

# 21st Century Fox, Inc and Sky Plc

A report on the anticipated acquisition by 21st  
Century Fox, Inc of Sky Plc

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*Website:* [www.gov.uk/cma](http://www.gov.uk/cma)

**Members of the Competition and Markets Authority  
who conducted this inquiry**

Anne Lambert (*Chair of the Group*)

John Krumins

Sarah Chambers

Tim Tutton

**Chief Executive of the Competition and Markets Authority**

Andrea Coscelli

The Competition and Markets Authority has excluded from this published version of the report information which the Inquiry Group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Some numbers have been replaced by a range. These are shown in square brackets.

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## Summary

1. The Competition and Markets Authority (CMA) has found that the proposed acquisition by 21st Century Fox, Inc (Fox) of the shares of Sky Plc (Sky) that it does not already own (the Transaction) may be expected to operate against the public interest taking account of the need, in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience (the media plurality consideration).
2. The CMA has found that the Transaction may not be expected to operate against the public interest taking account of the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003 (the broadcasting standards consideration).

## Reference

3. On 20 September 2017, the then Secretary of State, in exercise of her powers under Article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (the Order), referred the Transaction to the CMA for further investigation and report by a group of CMA panel members (the Inquiry Group).
4. In exercise of its duty under Article 6 of the Order, the CMA must decide on the balance of probabilities:
  - (a) whether arrangements are in progress or in contemplation which, if carried into effect will result in the creation of a European relevant merger situation; and if so
  - (b) whether, taking account only of the media plurality consideration and the broadcasting standards consideration concerned, the creation of that situation may be expected to operate against the public interest; and if so
  - (c) whether (and if so what) action should be taken by the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which may be expected to result from the creation of the European relevant merger situation concerned.
5. It is ultimately for the Secretary of State, under Article 12(2) of the Order, to decide the questions set out in the Terms of Reference following receipt of the CMA's report. However, in doing so, the Secretary of State must accept the

CMA's decision on whether the Transaction amounts to a European relevant merger situation and shall, in particular, have regard to the CMA's report when making his decision about what action he may take to remedy any finding that the Transaction may be expected to operate against the public interest.

## **Background**

### **The Parties**

#### ***Fox***

6. Fox is a Delaware corporation whose shares are listed and traded on the NASDAQ Global Select Market. Fox is a global media company providing cable network programming, TV and filmed entertainment. In the UK, Fox's principal activities involve the licensing and distribution of audiovisual works for theatrical exhibition, TV and home entertainment viewing, and the wholesale supply of TV channels. Fox currently holds approximately a 39% stake in Sky.

#### ***Sky***

7. Sky is a public company whose shares are listed and traded on the London Stock Exchange. Sky is an entertainment and communications company active in a number of countries through several subsidiaries. Sky retails pay TV services on a linear and on-demand basis to residential and commercial premises in the UK, Ireland, Germany, Austria and Italy. Sky also produces a range of TV channels that it makes available to retail subscribers on its own and third party TV platforms and supplies on a wholesale basis to other retailers.
8. Sky's portfolio of TV channels in the UK includes Sky News (a 24-hour news channel also available on free-to-air TV). As well as Sky News, Sky provides news content in the form of bulletins and articles on its website, and through social media. Sky also owns and operates Sky News Radio, which supplies news to the Independent Radio News (IRN) network of radio stations in the UK.

#### ***Related parties***

9. News Corporation (News Corp) is a Delaware corporation whose shares are listed and traded on the NASDAQ Global Select Market. News Corp owns 100% of News UK and Ireland Limited (News UK, previously known as News

International), which publishes The Times, The Sunday Times, The Sun and The Sun on Sunday (along with their respective websites) and owns a number of UK radio networks (including TalkSport and Virgin Radio UK).

10. The Murdoch Family Trust (MFT) is the largest shareholder of Fox and News Corp, holding approximately 39% of the voting shares in each. The principal beneficiaries of the MFT are Rupert Murdoch's six children. The MFT exercises its voting rights through its sole trustee, Cruden Financial Services LLC (Cruden). Cruden is managed by its Managing Directors, who are appointed by Rupert Murdoch, Prudence MacLeod (née Murdoch), Elisabeth Murdoch, Lachlan Murdoch and James Murdoch.

## **The Transaction**

11. On 15 December 2016, Fox announced its intention to acquire the fully diluted share capital of Sky not already owned by Fox and its affiliates, increasing its existing shareholding from approximately 39%.
12. On 14 December 2017 Fox announced that it had agreed the sale to The Walt Disney Company (Disney) of certain assets including its interests in Sky (the Disney transaction). Subject to the transaction being completed, and if the sale to Disney completes on the terms proposed, then Disney would assume full ownership of Sky (including Sky News).
13. The Disney transaction will itself be subject to regulatory scrutiny, its terms may be varied as a result and it is unlikely to be completed until after the Secretary of State's decision on this Transaction. It is therefore uncertain whether, when or how the Disney transaction will be completed. As Fox intends to complete the acquisition of the 61% of Sky it does not already own prior to the Disney transaction completing, this report solely concerns Fox's proposed acquisition of the shares in Sky it does not own and does not concern the Disney transaction.

## **Rationale**

14. Fox's stated rationale for the Transaction is 'to achieve financial consolidation with a company in which it has held a substantial stake from the outset' and that it will enable Fox 'to diversify its activities geographically, by acquiring a significant presence in markets where its activities in the TV sector are limited, and to diversify its sources of earnings towards more stable subscription-based revenues'.

## **Jurisdiction and counterfactual**

15. We found that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation. This finding was on the basis of Fox and Sky ceasing to be distinct enterprises within the meaning of the Enterprise Act 2002 (the Act).
16. We also considered whether the MFT and Sky may cease to be distinct as a result of the Transaction. We found that the MFT currently has 'material influence' over Sky and, while it will have greater control over Sky after the Transaction, this will remain at the level of material influence within the meaning of the Act and not amount to 'de facto' control or a 'controlling interest'. This means that the MFT and Sky do not cease to be distinct within the meaning of the Act.
17. We found that the plurality of persons with control of media enterprises prior to the Transaction and the commitment to broadcasting standards prior to the Transaction is the most likely counterfactual.

## **Media plurality**

18. The media plurality consideration is set out in section 58(2C)(a) of the Act as:

the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience.
19. The statutory question that we are required to answer is whether, taking account of the media plurality consideration, the Transaction may be expected to operate against the public interest.
20. The consideration of media plurality goes to the heart of our democratic process and as such is given particular protection in legislation. It follows from this that parliament attached considerable importance to the preservation of the plurality of persons with control of the media enterprises. The media plurality consideration seeks to guard against the control of media enterprises being overly concentrated in the hands of a limited number of persons and the fact that it would be a concern for any one person to control too much of the media. Having due regard to this need for protection, we carefully considered how we should approach our assessment of media plurality.

## Assessment framework and potential harm from loss of plurality

21. We considered that reaching a view on whether the plurality of persons with control of media enterprises is sufficient post Transaction involves assessing:
  - the actual extent of the control exercised and exercisable by the MFT over Sky and Sky News following the Transaction and over News Corp currently;
  - the impact of the Transaction on the existing plurality of persons with control of media enterprises serving a UK audience, taking account of the increase in the extent of the MFT's control over Sky and Sky News; and
  - if there is a reduction in plurality arising as a result of the Transaction, whether the plurality of persons with control of media enterprises will be sufficient following the Transaction.
22. The Act gives the CMA discretion in construing the relevant audience for the purpose of the media plurality consideration. We concluded that the relevant audience is a single national audience for news and current affairs. While the Act does not require the CMA to limit its assessment of media plurality to news and current affairs, there is a broad consensus to do so and we considered that this is an appropriate and practicable approach.
23. We took Ofcom's definition of plurality as the starting point for our assessment. Ofcom identifies two related strands to the meaning of plurality:
  - ensuring that there is a diversity in the viewpoints that are available and consumed, across and within media enterprises; and
  - preventing any one media owner, or voice, having too much influence over public opinion and the political agenda.
24. Following Ofcom's definition, the first potential impact of the Transaction could be to reduce the diversity of viewpoints available to and consumed by members of the public. The specific concern is that the Transaction might reduce the independence of Sky's news and current affairs content on Sky News, and this in turn could lead to a reduction in the diversity of viewpoints across the news and current affairs offerings operated by the media enterprises controlled by the MFT, including Sky News, The Sun, The Sun on Sunday, The Times, and The Sunday Times.
25. Concerns about a reduction in diversity might arise, in particular, if the increased control that the MFT will have over Sky and Sky News following the Transaction means that the news and current affairs offerings of Sky News

and News Corp could pursue similar editorial positions or story selection following the Transaction. For example, 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. These concerns do not rely on full editorial alignment, but rather the potential for increased editorial alignment.

