

SKY'S RESPONSE TO THE CMA'S PROVISIONAL FINDINGS

1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1 This document sets out the response of Sky plc ("**Sky**") to the Provisional Findings published by the CMA on 23 January 2018 (the "**Provisional Findings**") in relation to the anticipated acquisition by 21st Century Fox, Inc. ("**21CF**") of Sky (the "**Transaction**"). This response should be read in conjunction with Sky's response of 6 February 2018 to the CMA's Remedies Notice dated 23 January 2018 (the "**Remedies Notice**") and Sky's previous submissions including, *inter alia*, its response to the Annotated Issues Statement.
- 1.2 In the time available, Sky has not been able to address every aspect of the Provisional Findings, which with appendices exceeds 500 pages. Sky's response therefore focusses on what it considers to be the key issues.
- 1.3 Sky agrees with the CMA's provisional conclusion that Fox, Sky and the Murdoch Family Trust ("**MFT**") have a genuine commitment to the attainment of the broadcasting standards objectives set out in s.319 of the Communications Act 2003, and that therefore the Transaction is not expected to operate against the public interest in relation to that public interest consideration.
- 1.4 However, Sky does not agree with the CMA's provisional conclusion 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 the viewpoints consumed by audiences in the UK and would give the MFT too much influence over public opinion and the political agenda".¹*
- 1.5 As set out in further detail in Sections 2 to 5 below, this conclusion is based on a number of serious legal and compounding factual errors.
- 1.5.1 First, the CMA's provisional finding that the MFT may as a result of the Transaction be able to exercise a limited degree of influence is insufficient to give rise to a plurality concern. The Provisional Findings erroneously proceed on the basis, contrary to the CMA's own assessment of the facts, that the MFT will, as a result of the Transaction, have significant influence or even full control over Sky News (**section 2**).
- 1.5.2 Second, the CMA errs in both law and fact when analysing the increase in the MFT's control over Sky and Sky News that will result from the Transaction (**section 3**). In particular:
- (A) The CMA misapplies the judgment of the Court of Appeal in *BSkyB v Competition Commission*² by focussing disproportionately on the level of control hypothetically exercisable by the MFT and failing to have proper regard to the level of control that the MFT will be able to exercise in practice.
- (B) In analysing the level of control of the MFT post-Transaction, the CMA fails to give adequate weight to both: the role of 21CF's independent directors and other governance measures (such as the board resolution ensuring *inter alia* independent editorial decision making at Sky News) and the range of factors which will continue to protect the editorial independence of Sky News post-Transaction.

¹ Provisional Findings, 12.20.

² [2010] EWCA Civ 2.

The result of these errors is that even the limited and speculative level of control that the CMA provisionally finds the MFT will have over Sky News is overstated.

- 1.5.3 Third, in analysing media plurality, both from the perspective of a reduction in the diversity of viewpoints available and of an increase in influence over public opinion and the political agenda, the CMA fails to ground its analysis in its own findings on control. Instead, it incorrectly proceeds as if the MFT would be able to exercise complete control over Sky and Sky News post-Transaction (**sections 3 to 5**).
- 1.5.4 Fourth, in any event, even adopting the CMA's flawed assessment, there is no credible basis to conclude that the Transaction will result in an insufficient plurality of persons with control of media enterprises serving audiences in the UK (**section 4**). In particular:
- (A) The CMA errs in law by adopting a threshold for insufficiency that is so low as to be meaningless. It interprets the 'unacceptable level of cross-media dominance' test³ in a way which deprives the word 'dominance' of its ordinary, natural meaning. It justifies this approach by misplaced reliance on irrelevant factors, such as the findings of the Leveson Inquiry.
 - (B) The CMA's factual analysis reveals no credible risk of the Transaction resulting in a reduction in diversity of viewpoints to a degree which would result in insufficient plurality, even applying the CMA's own erroneously low threshold. In particular, the CMA fails to have proper regard to the minimal impact of the Transaction, instead overstating its impact through, *inter alia*: unjustified adjustments to Sky News' share of reference; the broad range of alternative viewpoints that will remain post-Transaction (including erroneously, seeking to discount two of the most significant alternatives, namely the BBC and ITN); and the prevalence of multi-sourcing by news consumers in the UK.
- 1.5.5 Finally, there is no valid basis for a putative concern relating to influence over public opinion and the political agenda. The CMA's consideration of this theory of harm is inextricable from its assessment of diversity of viewpoints and therefore fails to disclose a public interest concern for the same reasons. In any event, the theory of harm is insufficiently linked to the statutory question that the CMA must answer and is based on evidence which is not robust and does not support the conclusions reached by the CMA (**section 5**).
- 1.6 Separately and in combination, these errors mean that the Provisional Findings are not a sufficient basis to conclude that the Transaction may be expected to operate contrary to the public interest. Correcting these errors, on the available evidence, the CMA would be able definitively to conclude that the level of control the MFT could in practice exert over Sky News, would not be sufficient to influence Sky News' editorial output. Moreover, in light of the ordinary meaning of "*media and cross-media dominance*", the CMA could safely conclude that the Transaction does not result in insufficient plurality, taking due account of consumers' access to both the extensive range and strength of existing and future alternative viewpoints. By the same reasoning, the CMA should conclude that the Transaction would not give the MFT excessive influence over public opinion and the political agenda. Sky invites the CMA, therefore, to correct the legal and factual errors contained in the Provisional Findings, and having done so, Sky submits that the CMA will have strong grounds to conclude that the Transaction cannot be expected to result in public interest concerns.

³ Set out in the DTI's Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004 (the "**DTI Guidance**").

- 1.7 Sky therefore considers that remedies are not required. However, Sky notes that 21CF has put forward a comprehensive package of remedies comprising a firewall that would prevent the MFT exercising any influence over editorial decisions at Sky News. As Sky has explained in its response to the Remedies Notice, that firewall directly and comprehensively addresses the concerns identified by the CMA in the Provisional Findings.

2. **NO IDENTIFICATION OF ANY ISSUES OF SUFFICIENT SCALE, LIKELIHOOD OR IMPORTANCE SO AS TO BE ADVERSE TO THE PUBLIC INTEREST**

(A) The CMA's findings

2.1 The CMA provisionally finds that the existing and continuing safeguards of the editorial independence of Sky News

"are likely to mean that the MFT could not attempt to exercise its increased control ... in an overt way", but "longer term and more subtle changes in position" would "not necessarily" engage or be prevented by those safeguards.⁴

2.2 The CMA envisages that those longer term and subtle changes would be in the form of

"story selection, prioritisation and omission", falling "short of full editorial alignment or major programming changes" that "may not be immediately apparent to viewers";⁵

and that they might arise only in relation to select, lower-profile matters that would not be subject to intense scrutiny.⁶

(B) Not a sufficient basis for identifying a public interest concern

2.3 The CMA's findings do not support the conclusion that the Transaction raises issues of sufficient scale, likelihood or importance as to be adverse to the public interest. The highly tentative conclusions described above constitute the apex of the potential influence that the CMA considers could be exercised by the MFT over the editorial output of Sky News. However the CMA then disregards these conclusions and at key points in its analysis, and inconsistently with those conclusions, assumes that (for example) "*the Transaction will significantly increase the extent of control the MFT is able to exercise over Sky and Sky News*".⁷ Indeed, in some instances the CMA appears to proceed from an assumption that the MFT would exercise full control of Sky News including, critically, when assessing diversity of viewpoints.⁸ By proceeding on this flawed premise, the CMA reaches the erroneous provisional conclusion that the Transaction may be expected to operate against the public interest.

2.4 The speculative and limited potential changes to Sky News that the CMA has identified, which might only arise in relation to lower-profile matters over a long period of time, are not of sufficient scale, likelihood or importance to give rise to a concern that, on the balance of probabilities, there would be a reduction in the diversity of viewpoints, or increase in possible influence over public opinion and the political agenda, sufficient to operate against the public interest.

⁴ Provisional Findings, 8.42 (emphasis added). See also, e.g., paras 47 (summary) and 7.92 which contends that "*influence over Sky News may not manifest itself in full control over editorial output and ... any exercise of such influence is likely to be more indirect in practice*" such as changes to budget, strategic direction, appointments, and members of the Murdoch family expressing views to editorial staff.

⁵ Provisional Findings, 8.22.

⁶ Provisional Findings, 8.41.

⁷ Provisional Findings, 7.94.

⁸ E.g. Provisional Findings, 10.71.

3. **FLAWED LEGAL AND FACTUAL ASSESSMENT OF CHANGE IN CONTROL LEADS TO INCORRECT AND OVERSTATED PROVISIONAL CONCLUSIONS**

3.1 Errors in the CMA's legal and factual assessment of change of control lead it to reach incorrect and overstated provisional conclusions.

(A) Incorrect legal approach

3.2 The CMA sets out its framework for assessing the media plurality consideration primarily in Chapter 6 of the Provisional Findings. Central to this is how the CMA proposes to assess "the extent to which the Murdoch Family Trust's (MFT) control over Sky will increase as a result of the Transaction".⁹ In seeking to answer this question, the CMA has erred by focusing on the level of control that could be exercisable; in effect focusing on the mere possibility that the MFT could exert some control over Sky. In doing so it has not taken proper or adequate account of the extent of control that is likely to be exercised and exercisable and over what time period.¹⁰ Further, and critically, the CMA conflates its analysis of the level of control that the MFT would be able to exercise over Sky with its analysis of the level of control that MFT could exercise over Sky News,¹¹ without ever properly analysing the latter question which is central to whether the Transaction will give rise to a plurality concern.

3.3 The CMA's approach is contrary to that articulated by the Court of Appeal; it results in a flawed consideration of internal plurality; and it causes the CMA to assess the evidence in an unbalanced way.

(i) The Court of Appeal's judgment requires a proper assessment of the likelihood that control would be exercised and exercisable in a way which would give rise to a plurality concern

3.4 The Provisional Findings quote part of the test set out in *BSkyB plc v Competition Commission*; namely, that assessment of the actual extent of control exercised and exercisable is required.¹² But the CMA then fails to take account of the test as it is articulated in full by the Court of Appeal. This requires regard to be had to the "practical reality", and a proper assessment of the actual likelihood that control would be exercised and exercisable in a way which would give rise to a plurality concern, as articulated in the following passages of the Court of Appeal's judgment:

*"These considerations favour the submission made on behalf of the Competition Commission, which was supported by the Secretary of State and Sky, 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, namely media enterprises serving relevant audiences in the UK or in particular parts of areas within it"*¹³

*"... 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"*¹⁴

⁹ Provisional Findings, 6.3(b)(i).

¹⁰ The CMA is also wrong to suggest that Sky contends that the CMA should not take account of how control might be exercised in the future (see, e.g., Provisional Findings, 6.34). This should be a part of the CMA's assessment, provided that the likelihood of future actions by the MFT are properly taken into account, as explained further below.

¹¹ Indeed, para 6.3(b) does not include the specific question of the extent if at all to which the MFT's control of Sky News (as distinct from Sky) would increase as a result of the Transaction.

¹² See, e.g., Provisional Findings, 6.21 and 6.22.

¹³ [91].

¹⁴ [99].

"The clear requirement for a detailed and realistic analysis which is inherent in the statute as a whole..."¹⁵

"...when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the [CMA] may, and should, take into account the actual extent of control exercised and exercisable over a relevant enterprise by another, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control"¹⁶

(emphasis added)

(ii) The CMA must assess the extent of control that would be exercised

- 3.5 The CMA provisionally considers that the extent of control exercisable (rather than exercised) is "most relevant" to its assessment.¹⁷ Sky disagrees. While the extent of exercisable control is relevant, it should not be given greater weight than the extent of control that would likely be exercised in practice. Moreover, in considering the extent of control exercisable over time post-Transaction, the CMA must also consider, as is normal practice in any merger assessment, what is likely to happen on the balance of probabilities, having regard to incentives of the parties and the practical constraints on the exercise of control, as well as the time period over which such control would be exercised. The CMA cannot confine its analysis to the "ability"¹⁸ to exercise control alone.
- 3.6 The only justification posited by the CMA for the approach it has taken is that, if it were to allow the merger to proceed on the basis that the MFT is unlikely to exercise influence available to it, there would be no opportunity for a further review if that turned out to be incorrect.¹⁹ However, this is true of all merger reviews, not just media mergers, and such an overly precautionary approach is not considered to be justified (given it would result in over-enforcement) in the comparable context of competition law merger reviews. The CMA must instead make an evidence-based assessment of the likelihood that the MFT will in practice exercise the influence that may be available to it as a result of the Transaction.²⁰
- 3.7 Contrary to the implication in Provisional Findings, 6.34, Sky is not suggesting that the CMA may only find that a merger may be expected to operate against the public interest where control is likely to be exercised in a particular way. Rather, the CMA needs to be able to conclude that control could and would be likely to be exercised in ways which would give rise to the plurality concern identified; in other words, the CMA must identify a plausible mechanism (or mechanisms) which would afford the MFT a degree of control sufficient to bring about an identified theory of harm (or theories of harm).

¹⁵ [120].

¹⁶ [121].

¹⁷ Provisional Findings, 6.28ff. Indeed it appears in some parts of the Provisional Findings that the CMA proposes to ignore the actual extent of control exercised; e.g. "a transaction may operate contrary to the public interest where it leads to a controller of media enterprises having the ability to exercise a greater degree of control... post-Transaction" (para 6.31); although in other places the CMA states that historical exercise of control is relevant but not determinative (later in para 6.31), and in para 6.34 the CMA asserts that it has taken into account evidence as to how control would be exercised.

¹⁸ Provisional Findings, 6.31.

¹⁹ Provisional Findings, 6.31-6.33.

