS] shows that over the past four years the wholesale shares of reference of major news providers have remained broadly constant (with the BBC's share of reference between 42 to 44%, Sky News' between 6 to 7% and News Corp's share of reference between 3 to 4%). While relative positions have not changed, the share of reference of some providers have seen larger changes in percentage terms - for example, ITN has lost over 20% of its share of reference since 2013. [¶10.60]

This is deeply misleading. ITN has lost over 20% SoR on a percentage basis, but News Corp has lost 25%.⁶⁵ It is unclear why the CMA highlights the former as a 'larger change', but describes the latter as 'remaining broadly constant'.

It is also not true to say 'relative positions have not changed'. This ignores the dramatic rise of the intermediaries, with Facebook now being the #3 player. But it also ignores changes amongst the traditional players. DMGT has overtaken News, for example, and GMG has passed Telegraph Media and N&S.

We note that the increment from the Transaction (ie combining the shares of reference of Sky News and News Corp) is large relative to the shares of reference of other established news providers [¶10.60]⁶⁶

As discussed above, when properly understood the increment from the transaction is 3 percentage points of SoR. On its face this is not particularly significant, and contrary to the CMA's statement above, it certainly is not large relative to other providers. As I have discussed, it is far smaller than the BBC and ITV, smaller than DMGT, Facebook and Google, and only slightly greater than GMG, Trinity Mirror and Channel 4.

[W]e note that the argument that online multi-sourcing increases plurality only holds for the 30% of the population who use online intermediaries to access news. [¶10.89]

This is incorrect. The internet substantially increases multi-sourcing quite aside from the impact of intermediaries., since:

⁶⁵ Based on the rounded figures provided by Ofcom – the true figure could be somewhat higher or lower

⁶⁶ This claim is reiterated at ¶10.98

- It is easy to sample from multiple sources (by contrast to trying to watch news at 10pm on the BBC and ITV)
- The predominance of free news encourages multisourcing (by contrast to paying for two newspapers)
- The internet makes available a wide variety of sources that might not otherwise be accessible to a consumer (for instance, international titles, or the *FT* which might not be available in a rural newsagent)
- The internet enables entirely new sources, such as BuzzFeed and HuffPo
- Consumers may choose to use different traditional sources online than offline, precisely because they've already heard from those sources offline

In the 2010 Public Interest Test, Ofcom found that “There is also evidence that multi-sourcing ... may be higher among consumers of online news than other platforms.”⁶⁷ At that time, Facebook and Twitter were a fraction of their current significance, suggesting that multi-sourcing online is *not* dependent on them.

Influence over public opinion and the political agenda

[M]ore trusted news providers are more influential and the addition of a trusted news provider will increase the influence of the MFT. [¶11.15b]

There are two problems with the CMA's logic here.

First, it once again makes the mistake of focusing on the wrong increment. The impact of the transaction should be assessed as News+Sky vs Sky, not News+Sky vs News. On this basis, the CMA's language above becomes “Less trusted news providers are less influential, and the addition of News (and in particular the Sun, which scores poorly on trust) will provide only a limited increase relative to that of Sky before the transaction”.

Second, even setting this aside, if the CMA attaches significance to trust, it should acknowledge the very high levels of trust for the likes of the BBC and the Guardian, which act to dilute the influence of News relative to its SoR.

⁶⁷ ¶14.30, Ofcom, [Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation](#), 31 December 2010

[A] TV news provider can at least influence what the public thinks about while still operating within the Broadcasting Code [¶11.34]

This argument is fundamental to the CMA’s view that ownership of Sky brings influence. However, the intermediaries also have the power to ‘influence what the public thinks about’. Consciously or otherwise, their algorithms do exactly this by highlighting certain items and burying others. Right now Facebook is making a very explicit attempt to influence the public to think less about ‘fake news’.

Thus the intermediaries have exactly the power that the CMA sees in the broadcasters – and yet the CMA essentially sets aside the intermediaries in its analysis.