26. The second potential effect is that the Transaction could give the MFT greater control over Sky News, and that, in combination with its existing control over News Corp's newspaper titles, this could lead to too much influence by the MFT and, by proxy, the Murdoch family over public opinion and the political agenda.
27. These two potential harms are closely linked. For example, if the Transaction were to increase the MFT's control over Sky News, this could translate into a reduction in the diversity of viewpoints consumed by the public as a result of the MFT's increased control of Sky News and its existing control over News Corp. Equally, the increased consumption might be expected to increase the ability of the MFT to influence public opinion and the political agenda.
28. To assess these two potential effects, we built on Ofcom's media plurality measurement framework. We considered both quantitative and qualitative measures covering availability, consumption, impact and contextual factors. We noted that Ofcom is clear that any assessment of plurality should not be focused solely on quantitative metrics but must instead take account of qualitative factors and recognise the complexity of assessing the plurality of news provision. We agreed with this and we considered how practical observations and other qualitative assessments presented to us should be interpreted alongside quantitative evidence.
29. Our assessment required us to consider whether, if there is a reduction in plurality arising as a result of the Transaction, plurality nonetheless remains sufficient. The media plurality consideration was introduced into the Act on the basis that competition law may not be sufficient to safeguard a sufficient level of plurality.
30. Given that parliament attached considerable importance to the preservation of plurality of persons with control of media enterprises, in order to support a healthy and informed democracy, we considered 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.
31. We note that the Act does not provide a definition or measure of what constitutes sufficient plurality or a sufficient plurality of persons with control of

media enterprises. Furthermore, there is limited existing guidance and Ofcom's media plurality measurement framework does not establish a benchmark for a 'sufficient' level of plurality.

32. We do not believe that there is a set of quantitative indicators which could adequately capture the intention of the media plurality consideration and be applied across the range of cases which may arise. We assessed sufficiency following the Transaction in relation to two key factors, having considered the range of qualitative and quantitative evidence in the round:

- first, the MFT's position following the Transaction, as the person with control of News Corp and significantly increased level of control over Sky and Sky News, in relation to the two core elements of plurality – the diversity of viewpoints consumed, and the ability to influence public opinion and the political agenda. In this context, we considered the availability, consumption and impact of the viewpoints consumed by audiences in the UK over which the MFT has control; and the strength of the MFT's influence over public opinion and the political agenda;
- second, the wider context of other media enterprises serving the relevant audience. In this context we considered the alternative viewpoints provided by other media enterprises, and the extent to which an increase in the degree of influence of the MFT might be mitigated or moderated by other media enterprises.

### **The MFT's control over Sky**

33. In line with the Court of Appeal's 2010 judgment in relation to the acquisition by British Sky Broadcasting Group (BSkyB, now Sky) of 17.9% of the shares in ITV (BSkyB/ITV), we carried out a qualitative assessment of the actual extent of the control exercised and exercisable by the MFT over Sky (including Sky News) and News Corp. We therefore did not assume that the MFT, Fox, Sky and News Corp are to be treated as a single entity following the Transaction.

34. We considered that the extent of control exercisable by the MFT over Sky and Sky News currently and the extent of control exercisable by the MFT post Transaction are most relevant to our assessment, and that this approach is consistent with the Court of Appeal's judgment. Furthermore, this approach reflected the purpose and content of the media plurality consideration, which seeks to guard against the potentially harmful effects of the control of media enterprises being overly concentrated in the hands of a limited number of persons and the fact that it would be a concern for any one person to control too much of the media.

35. It is relevant that an assessment of the kind we carried out can only be triggered by an intervention in relation to a merger. Accordingly, any assessment of the control that will be exercisable post Transaction must take into account the ability of the MFT to increase the degree of control actually exercised over Sky and Sky News in the future, and we must assess the MFT's ability to exercise a greater degree of control than it currently does, rather than its current stated intentions. The way the MFT has exercised control over Sky and Sky News prior to the Transaction is not determinative of its future behaviour, bearing in mind that the regulatory scrutiny is carried out now, rather than an ongoing assessment.
36. We considered the approach adopted by the legislation reflects the fact that:
- parliament attached considerable importance to the preservation of sufficient plurality of media controllers in order to avoid an over-concentration of media enterprises in the hands of a limited number of persons;
  - sufficiency is not subject to continual regulatory scrutiny; and
  - if sufficiency of plurality is lost, it may be difficult or impossible to restore.
37. Our view is that the MFT and Rupert, Lachlan and James Murdoch should be considered to act together for the purpose of our assessment of the extent of control exercised and exercisable by the MFT over Fox, Sky (including Sky News) and News Corp. This is based on the close association between Rupert, Lachlan and James Murdoch as family members and their close association with the MFT.
38. In terms of the extent of control currently exercised and exercisable by the MFT over each of Fox, News Corp and Sky, we found that:
- the MFT exercises a significant degree of formal control over Fox. This control is exercised primarily through its shareholding and the presence of James Murdoch as CEO and Rupert and Lachlan Murdoch as executive co-chairmen. We also considered that the MFT's control over Fox is further enhanced by informal means including through relationships between certain directors of Fox and either the MFT or members of the Murdoch family (or both);
  - the MFT exercises a significant degree of formal control over News Corp. This control is exercised primarily through its shareholding and the presence of Rupert and Lachlan Murdoch as executive co-chairmen, with James Murdoch as another director. In addition, the MFT, through Rupert Murdoch's historic relationship with the News UK newspapers, exercises

significant informal influence over News UK newspapers, including their editorial positions; and

- the MFT currently exercises a relatively low level of formal control over Sky through its indirect ownership (ie through Fox's approximately 39% holding in Sky). The level of the MFT's control over Sky is currently constrained by the fact that Sky is a listed public company with its own independent board of directors and a majority of independent shareholders. Evidence we obtained from Sky and Fox's independent directors indicates that Sky currently operates as an independent business over which Fox does not have effective control.

39. We found that the Transaction will significantly increase the level of control the MFT is able to exercise over Sky and Sky News. Following the Transaction, Sky will no longer be a listed public company and will instead be wholly owned by Fox, fully controlled by Fox management and with oversight by the Fox board based in the US. On that basis, the MFT will also be able to exercise a similar, significant, level of control over Sky and Sky News following the Transaction, as it currently exercises over Fox.
40. We considered that the direct impact of the Transaction will be to allow the MFT to significantly increase the level of control it is able to exercise over the management of Sky's business through formal mechanisms (over which Fox will have direct control) such as setting the strategic direction, commercial objectives and budget of Sky and Sky News, and would mean the MFT could more easily influence the appointment of senior staff at Sky and Sky News. These matters impact on editorial positioning and the agenda of Sky News. This is further enhanced by informal means including through relationships between certain directors of Fox and either the MFT or members of the Murdoch family (or both).
41. We noted that increased influence by the MFT over Sky News may not manifest itself in full control over editorial output and considered that any exercise of such influence is likely to be more indirect in practice. For example, such influence will be exercisable through changes to the Sky News budget, the strategic direction of the business, seeking to secure synergies across Fox's news assets, the appointment of editorial positions within Sky News or the clear expression of the views of members of the Murdoch family directly to editorial staff, which could lead to influence over and changes to the editorial positioning and agenda of Sky News. Furthermore, as noted previously, concerns about a reduction in the diversity of viewpoints do not rely on full editorial alignment, but rather the potential for increased editorial alignment.

### ***Internal plurality and other constraints on the MFT's ability to exercise control***

42. We also considered the extent to which, in practice, the MFT's increased control over Sky and Sky News may be constrained by 'internal plurality'. Internal plurality describes the range of information and views that are provided within individual media enterprises, in contrast to 'external plurality' which relates to the range of information and views that are provided across separate independent media enterprises.
43. In the context of the Transaction, our consideration of internal plurality included the effects of a board resolution passed by Fox to protect the independence of Sky News (by requiring approval of a committee of independent Fox directors for the appointment or removal of the Head of Sky News, changes to their authority, or changes to the Sky News Editorial Guidelines), the independent culture of broadcasting newsrooms, audience expectations and commercial incentives, the impartiality rules in the Broadcasting Code, and the existing diversity of editorial output within News UK.
44. We considered that we should attach most weight to the degree of control which would be exercisable by the MFT over Sky and Sky News following the Transaction when assessing: (i) the impact of the various constraints and safeguards identified by the Parties; and (ii) whether evidence of historic internal plurality within the media enterprises controlled by the MFT mitigates the concerns we identified in our assessment. In that context, we found that:
- the board resolution passed by Fox may not over time (given it is an internal governance mechanism) prevent Fox taking decisions that are within the commercial interests of Fox and Sky, but which would impact on the independence of Sky News. Furthermore, the process by which the Head of Sky News is appointed is not well established or subject to clearly established parameters about who should be involved in that decision. Directors on the committee have limited experience of the UK TV news sector or the UK broadcasting industry more generally, meaning that, given their extensive experience of the UK market and direct current and historic involvement with the Sky business, Rupert and James Murdoch would be likely to have considerable opportunity to influence the recommendation for any new Head of Sky News. The resolution therefore does not necessarily prevent the MFT having influence over future appointments;
  - we recognise that the current culture at Sky News, which has been shaped by its operation as an independent unit with limited Sky board level involvement, may act as a constraint on the ability of the MFT to exercise

control in the short term. However, there is no inherent reason for such a culture to persist and it could be changed over time with changes in key personnel. While we accept that decision making in the broadcast of a 24-hour TV news service will often be devolved and require immediate editorial judgements to be made, this is not true of many important decisions, which are taken at a more senior level and subject to greater deliberation;

- while we agree that audiences expect broadcast news to be impartial, we considered that such expectations provide less of a constraint where editorial influence is subtle and not immediately obvious. We also noted that different broadcast news providers in the UK take different editorial lines (for example, Channel 4 News has a different editorial focus compared to the BBC or ITV), but are perceived by audiences as being similarly trustworthy and impartial; and
- the Broadcasting Code offers some protection against editorial alignment between Sky News and the News Corp newspapers. However, our view is that this protection is limited because the Broadcasting Code affords licence holders a considerable degree of latitude to adopt particular stances or viewpoints in their output in terms of both news and current affairs output.