²⁰ While the Provisional Findings refer to some consideration of control that is likely to be exercised (see, e.g., para 6.34 together with 6.32) this is cursory and insufficient; not least because it focuses on ability without proper regard either to the constraints on that ability or the likelihood that power would be exercised in this way.

(iii) Erroneous treatment of internal plurality

- 3.8 The CMA's approach also leads it to treat internal plurality erroneously. The Provisional Findings refer to the Court of Appeal's finding that internal plurality is a relevant consideration.²¹ However, the CMA goes on to dismiss the importance of this and concludes that it should instead attach "*most weight to the degree of control which would be exercisable by the MFT over Sky and Sky News following the Transaction...*"²² (emphasis added). The CMA seeks to rely on the Court of Appeal's judgment to support this approach,²³ however, the Court of Appeal clearly confirmed that internal plurality was relevant and should be given full consideration as one of the central factors in any assessment of control. Indeed this is required to reach a properly informed understanding of the "*practical reality as regards the extent of control exercised or exercisable*".²⁴
- 3.9 The CMA's approach leads it to inappropriately downplay and/or disregard compelling evidence of ongoing Sky News editorial independence post-Transaction. It is wrong for the CMA to consider constraints on the level of the MFT's control over Sky News merely as a separate contextual factor. Instead, the assessment of such constraints is central to an evidence-based assessment of the extent of control exercised and exercisable by the MFT over Sky News.²⁵

(B) Unbalanced and incorrect analysis of the facts

(i) Introduction

- 3.10 These errors in the CMA's legal approach mean that it fails to assess the evidence in the balanced way required by the Court of Appeal in *BSkyB v Competition Commission*.
- 3.11 As a result the CMA reaches the incorrect provisional conclusions in Chapter 7 of the Provisional Findings²⁶ that

*"the Transaction will significantly increase the extent of control the MFT is able to exercise over Sky and Sky News. We consider that the loss of the current Sky board and its independent directors, in particular, will increase the ability of the MFT to control Sky and Sky News post Transaction"*²⁷

and that

*"although the MFT will not have full ownership of Sky following the Transaction, the significant extent of the increased control it will be able to exercise is sufficient to give rise to concerns that, as a result of the Transaction, 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. We consider that these types of alignment have the potential to raise concerns with regards to a material reduction in plurality leading to insufficient plurality of persons with control of the media enterprises."*²⁸

- 3.12 These provisional conclusions are also wrong because: first, they assume that the Transaction will result in a greater degree of exercisable control than is in fact the case; and, second, the CMA

²¹ Provisional Findings, 6.36.

²² Provisional Findings, 6.38.

²³ Provisional Findings, 6.37(c) and 6.40.

²⁴ *BSkyB plc v Competition Commission*, [99]; see also para 3.4 above.

²⁵ See further paragraphs 3.22 to 3.52 below.

²⁶ Sky understands that 21CF will address other errors in this section of the Provisional Findings including in relation to the CMA's provisional conclusions concerning the level of control MFT has over 21CF.

²⁷ Provisional Findings, 7.94.

²⁸ Provisional Findings, 7.95.

fails to give adequate weight to factors which will constrain the control exercisable by the MFT over Sky News post-Transaction.

(ii) The Provisional Findings assume that the Transaction will result in a greater degree of exercisable control than is in fact the case

Consideration of the extent of the MFT's control over Sky and Sky News pre-Transaction, and implications for the CMA's analysis of control post-Transaction

3.13 The CMA's consideration of the extent of control over Sky prior to the Transaction does not fully take account of factors relating to Sky News specifically; and conflates this with the issue of control over Sky more generally.

3.14 Notably, the conclusions concerning Sky's independent shareholders set out in Provisional Findings, 7.60, refer only to constraints on the exercise of control over Sky and not Sky News. In addition the brief consideration of the role of non-Fox shareholders as a constraint of the exercise of control by the MFT on Sky News does not indicate any interest on the part of those shareholders in seeking to prevent MFT influence on editorial policy.²⁹ There is some consideration of the role of Sky's independent directors at Provisional Findings, 7.70-7.74, which includes a separate conclusion as regards Sky News. But the most crucial, practical current constraints on the potential exercise of control over Sky News³⁰ are ignored in Chapter 7 of the Provisional Findings. Instead, some (but not all) of these constraints are considered separately in Chapter 8 of the Provisional Findings in the context of internal plurality and are erroneously given little weight.³¹ Ignoring these constraints in its analysis of the MFT's control pre-Transaction leads the CMA to exaggerate the effects of the Transaction.

Exaggerated conclusions on the impact of the Transaction on the extent of the MFT's control over Sky and Sky News

3.15 The CMA also conflates its consideration of the level of control over Sky with that over Sky News. The plurality issue on which the CMA is required to focus concerns Sky News in particular, and, specifically, the level of influence over editorial policy at Sky News. Accordingly, corporate governance issues which do not have a direct effect on such editorial policy are at best of limited relevance; however, this appears to be the focus of the CMA's analysis at Provisional Findings, 7.84-7.94.

3.16 The CMA concludes in Provisional Findings, 7.89, that:

"the direct impact of the Transaction will be to allow the MFT to significantly increase control it is able to exercise over the management of Sky's business ... , and would mean the MFT could more easily influence the appointment of senior staff at Sky and Sky News" because there would no longer be two layers of independent directors and non-Fox / non-MFT shareholders.

3.17 Underpinning this conclusion is the statement that:

"... while the MFT does have material influence over Sky, the extent of control is significantly constrained by the presence of independent directors".³²

²⁹ Provisional Findings, 7.58-7.59.

³⁰ I.e., newsroom culture and people; practical constraints such as decentralised decision-making in 24-hour news channel production; audience expectations; broadcasting regulation; and the Sky News Editorial Guidelines which embody the newsroom culture and Sky News' strong commitment to impartiality, accuracy and compliance with relevant regulation.

³¹ See, further, paragraphs 3.8-3.9 above, and in detail at paragraphs 3.22-3.56 below.

³² Provisional Findings, 7.74.

- 3.18 However, there are two serious flaws with the CMA's reasoning at Provisional Findings, 7.89.
- 3.18.1 First, the only purported evidence the CMA has for its conclusion is a reference to paragraph 18 of the summary of the hearing with Sky's Independent Directors, from which the CMA contends that any attempt by members of the Murdoch family to exercise undue influence over editorial decisions would be raised by management with the Board.³³ However, the independent directors were clearly speaking about the business of Sky in general, rather than editorial decisions at Sky News, as paragraph 18 records.³⁴ There is nothing to support a contention that, so far as editorial decisions are concerned, any independent director of Sky has been called upon to address any attempt by the MFT to influence Sky News.³⁵ Indeed, the evidence is that no independent director has been called upon in this way.
- 3.18.2 Second, the CMA's conclusion ignores the important reasons why Sky's non-Fox shareholders and independent directors have not intervened.³⁶ These constraints would not change as a result of the Transaction.
- 3.19 Ultimately, the main role for Sky's independent shareholders or directors that the CMA identifies as relevant to editorial matters at Sky News is that concerns about undue influence by members of the Murdoch family in relation to editorial matters can be raised to Sky's Board.³⁷ However, the loss of independent Sky directors post-Transaction (and the ability to raise concerns about Murdoch influence) would be fully offset by the presence of a majority of independent directors on 21CF's Board (and reinforced by the board resolution passed by 21CF³⁸).
- 3.20 The CMA contends in Provisional Findings, 7.90, that some of 21CF's independent directors are not as independent as Sky's and may be more likely to defer to James, Lachlan or Rupert Murdoch. 21CF explains in its submissions why that is not the case. Moreover, given that the CMA concludes any influence would be indirect (Provisional Findings, 7.92), it is difficult to see how the MFT could achieve the subtle alignment of Sky News with News Corp newspapers envisioned by the CMA and the Provisional Findings do not address this.
- 3.21 Finally, at Provisional Findings, 7.93, the CMA notes the level of influence the MFT has over News Corp's UK newspapers, and suggests that this could be informative about the level of influence the MFT could exercise over Sky and Sky News post-Transaction. This ignores the very significant differences between the two contexts, as explained further below.³⁹

³³ Provisional Findings, 7.73.

³⁴ Further, it is clear from the transcript of that hearing that what was being discussed was the influence of the MFT over Sky as a whole, see, e.g., P32L6 to P33L24.

³⁵ It is also noted that, as recorded in Provisional Findings, 7.70-7.73, Sky's Independent Directors' experience is that Sky News is run largely autonomously with minimal input from them; and that where they are involved, this is on matters unrelated to editorial decisions (e.g. health and safety or regulatory issues). As for Sky's independent shareholders, para 7.59 records that they are concerned with the value of Sky overall and they do not pay any attention to Sky News, suggesting that they would not have any interest in seeking to constrain potential editorial influence over Sky News.

³⁶ See paragraphs 3.22-3.56 below.

³⁷ Provisional Findings, 7.74. As noted in para 3.14 above, no specific constraints relating to potential influence on editorial policy at Sky News were identified in relation to Sky's independent shareholders.

³⁸ See further para 3.28 below.

³⁹ These matters were also dealt with in detail in Sky's response to the Annotated Issues Statement, 2.6(b)-(d), 4.4-4.12; and are further detailed below in paras 3.22 to 3.56 below.

(iii) The CMA in any event fails to give adequate weight to factors which will constrain the control exercisable by the MFT post-Transaction

- 3.22 The CMA provisionally concludes that the various constraints on the degree of control exercisable by the MFT over Sky News post-Transaction should be considered as part of an assessment of internal plurality, rather than forming part of the assessment of control. The CMA then says that “*the media plurality consideration focuses on the sufficiency of plurality of persons with control of media enterprises, rather than the sufficiency of viewpoints across and within media enterprises*”⁴⁰ and, therefore, that less weight should be accorded to factors relevant to internal plurality. By adopting this approach, the CMA has failed properly to engage with evidence directly relevant to whether, post-Transaction, the MFT will have sufficient control over Sky News’ editorial position to bring about the theories of harm.
- 3.23 In its response to the CMA’s Annotated Issues Statement and at the main party hearing, Sky set out a number of practical and legal constraints which, together, make it highly unlikely that the MFT would be able to exert sufficient influence over Sky News to bring about any meaningful alignment between the Sky News editorial position and the more partisan positions taken by newspapers. These factors are:
- 3.23.1 Sky News’ culture and tradition of editorial independence and the practicalities of editorial decision making in a rolling TV news setting;
 - 3.23.2 the editorial independence of TV news more broadly and the expectations of UK audiences, including the related impact on 21CF’s commercial incentives; and
 - 3.23.3 additional legal and regulatory constraints (in particular the obligations placed on Sky News by Ofcom’s Broadcasting Code).
- 3.24 The Provisional Findings fail to place due weight on the strength of these constraints.
- 3.25 Sky has set out its full analysis of the significance of these constraints on the MFT’s ability to bring about the CMA’s theories of harm at paragraphs 4.4 to 4.18 of its response to the CMA’s Annotated Issues Statement. However, where the CMA has failed to adequately reflect their significance or to take them into account at all, Sky has addressed this below.
- Culture and tradition of editorial independence*
- 3.26 The CMA recognises that “*Sky News currently operates as an independent unit within Sky and has a strong culture of editorial independence; senior editors with resistance to influence, published editorial guidelines, and a reputation for quality broadcasting.*”⁴¹ In light of this, the CMA has provisionally concluded that the culture of Sky News “*may act as a constraint on the ability of the MFT to exercise control in the short term.*”⁴²
- 3.27 The current culture of Sky News is a barrier to the MFT seeking to influence or make changes to its editorial position.
- 3.28 However, the CMA incorrectly finds that this culture could be unravelled over time. In practice, this is highly unlikely for the following reasons:
- 3.28.1 The embedded culture at Sky News was created over a long period of time. It has been fostered and developed over many years, is entrenched at all levels of the organisation and is enshrined in the Sky News Editorial Guidelines (to which 21CF has reiterated its

⁴⁰ Provisional Findings, 8.3.

⁴¹ Provisional Findings, 8.13.

⁴² Provisional Findings, 8.19.

commitment on multiple occasions, including a formal commitment to maintain the Guidelines post-Transaction through the passing of a board resolution in April 2017⁴³).

- 3.28.2 To change this significantly would require radical and extensive change of personnel at all levels – something which would not be readily accepted by Sky News staff, particularly if the changes were designed to run against the grain of Sky News’ firm and long-standing commitment to accurate, impartial and high quality broadcasting across all of its platforms. It would also take considerable time as the CMA accepts.
- 3.28.3 Further, such a process would be highly visible as Sky News journalists and third party commentators would draw attention to it. This would increase viewer awareness of the changes, resulting in a loss of trust in Sky News as an impartial broadcaster and a decline in Sky News’ audience. As well as the difficulties involved in being able to implement such a change, the likelihood of adverse audience reaction would mean that the MFT would not have any commercial incentive to implement such a change.⁴⁴
- 3.29 It is highly doubtful, therefore, that the MFT would be able, or have the incentive, to unwind the Sky News culture over time.
- 3.30 In questioning the ability of the Sky News culture to withstand influence over time, the CMA notes in its Provisional Findings that:
- “the style and editorial content of TV news is differentiated across TV news providers in the UK and, as such, it is possible to have a TV news provider with a culture that is focused on a particular editorial outlook or strategy.”⁴⁵*
- 3.31 For the reasons described more fully below, the fact that TV news is not a homogenous product and that broadcasters are able to achieve a degree of differentiation without compromising their culture, independence or impartiality, is not probative in considering whether the MFT could bring about any meaningful degree of alignment of Sky News content with the more partisan positioning of News Corp newspapers.
- The practicalities of editorial decision making within a rolling news service*
- 3.32 The CMA has failed entirely to engage with the practicalities of operating a 24 hour news service.⁴⁶ In doing so, the CMA has ignored evidence which is central to the question of whether the MFT could, in practice, exert sufficient influence to bring about the CMA’s theories of harm.
- 3.33 As explained by Sky in its response to the CMA’s Annotated Issues Statement and demonstrated at the Sky site-visit, in a fast-paced, 24 hour TV news environment like Sky News, decision-making is decentralised. Editorial decisions are taken by a significant number of individuals at all levels of the news-gathering, production, editorial and senior editorial teams, as well as by the news presenters delivering the story to viewers. Only exceptionally would the Head of Sky News expect to be involved in real-time editorial decision-making.
- 3.34 The devolved nature of editorial decision-making in TV newsrooms is reflected in the evidence provided by third party news organisations such as the BBC:

⁴³ See further paras 4.14 to 4.17 of Sky’s response to the Annotated Issues Statement.