[W]e note comments from Mr Neil that ‘you cannot really now be big in broadcast news unless you have a 24-hour news channel. You can have other news outlets but you need a 24-hour news’ [¶11.36]

The CMA offers this quote to support its assertion that Sky has material influence. However, there is nothing in the context of Mr Neil’s remarks to suggest that by ‘big’ he had influential in mind (as opposed to, say, audience size or awareness). Indeed, later in his evidence Mr Neil says:

“I think [Sky News’] influence is pretty limited ... it is a pretty straight-shooter news organisation. It is pretty up and down. It does not have opinions. So, I think its influence is pretty minimal”.⁶⁸

This is entirely at odds with how the CMA seeks to position his remark on being ‘big’.

⁶⁸ CMA, *Notes of a hearing with Andrew Neil*, 18 October 2017. p7

While having lower trust scores may indicate a lower degree of influence, there are limitations in using the metrics above, which were highlighted in Ofcom's Public Interest Report:

a) people may not be aware of the impact that a particular news provider has upon them. News Corp titles (and others) may have the potential to influence all of their respective readers to varying degrees, in ways not picked up by these metrics;

b) the metrics may overstate the impact of TV news because broadcasting regulation has 'helped to construct a strong attachment to broadcasting as a highly trusted medium'

c) an 'acceptability bias' may lead to these metrics understating the use of certain sources because 'the degree to which consumers will be prepared to report, in a face-to-face survey, their attitudes to different news sources is likely to be conditioned by their perception of how socially acceptable it is to have those attitudes'; and

d) news providers with lower trust scores may nonetheless reach a large number of consumers, or they may have a role in leading the news agenda, both of which will in themselves provide influence. [¶11.42]

The CMA's discussion of trust is incoherent.

The overarching problem is that the CMA here is seeking to make the case that low trust metrics don't matter (or matter much) for influence. However elsewhere the CMA argues that higher trust scores for the *Times* and Sky mean they are particularly influential (see, for instance, ¶95, ¶11.44). Either differences in trust scores matter or they do not. In the former case the CMA must agree that low trust reduces the *Sun's* influence; in the latter case it must abandon its contention that high trust makes the *Times* and Sky particularly influential.

Turning to the more detailed points:

While respondents may be unaware of impacts upon them, this is very different from saying lesser trust doesn't lead to lesser impact. If a consumer is wary of a particular outlet, then clearly its potential to persuade a consumer is much reduced.

The high trust of TV may well be as a result of regulation – but this is irrelevant. The fact is, TV is trusted, and this augments the influence of TV, regardless of the origin of that trust.

Regarding acceptability bias, the CMA makes a statement about usage, but seeks to support it with a quote about attitudes, an entirely separate issue. Further, the implicit contention that it is socially unacceptable to trust the *Sun* may be seen as a metropolitan perspective. Finally, the *Mail* and the *Sun* attract equally enthusiastic dislike, but the *Sun*'s trust scores are appreciably lower, suggesting that much more is at work than an acceptability bias.

Regarding the ability of low-trust outlets to have influence via large reach, this is true but tangential. The key question is whether low levels of trust dilute the influence of an outlet with a given scale.

Finally the CMA contends that a low-trust outlet may lead the news agenda. But it offers no evidence that the *Sun* – the case in point – does in fact have agenda setting power. Indeed, the studies of agenda setting the CMA cites suggest that the *Sun* has minimal agenda setting power.

[A]analysis of the NCS showed that of the 14% of population that consume news from News Corp, 25% of the time they consume news is from News Corp and 5% is from Sky News. Therefore, by bringing both media sources under the control of the MFT, this would increase the share of times that news is consumed by MFT controlled [¶11.56]

The CMA's analysis here shows that even those who already consume from both sources (who might be expected to be most vulnerable to the transaction) will still get twice as much news from other sources as they do from News+Sky. This does not seem to suggest that News+Sky will be particularly influential as a result.