45. We do not dispute that there is currently editorial diversity within News UK's newspaper titles, which is illustrated by different positions being taken on issues such as the EU referendum and past general elections. However, our concerns do not depend on full editorial alignment, but rather the potential for increased editorial alignment. For example, if Sky News and the News Corp newspapers could take a similar approach on specific topics or issues, push certain stories, or downplay others.
46. Although we considered that the safeguards identified are likely to mean that the MFT could not exercise its increased control over Sky News in certain ways (for example, requiring Sky to back a specific political party would not be possible given the requirement for impartiality in the Broadcasting Code), more subtle changes in position applied over time as a result of the MFT's increased influence would not necessarily engage or be prevented by any of these safeguards, so that even their cumulative effects would not be sufficient to allay concerns.

## ***Conclusion on the change in the actual extent of the MFT's control post Transaction***

47. Our assessment of the impact of the Transaction on the change in the actual level of the MFT's control included our assessment of internal plurality and other potential constraints on the MFT's control. Our view is that although the MFT will not have full ownership of Sky following the Transaction, the significantly increased control it will be able to exercise over Sky and Sky News is sufficient to give rise to concerns that, as a result of the Transaction, there could be increased editorial alignment of Sky News and the newspapers owned by News Corp.
48. We considered that this increased alignment has 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. We found that the Transaction gives the MFT the ability to influence the content of Sky News in this way, and thus creates the potential for it to reduce the independence of Sky News over time.

## **UK news media landscape**

49. In considering the current level of media plurality and the availability, consumption and impact of news providers, we looked at the distribution and different nature of news consumption across the four main platforms – TV, print, online and radio. We gave particular regard to the way in which different types of news providers operate (for example newspapers as compared to TV news); and recent changes to the way that news is consumed, including the growth of online news production, distribution and distinct online aggregation services; and the impact of cross-platform distribution.
50. We note that different types of news provider serve different functions in the public's consumption of news. For example, newspapers are known for providing opinion and a partisan voice on particular issues whereas, due in part to a different regulatory framework, TV news providers are known for a more balanced reporting of news. We see this in the level of trust reported in Ofcom's News Consumption Survey (NCS) where overall TV news providers generally rate higher than newspapers for providing news that is 'accurate and reliable' or 'impartial and unbiased'.
51. The provision of news has changed significantly over the last decade with the growth of online news. However, TV remains the platform used by the highest proportion of adults as a source of news (69% in 2016). Newspapers are also still used by nearly one third of adults as a source of news.

52. We have seen an increase in access to the internet (from 60% to 88% over the last 12 years) and, crucially for news provision, very rapid growth in access to the internet via mobile devices. Online news was used by roughly half of the population in 2016 (rising from 32% in 2013). However, the consumption of online news varies significantly across age groups (56% of 18 to 24 year olds compared to 4% of those over 75).
53. The provision of online news is not directly regulated. The news content available comes in many forms, from breaking news feeds to written opinion pieces to video stories. We note that the provision of online news is highly fragmented (for example comScore records 532 online news providers alone).
54. Online news providers fall into three main categories:
- ‘traditional’ news providers (such as TV news broadcasters and newspaper publishers);
  - ‘online-only’ providers (websites such as BuzzFeed, HuffPost UK, and The Independent); and
  - ‘intermediaries’, who do not produce their own content but aggregate content from other sources.
55. The traditional news organisations have established a significant presence online (for example The Sun Online has 29 million unique visitors a month).
56. The online-only providers have established a more limited presence. For example, one of the largest online-only providers is HuffPost UK, which despite offering a news service in the UK for six years, still has a consumption level by some way smaller than traditional organisations’ online operations.
57. Intermediaries (such as Facebook, Twitter, Google and YouTube (owned by Google)) include:
- social media sites, which allow content to be shared by users from various sources. This content can be from news organisations but also individual commentators, politicians and campaign groups;
  - search engines, which allow users to search specific terms, and in some cases provide a curated news feed drawn primarily from news organisations; and
  - aggregators, which provide a news feed drawn from a range of news organisations.

58. These intermediaries generally do not produce their own news content - they distribute content from others. We have seen an increased range of ways in which individuals and organisations can distribute their opinions and campaigns through social media. However, traditional news providers continue to be among the largest contributors by number of impressions and click throughs.
59. The development of online news has increased the availability of a wide range of news sources and has provided a platform for a wider range of voices. However, it has not yet significantly diminished the impact of traditional news providers who still provide news on the most consumed platforms such as TV and have developed their own significant online presence alongside their other platforms. Traditional news organisations still provide the majority of news content that is consumed online.

### **Ensuring that there is diversity in the viewpoints that are available and consumed**

60. We considered whether the Transaction is likely to materially reduce the diversity of viewpoints available and consumed in UK news and current affairs content. In particular, we assessed whether the MFT's increased influence over Sky and Sky News as a result of the Transaction might reduce the independence of Sky News, and whether this could lead to a reduction in the diversity of viewpoints available to the public.
61. We assessed the likely scale of this loss of the diversity of viewpoints by building on Ofcom's media plurality measurement framework, considering the availability, reach and consumption of alternative providers before and after the Transaction through the use of both quantitative metrics and qualitative evidence.

#### ***Availability***

62. Following the Transaction there will continue to be a large number of news sources available to the public, including online news providers. However, merely counting the number of news providers did not give us any insight into their reach, consumption or influence, and thus is of limited relevance to plurality.

#### ***Reach***

63. Reach measures the number of people who use a news source in a given time period, for a minimum duration. It is a relatively high level measure given

that a source will be counted as having ‘reached’ a user even if actual engagement is relatively limited.

64. Sky News and the News Corp titles have significant combined reach. For example, The Sun currently has the largest reach of any national newspaper. The Sky News website and The Sun website reach around 20% of adults each in the UK. Sky News TV reaches fewer viewers (9%) than the BBC (62%) or ITN (43%), but is one of a limited number of TV broadcasters, and as such has the third largest reach in the UK.
65. The cross-platform reach for Sky News is 21% and News Corp is 14%, and 31% on a combined basis, meaning that nearly one in three members of the public use at least one of their platforms to access news. The combination of News Corp and Sky News would have the third largest reach behind the BBC (77%) and ITN (39%) but almost double that of the next largest, Daily Mail and General Trust (DMGT) (17%).

### **Consumption**

66. Going beyond the reach of a news provider, we considered how to measure consumption. Consumption measures attempt to track the frequency and actual amount of time that a consumer has spent engaging with a particular news source. The most detailed measure of cross-platform consumption is a bespoke ‘share of reference’ metric devised by Ofcom. This metric attempts to provide a ‘common currency’ for measuring news consumption across all four platforms.
67. Sky News and the News Corp newspaper titles account for a significant share of current news consumption on each platform. Sky News accounts for 7% of TV news consumption, behind the BBC (76%) and ITV (12%) but ahead of other providers. Despite declining readership, The Sun has an average daily readership of 3.5 million (the largest readership of all national daily newspapers). The Times has an average daily readership of 1.1 million. Sky News has the largest share of online news consumption behind the BBC, followed by The Mail Online, BuzzFeed and The Times.
68. On a cross-platform basis, Sky News and News Corp together represent 10% of total news consumption using Ofcom’s share of reference measure. Sky News alone accounts for around 6% of the total share of reference, larger than all other news providers except the BBC and ITN. We considered sensitivity adjustments to reflect alternative assumptions. These adjustments could increase the combined share of reference of Sky News and News Corp to as much as 13%.