⁴⁴ See further paras 3.38 to 3.44 below.

⁴⁵ Provisional Findings, 8.19

⁴⁶ At Provisional Findings, 8.13, the CMA notes *“the practicalities of devolved editorial decision making in TV news”* as a possible constraint put forward by the Parties. However, the CMA does not return to this point or explain why or how it considers it to be an ineffective constraint.

“in the end it is the judgement of our editors and our editorial teams who then determine both the verification of these stories because obviously there are lots of sources giving lots of information the whole time - increasingly so in the current world we operate in and online plays a part in that. So then it is a judgement for them about what stories do they follow, how they do that, how they verify their sources and then also most importantly how they report.”⁴⁷

- 3.35 The operation of a 24 hour TV news service, in particular the nature of editorial decision-making, is materially different to the process for editorial decision-making at a newspaper, where a single journalist could originate the idea for, research, write and deliver a news story under the direction of a small number of people responsible for centralised editorial decision making.
- 3.36 Therefore, in relation to rolling TV news, no plausible mechanism exists for the MFT to exert sufficient influence, with adequate clarity, in real-time, over all required individuals, to achieve any meaningful alignment between the Sky News editorial position and more partisan positions taken by newspapers.
- 3.37 The CMA is not able to properly discharge its burden of proof without at least identifying one or more mechanisms which, on the balance of probabilities, would afford the MFT the ability to exert the required degree of control over the Sky News editorial decision-making process to bring about the theories of harm. On the basis of its Provisional Findings, the CMA has failed to do so.

Audience expectations and commercial incentives

- 3.38 Impartiality and accuracy in reporting the news have become the cornerstones of TV news in the UK. TV audiences expect a certain type of service from broadcasters which they do not expect from newspapers.
- 3.39 If viewers perceived a TV news service to have lowered its editorial standards, to have begun to adopt a partisan viewpoint or to have avoided reporting on certain stories, viewers would quickly lose confidence in the trustworthiness of the service and switch away. There is therefore no commercial rationale for this.
- 3.40 The importance of the perception of accuracy and impartiality to audiences of TV news in the UK is well evidenced and widely acknowledged:

3.40.1 Ofcom notes:

“In its research, Ofcom has consistently found that audiences say that impartiality and accuracy in broadcast news is important to them. For example, Ofcom’s 2015 Media Tracker survey⁴⁸ found that 88% of all respondents considered it important that television news is impartial, with the corresponding figure for radio news being 80%. Ofcom research has found that audiences consider it important that television and radio news is accurate. Ofcom research has also demonstrated that there are greater expectations for news channels that are perceived to be aimed at a UK audience than there are for channels with a global audience.”⁴⁹

3.40.2 Sky News survey evidence⁵⁰ [38]; and

⁴⁷ BBC Hearing Transcript, page 22.

⁴⁸ See https://www.ofcom.org.uk/data/assets/pdf_file/0021/74451/ofcom_media_tracker_2015_data_tables.pdf from August 2015.

⁴⁹ Ofcom Guidance Notes, Section Five: Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions, 22 March 2017 (the “**Guidance Notes**”), 1.13 and 1.14.

⁵⁰ See Annex 3 to Sky’s Initial Submission, Sky News Cross Platform Usage Analysis, October 2016.

3.40.3 In their hearings with the CMA, both the BBC and ITN likewise stressed the importance of audience expectation in ensuring that TV news services remain factual, impartial and reflective of a range of alternative viewpoints:

*"If you are tuning into the BBC or the ITV and to some extent Sky although that is a smaller market you are expecting a certain type of product as well and I think that audience expectation in this debate is actually really important. You are not expecting something that is not highly factual presenting what is going on in the day and giving the range of opinion."*⁵¹

*"The notion that any, either client or any of the newsrooms, would say, "We are a bit more pro-Brexit here", or pro-Remain, is anathema to that newsroom ... it would be suicide to our reputation and completely wrong from a point of view of impartiality to even allow that thought to emerge."*⁵²

3.41 Nevertheless, the CMA has provisionally concluded that audience expectation is unlikely to be an effective constraint on the possibility of MFT influence. This is on the basis that audience expectation would provide less of a constraint where editorial influence is limited, falls short of full editorial alignment or major programming changes and may not be immediately apparent to viewers.⁵³ The CMA's conclusions therefore rely on the ability of the MFT to exert influence which is:

3.41.1 sufficiently nuanced to bring about changes to the Sky News editorial agenda which are so subtle and subliminal that they remain undetected by Sky News viewers and would not, therefore, affect audience perception or result in a loss of viewers; and

3.41.2 not so subtle or unapparent as to be meaningless in the context of a reduction in viewpoints or as a means of exerting greater influence over public opinion and the political agenda.

3.42 The margin between the two positions is indiscernible. Either, attempted changes are so nuanced, they have no, or insufficient effect, or they are meaningful and would cause viewers to switch. The CMA's provisional conclusion that there would be an adverse effect on the diversity of viewpoints as a result of such imperceptible changes does not stand up.

3.43 In the context of audience expectations, the CMA also notes that viewers' expectations *can* change over time and that even if some viewers are lost, these viewers *could* be replaced with others. This is highly speculative and ignores the findings from Ofcom (above) regarding the consistency over time with which impartiality and accuracy in broadcast news have remained important to UK audiences.

3.44 Finally, and crucially, the CMA has not identified any commercial incentive for the MFT to seek to influence Sky News' output, whether in the way the CMA posits or otherwise. The CMA has evidence before it which it has not adequately taken into account which indicates that there are strong commercial reasons why it would not be rational for the MFT to do so.⁵⁴ For example, as set out in in Sky's Response to the CMA's Annotated Issues Statement:⁵⁵

⁵¹ BBC Hearing Transcript, page 26.

⁵² ITN hearing transcript, pages.34-35.

⁵³ Provisional Findings, 8.22.

⁵⁴ And there is significant evidence that there is no intention to do so; for example, 21CF's public statements and its board resolution which commits to measures safeguarding the editorial independence of Sky News.

⁵⁵ Paragraph 4.8.

- 3.44.1 Sky derives brand value from operating a trusted, independent 24-hour TV news service, which contributes to Sky's reputation as a high quality broadcaster. Sky's customers value Sky News precisely because it is a trusted, impartial, and accurate independent voice. It would make no sense to undermine this.
- 3.44.2 Attempts to interfere with or direct Sky News' editorial output would undermine Sky's strong bond of trust with its customers more broadly and therefore its viewer and customer numbers. This would affect not only Sky News' direct revenues (advertising, wholesale carriage fees and the potential loss of Sky's contract with IRN), but more importantly, it would threaten the core of Sky's business and its credentials as a high quality family-oriented broadcaster. This would pose a significant risk to Sky's wider business (for example the revenues from over 12 million pay TV customers in the UK and the Republic of Ireland, including those who also take broadband, fixed voice and mobile services). It would make no commercial sense for Sky, or for the MFT, to make such editorial changes to Sky News (particularly in the context of the £17.9bn investment 21CF is proposing to make and of which Sky News is an extremely small part, in which the MFT has a financial interest).

Legal and regulatory constraints

- 3.45 In its response to the CMA's Annotated Issues Statement, Sky set out a number of legal and regulatory constraints on the MFT's ability to bring about the CMA's theories of harm.⁵⁶
- 3.46 Notwithstanding the evidence provided by Sky, and despite the CMA's acknowledgement that "*the degree of latitude available to broadcasters to position output is more limited in respect of news coverage*", the CMA has provisionally concluded that "*there is substantial scope for permissible changes in alignment or positioning to occur within the framework of the Broadcasting Code.*"⁵⁷
- 3.47 The CMA's Provisional Findings fail to properly reflect the nature and breadth of application of the following rules set out in Ofcom's Broadcasting Code:
 - 3.47.1 Rule 5.1 which requires that news, in whatever form, must be reported with due accuracy and presented with due impartiality;
 - 3.47.2 the 'Special Impartiality' rules (Rules 5.4 to 5.13), which require, *inter alia*, that views and facts are not misrepresented, that due impartiality be preserved and that, when covering matters of political or industrial controversy or current public policy, programmes "*exclude all expressions of the views and opinions of the person providing the service*"; and
 - 3.47.3 Rule 5.9 which relates to opinions or views presented in the context of "personal view" or "authored" programmes.
- 3.48 In failing to afford the appropriate weight to these Rules as constraints on the ability of the MFT to bring about the CMA's theories of harm, the CMA's provisional conclusions are vitiated by the following fundamental errors:
 - 3.48.1 an undue focus on the application of the Broadcasting Code to content which would not appear (or would very rarely appear) on Sky News (i.e., content that would not be considered by Ofcom to be "news" or to relate to matters of political or industrial controversy or current public policy);

⁵⁶ See paragraph 4.10.

⁵⁷ Provisional Findings, 8.37.

- 3.48.2 a misconception of the scope of Rule 5.9 of the Broadcasting Code relating to “authored” or “personal view” programmes and the degree of latitude afforded to programmes taken as a whole to align themselves with a particular viewpoint; and
- 3.48.3 a material overstatement of the degree and nature of the editorial discretion that can be exercised by broadcasters of news programmes without breaching the Broadcasting Code, in particular as regards the potential for the MFT to engineer an alignment of Sky News’ output with more partisan viewpoints adopted by News Group newspapers.
- 3.49 As to matters of political or industrial controversy and matters relating to current public policy:
- 3.49.1 Quoting from Ofcom’s Public Interest Report, the CMA notes that a channel is not prevented from becoming more partisan through the use of current affairs programming which excludes content related to matters of political or industrial controversy or matters relating to current public policy, given that such programming is not subject to obligations of due impartiality (under Rule 5.5) or restrictions on the expression of views and opinions (under Rule 5.4). Whilst this may be true in theory for general interest channels, Ofcom’s comments are not, in practice, relevant to Sky News’ programming.
- 3.49.2 Outside of Sky News’ only discussion show, ‘The Pledge’, all the content on its 24-hour news service is likely to be considered “news” content, subject to Rule 5.1 of the Code requiring due accuracy and impartiality. To the extent that any programming on Sky News is not considered to be “news”, such as ‘The Pledge’, this content would in almost all instances be current affairs content which would still relate to matters of political or industrial controversy or matters relating to current public policy.⁵⁸ In fact, it would be virtually impossible to avoid such topics in the context of a discussion show which covers national and global current affairs (i.e., discussion shows appropriate for broadcast on a rolling news service such as Sky News), such as The Pledge.
- 3.49.3 Sky has conducted a review of the topics for discussion on The Pledge. These topics almost exclusively relate directly to matters of political or industrial controversy or current public policy. Of the last 100 topics discussed on the Pledge to February 2018, Sky considers that, at most, four of these might, in theory, be free from issues relating to political or industrial controversy or current public policy. These topics were: (i) ‘Ivanka Trump’, (ii) ‘in praise of have-a-go-heroes’, (iii) “Prince Harry and Meghan Markle engagement” and (iv) “nominations for person of the year”.
- 3.49.4 However, even in these instances where the title of the discussion itself doesn’t clearly relate to political or industrial controversy or issues of current public policy, the ensuing discussion may nevertheless stray into these areas depending on the direction of the conversation and the points made by the panellists. In such circumstances, obligations of due impartiality would immediately apply.
- 3.49.5 In light of the above, it is clear that there are very limited (if any) circumstances in which Sky News would broadcast content which was not news and did not relate to

⁵⁸ As is clear from the Guidance Notes, Ofcom interprets “matters of political or industrial controversy and matters relating to current public policy” widely: *“Matters of political or industrial controversy are political or industrial issues on which politicians, industry and/or the media are in debate. Matters relating to current public policy need not be the subject of debate but relate to a policy under discussion or already decided by a local, regional or national government or by bodies mandated by those public bodies to make policy on their behalf, for example non-governmental organisations, relevant European institutions, etc”.*

matters of political or industrial controversy or current public policy. Furthermore, on the very rare occasion that this might arise, it is not credible to consider that content of this nature could, even in theory, result in a reduction in the diversity of viewpoints or be used to exert an influence over public opinion or the political agenda in a manner contrary to the public interest.

3.50 As to “authored” or “personal view” programmes:

3.50.1 The CMA states that the Broadcasting Code:

*“affords a significant degree of latitude to adopt a particular viewpoint where matters of current affairs are covered in a format involving authored or ‘personal view’ programmes”.*⁵⁹

3.50.2 As fully explained in Sky’s response to the CMA’s Annotated Issues Statement, there is no commercial incentive to introduce more opinion-based programming on Sky News. [X].⁶⁰ Rather, there are a number of material disincentives from pursuing this approach, such as the real risk this would pose to Sky’s core subscription revenues and its reputation as a family-oriented broadcaster, as well as the greater financial outlay required for such programming.