Data from YouGov allowed us to see what news sources are relied on by this panel of 'opinion formers'. The news providers that influence them could be expected to have greater influence overall. The news providers on which they rely can be seen in Figure 11.4. [¶11.53]

The CMA mischaracterises its evidence. While Figure 11.4 is headed 'Commonly used news sources for opinion formers', it is in fact *print and online* sources only (as is acknowledged in a footnote). By excluding TV and radio, this data will inevitably understate the

importance of the BBC, ITN (the latter does not even appear in the results), Sky and commercial radio. By extension, it overstates the relative importance of the broadsheets.

The CMA's following paragraph extends this confusion, by seeking to compare the YouGov figures for print and online directly to the NCS figures for consumption across *all* media.

I also note that the YouGov survey found that 58% agreed "The advent of the digital age has diminished the influence of newspapers" (just 10% disagreed). This directly contradicts the CMA's assertion elsewhere that online news has not affected the influence of traditional media.

"[Sky News] outperforms with the higher social classes, meaning that the MFT will benefit from greater access to a more influential audience segment". [¶11.56]

If the CMA believes that appealing to 'higher social classes' (or more properly Social Grades A & B) brings greater influence, it should acknowledge that Sky News is outperformed on this metric by several other TV news outlets, including the BBC News Channel, BBC Two and Channel 4.⁶⁹

[T]he significantly increased control that the MFT will have over Sky News as a result of the Transaction will provide the MFT with an increase in an audience which is influential in itself (especially as older and more affluent demographics are more likely to vote) and with a broader demographic profile. [¶11.58]

Once again the CMA focuses on the wrong increment. This is better put as "the incremental influence of Sky+News over Sky is limited by the narrower demographic profile of News".

The Cardiff University study concluded that morning newspapers continued to share a similar agenda to the evening TV news bulletins during the 2015 general election [¶11.68]

It did not.

I repeat my previous evidence on this point:

⁶⁹ NCS

The paper's statistical analysis focused only on stories where there was the potential to demonstrate a correlation. 'Process' stories (as opposed to 'policy' stories) were excluded:

"In order to interpret the editorial agenda-setting power of newspapers, we primarily focused on television news stories that could have been covered the previous day by the press. So, for example, since many process stories relate to that day's news (a campaign event), newspapers would not have covered them."

In other words, the Cardiff paper begins by setting aside a large number of TV stories where there was no newspaper influence. Thus at best, the paper concluded that for some of the stories where there was the possibility of TV following print, TV did so. Even amongst policy stories, just 31% had appeared in newspapers previously.

Thus the CMA's claim that newspapers and TV had a similar agenda overall is simply false.

The study found that the largest proportion of stories reported by newspapers before appearing on national TV news bulletins came from News Corp titles (23% overall; 16.3% from The Times/Sunday Times, and 6.7% from The Sun/Sun on Sunday). [¶11.68]

Again, this is incorrect.

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 it would be wrong to say (as the CMA does) that the story 'came from' News Corp.

Further, many news stories in the sample were so significant that they were bound to be covered by both print and TV. Again, in these cases, it would be quite wrong to say the story 'came from' a newspaper.

We recognise that the news media landscape is changing rapidly, in that Twitter and other intermediaries allow politicians and others to communicate directly with the public rather than having to go through traditional news providers, and that this may lessen concerns about mergers of traditional news providers in the future. However the evidence that we have seen suggests that traditional news providers currently remain influential in leading the news agenda, given that, as we set out in chapter 10, they continue to provide the bulk of the news content consumed online. [¶11.77]

The logic here regarding the news agenda is unclear. If agenda setting is simply a function of the volume of consumption, then there is no need to consider it separately from consumption metrics. Further, we would therefore conclude that the BBC dominates agenda setting, since it is the largest player by consumption by far.

In fact, agenda setting is not tightly tied to volume of consumption, and so the CMA cannot dismiss the agenda setting power of non-traditional sources on this basis. A case in point is the tweets of President Trump, which clearly have enormous agenda setting power.