69. We considered the extent to which people use multiple sources of news in a way which might reduce our concern about the impact of the Transaction on the diversity of viewpoints consumed. While the average customer of Sky News and News Corp uses between four and five different sources of news, roughly a third of their customers use between one and three sources of news. In other words, a significant minority of their customers remain relatively reliant on the news content they produce. Overall, the evidence of multi-sourcing did not remove our concern about the impact of the Transaction on the diversity of viewpoints consumed.
70. The Parties submitted that a 10% share of consumption for Sky News and News Corp is not consistent with a finding that the Transaction could lead to a material reduction in the diversity of viewpoints. We do not agree. The increment from the Transaction is large relative to the shares of reference of other established news providers. Sky News and News Corp have a combined share of reference that is significantly larger than the fourth largest news provider, DMGT. Over time, there has been limited new entry among major news providers and limited organic growth. Although there is a long tail of news providers, most of these providers only operate on one or two platforms and many of their individual shares of reference are 1% or less.

#### ***Assessment of other news providers***

71. The BBC is the only other provider with a significant presence across multiple platforms, and is the largest provider of news in the UK. The BBC has a significant role in informing the public, reflected in the unique way it is governed and funded. This means that the BBC has special constraints on it to provide impartial and balanced news coverage. Furthermore, unlike the MFT, the BBC does not control any newspapers.
72. ITN would have a similar share of consumption to Sky News and News Corp following the Transaction. However, we noted that there is a commercial need for ITN to reflect the preferred style, tone and editorial approach of the retail news providers to which it provides news under contract (ITV, Channel 4 and Channel 5). ITN is also focused largely on a single platform (TV), with limited online presence and does not control any newspapers or radio news.
73. With the exception of the BBC and ITN, the remaining providers' individual shares of reference are small relative to Sky News and News Corp. These providers are primarily focused on one platform (such as BuzzFeed online, or Bauer on radio). New entrants have not been able to establish a share of reference above 1%.

74. We also considered that post Transaction, given the restrictions on the ownership of ITV, the fact that Channel 4 is publicly owned, and the limited share of reference of Channel 5, it is unlikely that another cross-platform provider with the scale and scope of the Parties and News Corp combined could emerge.
75. The Parties argued that these findings do not properly reflect the fact that Fox and News Corp would remain separate entities following the Transaction, with the MFT continuing to exercise material influence rather than full control. We disagree. We carefully considered the degree of control that the MFT would have over Sky News and News Corp following the Transaction. We recognised that the separation of Sky and News Corp is likely to limit the degree to which there could be full editorial alignment or integration of news operations. However, we concluded that the MFT would be able to influence the editorial agenda in other ways, as 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. Given the scale of consumption of Sky News and News Corp relative to other news providers, we concluded that there is the potential for a material reduction in the diversity of viewpoints as a result of the Transaction, even though Fox and News Corp will not act as a single economic entity.
76. We concluded that the Transaction is likely to lead to a material reduction in the diversity of viewpoints consumed by the public across and within media enterprises because of the increase in the MFT's control over Sky News, and given the significant level of consumption and reach of Sky News and News Corp.

### **Preventing any one media owner, or voice, having too much influence over public opinion and the political agenda**

77. We considered whether the Transaction will provide members of the Murdoch family, through the media enterprises controlled by the MFT, with increased influence over public opinion and the political agenda.
78. We found that the MFT already has significant influence over public opinion and the political agenda through its existing control of the News Corp titles. The Times, The Sunday Times, The Sun and The Sun on Sunday together are one of the most read group of newspapers, and that readership covers a broader audience than any other media enterprise involved in the supply of newspapers. News Corp newspapers also have a significant online presence.
79. Studies on leading the news agenda show that, even though the reach of print newspapers has been declining, News Corp's newspapers (both print and

online), along with other traditional news providers, still have a significant impact on the wider news agenda, including the stories that are carried by TV and radio broadcasters.

80. There is some evidence to suggest that new online-only providers can sometimes lead the news agenda and are beginning to be seen as important in influencing the political agenda. However, we considered that the evidence suggests that it is the traditional news providers that do this on a consistent basis and, due to their resources, that this is likely to continue to be the case for the foreseeable future.
81. The influence of the Murdoch family through the MFT was highlighted by a large number of third parties, including politicians and political advisers. In addition, we noted that members of the Murdoch family and representatives of News Corp have met with government ministers significantly more frequently than other newspaper owners over the past two and a half years. We also gave weight to the conclusions reached in the Leveson Inquiry and used the detailed assessment of the relationship between the press and politicians undertaken by the Leveson Inquiry as a starting point for our own assessment.
82. We considered the extent to which the MFT's greater control over Sky News could enable the Murdoch family to exercise increased influence over public opinion and the political agenda as a result of the Transaction. The Transaction would give the MFT significantly increased control over Sky News and therefore significant control over news providers across all four platforms – TV, print, online and radio.
83. While the Parties argued that TV news is constrained by the Broadcasting Code, we found that it can nonetheless be used to influence, even if in different ways to newspapers and other media platforms. We are therefore concerned that the Transaction could increase the influence of the MFT in several ways.
84. First, as noted above, these news providers directly reach nearly a third of the UK population and have a consumption in terms of share of reference of at least 10%. We found that the Transaction would give the MFT the ability to increase alignment between Sky News and the News Corp titles over time, for example through story selection and a similar approach to particular issues.
85. Second, like the other main UK TV news broadcasters, Sky News is highly trusted, which means its influence is likely to be greater than its reach and consumption figures indicate.

86. Third, the increased control of Sky News significantly reinforces the broad demographic reach of the MFT, including over a particularly influential audience set. The Transaction would enable the MFT to influence a broad set of viewers, with significantly wider demographic reach than that of other news providers, except the BBC and ITN.
87. Further, the MFT's significant control over major news providers across all four platforms is not matched by any other person with control of media enterprises. We are concerned that this cross-media control will have an amplification effect on the influence the MFT has over public opinion and the political agenda, beyond the basic reach and consumption figures.
88. In particular, the ability to repeat on Sky News stories previously covered in the News Corps newspapers (and vice versa), could amplify the effect of those stories. For example, a story originating in The Sun repeated on Sky News is likely to be more influential than if it was simply repeated in The Sun the following day. Combined with its control of media enterprises with a presence online (and in radio), the MFT will increase its ability to lead the news agenda and influence public opinion.
89. The BBC would continue to have a larger share of overall news consumption following the Transaction, and would match the broad demographic reach of the MFT. However, it notably lacks a newspaper platform, and faces tighter constraints on pursuing a particular editorial line than the media owned by the MFT (even taking into account the Broadcasting Code). Similarly, although ITN has a similar share of reference to Sky News and News Corp taken together, it is focused largely on one medium – TV news – with no presence in newspapers or radio, and only a relatively small online audience. Given this context, we considered that the Transaction will give the MFT a unique position from which to influence the news agenda.
90. Overall, we found that as a result of the Transaction, the MFT will be able to exercise a significantly increased level of control over Sky and Sky News. This would enable the MFT to exercise materially greater influence over public opinion and the political agenda through Sky News, and would add to the MFT's already significant influence over public opinion and the political agenda through its control of the News Corp titles.

## **Assessment of sufficiency and finding on the media plurality consideration**

91. We set out above our findings that:
- the Murdoch family, through the MFT, will be able to exercise a significantly increased level of control over Sky and Sky News. This, combined with the already significant level of control that the MFT is able to exercise over News Corp, will mean the MFT will have the ability to control the way in which these media enterprises provide news to the public; and
  - this significant increase in control has the potential to lead to a material reduction in the diversity of viewpoints that are consumed, across and within media enterprises, and would enable the MFT to exercise materially greater influence over public opinion and the political agenda through Sky and Sky News, in combination with its existing level of control over News Corp titles.
92. In light of these findings, we assessed whether the remaining level of plurality would be sufficient following the Transaction using the framework outlined in paragraph 32. We first considered the MFT's position following the Transaction in relation to the two core elements of plurality – the diversity of viewpoints consumed, and the ability to influence public opinion and the political agenda.
93. Based on our analysis of the impact of the Transaction on the diversity of viewpoints and the influence of the MFT, we concluded that the Murdoch family, through the MFT, would have greater control over a very substantial share of the viewpoints consumed by audiences in the UK:
- Sky News and the News Corp titles currently provide news to nearly a third of the population and have a combined share of consumption significantly greater than all other news providers, with the exception of the BBC and ITN;
  - Sky News is the third highest consumed TV news provider behind the BBC and ITV. The Sun has the largest readership of all daily national newspapers and The Times also has significant reach and influence. Sky News, The Sun and The Times all have significant and growing online brands, which provide a wide variety of content to diverse sections of the population; and
  - the MFT will be the only person with control of media enterprises across all four platforms – TV, print, online and radio.