3.50.3 However, leaving aside the absence of any commercial incentive for Sky News to introduce “authored” or “personal view” programmes, the CMA materially overstates the latitude afforded by the Broadcasting Code to the overall tone and balance of such programming, irrespective of the views able to be expressed by particular individuals.

3.50.4 Rule 5.9 of the Code sets out that *“presenters of ‘personal view’ or ‘authored’ programmes ... may express their own views on matters of political or industrial controversy or matters relating to current public policy.”*

3.50.5 However, whilst Rule 5.9 permits participating individuals to voice an opinion and take a position on such matters, it does not allow for the overall tone of such programmes to be partisan or biased towards a particular viewpoint. Rather, such programmes, taken as a whole, remain subject to due impartiality obligations and a requirement under Rule 5.9 to adequately represent alternative viewpoints. In order to prevent such shows being used to push a particular agenda or become a conduit for the delivery of partisan programming, Ofcom’s Guidance under Rule 5.9 requires that:

- (A) such shows are clearly signalled as ‘personal view’ programmes;⁶¹
- (B) presenters do not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality and that presenter phone-ins encourage and do not exclude alternative views;⁶²
- (C) if a presenter has strongly held views, and there are few, if any, alternative views expressed by the audience, the broadcaster must take appropriate action and have systems in place to ensure that due impartiality is maintained

⁵⁹ Provisional Findings, 8.31.

⁶⁰ See further paragraph 4.8(d) of Sky’s response to the CMA’s Annotated Issues Statement.

⁶¹ Guidance Notes, para 1.48.

⁶² Intro to Rule 5.9.

in the same programme or over a series of programmes taken as a whole;⁶³
and

- (D) broadcasters ensure that if alternative views are included within a 'personal view' programme to maintain due impartiality, such views cannot be included in a way that they are merely dismissed and used as a further opportunity to put forward the presenter's own views.⁶⁴

3.50.6 In light of these factors, the CMA's provisional conclusion that "*there is a substantially greater degree of latitude for broadcasters to adopt a particular stance in respect of discussion programmes, or personal view programming, including on matters of political or industrial controversy or current public policy*"⁶⁵ is simply not correct.

3.50.7 Firstly, Rule 5.9 does not permit broadcasters to express views or adopt a particular stance. Rather, it allows the expression of views by individuals in clearly signalled "personal view" programmes. Even if the CMA were correct that the MFT could introduce such programmes to Sky News, such a change in Sky News' output would be immediately detectable and would be far more explicit than the subtle editorial alignment posited elsewhere by the CMA. Such a change would have an immediate impact on viewers' trust in Sky News. Secondly, the ability of individuals to express personal views on matters of political or industrial controversy is not unqualified and does not remove the requirement for such programmes, taken as a whole, to be presented with due impartiality and to adequately represent alternative viewpoints.

3.50.8 Where, in the past, broadcasters of 'personal view' programmes have failed to adhere to their obligations under Rule 5.9, Ofcom has found them to be in breach of the Code.⁶⁶

3.51 As to story selection and prioritisation:

3.51.1 In relation to "news" content (which makes up the overwhelming majority of Sky News programming), the CMA acknowledges that, "*the degree of latitude available to broadcasters to position output is more limited in respect of news coverage.*"⁶⁷

3.51.2 However, despite this acknowledgement, the CMA goes on to provisionally conclude that "*the Broadcasting Code affords licence holders a significant degree of latitude to adopt particular stances*" and to "*align output towards a particular viewpoint.*"⁶⁸ The CMA's conclusion relies heavily on the following:

- (A) the Broadcasting Code does not seek to homogenise TV news or directly regulate day to day decisions around story selection and prioritisation; and
- (B) the potential for the MFT to exert subtle forms of influence which might not infringe the Broadcasting Code.

⁶³ Guidance Notes, para 1.51.

⁶⁴ Guidance Notes, para 1.50.

⁶⁵ Provisional Findings, 8.37.

⁶⁶ See, by way of example, three instances of breaches included in the Guidance Notes at paragraph 1.52 relating to 'personal view' programmes aired on Talk Sport Radio, Press TV and Russia Today.

⁶⁷ Provisional Findings, 8.37.

⁶⁸ Provisional Findings, 8.36 and 8.27 respectively.

Story selection and prioritisation: no significant degree of latitude

- 3.51.3 In concluding that the Broadcasting Code “affords licence holders a significant degree of latitude to adopt particular stances” (emphasis added),⁶⁹ the CMA prays in aid the degree of differentiation that exists between broadcasters, noting in particular Channel 4 News.
- 3.51.4 In discharging its burden of proof, it is not enough for the CMA to point to the existence of some editorial discretion within the Broadcasting Code or that the TV news bulletins of existing broadcasters are distinguishable.
- 3.51.5 Sky does not argue that the Broadcasting Code acts a straitjacket on the exercise of editorial discretion, preventing broadcasters from differentiating themselves. Rather, Sky’s position is that the CMA must be able to show that the discretion afforded to broadcasters under the Broadcasting Code would enable the MFT to achieve a meaningful alignment of Sky News’ programming with more partisan positions taken by News Corp newspapers to a degree which materially reduces the range of viewpoints available. Whilst other broadcasters, such as Channel 4 and Channel 5, may position their news coverage differently from Sky, they still do so in a manner which is compatible with their obligations of due accuracy and impartiality under the Broadcasting Code.

Overstated potential for subtle forms of influence

- 3.51.6 Despite its provisional conclusion on the latitude permitted by the Broadcasting Code, the CMA acknowledges that this latitude would not allow the MFT to exert influence in an *overt* way. Rather, this influence may take more subtle forms which would not infringe the Broadcasting Code.
- 3.51.7 The CMA refers to the potential for the MFT to influence selection or omission of certain stories as an example of such subtle influence over time. However, the CMA has failed to engage with the *significance* of this subtle influence in the context of its theories of harm.
- 3.51.8 Notwithstanding the practical constraints which would prevent even a subtle influence from being brought to bear, the CMA would in any event need to show that the exertion of such a subtle, unidentifiable influence over story selection and prioritisation would: (a) allow the MFT to bring about a meaningful degree of alignment with News Corp newspapers, resulting in a material reduction in the number of viewpoints available; and (b) afford the MFT a greater degree of (leading to “too much”) influence over public opinion and the political agenda.
- 3.51.9 Based on Sky News’ experience and long history of applying the Broadcasting Code, it is not plausible (and certainly not likely) that such alignment or influence could be achieved without breaching the Code. None of the analysis or evidence set out by the CMA in its Provisional Findings calls into question this conclusion.
- 3.52 Finally, as the CMA recognises, the effect of these constraints must be assessed cumulatively.⁷⁰

⁶⁹ Provisional Findings, 8.36.

⁷⁰ Provisional Findings, 8.40 to 8.45.

- 3.53 The CMA has provisionally found that the cumulative effect of the various constraints described above is that influence by the MFT:

*“is unlikely to manifest itself in full control”; “is likely to be more nuanced in practice”; “could arise in relation to select matters which may not ... be those subject to intense scrutiny”; could not be exercised in an “overt way”; could allow “longer term and more subtle changes in position” “which fall short of full editorial alignment or major programming changes”; and “may not be immediately apparent”.*⁷¹

- 3.54 Despite this, the CMA goes on to find that these constraints:

*“would not act to significantly limit the increased control the MFT would be able to exercise”.*⁷²

- 3.55 Notwithstanding that the CMA has understated (or, in some cases, failed to consider) the impact of the constraints described above (in particular, the practical reality of operating a 24 hour news room and the nature of the Broadcasting Code), its conclusion is entirely unanchored in its own assessment of these factors.

- 3.56 Fundamentally, the CMA has not adduced adequate evidence to show that the MFT could exert a degree of control over Sky News which, as well as being practically possible, somehow steered a course between these cumulative factors in a way that would: afford a meaningful influence over editorial decision-making (at all requisite levels); allow for the posited degree of editorial alignment; and would not fall foul of opposition from Sky News’ staff, its audience or, importantly, from Ofcom.

Conclusion: the CMA's flawed legal and factual assessment of change in control leads to incorrect conclusions

- 3.57 By focusing on control exercisable, the CMA has adopted a blinkered approach centring on the mere possibility that the MFT could exert some control over Sky (and, critically, in turn, Sky News). In doing so it has not taken adequate account of the extent of control that is likely on the balance of probabilities to be exercised and exercisable, and over what time period, having regard to the incentives of the parties.

- 3.58 These are very significant omissions. There is no evidence that the MFT has the incentive to seek to align Sky News with any of News Corp’s newspapers. In fact the evidence suggests that there would be no commercial rationale for the MFT to do so.

- 3.59 In any event, even adopting the CMA’s flawed approach and focussing solely on the degree of control potentially exercisable by the MFT post-Transaction, the CMA has ignored or downplayed significant legal and practical constraints which will remain post-Transaction and will continue to protect the independence of Sky News.

⁷¹ Provisional Findings, 8.22, 8.41 and 8.42.

⁷² Provisional Findings, 8.43.

4. **SUFFICIENT PLURALITY WILL REMAIN POST-TRANSACTION**

4.1 In addition to the errors made in assessing the degree of control the MFT is likely to be able to exercise over Sky News in practice, the CMA's assessment of the sufficiency of remaining plurality is also flawed as:

4.1.1 the CMA misdirects itself as to the correct legal test for sufficiency; and

4.1.2 the CMA's factual analysis is not grounded in its own findings as to the limited and speculative levels of influence that the MFT might be able to exercise over Sky post-Transaction.⁷³

(A) The CMA has adopted a flawed framework for assessing sufficient plurality

(i) Incorrect consideration of threshold for sufficiency

4.2 The CMA has proceeded on an assumption that even a very small decrease in plurality would lead to insufficient plurality for the purposes of the statutory test. The threshold the CMA appears to have identified is so low as to be in effect meaningless.

4.3 The CMA has not corrected the legal errors identified in paragraphs 3.2-3.10 of Sky's response to the Annotated Issues Statement which, in summary, explain why:

4.3.1 the CMA has not applied the correct test for determining sufficiency of media plurality and instead relies on analytical short cuts;

4.3.2 the mere addition of a TV news presence cannot be a problem per se as the CMA seeks to infer;⁷⁴ and

4.3.3 Lord Justice Leveson's Report in to the culture, practices and ethics of the press (the "**Leveson Inquiry Report**") has little bearing on the statutory question.

4.4 The most informative existing guidance on what would constitute sufficient plurality is the DTI Guidance. This constitutes formal statutory guidance, pursuant to s.106A of the Enterprise Act 2002, explaining the media public interest considerations specified in the Act. The DTI Guidance provides that the test for assessing transactions involving cross-media ownership (such as the present) is whether the Transaction will result in "*unacceptable levels of media and cross-media dominance*".⁷⁵ However, in the Provisional Findings, the CMA has interpreted this test in such a way as to produce a threshold that is so low it is meaningless, depriving the word 'dominance' of its ordinary, natural meaning.

The CMA places undue weight on the existence of the media plurality regime and restrictions on cross-media ownership

4.5 At Provisional Findings, 6.69 the CMA states:

"[...] the media plurality consideration was introduced into the statutory framework for UK merger control on the basis that statutory protection regarding competition may not be sufficient to safeguard the level of plurality that is considered necessary".

4.6 It develops this point further at Provisional Findings, 6.70, stating:

⁷⁴ Although the CMA acknowledges at Provisional Findings, 6.75 that "*[...] the combination of TV and newspaper assets does not in and of itself necessarily mean there is a plurality concern*", its subsequent approach appears to be premised on the notion that such a combination creates a media plurality concern *per se*. See further paras 4.8 and 4.39 to 4.42 below.

⁷⁵ DTI Guidance, 7.7.

"We therefore consider that concerns in relation to the sufficiency of plurality may arise at lower levels of concentration than would be considered problematic in the context of a competition assessment".

- 4.7 However, this does not logically follow from the observation the CMA makes at 6.69. The fact that an additional safeguard for plurality was introduced has no bearing on the level of concentration that would be considered problematic under that safeguard relative to that under the normal competition regime.
- 4.8 In addition, the CMA incorrectly asserts that the statutory framework for regulating media ownership requires particular scrutiny in the case of mergers involving cross-ownership of newspapers and TV channels and therefore justifies a low threshold for finding plurality concerns.⁷⁶ In fact, a high threshold for intervention only in "*exceptional circumstances*" applies in the present case:
- 4.8.1 As a starting point, the CMA incorrectly relies on other media plurality controls which have no application to the CMA's assessment of the present Transaction. The CMA makes reference at Provisional Findings, 12.13 and footnote 296 to s.391 of the Communications Act 2003 – a rule that applies only in the very specific case of the acquisition by an owner of newspapers with an aggregate market share of 20% or more of an interest of 20% or more in a company which holds a Channel 3 licence. It is not appropriate to seek to read across the application of that provision to this Transaction in circumstances where Parliament has chosen to legislate in relation to a very specific type of cross-media concentration which is not applicable to the Transaction.
- 4.8.2 Paragraph 8.8 of the DTI Guidance states that public interest intervention in cases where there "*have never been [media ownership] rules*" (precisely the situation here) would only be justified in "*exceptional circumstances*" where the transaction in question "*may give rise to serious public interest concerns*" (emphasis added). An example given in the guidance as to when such serious concerns may arise is where "*a large number of news [...] channels would be coming under single control*". This demonstrates that a high threshold for intervention should be applied in the CMA's review of this Transaction.