Further, even if intermediaries had no agenda setting power, the CMA's logic here would still be wrong. For example, Trump's tweets have impact in part because it allows him to *bypass* the media's agenda. The same could be said of Jeremy Corbyn's use of social media. Millions of people hear from them directly. It may be that traditional media pick up these story subsequently, but this is a bonus, not a necessity.

Thus the CMA has no basis to dismiss the impact of disintermediation by social media.

Baroness Greener, previously acting Deputy Director of Communications for the government, stated that:

...

“We would often give keynote interviews to the Independent on Sunday in spite of their poor circulation [...] [who] would probably put the story on the front page, that would get an airing on the all-important Sunday political programmes, which would in turn get good follow-up coverage in all the daily papers on the Monday.”

[¶11.87]

This quote underlines the agenda setting power of small players, out of all proportion to their SoR. By extension, the SoR of larger providers (such as Sky and the *Sun*) will overstate their relative influence.

Assessment of sufficiency of plurality

We consider that the presence of established news providers in newspaper and TV continues to be the principal factor in determining the extent of media plurality in the UK. [¶12.12]

As of 2016, the SoR of TV, internet, radio and newspapers were 39%, 37%, 16% and 9%. As of today, the internet is almost certainly the largest platform, given its rapid growth. An analysis of plurality today should begin with the internet, not with TV, and particularly not with newspapers.

[A]ll other news providers are of a magnitude smaller than the combination of Sky News and News Corp newspapers [¶12.18]

This is clearly false – both ITN and the BBC are bigger.

ANNEX 3

RT AND CNN BREACHES 2013-2017

RT – 16 BREACHES¹ INCLUDING STATUTORY SANCTIONS

Programme	Ofcom broadcast bulletin	Date of Transmission	Rules breached
News	241	5 August 2013	Rules 1.3, 1.11, 2.3
Syrian Diary	244	17 March 2013	Rule 5.5, 5.9
Joystick Warrior	253	3 March 2014	Rules 1.11, 1.14, 2.3
Joystick Warrior	253	4 March 2014	Rules 1.11, 1.14, 2.3
News	261	22 May 2014	Rules 6.4, 6.5
News	266	1 March 2014	Rules 5.1, 5.11, 5.12
News	266	3 March 2014	Rules 5.1, 5.11, 5.12
News	266	5 March 2014	Rules 5.1, 5.11, 5.12
News	266	6 March 2014	Rules 5.1, 5.11, 5.12
The Truth Seeker	288	23 March 2014	Rule 2.2 (breach resulted in Ofcom direction to broadcast summary of decision)
The Truth Seeker	288	24 March 2014	Rule 2.2 (breach resulted in Ofcom direction to broadcast summary of decision)
The Truth Seeker	288	24 March 2014	Rule 7.1
Ukraines Refugees	288	Various	Rule 5.5
Going Underground	308	5 March 2016	Rule 5.5
Going Underground	308	23 March 2016	Rule 5.5
Crosstalk	319	11 July 2016	Rule 5.5

¹ In addition, RT had 37 COSTA breaches recorded against it during this period.

CNN – 27 BREACHES

Programme	Ofcom broadcast bulletin	Date of Transmission	Rules breached
Marketplace Middle East	285	22 January 2010	Rule 5.8
Quest Means Business	285	13 July 2011	Rule 5.8
Marketplace Middle East	285	21 May 2010	Rule 5.8
Marketplace Middle East	285	22 May 2009	Rule 5.8
Highlight CNN – Marketplace Middle-East	285	2009	Rule 9.1
4xHighlight CNN(i-List Macedonia)	285	2010	Rules 9.1, 9.5
6xHighlight CNN (Marketplace Africa)	285	2012	Rule 9.15
3xHighlight CNN (Outlook Indonesia)	285	2011	Rule 9.15
Eye on Georgia	285	2011	Rule 9.15
3xOutlook Cambodia	285	2011	Rule 9.15
Highlight CNN (Cambodia)	285	2011	Rule 9.15
3xHighlight CNN (Outlook Singapore)	285	2012	Rule 9.15
The World Right Now	335	9 May 2017	Rule 1.3