94. While we noted that the MFT already has material influence over the media enterprises providing these various viewpoints, the Transaction would significantly increase its control over Sky News and further concentrate control of these enterprises in the hands of the MFT.
95. The Transaction will also strengthen the ability of the MFT to exercise influence over public opinion and the political agenda from an already strong base:
- the reach and share of reference of Sky News, in addition to that of the News Corp titles, gives them an increased ability to influence public opinion and lead the news agenda. Sky News and The Times are highly trusted and therefore likely to be more influential than raw audience numbers indicate;
  - traditional news providers, particularly newspapers and broadcasters, continue to play a key role in leading the news agenda across all media platforms;
  - the MFT will obtain significantly increased control of Sky News, strengthening its position as the only person with control of media enterprises across all four platforms;
  - members of the Murdoch family and representatives at News Corp have historically had greater access to government ministers than other comparable news providers, and the scope for access and influence could be increased following the Transaction.
96. We noted that the MFT is already in a particularly strong and in some respects unique position in relation to its control of media enterprises in the UK across a number of platforms, and the Transaction will significantly enhance that strong position. In our view the MFT's already strong position means that any material increase in the extent of its control and influence is likely to give rise to concerns in the context of the media plurality consideration.
97. In line with our framework for assessing sufficiency we then examined the wider context of other media enterprises serving the relevant audience. We went on to consider the extent to which other news providers will be in a position to mitigate or moderate the influence of the MFT following the Transaction.
98. We considered that the established news providers in newspaper and TV continue to be the principal players in determining the extent of media plurality in the UK. These news providers are well funded and have sufficient scale to

remain as trusted news sources. They have also developed significant online brands with a wide reach and in some cases a high level of consumption.

99. In our view two important consequences followed from this:

- first, as reflected in the current statutory limits on cross-platform ownership between ITV and newspapers, combinations of TV and newspaper media enterprises should be placed under close scrutiny, taking into account the relevant evidence on a case by case basis. This is particularly the case given that it is only when there is a merger between media enterprises that it is possible to carry out an assessment of the sufficiency of media plurality. It is difficult to establish a news provider of national significance and as such it is in the public interest to ensure close scrutiny of the loss of an independent voice of such a provider. We considered this factor is a key reason why parliament attached considerable importance to the preservation of plurality of persons with control of media enterprises, as once plurality is lost it may be difficult to restore. These points reinforced our concerns about a further increase in the MFT's control of media enterprises in the UK, and in particular the strengthening of its control over an established provider of broadcast news; and
- second, we considered it is only established news providers with a substantial presence in TV and newspapers who might be in a position to mitigate or moderate the increased influence of the MFT.

100. While the provision of online news has rapidly developed and there has been entry of online-only news providers, this entry has not so far significantly eroded the influence of the traditional news providers (including through their online presence). The evidence that we gathered indicates that traditional news organisations still provide the majority of news content that is consumed online, and Sky News and News Corp newspapers are significant online players.

101. We considered how we should take account of the position of the BBC, which is by some margin the largest news provider in the UK. We considered that the maintenance of a sufficient level of plurality in the UK requires not just the availability of a reliable source of impartial and accurate news, but also the coexistence of a diversity of voices, both impartial and opinionated. As such, while the BBC undoubtedly makes a very significant contribution to plurality in the UK, this is not to the extent that we would not be concerned about the loss of a significant independent voice elsewhere in the media landscape.

102. Looking beyond the BBC, the media enterprises which the MFT controls and over which it would have the ability to exercise significantly increased control

following the Transaction, are amongst the most significant in the UK in terms of their cross-platform reach and share of reference. In our judgement, the proposed further concentration of the MFT's control over those media enterprises is contrary to the interests which the media plurality consideration is designed to protect, notwithstanding the strong position of the BBC. We also noted that the particular position of the BBC means that the range of content which it is able to provide is constrained by factors going beyond the requirements of the Broadcasting Code.

103. We recognised that there will be other news providers, including ITN and the larger newspaper groups, which could also provide a counterpoint to the MFT's influence. However, the MFT is the only person with control of media enterprises across all four platforms – TV, print, online and radio – and all other news providers aside from the BBC and ITN are of a magnitude smaller than the combination of Sky News and News Corp newspapers. The MFT is the only person with control of media enterprises that would have brands which span the spectrum of highly trusted TV news through to unregulated opinion and comment. For these reasons, we did not believe that the presence of the BBC, ITN and other existing news providers are sufficient to prevent the Transaction from being contrary to the public interest.
104. We found that it is unlikely that another news provider would be able to mitigate or moderate, either through its current position or through organic growth or by acquisition, the increased control and influence of the MFT post Transaction. In that regard, we considered that it is relevant that history indicates the difficulty in building up a significant national news provider through growth and that post Transaction the only other significant TV news providers, other than the BBC, are ITV, in relation to which there are legal restrictions on ownership by newspaper groups of a material size, and Channel 4, which is publicly owned.
105. Taking the points outlined above together, and based on our assessment of the evidence in the round, we concluded that the Transaction may be expected to result in insufficient plurality of persons with control of media enterprises serving audiences in the UK because it would lead to the MFT holding too great a degree of control over the diversity of viewpoints consumed by audiences in the UK, and would give the MFT too much influence over public opinion and the political agenda.
106. As a result, we found that, on the balance of probabilities, the Transaction may be expected to operate against the public interest, taking account of the need, in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience.

## **Genuine commitment to the attainment of broadcasting standards**

107. The broadcasting standards consideration is set out in section 58(2C)(c) of the Act as:

the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

108. The broadcasting standards objectives cover a range of matters, including protection of the under 18s; restrictions on the inclusion of offensive or harmful material or material that is likely to incite crime or disorder; the requirements for due accuracy and due impartiality for news and 'special impartiality' for matters of political or industrial controversy and current public policy; the control of various advertising practices; and requiring responsibility in the content of religious programmes.

109. The broadcasting standards objectives and the Broadcasting Code are clearly closely related, as the Broadcasting Code is developed by Ofcom to give effect to the broadcasting standards objectives. Nevertheless, we note that the broadcasting standards consideration refers to the need for a commitment to the broadcasting standards objectives, which are in the nature of general principles, rather than to the detailed rules of the Broadcasting Code. We also note that the broadcasting standards consideration is separate and distinct from both the media plurality consideration and Ofcom's ongoing duty to assess whether broadcast licence holders are fit and proper to hold a broadcasting licence.

110. We carefully considered how we should assess the broadcasting standards consideration. This is the first time that a reference has been made by the Secretary of State on such grounds and the only guidance about how to interpret the test we needed to apply is set out in the Explanatory Notes to the Communications Act 2003 (the Explanatory Notes) and guidance prepared by the then Department of Trade and Industry dating from 2004 (the DTI Guidance).

### **Framework for our assessment**

111. We considered that in the absence of precedent and any recent guidance, the need for 'a genuine commitment to the attainment' of the broadcasting standards objectives should be given its natural and ordinary meaning. Like

any phrase in a statute, it must be read in context, having regard to the purposes of the legislation in question. The Explanatory Notes and the DTI Guidance refer to the intention behind the broadcasting standards consideration as being to assess compliance with the 'spirit' and not just the 'letter' of the broadcasting standards objectives.

112. The Parties challenged the notion of spirit, submitting that consideration of a commitment to the spirit of the Broadcasting Code lacks clarity and would be a disproportionate inhibition on freedom of expression and would result in very substantial uncertainty. The Parties also submitted that the way a media enterprise shows a genuine commitment to the attainment of the broadcasting standards objectives is to satisfy the authorities that one complies, and intends to comply, with the relevant standards laid down in the Broadcasting Code.
113. Our view is that where a media enterprise is already involved in broadcasting in the UK, its record of complying with the Broadcasting Code is of central relevance to the assessment of the broadcasting standards consideration. However, we do not consider that a positive record of compliance is, by itself, sufficient to conclude that a relevant person has a genuine commitment.
114. We are nevertheless mindful that a commitment to the spirit of the broadcasting standards objectives may be difficult to observe directly or to test. In that regard, we agreed with the Parties that the concept of spirit is, by itself, too vague to provide meaningful guidance on how to apply the broadcasting standards consideration and assess a genuine commitment.
115. Where, as in the present case, the relevant persons are already involved in broadcasting in the UK, our view is that to demonstrate the 'genuine commitment' required, they must show that effective steps have been and will be taken to promote and support a culture in which the broadcasting standards objectives are attained. We would therefore expect to see observable indicators that provide evidence of those persons having promoted and supported compliance with the Broadcasting Code and the broadcasting standards objectives, and their intention to continue to do so. This would mean the relevant persons having in place effective up to date policies, systems and procedures that are embedded within the business in a way that supports and facilitates the ongoing attainment of the broadcasting standards objectives.
116. We considered that this is a workable and evidence-based approach to assessing the commitment of Fox, Sky and the MFT (as the person with control of Fox and Sky following the Transaction) to the broadcasting standards regime (both in its spirit and its letter). With this in mind, we carried

out a qualitative assessment that considered a wide range of evidence, both relating to the UK and elsewhere, covering:

- how Fox and Sky approach the broadcasting standards objectives in the UK;
- how Fox and Sky approach broadcasting standards outside the UK; and
- the approaches of Fox and News Corp (as companies controlled by the MFT and in which members of the Murdoch family hold senior positions) to wider regulatory compliance and corporate governance.