The CMA's continued reliance on the Leveson Inquiry Report

- 4.9 The CMA continues to rely inappropriately on a remark made in the Leveson Inquiry Report that "*the levels of influence that would give rise to concerns in relation to plurality must be lower, and probably considerably lower, than the levels of concentration that would give rise to competition concerns*".⁷⁷
- 4.10 As set out more fully in Sky's response to the Annotated Issues Statement, the Leveson Inquiry focused on and was conducted through the lens of matters that were not directed at media plurality and were largely focused on the printed press, rather than TV news;⁷⁸ Lord Justice Leveson acknowledged that he was not qualified to express a view on the specific levels at which plurality concerns should be identified;⁷⁹ and the Leveson Inquiry Report specifically acknowledged that there was insufficient time to look in detail at plurality issues.⁸⁰

⁷⁶ See Provisional Findings, 6.69 and footnote 139 which in turn refers to Appendix D, and para 12.13.

⁷⁷ See Provisional Findings, 6.70-6.73.

⁷⁸ Sky Response to the Annotated Issues Statement, 3.8(a) and 4.27.

⁷⁹ Sky Response to the Annotated Issues Statement, 3.8(b). The CMA is wrong to contend (at Provisional Findings, 6.73) that Sky's submission here suggested that Lord Justice Leveson stated

- 4.11 But, in any event, the key problem is that it is a wholly uninformative exercise to attempt to compare levels of "influence" in a plurality context with levels of "concentration" in a competition context. These are different concepts which cannot be directly compared or equated, and it is not informative to seek to compare (for example) levels of market share aggregation in a competition context to some metric for "influence" in a plurality context.⁸¹ The Provisional Findings do not grapple with this issue.⁸²
- 4.12 It is no answer for the CMA to point out that Lord Justice Leveson was not saying that he was not qualified to observe that plurality concerns may be observed at lower levels of concentration than competition concerns.⁸³ It remains the case that Lord Justice Leveson expressly did not volunteer guidance on the specific levels at which plurality concerns may arise, and the CMA has not identified anything in the Leveson Inquiry Report suggests that an "unacceptable level of media and cross-media dominance" is not the test which should be applied. Accordingly, the Leveson Inquiry Report does not support an approach which would deprive the word 'dominance' of its ordinary meaning.
- 4.13 In any event, the Leveson Inquiry Report was published nearly six years ago, concerning evidence relating to a time period that is earlier still. Given the developments that have taken place in news provision during this period (such as the decline in the circulation of the printed press and the growth of online news, as considered further below), the CMA errs in placing weight on the conclusions set out in the Leveson Inquiry Report.
- 4.14 Accordingly, the CMA should have adopted an approach which accorded the ordinary, natural meaning to the phrase "*unacceptable media and cross-media dominance*". For the reasons set out further below the Transaction is incapable of resulting in an unacceptable level of cross-media dominance on any ordinary reading of that phrase.
- (ii) Error in focusing only on the impact on plurality arising from changes in exercisable control
- 4.15 The CMA acknowledges that the assessment of plurality requires a qualitative assessment of the position likely to result from the Transaction (Provisional Findings, 6.43, referring to the Court of Appeal in *BSkyB v Competition Commission* at [118]). However, it then fails to do so by reference to all the relevant evidence, by limiting its analysis of sufficiency of plurality to considering "*the impact of plurality arising from the increased extent of the control the MFT will be able to exercise over Sky and Sky News following the Transaction*" (para 6.44, emphasis added). Again (see section 3 above) this focuses only on the theoretical level of control potentially available, and does not take account of the likelihood, extent, quality or time period any such control may be achieved. The Court of Appeal, in the paragraph the CMA cites above, states that an assessment should be expected to be made "*by reference to the real position as regards the extent and level of control*".⁸⁴
- (iii) Failure to consider character and time period of control in sufficiency analysis
- 4.16 The above error is compounded by the CMA failing to take account of the character of control in its analysis of sufficiency of plurality.

that he was not qualified to conclude that plurality concerns would be observed at lower levels of concentrations than competition concerns.

⁸⁰ As regards plurality, the Leveson Inquiry Report stated: "*It is important to note that, within the broad constraints of the work that the Inquiry has had to undertake, there has been insufficient time to devote to a full scale review or to look in detail at these issues*" (p.1461); cited in Sky's response to the Annotated Issues Statement, footnote 30.

⁸¹ Sky's response to the Annotated Issues Statement, 3.8(c).

⁸² Provisional Findings, 6.70-6.73.

⁸³ Provisional Findings, 6.73.

⁸⁴ *BSkyB plc v Competition Commission*, [118].

- 4.17 The framework the CMA sets out in para 6.79 refers to "*the MFT's position, following the Transaction, as the person with control of News Corp and increased control of Sky and Sky News*". This does not appear to acknowledge the nature of the CMA's own provisional conclusions that any MFT influence over Sky News is speculative, would be limited, and could be affected only over a long time period,⁸⁵ and the CMA's further consideration of the sufficiency of plurality ignores this.⁸⁶
- 4.18 It is a particularly serious omission that there is no attempt to assess sufficiency of plurality over time in circumstances where the CMA identifies the potential control as exercisable over a "*longer term*", and notwithstanding the CMA's own recognition that it must take account of how control might evolve over time.⁸⁷ Instead, the CMA appears to proceed on an assumption that (for the purposes of the CMA's analysis of sufficiency of plurality and the theories of harm set out in Chapters 9-12 of the Provisional Findings) control will be exercised from the moment the Transaction is completed. In circumstances where the effects are found only over a longer term, the CMA should have regard to: (i) the time period involved (including an assessment of the extent to which both the MFT's actual ability and incentives to exercise control may change over such time period); (ii) how news provision is likely to develop over that time period; and (iii) what impact those developments might have.⁸⁸ In other words, given the CMA's provisional conclusions that control could only be exercisable over time, its assessment must necessarily be forward looking.

(B) In any event, the Transaction is incapable of giving rise to an unacceptable level of cross-media dominance

- 4.19 The CMA concludes its analysis in Chapter 10 of the Provisional Findings by asserting that the Transaction results in a "*material reduction in the diversity of viewpoints consumed by the public across and within media enterprises*".⁸⁹
- 4.20 This aspect of the CMA's analysis is not properly grounded in the CMA's own findings on control, and is therefore fundamentally flawed. In any event, it is clear from the available evidence that the Transaction is incapable of resulting in insufficient plurality because the CMA has:
- 4.20.1 set an artificially low bar for identifying when plurality concerns may arise and has failed to justify why such a low bar is appropriate (see further paragraphs 4.2 to 4.14 above). Instead the CMA's reasoning in support of this threshold: seeks to discount or downplay the important counterweight of the two largest news providers in the UK (the BBC and ITN); involves a selective analysis of share of reference over time which excludes any forward looking assessment; and places undue emphasis on the cross-platform nature of the Transaction;
 - 4.20.2 inflated the respective positions of Sky News and News Corp, by: erroneously allocating a proportion of the shares of reference of Global and Bauer to Sky; and inappropriately emphasising the significance of talkSPORT; and
 - 4.20.3 given insufficient weight to the prevalence of multi-sourcing by news consumers in the UK (in particular by consumers of Sky News and News Corp).

⁸⁵ See paragraphs 2.1 and 2.2 above.

⁸⁶ See in particular paras 4.22 to 4.27 below.

⁸⁷ See Provisional Findings, 6.32 and 6.39.

⁸⁸ See paragraphs 4.34 to 4.38 below for select examples of the factors the CMA should have taken into account.

⁸⁹ Provisional Findings, 10.103.

- 4.21 Once these errors are addressed it is clear that the Transaction has a negligible impact on media plurality in the UK, and is therefore incapable of resulting in insufficient plurality.
- (i) The CMA fails to ground its analysis in its own findings on control
- 4.22 The CMA's analysis fails to take account of its own provisional finding that "*the MFT will not have full control of Sky and News Corp following the Transaction*".⁹⁰ Instead, the CMA's analysis proceeds on the basis that Sky and News Corp will be combined, without adjusting for the limited level of control the MFT will exercise over Sky, and in turn, Sky News, over time.⁹¹
- 4.23 Not only does the CMA ignore its findings on control when assessing media plurality, it goes further and asserts incorrectly that internal plurality⁹² considerations are irrelevant to its analysis because the statutory question focuses on plurality of persons and it is not therefore appropriate to weight the share of reference for, *inter alia*, the degree of control of MFT over Sky News post Transaction.⁹³
- 4.24 This approach to internal plurality is simplistic and has no regard for the role of internal plurality in maintaining diversity of viewpoints. In particular, internal plurality results in a broader range of viewpoints being available to audiences than is apparent from an analysis of aggregated shares of reference alone. Internal plurality is therefore an essential element of an assessment of sufficiency of plurality.
- 4.25 The CMA appears to have acknowledged this function of internal plurality in relation to ITN. The CMA splits ITN's share of reference between the three retail outlets to which it provides content. Part of the CMA's justification for this approach is that there is a "*degree of differentiation in the news services provided by [ITV, Channel 4 and Channel 5]*".⁹⁴
- 4.26 This same logic applies to News Corp's newspaper titles and will apply as between Sky News and News Corp post-Transaction.
- 4.26.1 The News Corp Newspapers frequently adopt different editorial lines, even on significant political issues such as the EU referendum. This is supported by data presented by the CMA.⁹⁵
- 4.26.2 As regards Sky News, the CMA advances a theory of harm based on subtle editorial alignment between Sky News and News Corp's newspapers. Assessing whether such alignment will be possible in practice⁹⁶ inevitably involves an analysis of internal plurality and the impact the Transaction will have on editorial independence at Sky News and, for the reasons set out in paras 3.22 to 3.56 above, leads to the conclusion that, post-Transaction, the output of Sky News will remain editorially distinct from all of the News Corp newspaper outlets.

⁹⁰ Provisional Findings, 10.5.

⁹¹ At Provisional Findings, 10.71, the CMA asserts that it is "*reasonable to take into account the full combined share of reference of Sky News and News Corp*".

⁹² Sky has set out above (paras 3.22 to 3.56) why the CMA's analysis of internal plurality in Chapter 8 of the Provisional Findings is inadequate

⁹³ Provisional Findings, 10.71.

⁹⁴ Provisional Findings, 10.57(b).

⁹⁵ See Provisional Findings, e.g. 11.39-11.41 and accompanying Figures, which demonstrate that the Times has a significantly higher 'trust score' than the Sun (with the CMA noting that the Sun's low trust score can be attributed to its status as a 'tabloid' news provider); 11.55-11.59 and accompanying Figures, which show a significant variance in the demographic profiles of readers of the Sun on one hand and the Times on the other.

⁹⁶ Which the CMA is legally required to do, see paras 3.2 to 3.9 above.

4.27 The CMA has erred by not basing its assessment of plurality on its provisional conclusions as to the level of control that the MFT will be able to exercise over Sky post-Transaction. It has then compounded this error by also provisionally concluding that the statutory test does not require it to take account of internal plurality when assessing the impact of the Transaction on availability of viewpoints. A proper analysis of media plurality in light of the limited control that the MFT will be able to exercise over Sky post-Transaction and the subtle and non-overt way in which the CMA asserts the MFT would seek to alter the output of Sky News demonstrates that, even if there were some potential for increased editorial alignment between the News Corp newspapers and Sky News, the risk would be both small and remote, and would be incapable of resulting in there being an insufficient plurality of persons with control of media enterprises in the UK.

(ii) The CMA has not adequately explained how a small increase in share of reference can have an adverse impact on plurality

4.28 In this section and the following section,⁹⁷ Sky considers some specific errors that arise in the CMA's assessment in the Provisional Findings of diversity of viewpoints and sufficiency of plurality.⁹⁸

4.29 The CMA has erred in law by setting an artificially low threshold for determining whether the Transaction will result in there being insufficient plurality. The CMA has further erred by applying that low threshold in Chapter 10 of the Provisional Findings. The CMA notes that the combined share of reference of Sky News and News Corp will be 10% (rising to 14% on the application of certain adjustments posited by the CMA⁹⁹), over 6% for Sky and 3% for News Corp. The CMA asserts this is not an insignificant increment, resulting in the combined entity having a "*position across all four platforms, which, when combined and taking account of their size in terms of reach and consumption, is not matched by any other news provider*".¹⁰⁰ However, this does not stand up to scrutiny.

The CMA must have regard to its own findings on control

4.30 By simply combining the respective shares of reference of Sky News and News Corp, the CMA appears to assume that the MFT will be able to exercise full control over Sky News post-Transaction.¹⁰¹ It is not open to the CMA to approach its analysis in this way. Given its findings that the increased control the MFT will be able to exercise over Sky News is limited and will only manifest itself in a subtle way over the long term, the CMA must have regard to how such control is likely, in fact, to be exercised when deciding on the extent to which the shares of reference of Sky News and News Corp can be combined (if at all).

It is not open to the CMA to disregard the BBC and ITN

4.31 The BBC and ITN (and the three broadcasters, ITV, Channel 4 and Channel 5, which take news content from ITN) are significant parts of the UK news media landscape, and are respectively the first and second largest wholesale news providers on a share of reference basis. It is not open to the CMA to seek to exclude them or downplay their significance and thereby exaggerate the impact of the Transaction.

⁹⁷ Paras 4.29 to 4.50 below.

⁹⁸ Sky has seen 21CF's response to the Provisional Findings as submitted to the CMA and agrees with the points made regarding the CMA's assessment of media plurality (in particular sections 3 and 4 thereof).

⁹⁹ See further paras 4.43 to 4.45 below.

¹⁰⁰ Provisional Findings, 10.54.

¹⁰¹ Provisional Findings, 10.71.