## **Broadcasting standards in the UK**

117. The Parties have a long history of broadcasting in the UK. Fox and Sky each hold multiple UK broadcast licences and air a number of channels that attract tens of thousands of viewers each day. Against this backdrop, we considered that the Parties' approach to broadcasting standards and their compliance records in the UK comprise the most direct and relevant evidence to the broadcasting standards consideration. We received a large number of submissions from third parties addressing the commitment of both Sky and Fox to the broadcasting standards objectives in the UK. We took these into account in conducting our assessment.
118. In the UK, Ofcom is responsible for regulating broadcasting. Its duties include licensing and ensuring licensees remain 'fit and proper'. Ofcom currently oversees over 1,000 licences. It is rare for Ofcom to find that an existing licence holder is not fit and proper. It has only found two licence holders not to be fit and proper in the past five years. As well as licensing, Ofcom is required to draw up codes for TV and radio broadcasting covering, among other things, the broadcasting standards objectives – including the Broadcasting Code.
119. Although Ofcom monitors content proactively from time-to-time, it is alerted to potential breaches of the Broadcasting Code mainly via complaints made against broadcasters. Ofcom receives a sizeable number of such complaints. For the period between January 2013 and October 2017, Ofcom assessed over 94,000 complaints and over 15,000 of these raised substantive issues warranting further investigation. In the past five years, Ofcom launched almost 900 investigations under its content standards procedures, and identified 572 breaches of the Broadcasting Code. When a broadcaster breaches the Broadcasting Code deliberately, seriously, repeatedly or recklessly, Ofcom may impose statutory sanctions. Ofcom imposed sanctions on broadcasters for serious breaches 17 times in the past five years.

120. In applying the Broadcasting Code, Ofcom takes into account the context of the material complained about, including the degree of harm and offence likely to be caused, the likely size and composition of the audience and the likely expectations of the audience.

## **Fox**

121. Fox currently holds 12 licences to broadcast content in the UK. The international feed of Fox News, which had broadcast into the UK since 2001, was switched off on 29 August 2017. Fox News relinquished its licence to Ofcom on 1 November 2017. STAR Utsav ceased broadcasting in the UK on 4 January 2018.
122. We looked across Fox's 12 current UK broadcast licences, as well as those it has recently ceased broadcasting in the UK: Fox News and STAR Utsav. Our review of the steps Fox has taken to attain the broadcasting standards objectives (including whether policies, systems and procedures are embedded within the Fox divisions broadcasting in the UK in a way that supports ongoing attainment of those objectives) highlighted a difference between (i) the licence that was held by Fox News and (ii) the other 13 licences held by Fox for channels compiled for UK or European audiences (FNG, National Geographic and STAR channels).
123. Although the content broadcast on the five FNG and four National Geographic channels is largely US produced, all but one of the channels are compiled specifically for audiences in the UK and Ireland (the exception being National Geographic Wild, which is compiled for a European-wide audience). At FNG and National Geographic we found evidence of Fox embedding policies, systems and procedures into its businesses to support and promote the attainment of the broadcasting standards objectives. This included Fox having detailed, up to date policies, systems and procedures in place and a team dedicated to compliance with the Broadcasting Code. The team comprised experienced staff, trained specifically on UK broadcasting standards and the Broadcasting Code. In addition, we found effective ex ante controls in place to monitor, review and edit content, to assess its compliance with UK broadcasting standards and the Broadcasting Code, before it is broadcast in the UK and Ireland.
124. Content broadcast on STAR channels is produced in India for viewers in India and members of South Asian communities globally. The three STAR channels currently broadcast in the UK are (and STAR Utsav was) targeted at audiences across Europe via the same feed and compiled for a European audience. Again, we found evidence of Fox embedding policies, systems and procedures at STAR to support and promote the attainment of the

broadcasting standards objectives. Of the large team at STAR dealing with compliance in India and internationally, over a third deal specifically with compliance with the UK's broadcasting standards, and processes are in place to edit content for broadcast in the UK to comply with the Broadcasting Code.

125. The picture at Fox News was different. Fox News is produced for US audiences and, when it was broadcast in the UK, it was simulcast through an international feed unedited, except for Fox Extra content (which replaces US advertising breaks in the international feed). During its phase 1 review, Ofcom identified that Fox News had no compliance team or officers specifically dedicated to monitoring Fox News' content for compliance with UK broadcasting standards. Nor had specific training on the Broadcasting Code been given to the members of staff dealing with international broadcasting standards. That said, those members of staff in the US dealing with compliance with international broadcasting standards did review the Fox Extra inserts and edited some content to be broadcast on the international feed. In response to Ofcom's concerns, Fox introduced substantial additional policies, systems and procedures to facilitate Fox News' compliance with UK broadcasting standards.
126. When asked about the lack of UK-specific processes at Fox News, Fox submitted to us, and to Ofcom, that it had believed Fox News' approach was appropriate and proportionate. Fox explained that Fox News' approach was founded both on an understanding of the importance of context in applying the Broadcasting Code to content, and on the assumption that Ofcom agreed with the approach taken. In Fox's view this was demonstrated by the fact that, over a ten-year period, Ofcom had only found Fox News to be in breach of impartiality requirements three times.
127. The new policies, systems and procedures introduced by Fox in response to the concerns Ofcom raised were only in place from May to August 2017, when Fox News stopped broadcasting in the UK. Given this, we had limited evidence to assess the efficacy of these arrangements. We noted that Ofcom was satisfied with their adequacy.
128. The differences in policies, systems and procedures and other proactive steps to promote and support compliance with the Broadcasting Code between the 12 current Fox licences and STAR Utsav on the one hand and Fox News on the other were mirrored in our findings from our review of compliance records. In the past five years, across all its 12 current licences and STAR Utsav, Fox was found in breach of the Broadcasting Code six times. Three of these breaches related to standards concerning advertising and took place nearly five years ago. Conversely, Fox News breached the Broadcasting Code ten

times in the past five years (five of which were between April 2016 and May 2017), more than all the other 13 Fox licences combined.

129. In weighing up the evidence across Fox's licences, we considered it important that Fox News is a US news channel, directed at US audiences, that was simulcast directly into the UK largely without editing. The average audience size for Fox News was small by comparison to other international news channels. In our view, it is likely that Fox News' audience in the UK would have been aware it was a US news channel and are likely to have had expectations corresponding with the type of US-focused news and current affairs content typically shown on Fox News. We also noted that Ofcom's regulation of broadcasting content in the UK is grounded in and takes account of context of this nature. Against this backdrop, we considered that Fox's explanation for its misinterpretation of the depth and breadth of the requirements of the Broadcasting Code when applied to the context of Fox News, in terms of deficiencies in its procedures, was credible.
130. Furthermore, we considered that it is relevant that Ofcom imposed no sanctions on Fox News or any other Fox channel under licence in the UK. This contrasts with the record of a UK-based news provider whose content is compiled specifically for UK audiences and who has been sanctioned in relation to breaches in news programming.
131. Given that the content broadcast via Fox's 12 current licences is (and the content on STAR Utsav was) compiled specifically for the UK and/or European audiences, we considered that Fox's approach to compliance in those parts of its business is most informative in relation to Fox's commitment to the attainment of the broadcasting standards objectives. At Fox's 12 current UK licences and STAR Utsav, we found both a positive compliance record and evidence of policies, systems and procedures being embedded within the business in order to support a culture in which the broadcasting standards objectives are attained. In our view, this provided strong evidence of a genuine commitment to the attainment of the broadcasting standards objectives.
132. In contrast, we thought that Fox News' approach and compliance record should not be given undue weight in our overall assessment of Fox's commitment to broadcasting standards in the UK, given the fact that Fox News was broadcasting in the UK as a simulcast of its US feed, the nature of its likely audience, and the importance of context in the regulatory regime.
133. We did not therefore consider that the inadequacy of the arrangements in relation to the unedited simulcast of the international feed of Fox News outweighed the positive record and proactive steps Fox took to promote and

support compliance with the Broadcasting Code and the broadcasting standards objectives across its 13 other licences, which all broadcast content compiled specifically for UK and/or European audiences. Overall, our view is that Fox's approach to broadcasting in the UK, looked at in the round, demonstrates a genuine commitment to the attainment of the broadcasting standards objectives in the UK.