- 4.32 First, the BBC remains a significant player in news provision in the UK and its position is enhanced by its status as a trusted and impartial broadcaster.
- 4.32.1 The CMA asserts that the BBC is not driven by commercial imperatives, but by fulfilling the public purposes it serves as set out in its Royal Charter, one of which is "*to provide impartial news and information to help people understand and engage with the world around them*". The CMA concludes that, on this basis, there is a limit to which the BBC is able to challenge the views of other news providers or mitigate/moderate their influence.¹⁰²
- 4.32.2 However, this is not relevant to the way in which the CMA has formulated its theory of harm. The CMA asserts that the potential reduction in the 'diversity of viewpoints' available that results from the Transaction comes about as:
- "the Transaction might make it more likely that 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."*¹⁰³
- 4.32.3 To counteract this putative potential subtle editorial alignment or tone in presenting stories, it would not be necessary for the BBC to directly challenge stories broadcast on Sky News.
- 4.32.4 The BBC is an impartial broadcaster, which provides a reliable source of news to audiences, both in relation to content, and in relation to story selection, prominence and tone. This is likely to continue to be the position in the future, for the reasons identified by the CMA. Accordingly, even if the MFT were to seek to align Sky News with one or both of the News Corp newspapers through the subtle means identified by the CMA, the BBC would remain a wholly effective counterweight. It would not be necessary for the BBC to directly "challenge" any view expressed on Sky News in order to moderate any influence the MFT might exercise through Sky News. It would be sufficient for the BBC to continue to operate as it currently does, providing a highly impartial service (which is ensured by requirements which go beyond the terms of the Broadcasting Code and which therefore firmly entrench the impartial nature of the BBC's offering¹⁰⁴), which would address any potential effects of the Transaction.
- 4.32.5 For the same reasons, it is irrelevant that ITN's ability to challenge viewpoints is limited by its "*commercial need [...] to reflect the preferred style, tone and editorial approach of the retail news providers to which it provides news under contract*",¹⁰⁵ so long as ITN (and the retail outlets using its content) remain trusted and impartial sources to which audiences can make reference.
- 4.33 Second, ITV, Channel 4 and Channel 5 are each significant players in the supply of news in the UK.
- 4.33.1 In addition to the alleged limitations on ITN's ability to challenge viewpoints, the CMA asserts that the counterweight posed by ITN is limited because:
- (A) there is a high degree of editorial control exercised by ITV, Channel 4 and Channel 5, who also produce their own news and current affairs content to supplement the content they receive from ITN, and therefore ITN's share of reference should be split amongst these three resulting in a combined Sky

¹⁰² Provisional Findings, 10.56.

¹⁰³ Provisional Findings, 10.2.

¹⁰⁴ Provisional Findings, 10.56

¹⁰⁵ Provisional Findings, 10.99.

and News Corp being the second largest provider by share of reference (with 10%, although ITV would be a close third with 8%);¹⁰⁶ and

(B) ITN is in any event focussed on only one platform, TV.¹⁰⁷

4.33.2 However, even if it is correct to look at ITV, Channel 4 and Channel 5 individually (and not at ITN as a whole) these are three significant providers of terrestrial broadcast news (behind only the BBC in terms of reach and consumption) who will continue to be important additional voices post-Transaction. Indeed, as set out in Sky's response to the Annotated Issues Statement, these providers do not view Sky News as being as important a part of the news landscape as their respective news programmes, given its relatively limited audience. ITN stated in its hearing with the CMA that:

*"we do not see ourselves, as we have said, so much in competition with Sky News, because we have much larger audiences. The services we provide have larger audiences because they are bulletins on major platforms. So the individual audience of Sky News may peak at, I do not know, 70,000 viewers in the course of the day at any one time? Its reach across the day in aggregate will build. Whereas the smallest of our services on Channel 5 News, the 5.00 pm news will, say, have 0.5 million people watching, and the 6.30 pm news with ITV, which is the largest commercial news programme, maybe 3.5 million viewers watching that. Therefore the services that we provide clearly have larger audiences than Sky News."*¹⁰⁸

4.33.3 Further, the significance of ITN (and, therefore, ITV, Channel 4 and Channel 5) cannot be downplayed by reference to the fact that it is primarily active in TV news, given that the CMA has identified TV as the main platform for a significant majority of adults in the UK as a source of news.¹⁰⁹

The CMA's analysis of share of reference over time is selective and not sufficiently forward looking

4.34 The CMA asserts that it has analysed trends in share of reference over time and concludes that the relative positions of the various providers are largely unchanged, with shares of reference of the largest providers overall being flat, albeit with a slight decline (and the CMA expressly notes that ITN has lost over 20% of its share of reference since 2013).¹¹⁰

4.35 However, the CMA's analysis of historic trends is selective:

4.35.1 the CMA notes that ITN has lost over 20% of its share of reference since 2013, but makes little reference to the fact that News Corp has lost 25% and Sky almost 15% of their respective shares of reference in the same period;¹¹¹

4.35.2 by contrast, the share of reference attributable to 'other' providers has grown by almost 40% during the same period.¹¹² This suggests that there has been significant entry or organic growth by smaller players, who are acquiring share of reference from larger and more established players. Given the rapid growth of online news, this trend is likely to continue over time; and

¹⁰⁶ Provisional Findings, 10.57.

¹⁰⁷ Provisional Findings, 10.99.

¹⁰⁸ ITN hearing transcript, page 13.

¹⁰⁹ Provisional Findings, 9.15(b).

¹¹⁰ Provisional Findings, 10.60-10.61.

¹¹¹ Provisional Findings, 10.60 and Figure 10.11.

¹¹² Provisional Findings, 10.60 and Figure 10.11.

- 4.35.3 in assessing influence over public opinion and the political agenda,¹¹³ the CMA pays lip service to the need for a forward looking analysis, but ultimately concludes that this will have no impact on its assessment.¹¹⁴ However, the CMA does not set out a robust, evidenced-based analysis to support this conclusion.
- 4.36 In addition, the CMA does not carry out an adequate forward looking assessment of potential market developments. The CMA's analysis is limited to asserting that a 'significant' alternative provider to Sky News and News Corp would not emerge organically in the short to medium term, because new entrants, such as BuzzFeed, have failed to acquire a share of reference of over 1%, without explaining why this is the only relevant form of entry.
- 4.37 Not only does the CMA's limited analysis not support its conclusions regarding new entry and growth (for example, BuzzFeed, with a share of reference of 1%, has reached a position of equivalence with established players such as Telegraph Media), but it is not adequate to demonstrate that the Transaction is capable of harming plurality.
- 4.38 In particular, the CMA has failed to align this analysis with its provisional conclusion that any influence that the MFT might have over Sky News would only emerge over time. In light of that conclusion, it is incumbent on the CMA to consider how the market will evolve. The CMA has not carried out any such analysis, and should have had regard to:
- 4.38.1 the fact that there has been significant new entry in recent years and that there is scope for this trend to continue.¹¹⁵ Whilst it may be the case that such entry is more likely to take place online rather than on other platforms, online news is growing in significance as a platform (between just June 2017 and August 2017 the share of time spent consuming news online grew by almost 5%¹¹⁶) whereas the significance of other platforms, in particular newspapers, has been and continues to be in decline.¹¹⁷ Accordingly, such entry still presents an important part of the news provision landscape; and
- 4.38.2 factors which might reduce the significance of Sky News or News Corp specifically in the provision of news in the UK. For example, the possibility that Sky News' contract to provide news content to IRN may be awarded to a different body on renewal (as was the case when the contract to provide news to Channel 5 switched from Sky to ITN in February 2012).

The CMA's focus on the absence of another provider active across all four platforms is unjustified

- 4.39 The CMA places significant weight on the provisional conclusion that it is unlikely that another significant cross-platform news provider is likely to emerge.¹¹⁸ However, the CMA does not explain why it is necessary for such a provider to emerge or why the presence of only one such provider active across all four platforms causes, in and of itself, a plurality problem.
- 4.40 First, consumers multi-source across different platforms and different providers to a significant degree, meaning that it is unnecessary for one single provider to be active across all platforms in

¹¹³ See further section 5 below.

¹¹⁴ Provisional Findings, 11.130.

¹¹⁵ This has been recognised by Ofcom. For example, its Report to the Secretary of State on the operation of media ownership rules listed under Section 391 of the Communications Act 2003, 26 November 2015, states at para 1.17: "Significant changes in the pattern of news consumption and in the diversity of available news sources are taking place and these trends are expected to continue over the next few years".

¹¹⁶ Provisional Findings, Figure 10.9.

¹¹⁷ E.g. Provisional Findings, Figure 10.7.

¹¹⁸ Provisional Findings, e.g. 10.102, 11.131 and 12.19.

order for there to be sufficient alternative viewpoints.¹¹⁹ A significant range of alternative newspapers, online-only and broadcast news (both TV and radio) offerings will remain available in the UK post-Transaction, allowing consumers access to sufficient alternatives for all types of news content that will be offered by News Corp and Sky News.

- 4.41 Second, as the CMA has accepted, there are limited synergies between broadcast news and newspapers, meaning that a combined Sky News and News Corp would not be able to operate as a single proposition, and there would be limited benefit to any new entrant in being 'cross-platform' for the same reason.¹²⁰
- 4.42 Third, the CMA misunderstands the scheme for the regulation of cross-media ownership set out in the Broadcasting Act 1990. The CMA's analysis of this, which it considers concerns "*protection of media plurality before the Communications Act 2003*" is set out in Appendix D, 3-5. The CMA erroneously asserts in Provisional Findings, 12.13, that these rules require it to scrutinise this merger, as a merger between a newspaper owner and a broadcast news provider, particularly closely. However, the historic rules regulating cross-media ownership were introduced to protect media plurality in a market which has subsequently undergone extensive liberalisation. Such rules have, accordingly, been relaxed over the years to better reflect the balance between allowing markets to function free from interference and protecting media plurality through appropriate regulation. The strict cross-media ownership rules set out in the Broadcasting Act have now been confined to a very limited set of circumstances (which do not apply to this Transaction).¹²¹

(iii) The CMA overstates the position of Sky News and News Corp

*It is not appropriate to allocate the shares of reference of Global and Bauer to Sky*¹²²

- 4.43 The CMA acknowledges that Sky News has only a limited degree of editorial control over the material provided to the IRN. However, it asserts that, []¹²³
- 4.44 Global and Bauer exercise a significant degree of editorial judgment in deciding what content to use from IRN, if any, and they supplement that content with their own independent journalism and content sourced from other third parties (e.g. news agencies). Indeed, Bauer told the CMA that it was common for none of the content provided to IRN by Sky News to be used by Bauer.¹²⁴ The CMA is wrong to allocate any share of reference from Global and Bauer to Sky because:

¹¹⁹ See further paras 4.48 to 4.50 below.

¹²⁰ Provisional Findings, 11.91. Sky notes that the CMA's reference at footnote 371 to sharing of resources between TV/newspapers and their own online offerings does not alter this. In relation to the example given by the CMA, the respective websites of Sky News and the Times are very different, and respectively more closely reflect Sky News' broadcast offering and the Times' newspaper offering than they do one and other. As explained to the CMA previously (e.g. Sky's response of 1 November 2017 to question 17 of the CMA's RFI of 25 October 2017), Sky adopts a single editorial policy across all of its platforms including online. Accordingly, content from the News Corp newspapers could not simply be repurposed for use in the Sky News website because it would not necessarily comply with, for example, the requirements of the Broadcasting Code and, by extension, Sky News' Editorial Guidelines.

¹²¹ See further paragraphs 4.8.1 and 4.8.2 above.

¹²² Sky notes that, in its response to the Provisional Findings, 21CF has dealt extensively with the CMA's analysis of share of reference. Sky agrees with 21CF's submissions, and in this response focuses on the specific issue of the allocation the shares of reference of Global and Bauer to Sky.

¹²³ Provisional Findings, 10.66; Appendix F, 10-14.

¹²⁴ Provisional Findings, Appendix F, 10.

- 4.44.1 First, editorial control lies principally with the radio operator. By analogy, the CMA has not for example sought to reduce the shares of reference of news providers to account for the content they receive via news wires;
- 4.44.2 Second, given the CMA's media plurality theories of harm are premised on the risk of subtle editorial alignment, it is not appropriate to allocate any of Global and Bauer's share of reference to Sky News in circumstances where this sort of alignment is not possible because of the level of editorial control they themselves exercise; decisions about story selection, omission and prioritisation are made by Global and Bauer and not by Sky. Even if such alignment were possible, it would be temporary at worst, as the IRN contract may be awarded to a new provider when it comes up for renewal or the terms of the contract could be changed to prohibit any such alignment; and
- 4.44.3 Third, Global and Bauer exercise a degree of editorial independence that is at least as great (and likely greater) than that exercised by ITV, Channel 4 and Channel 5 in relation to the content they receive from ITN (which, as set out above, the CMA considers significant enough to justify separating out ITN entirely into the three retail outlets it supplies).¹²⁵
- 4.45 In addition, to the extent that Global and Bauer do rely on content provided by Sky for overnight bulletins, this will have a *de minimis* impact on media plurality. The CMA states that it does not have evidence to "*quantify precisely [X] is likely to be [overnight]*".¹²⁶ However, that does not justify the CMA having no regard at all to the fact that such listenership is likely to be minimal. Accordingly, in light of the editorial autonomy of Global and Bauer, the CMA is incorrect to allocate any of the share of reference to Sky at all, much less a proportion that represents [X] of the content taken from IRN by Global, without any regard to how much of that content is actually used overnight, and how much of that content is edited by Global prior to broadcast.

The CMA gives undue prominence to talkSPORT

- 4.46 When considering the reach of the top five UK radio stations, the CMA also includes talkSPORT in its analysis, despite talkSPORT falling significantly outside of the top 5, because "*talkSPORT is included as it is a News Corp owned station*".¹²⁷ The CMA then goes on to assert that part of the reason for its conclusion that Sky News and News Corp "*reach a significant proportion of the population*" is that "*talkSPORT reaches between 2.3 and 3.2 million listeners*".¹²⁸
- 4.47 This approach overstates the significance of talkSPORT to the plurality assessment and is clearly inappropriate. According to RAJAR quarterly listening data for the period ending September 2017, commercial radio accounted for just 45.3% of radio listening (with all BBC listening accounting for 52.1%). talkSPORT accounted for just 1.9% of radio listening in the same period, and several other commercial providers had significantly higher shares (for example Global radio had a total group listening share of 20.6%, and Bauer had a total group listening share of 14.8%, reaching approx. 23.5 and 17.8 million people respectively). Moreover the Provisional Findings contain no analysis of news provision by talkSPORT.

(iv) The CMA understates the impact of multi-sourcing

- 4.48 Despite the CMA identifying significant multi-sourcing, particularly by Sky and News Corp customers (with the average Sky and News Corp customer using between four and five different

¹²⁵ See paras 4.33.1 to 4.33.3 above.

¹²⁶ Provisional Findings, Appendix F, 14.

¹²⁷ Provisional Findings, footnote 257.

¹²⁸ Provisional Findings, 10.28(c).

sources of news, compared to a general average of just over three),¹²⁹ the CMA concludes that "the evidence on multi-sourcing does not remove our concern about the impact of the Transaction on the diversity of viewpoints consumed".¹³⁰ The CMA asserts that this is because "a significant minority of Sky News and News Corp's customers remains relatively reliant on the news content they produce".

4.49 The CMA's conclusion is based on the claim that just over one third of Sky News and/or News Corp customers use between one and three sources of news. However, this is not an appropriate basis for dismissing the relevance of multi-sourcing from the CMA's plurality assessment:

4.49.1 First, it ignores the importance of multi-sourcing to (1) the vast majority of Sky and News Corp's customers; and (2) audiences generally. Given that the CMA has correctly identified a single UK wide audience for news content as the relevant audience for its analysis in this case,¹³¹ the CMA cannot dismiss the significance of multi-sourcing by reference to the habits of a very small proportion of that audience; and

4.49.2 Second, the number of consumers who would rely solely on Sky and News Corp post-Transaction is *de minimis*, and is far smaller than one third. As the CMA identifies, only four individuals (0.04% of those surveyed) consume news from Fox and/or News Corp and Sky and no other source.¹³² Indeed, the CMA finds that the reverse is true, as consumers who obtain news from both Fox and/or News Corp and Sky also typically used a number of other news sources (and, notably, use a significantly higher number of news sources than the average consumer who accesses news from two or more sources).¹³³

4.50 The high prevalence of multi-sourcing offsets the CMA's (unjustified) concerns regarding the combined entity being the only news provider active across all four platforms.¹³⁴

(C) Conclusion on sufficiency of plurality

4.51 As a starting point, the CMA has failed to ground its analysis in its findings on the level of control that the MFT will be able to exercise over Sky post-Transaction. This is a matter that goes to the heart of the degree to which editorial alignment between the News Corp newspapers and Sky News will be possible in practice, and, if it is, whether it will be possible on the balance of probabilities to an extent sufficient to result in the MFT being in a position of unacceptable cross-media dominance. As a result, the analysis the CMA does carry out in relation to diversity of viewpoints and sufficiency of plurality is deficient.

4.52 In any event, the analysis that the CMA has carried out does not disclose harm to media plurality contrary to the public interest because:

4.52.1 the CMA has failed to justify the low threshold that it has adopted for identifying whether or not the Transaction will result in insufficient plurality. Its subsequent analysis of whether or not that low threshold is met is therefore incapable of shedding any light on the statutory question;

4.52.2 the CMA's analysis contains significant errors and does not support the conclusion, irrespective of the threshold applied; and

¹²⁹ Provisional Findings, 10.77-10.78.

¹³⁰ Provisional Findings, 10.98.

¹³¹ Provisional Findings, 6.23

¹³² Provisional Findings, 10.81. The CMA identifies differences between the respective services of Channel 4 and Channel 5 for example at Provisional Findings, 11.33.

¹³³ Provisional Findings, 10.82.

¹³⁴ See further paras 4.39 to 4.42 above.

- 4.52.3 the CMA has failed to rebut the evidence set out in Section 3 of Sky's response to the Annotated Issues Statement, which set out in detail why the Transaction is incapable of causing harm to media plurality because of, *inter alia*, the limited position of Sky News in the provision of news in the UK.
- 4.53 The available evidence strongly supports the conclusion that sufficient plurality will remain post-Transaction.

5. **THE CMA FAILS TO IDENTIFY A VALID CONCERN ARISING FROM INFLUENCE OVER PUBLIC OPINION AND THE POLITICAL AGENDA**

5.1 Chapter 11 of the Provisional Findings sets out the CMA's analysis of influence over public opinion and the political agenda. The CMA provisionally concludes that the MFT will be able to exercise "*materially greater*" influence over public opinion and the political agenda following the Transaction, in particular because it will be able to use Sky News to 'amplify' its existing influence and because it will have a "*unique position from which to influence the news agenda*".¹³⁵ The CMA's analysis is not sustainable.

5.2 The CMA has failed to establish that its concerns relating to influence over public opinion and the political agenda can amount to a standalone theory of harm within the confines of the statutory question that the CMA must answer:

5.2.1 first, the theory of harm posited by the CMA is inextricably linked to its concerns regarding reduced diversity of viewpoints; and

5.2.2 second, the theory of harm lacks a sufficient nexus to the statutory question.

5.3 Additionally, the evidence does not support the provisional conclusion that a concern even arises.

5.3.1 The CMA's conclusion principally relies upon a flawed analysis of whether the Transaction will allow the MFT to use Sky News to 'amplify' its existing influence.

5.3.2 The CMA's analysis of the MFT's political influence focuses on evidence of the MFT's influence over politicians which is not in itself relevant to the statutory question, nor is it Transaction-specific.

(A) The CMA's concerns regarding increased influence are inextricably linked to its concerns regarding a reduction in viewpoints

5.4 The CMA states at Provisional Findings, 11.11:

"All things being equal, we would expect [the reduction in the diversity of viewpoints consumed that will result from the Transaction] to enable the MFT to exercise greater influence over public opinion and the political agenda following the Transaction." The CMA then goes on to describe a number of factors which it considers support this proposition notwithstanding the relatively limited size of Sky News.¹³⁶

5.5 Sky has described comprehensively in sections 2 to 4 above why the Transaction will not result in a reduction in viewpoints to a degree which results in there being insufficient plurality. Given the CMA's conclusions regarding insufficiency are the CMA's starting point in its assessment of influence over public opinion and the political agenda, it follows that its conclusions on that issue must fail for the same reasons.

(B) A standalone theory of harm would lack a sufficient nexus to the statutory test

5.6 To the extent that the CMA seeks in Chapter 11 of the Provisional Findings to identify a standalone theory of harm concerning influence over public opinion and the political agenda, this lacks a sufficient nexus to the statutory question it must answer and therefore cannot justify intervention in this case. This error manifests itself in three ways:

5.6.1 the CMA's test for assessing influence;

¹³⁵ Provisional Findings, e.g. 11.132 and 11.135-11.136.

¹³⁶ Provisional Findings, 11.12-11.14.

5.6.2 the CMA's approach to assessing influence, which rests principally on an analysis of how Sky News could be used to 'amplify' the MFT's influence; and

5.6.3 the CMA's analysis of influence over the political agenda only.

(i) The CMA's test for assessing influence

5.7 At the outset of its analysis, the CMA fails to specify when an increase in influence over public opinion and the political agenda results in an insufficient plurality of persons controlling media enterprises in the UK. The CMA only states that the 'concern' is that by combining Sky News with News Corp's newspaper assets, the MFT will have "*too much*" influence over public opinion and the political agenda. The CMA does not attempt to articulate what "*too much*" influence may be or how it can be precisely identified.

5.8 In identifying this as the relevant test, the CMA has chosen selectively from the concern identified in Ofcom's measurement framework for media plurality, which defines plurality as:

- *"Ensuring that there is diversity in the viewpoints that are available and consumed across and within media enterprises. There should be a diverse range of independent news voices across all platforms, a high overall consumption across demographics and consumers and active use of a range of different news sources.*
- *Preventing any one media owner, or voice, having too much influence over public opinion and the political agenda. This can be achieved by ensuring that no organisation or news source has a share of consumption that is so high that there is a risk that people are exposed to a narrow set of viewpoints.*

*The focus of the framework is on the first of these (informed citizens), as this goal helps mitigate the second (influence over the political process).*¹³⁷ (emphasis added).

5.9 The CMA's vague test of "*too much*" influence ignores what Ofcom considered to be a need for a very high share of consumption and a resulting risk of only a narrow set of viewpoints being available to the public. This is not the case here.

(ii) The CMA does not link its assessment of 'amplification' to the statutory test

5.10 The CMA's analysis of the potential for the MFT to use Sky News to 'amplify' its influence is not linked to whether the Transaction will result in an insufficient plurality of persons with control over media enterprises in the UK. The CMA does not even link this analysis back to its own nebulous test of whether the Transaction will result in 'too much' influence over public opinion and the political agenda and appears to proceed on the erroneous basis that any degree of amplification is, in and of itself, a problem. This analysis is therefore incapable of disclosing a potential adverse effect on media plurality to a degree contrary to the public interest.

(iii) The CMA's analysis of influence over the political agenda has no bearing on the statutory question

5.11 In Sky's response to the Annotated Issues Statement, Sky explained that it is not open to the CMA to consider influence over the political agenda (in particular influence over politicians) separately from influence over public opinion.¹³⁸ Such a narrow focus cannot provide any insight into whether the Transaction will result in an insufficient plurality of persons with control over media enterprises in the UK and is therefore irrelevant to the statutory question the CMA must

¹³⁷ Paragraphs 2.2 and 2.3 of Ofcom's advice to the Secretary of State for Culture, Media and Sport on a measurement framework for media plurality, 5 November 2015.

¹³⁸ See, for example, paragraphs 4.21 to 4.25.

answer. Whilst the CMA has, correctly, identified the need to focus on influence over public opinion and the political agenda in its Provisional Findings, the latter part of its analysis (11.96-11.126) sets out an analysis of the MFT's influence over the political agenda only. This analysis sheds no light on the statutory question the CMA must answer, namely whether the Transaction will result in an insufficient plurality of persons controlling media enterprises servicing audiences in the UK.

- 5.12 In Provisional Findings, 11.104-11.114, the CMA analyses meetings between ministers and media enterprises. Despite acknowledging Sky's criticism that this analysis does not shed any light on the statutory question the CMA must answer, it asserts that it is nonetheless probative of the degree of influence media owners may have over the political agenda.¹³⁹ However, the CMA misses the fundamental point that evidence on that issue does not assist it in answering the statutory question.

(C) The CMA's analysis of the evidence not support the conclusion that a potential concern arises

- 5.13 Putting to one side the legal deficiencies' in the theory of harm, there are also key failings in the CMA's analysis of the evidence.

(i) The CMA's analysis of 'amplification' is fatally flawed

- 5.14 The mechanism identified by the CMA by which the Transaction could increase the influence of the MFT over public opinion is the potential for the MFT to use Sky News to 'amplify' the influence it currently exercises via News Corp's newspaper assets. It identifies four potential means by which such amplification could take place. However, nothing in the CMA's analysis discloses a plurality concern.

The CMA's analysis of 'amplification' is not grounded in its findings on control

- 5.15 As is the case with the CMA's analysis of availability of viewpoints,¹⁴⁰ the CMA's assessment of 'amplification' is not sufficiently grounded in the CMA's conclusions on the level of control that the MFT will be able to exercise over Sky News post-Transaction. The CMA does not explain how the MFT will be able to exercise a sufficient degree of editorial influence over Sky News to 'amplify' its voice, given the limited level of control that the MFT will be able to exercise. Instead, the CMA asserts that the MFT would be able to exercise the necessary editorial influence because the level of control it will be able to exercise over Sky and Sky News will increase, without the necessary analysis of the nature of that increase and the character of that control.¹⁴¹

- 5.16 In fact, given the limited nature of control (on the CMA's analysis), the MFT would not be able to 'amplify' its voice, at all, or to any meaningful degree.

The CMA's analysis of the ability of the MFT to influence through different platforms ignores the fundamental differences between those platforms

- 5.17 As a starting point, the CMA considers how media outlets can influence their audiences, and identifies a number of ways in which newspapers can do so.¹⁴² Even then the CMA notes that newspapers' influence may be limited to playing a role in shaping the issues that people think about, with no ability to influence what they think about those issues.¹⁴³ The CMA then acknowledges that there are limitations on the ability of broadcasters to influence viewers in the

¹³⁹ Provisional Findings, 11.104-11.105.

¹⁴⁰ See paragraphs 4.22 to 4.27 above.

¹⁴¹ See, for example. Provisional Findings. 11.35, 11.44, 11.61 and 11.95.

¹⁴² Provisional Findings, 11.18-11.29.

¹⁴³ Provisional Findings, 11.21.

same way (the CMA cites only the Broadcasting Code, but there are other factors, such as UK audience expectations of impartiality, newsroom culture etc.^{144,145}). However, the CMA concludes that broadcasters can still influence public opinion within the constraints of the Broadcasting Code (e.g. through story selection and prominence).