## **Sky**

134. Sky holds 54 licences to broadcast content in the UK, ranging from news to sports to entertainment programmes. Much of the content is produced specifically for UK audiences.
135. Our review of Sky's approach to broadcasting standards in the UK found that Sky has in place extensive and thorough policies, systems and procedures that promote and support compliance with the Broadcasting Code and the attainment of the broadcasting standards objectives. Sky has an experienced and well-staffed compliance team that helps support and inform staff of its regulatory obligations and their responsibilities under Sky's internal systems. Sky has in place processes to check, monitor and edit content before it is aired. Sky trains its staff on a range of issues including the Broadcasting Code and the broadcasting standards objectives; has written guidelines to help staff understand the legal and regulatory framework in which they operate; and has in place effective policies to remedy any compliance issues if they do arise.
136. Across its 54 licences, Sky has breached the Broadcasting Code 27 times in the past five years. None of the breaches was sufficiently serious to warrant a sanction. Thirteen of the 27 breaches related to offensive language. One of the breaches related to due impartiality when Sky News' failure to list all of the candidates in a London constituency was found in breach of the special impartiality requirements applied at the times of elections and referendums. Our review of breaches by Sky did not identify any significant issues across Sky's 54 licences.
137. We compared Sky's compliance record, and in particular that of Sky News, with comparable broadcasters like the BBC, ITV and Channel 4, each of which has similarities to Sky with sizeable UK audience reach, content curated mainly for a UK audience, and the broadcast of news and current affairs programmes. We found that Sky's overall compliance record is in line with that of its peers and that Sky News' record is on a par with other major news providers in the UK like BBC News, ITV News and Channel 4 News.
138. Having reviewed Sky's record of compliance with the Broadcasting Code and evidence of the other ways in which Sky has acted to promote and support

the attainment of the broadcasting standards objectives within its business, we concluded that Sky is genuinely committed to the attainment of the broadcasting standards objectives in the UK.

## **Broadcasting standards outside the UK**

139. Broadcasting standards differ from one country to another. The content of broadcasting laws and regulations and the approach to their enforcement depends on a country's political, economic and cultural makeup. A review of the Parties' approach to broadcasting standards outside the UK is nevertheless relevant to the broadcasting standards consideration as it could reveal a broader indication of the approach of the Parties generally to compliance with broadcasting standards.

### ***Fox***

140. Fox is a global media company providing cable network programming, TV and filmed entertainment, with interests in over 500 channels in over 170 countries. Outside the US, Fox channels are principally distributed by FNG, National Geographic and STAR. Under its licensing arrangements (where local distributors are responsible for local compliance), Fox is only directly responsible for compliance with local broadcasting standards in a few jurisdictions. Within the EU/EEA, under the provisions of the Audiovisual Media Services Directive, Fox is only required to hold a licence in any one EEA country in order to broadcast to other EEA countries.
141. We looked at Fox's policies, systems and procedures within the relevant business and the extent to which these are embedded in a way that supports and promotes a culture of compliance. We found that Fox's approach to compliance in other countries, including its policies, systems and procedures, mirrors its approach in the UK. That is, it has different policies for Fox News on the one hand, and FNG, National Geographic and STAR channels on the other.
142. As we found for the UK, Fox News has limited policies, systems or procedures in place that are specific to compliance with the broadcasting standards of other countries in which it broadcasts outside the US. However, as noted above, Fox News is simulcast and, additionally, in most jurisdictions in which Fox News is distributed, other than the EEA and the US, the multichannel platform operator is the licence holder and is responsible for compliance with local regulatory standards, rather than Fox News itself.
143. We asked Fox for data on complaints made against it in all of the 170 countries in which it operates. We also contacted 16 international media

regulatory authorities, including those in the countries in which Fox told us it had breached broadcasting standards, to confirm the accuracy of Fox's submissions on compliance with country-specific standards and to investigate whether international regulators had any observations about Fox's commitment to broadcasting standards in their country.

144. We found that Fox's services breached local broadcasting rules in ten countries outside the UK in the past five years. Based on our assessment, we considered that the countries in which the largest number of breaches occurred are jurisdictions where meaningful inferences cannot be drawn regarding Fox's commitment to broadcasting standards in the UK, given political and cultural differences.
145. Overall, we agreed with Ofcom's view which accorded more weight to the record of compliance by Fox in EU jurisdictions, where prevailing regulation is broadly similar to that which exists in the UK. Fox's record of compliance in the EU and the EEA is good.
146. In forming our overall view, we attached weight to the views of broadcast regulators about compliance in their own jurisdictions, given their respective expertise and knowledge of their own domestic arrangements. Again, none of the evidence Fox provided indicated that it has a lack of commitment to the attainment of local broadcasting standards in its jurisdictions. In view of this, we concluded that the evidence from overseas jurisdictions on Fox's record of and approach to compliance outside the UK does not raise concerns about Fox's commitment to the broadcasting standards objectives in the UK.

## **Sky**

147. Outside the UK, Sky has a presence in Ireland, Germany, Austria, and Italy. In addition, Sky News International is simulcast to over 100 countries and is distributed to third party operators. It is a direct feed of Sky News UK, except for bespoke content that is broadcast during advertising breaks, which is created and inserted into the feed by Sky in the UK. Sky does not provide specific regional feeds or include 'local' content for Sky News International.
148. While Sky's record in the jurisdictions outside the UK in which it has to comply with local broadcasting standards is not perfect, we noted that almost all of the breaches relate to advertising. Furthermore, in Italy, the country in which Sky has the most breaches, almost all were attributable to a technical failure of the software used by Sky Italia, rather than any suggestion of issues with Sky's policies, systems and procedures or with the approach to compliance at Sky. Our conclusion was that Sky's approach to broadcasting standards outside the UK, in terms of its policies, systems and procedures and its

compliance record, raise no concerns about Sky's commitment to the attainment of the broadcasting standards objectives in the UK.

## **Wider regulatory compliance and corporate governance**

149. We considered that evidence relating to wider regulatory compliance and corporate governance failures is potentially relevant to our assessment of the broadcasting standards consideration. For example, it may indicate that a media enterprise's policies, systems and procedures are nominal or ineffective in terms of supporting and promoting a culture of compliance with regulatory standards.
150. Third parties submitted that companies controlled by the MFT and in which members of the Murdoch family hold senior positions, in general, do not prioritise compliance with regulatory standards. In particular, a number of third parties submitted that these companies prioritise commercial gain or interests, such as influence, over compliance with regulatory standards. The main issues of concern raised by third parties related to (i) misconduct at News Corporation (which was split in 2013 into Fox and News Corp) prior to the Leveson Inquiry in 2011 in connection with phone hacking, and (ii) more recent allegations of sexual harassment and racial discrimination at Fox News in the US. Notably, in relation to sexual harassment allegations, those made against senior staff such as the former CEO of Fox News, Roger Ailes, and the high-profile Fox News presenter, Bill O'Reilly. At the time of the reference, the then Secretary of State specifically considered that the wider question of corporate governance could usefully be considered in further detail by us during our Inquiry.
151. Our view is that where a media enterprise – such as Fox – is already involved in broadcasting in the UK, evidence that directly relates to an intention to promote and support the attainment of the broadcasting standards objectives in the UK and its record of compliance with the Broadcasting Code, is of central relevance and should be accorded the greatest weight in our assessment. Nevertheless, we noted the large number of submissions raising concerns in relation to wider regulatory compliance and corporate governance. We therefore looked at how Fox and News Corp (as companies controlled by the MFT and in which members of the Murdoch family hold senior positions) meet other, non-broadcasting, legal and regulatory obligations – including regulations relating to newspapers in the UK.
152. We looked at News Corp's approach to wider regulatory compliance in the context of newspaper regulation. We also examined Fox's corporate governance and the efficacy of its policies, systems and procedures that seek to ensure wider regulatory compliance. We then considered the weight to give

this evidence in our assessment of the broadcasting standards consideration. In considering wider regulatory compliance and corporate governance, we:

- considered the findings of the Leveson Inquiry and those of the Culture, Media and Sport Select Committee on the failings of regulatory compliance at News International and its parent News Corporation in terms of compliance with press standards and the law in the context of phone hacking;
- had regard to the criticisms levelled at both Rupert and James Murdoch in relation to corporate governance failings at that time (including by Ofcom in its 2012 report following its 'fit and proper' assessment of Sky as a broadcast licence holder);
- examined the record of News Corp in complying with newspaper self-regulation in the UK, noting the creation in 2012 of a Chief Compliance Officer role at News UK and the introduction of a group-wide global compliance programme by the (then News Corporation, now Fox) board;
- reviewed in detail how Fox dealt with the serious allegations relating to sexual harassment at Fox News, including by questioning Fox board members, and in the context of these allegations, and other complaints and settlements related to corporate governance issues at Fox more widely;
- considered the efficacy of Fox's previous and existing policies, systems and procedures and the timeliness and effectiveness of Fox's responses.

153. With regard to misconduct at News Corporation in connection with phone hacking prior to the Leveson Inquiry in 2011, it is clear that there were serious failings in regulatory compliance with newspaper regulation and the law, as documented by the Leveson Inquiry and elsewhere. However, the misconduct which gave rise to the phone hacking scandal, while serious, occurred some time ago.

154. As a result, we also looked at the record of News Corporation and News Corp in the UK post Leveson. We found that the policies, systems and procedures News UK put in place were a considered and detailed attempt to address the failings identified by the Leveson Inquiry and others in the aftermath of phone hacking. News UK's record since shows its approach to complaints handling is on a par with comparable news publishers in the UK. We also did not identify evidence that indicates more recent non-compliance by News UK (or News Corp more generally) with UK regulation in general or press regulation in particular.