5.18 However, the CMA has wholly failed to analyse whether this would in fact be possible post-Transaction. The CMA's conclusion about what is hypothetically possible under the Broadcasting Code does not advance its case any further because:

5.18.1 first, the CMA's analysis of impact of the Broadcasting Code in practical terms is incorrect, and it does not afford broadcasters the degree of latitude asserted by the CMA,¹⁴⁶ and

5.18.2 in addition, it has not carried out any assessment of whether the MFT would have the ability to exert influence over the output of Sky News in the way envisaged by the CMA.¹⁴⁷ For example, the CMA asserts that "*the MFT through Rupert Murdoch's historic relationship with the News UK newspapers, exercises significant informal influence over News UK's newspapers, including their editorial positions. This influence is expressed through repeated conversations over several years [...]*".¹⁴⁸ In seeking to draw an analogy between the control exerted by the MFT over News UK, and the control the MFT would be able to exert over Sky post-Transaction,¹⁴⁹ the CMA fails to have regard to the additional constraints that apply in the case of Sky News, which would render such influence impossible,¹⁵⁰ and, in any event, ineffective.¹⁵¹

5.19 Furthermore, the CMA places undue weight on the alleged importance of 24-hour news channels. In particular, the CMA is wrong to place any weight on the statement of ITN that politicians value 24-hour news because it gives them more opportunities to appear on television,¹⁵² [X]¹⁵³

The CMA's analysis of agenda-setting is flawed and is insufficiently linked to its theory of harm

5.20 The CMA posits a number of ways in which news providers could 'lead' the news agenda. However, its analysis of each of these is flawed and, fundamentally, it establishes no link between ability to lead the news agenda and influence over public opinion and the political agenda.

5.21 First, the CMA places undue weight on a small sample of studies.

5.21.1 The CMA refers to two studies which considered the issue of news agenda setting, namely a study by Cardiff University carried out during the 2015 UK general election campaign and a study submitted by the Media Reform Coalition ("**MRC**") alongside its response to the CMA's Issues Statement. The CMA considers these two studies and concludes that their results are not representative of the influence of news providers on the news agenda, but nonetheless uses them to support its conclusion that 'traditional news providers' have a greater impact on the news agenda.¹⁵⁴

¹⁴⁴ See paragraphs 3.22 to 3.56 above.

¹⁴⁵ Provisional Findings, 11.30-11.34.

¹⁴⁶ See paragraphs 3.45 to 3.51 above.

¹⁴⁷ See paragraphs 5.15 to 5.16 above.

¹⁴⁸ Provisional Findings, 7.50.

¹⁴⁹ Provisional Findings, 7.93.

¹⁵⁰ E.g. the board resolution passed by 21CF, see paragraphs 3.19 and 3.28.1 above.

¹⁵¹ E.g. the devolved nature of decision making in broadcast journalism, see paras 3.32 to 3.37 above.

¹⁵² Provisional Findings, 11.36.

¹⁵³ Provisional Findings, 11.12.

¹⁵⁴ Provisional Findings, 11.67-11.71; Appendix I.

- 5.21.2 However, the CMA incorrectly relies on these studies in spite of the criticisms the CMA has itself made of their limited sample size, and the fact that the studies themselves conclude that no single provider is particularly important; a fact supported by evidence from third parties.¹⁵⁵
- 5.21.3 In addition, the CMA has failed to have due regard to the expert evidence put forward by 21CF¹⁵⁶ rebutting the results set out in the MRC study (and raising concerns with the methodology adopted which also casts doubt on the veracity of the results of the Cardiff University study).¹⁵⁷
- 5.22 Second, the CMA dismisses the role of online news outlets without proper analysis.
- 5.22.1 The CMA considers the role of online news providers through a very narrow lens, considering the impact of online news on the ability of traditional news providers to set the news agenda (with limited analysis of 'reverse agenda setting' by news consumers confined to an appendix). It then concludes that, given its own findings that traditional news providers provide "*the bulk*" of news consumed online, online news has no impact on the CMA's conclusion that traditional news providers remain the most influential in setting the news agenda.¹⁵⁸
- 5.22.2 In doing so, the CMA has ignored directly relevant evidence put forward by the parties relating to the role played by online only news providers in setting the news agenda.¹⁵⁹ Had the CMA given due consideration to this evidence it would be clear to it that the role of traditional news providers in setting the news agenda is waning, and that this trend is likely to continue over time.¹⁶⁰
- 5.23 Third, the CMA has not identified a correlation between news production capability and agenda setting.
- 5.23.1 The CMA considers news production capability of the 'major' UK news providers in 2017 and concludes that, although there is little correlation between headcount and the reach of an organisation, it is nonetheless the case that the traditional news providers which are more able to lead the news agenda are those with the greater resources.
- 5.23.2 The relevance of the CMA's analysis in this section of the Provisional Findings is unclear. Although the CMA notes a limited correlation between those news providers who it considers "*appear*" to lead the news agenda and those that have larger news production resources, it does not even purport to establish a causal link between the two. Notwithstanding that that analysis is flawed in itself, it is unclear what, if any, relevance the CMA's analysis has to the CMA's own test of whether the Transaction will result in the MFT having 'too much' influence over public opinion and the political agenda, let alone whether the Transaction will result in insufficient plurality. The CMA's

¹⁵⁵ Provisional Findings, 11.71.

¹⁵⁶ Comprised of papers from leading experts, namely Robert Kenny of Communications Chambers and from Charles River Associates, setting out detailed critiques of the studies in question.

¹⁵⁷ Provisional Findings, Appendix I, 12.

¹⁵⁸ Provisional Findings, 11.72-11.77; Appendix E, 58-70.

¹⁵⁹ Sky gave the example of online news site Order, Order, which broke the story regarding inappropriate remarks made by Labour MP for Sheffield Jared O'Mara, which was then picked up by a number of other news outlets, including 'traditional' news outlets, and resulted in his resignation from a select committee and suspension from the Labour Party – see Sky's response to the Annotated Issues Statement, 3.23.

¹⁶⁰ As the CMA acknowledges at Provisional Findings, 11.77.

provisional conclusion that, post-Transaction, the MFT will involve more news production resources than any provider other than the BBC is therefore irrelevant.¹⁶¹

- 5.24 Finally, cross-media ownership is irrelevant in this context given the differences between TV and newspapers.
- 5.24.1 The CMA posits that the cross-media nature of the Transaction will allow the MFT to influence the news agenda in different ways and on different platforms and to increase its ability to do so by exploiting synergies that arise from cross-platform media ownership.¹⁶²
- 5.24.2 The CMA's analysis of the impact of cross-media ownership on the ability to set the news agenda is unclear, unquantified, and, at best, inconclusive. The CMA concedes as such at Provisional Findings, 11.89 where it states that "*it is difficult to assess the magnitude or likelihood of this effect because of the absence of UK examples of current cross-media ownership*". Despite such difficulties, it then asserts that it is 'reasonable' to provisionally conclude that cross-media ownership allows for amplification of influence over the news agenda. This conclusion is not explained by the CMA and not justified by the evidence included in the Provisional Findings.
- 5.24.3 First, as Sky has explained above, there are fundamental differences between broadcast news and the printed press which mean that the ability of the MFT to use Sky News to amplify the voice of News Corp's newspaper assets would be very limited.¹⁶³
- 5.24.4 Second, as the CMA has accepted,¹⁶⁴ there is no real scope for synergies between broadcast news and newspapers.¹⁶⁵ Having accepted this, it is not clear what the basis is for the CMA's assertion that the MFT could exploit this to increase its ability to lead the news agenda.¹⁶⁶

The CMA misunderstands the significance of trust in news providers

- 5.25 The CMA conducts an analysis of audience trust in various news outlets and concludes that broadcast news outlets, and in particular Sky News, attract a high level of trust.¹⁶⁷ The CMA then goes on to assert that attracting a high level of trust from audiences can increase the influence of an outlet beyond that which may be indicated by its reach.
- 5.26 However, the CMA has fundamentally misunderstood the role of trust and the relevance it has to a news outlet's influence. In the case of broadcasters, and Sky in particular, to the extent that they have influence over audiences, it is because their audiences trust them to produce impartial and accurate news.¹⁶⁸ Any attempt to change the output of Sky News (even through subtle means such as story selection and prominence) so as to align it with one of the existing News Corp newspapers, in a way that has meaningful impact, would result in a negative reaction from audiences, thereby diminishing the trust audiences have in that outlet (and therefore, on the CMA's logic, decreasing the influence of that outlet).

¹⁶¹ Provisional Findings, 11.78-11.82; Appendix H.

¹⁶² Provisional Findings, 11.94-11.95.

¹⁶³ See paragraphs 5.17 to 5.19 above.

¹⁶⁴ Provisional Findings, 11.90-11.91

¹⁶⁵ See paragraph 4.41 above.

¹⁶⁶ Provisional Findings, 11.95.

¹⁶⁷ Provisional Findings, 11.37-11.44.

¹⁶⁸ As Sky has advanced previously, see for example, Sky's response to the Annotated Issues Statement, 4.40(b).

(ii) The CMA's analysis of evidence of influence over the political agenda is flawed and in any event not merger specific

5.27 Two specific failings in the CMA's analysis of evidence of influence over the political agenda should be highlighted:

5.27.1 the CMA has not answered the criticisms of its analysis of ministerial meetings set out in Sky's response to the Annotated Issues Statement; and

5.27.2 the qualitative evidence considered by the CMA is based on factors which are not merger specific.

The CMA's analysis of ministerial meetings does not answer Sky's previous criticisms

5.28 The CMA has not answered Sky's previous criticisms of the approach to this evidence. The CMA has made selective amendments to the evidence initially presented in its Working Papers in an attempt to meet Sky's criticism that it failed to have regard to the number of industry roundtables or introductory meetings with ministers that Sky will have in the ordinary course of its, non-news, operations. The CMA states that, to account for this, it has disregarded meetings with DCMS in its analysis in the Provisional Findings.¹⁶⁹ However, the CMA's approach is unprincipled, as it acknowledges that it has identified further roundtables hosted by other departments/ministers attended by Sky and News Corp that are still included in its dataset.¹⁷⁰ In any event, the precise adjustments made to this dataset are irrelevant given the continued remoteness of this evidence from the statutory question.

The qualitative evidence identified by the CMA is of no relevance to Sky News and, by extension, fails to demonstrate any Transaction-specific effect

5.29 In order to supplement its analysis of ministerial meetings, the CMA refers to and places weight on 'qualitative evidence' on political influence by the media, consisting of the personal views of a small group of current and former politicians and political advisers who have made presentations to the CMA or otherwise commented on this issue.¹⁷¹

5.30 The bulk of this analysis is concerned with the importance to politicians of the support of the printed press. As set out in Appendix K to the Provisional Findings, para 2(d), a former senior political adviser noted that governments considered how specific newspapers would react to a decision because this would affect how that decision will be portrayed to its readers. This would not be a concern in relation to broadcast news, because of the constraints broadcasters are under (i.e. the Broadcasting Code and audience expectations of impartiality). To the extent that the MFT has political influence via News Corp's newspapers, this is not a Transaction-specific concern.

5.31 The CMA does identify a small number of remarks regarding the importance of terrestrial news broadcasters, in particular the BBC, ITV and Channel 4.¹⁷² The reason that these outlets are seen as having political influence is because of the large number of viewers of their peak-time bulletins (6pm and 10pm). This is consistent with the submissions of Sky above regarding the significance of ITV, Channel 4 and Channel 5 in the media plurality landscape (based partly on observations made by ITN at its hearing with the CMA in the context of this Transaction).¹⁷³ However, this same logic cannot be read across to Sky News, which attracts significantly fewer viewers at any one

¹⁶⁹ Provisional Findings, 11.106, 11.110(c) and 11.112

¹⁷⁰ Provisional Findings, 11.112 and accompanying footnotes.

¹⁷¹ Provisional Findings, 11.115 to 11.125; Appendix K.

¹⁷² Provisional Findings, 11.119.

¹⁷³ Paragraphs 4.33.1 to 4.33.3.

time than the terrestrial broadcasters attract to their news bulletins. Further and significantly, Sky News is not identified at all in the relevant section of Chapter 11 of the Provisional Findings, or in Appendix K, as being an outlet which concerns politicians or political advisers or which they consider has political influence.

- 5.32 Overall (and putting aside the issue of the relevance of political influence to the statutory test), the qualitative evidence set out by the CMA is of no relevance to the Transaction as it sheds no light on whether acquiring increased control over Sky News will add to the MFT's political influence.

(D) Conclusion

- 5.33 The CMA's analysis of influence over public opinion and the political agenda discloses no media plurality concern. Indeed, it is incapable of doing so given its remoteness from the statutory question the CMA is charged with answering.
- 5.34 In any event, the CMA's analysis of the evidence contains errors of fact and assessment, in many places strays from evidence of Transaction-specific effects, and forms a wholly inadequate basis on which to base a media plurality concern.

6. CONCLUSION

- 6.1 It is clear that if the CMA applies the correct legal test requiring an assessment of the level of control likely to be exercised by the MFT over Sky in practice, and gives appropriate weight to the constraints on the exercise of that control, there is no scope for editorial alignment between Sky News and the News Corp newspapers, even to the extent of the subtle forms of alignment identified by the CMA.
- 6.2 Building on this finding, and applying an appropriate threshold for insufficient plurality, i.e. requiring an unacceptable level of media and cross-media dominance, whilst taking due account of the extensive range and strength of existing and future alternative viewpoints, the CMA would be able to definitively conclude that the Transaction does not result in insufficient plurality.
- 6.3 By the same reasoning, the CMA would be able to conclude that the Transaction would not give the MFT excessive influence over public opinion and the political agenda.
- 6.4 In reaching its final report, Sky invites the CMA to correct the legal and factual errors set out in this submission. In doing so, the CMA should have strong grounds to conclude that the Transaction cannot be expected to result in public interest concerns.

Sky

13 February 2018