155. With regard to the allegations against Fox News employees in the US, we acknowledged that Fox moved quickly in dealing with specific allegations against Roger Ailes once the Fox board was aware of these. The evidence suggested that there were factors relating to Bill O'Reilly's contractual arrangements that may explain why he was not dismissed sooner, and why the Fox board was not aware of the full extent of the recent personal settlements he had entered into. We also acknowledged that Fox has subsequently supplemented existing and introduced new corporate governance arrangements to deal with workplace harassment. However, we have concerns that these issues were not identified sooner by Fox and that there were deficiencies in certain of its previous corporate governance arrangements.
156. Nevertheless, while the submissions raised by third parties and the failures of corporate governance in the US concern serious matters, we noted that they relate to allegations of sexual harassment and racial discrimination and are not directly related to the attainment of broadcasting standards, in the UK or elsewhere. We therefore attached greater weight to the evidence relating to Fox's commitment to those standards in our assessment of the broadcasting standards consideration.
157. We also considered the concern raised by third parties, and noted by the then Secretary of State at the time of the reference, that MFT controlled companies prioritise commercial incentives or other interests over regulatory compliance and ethical standards, meaning that the MFT and Fox do not have a genuine commitment to the broadcasting standards objectives. We reviewed the corporate governance arrangements Fox put in place to address wider regulatory compliance and the response of Fox and the Fox board to the issues that arose. The evidence showed that there were deficiencies in certain policies, systems and procedures. For example, the fact that the HR, legal and finance functions, remained decentralised and operated at business unit level, with limited requirements for these functions to report upward. This was the case until changes made in 2017 in response to the allegations of sexual harassment at Fox News. However, we did not find, taking the evidence in the round, that the deficiencies in corporate governance that may have contributed to employee misconduct not being identified sooner, were motivated by the prioritisation of commercial or other interests over regulatory compliance or ethical standards. Our view is that the inadequate compliance arrangements for Fox News in the UK were a result of Fox's misinterpretation of the approach taken by Ofcom in applying the Broadcasting Code. Accordingly, we considered that the deficiencies in Fox News' approach to compliance in the UK were not a product of an attitude that sought to prioritise commercial or other interests over regulatory compliance. We therefore did

not find evidence of such conduct in the context of Fox's broadcasting operations.

158. In our view, the evidence concerning failures of corporate governance in other areas of Fox's business did not displace our assessment of the evidence relating more directly to the commitment of Fox (and the MFT) to the attainment of the broadcasting standards objectives in the UK. Our assessment of that evidence, and of Fox's approach to broadcasting standards in other jurisdictions, supports our conclusion that Fox has (and MFT controlled companies have) a genuine commitment to the attainment of the broadcasting standards objectives in the UK.

### **Finding on the broadcasting standards consideration**

159. Overall, assessing all the evidence in the round, we considered that Sky, Fox and the MFT have a genuine commitment to the attainment of the broadcasting standards objectives.
160. Accordingly, we found that, on the balance of probabilities, the Transaction may not be expected to operate against the public interest taking account of the need for persons carrying on media enterprises, and those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

### **Recommendation on remedies to the Secretary of State**

161. Having concluded that the Transaction may be expected to operate against the public interest with respect to media plurality, we were required to consider what action should be taken by the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which may be expected to result from the creation of the European relevant merger situation concerned.
162. In our assessment of remedy options, we were mindful of the importance of media plurality to the democratic process and the context in which any remedy would need to be effective, including that Sky News would depend on Fox, as its parent company, post Transaction for both financial and operational support.
163. In line with the CMA's general approach to merger remedies, we explored remedies that could be effective in addressing the effects adverse to the public interest which may be expected to result from the Transaction and then selected the least costly remedy that we considered to be effective.

164. In reaching our decision we took into account the written submissions received from, and oral hearings with, the Parties and third parties in response to the notice of possible remedies published on 23 January 2018.
165. Fox proposed three remedies accompanied by relevant undertakings (the latest versions of which are appended to this report):
- a firewall remedy, consisting of behavioural commitments designed to insulate Sky News from influence (Firewall);
  - a ring-fencing remedy involving the establishment of Sky News as a separate legal entity (Newco), 100% owned by Fox, along with behavioural commitments designed to insulate Sky News from influence (Ring-fencing); and
  - a divestiture of Sky News (Newco) to Disney.
166. We conducted a detailed assessment of each of Fox's proposals, alongside the option of prohibiting the Transaction.
167. Our analysis showed that both the Firewall and the Ring-fencing remedies suffered from material risks stemming from the ongoing ownership and commercial relationships between Fox and Sky News; Sky News' lack of financial independence; as well as fundamental problems with monitoring and enforcement. We considered that both remedies could at best mitigate only some of the effects adverse to the public interest that we identified. As a consequence, we concluded that neither of these remedies would be effective.
168. We then considered the two structural remedies, divestiture and prohibition. We concluded that divestiture of Sky News to a suitable upfront purchaser independent of the MFT would be an effective remedy. It would sever the ownership links between Fox and Sky News and remove any control of the MFT over Sky News in a timely manner. It would also require no ongoing monitoring and enforcement. We concluded that Disney would be a suitable upfront purchaser. We also concluded that prohibition of the Transaction would also be effective as it would prevent the effects adverse to the public interest that we identified from arising, by preventing the change of ownership and control. By focusing on the ownership of Sky News, both measures would address at their source the adverse effects we identified and would not require ongoing monitoring, enforcement or other intervention on behalf of the Secretary of State, or the CMA in order to safeguard this outcome.
169. While both a divestiture of Sky News to Disney (or to another suitable upfront purchaser) and prohibition would be effective solutions to address the effects

adverse to the public interest that we identified, we concluded that a divestiture to Disney would provide greater certainty over the continuation and availability of Sky News than prohibition. This is an additional benefit in terms of media plurality, which has been the focus of our concerns.

170. Having considered the effectiveness of remedy options we then considered the proportionality of the effective remedy options.
171. We concluded that divestiture of Sky News to Disney (or to another suitable upfront purchaser) would be a proportionate solution to the effects adverse to the public interest that we identified. It is no more onerous than required, while providing additional certainty as to the future provision of Sky News. It also has an acceptable risk profile. If it were not possible to secure a divestiture to Disney (or another suitable upfront purchaser, should divestiture to Disney fall through), we concluded that prohibition would be the only effective and proportionate remedy.
172. We therefore recommended to the Secretary of State that the most effective and most proportionate remedy is the divestiture of Sky News to Disney (or to another suitable upfront purchaser).

# Findings

## 1. The reference

- 1.1 On 20 September 2017, the then Secretary of State for Digital, Culture, Media and Sport (Secretary of State), in exercise of her powers under Article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (the Order), referred the proposed acquisition by 21st Century Fox, Inc (Fox) of the entire issued and to be issued share capital of Sky Plc (Sky) that Fox does not already own (the Transaction) for further investigation and report by a group of CMA panel members (the Inquiry Group).
- 1.2 The following public interest considerations in section 58(2C) of the Enterprise Act 2002 (the Act) were specified by the then Secretary of State in the Terms of Reference:<sup>1</sup>
- (a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience (the media plurality consideration); and
  - (b) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003 (the broadcasting standards consideration).
- 1.3 In exercise of our duty under Article 6 of the Order, we must decide, on the balance of probabilities:
- (a) whether arrangements are in progress or in contemplation which, if carried into effect will result in the creation of a European relevant merger situation;<sup>2</sup> and if so
  - (b) whether, taking account only of the media plurality consideration and the broadcasting standards consideration concerned, the creation of that situation may be expected to operate against the public interest;<sup>3</sup> and if so

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<sup>1</sup> Department for Digital, Culture, Media and Sport (2017) [21st Century Fox/Sky Plc Terms of Reference](#).

<sup>2</sup> Article 6(2) of the Order.

<sup>3</sup> Article 6(3) of the Order.

- (c) whether (and if so what) action should be taken by the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which may be expected to result from the creation of the European relevant merger situation concerned.<sup>4</sup>
- 1.4 It is ultimately for the Secretary of State, under Article 12(2) of the Order, to decide the questions set out in the Terms of Reference following receipt of our report. However, in doing so, the Secretary of State must accept our decision on whether the Transaction amounts to a European relevant merger situation<sup>5</sup> (ERMS) and shall, in particular, have regard to our report when making his decision about what action he may take to remedy any finding that the Transaction may be expected to operate against the public interest.<sup>6</sup>
- 1.5 As the Transaction is anticipated and not completed we refer separately to Fox and Sky throughout this report. However, where we wish to refer to both Fox and Sky, we collectively refer to them as the Parties.
- 1.6 This Inquiry also has two key related parties. These are the Murdoch Family Trust (MFT) and News Corporation (News Corp):
- (a) the MFT holds 38.4% of the voting stock in Fox and 38.4% of the voting stock in News Corp. Certain members of the Murdoch family are beneficiaries of the MFT;
- (b) News Corp is the parent of the UK newspaper group, News UK.<sup>7</sup> Among others, News UK publishes titles such as The Times, The Sunday Times, The Sun and The Sun on Sunday.
- 1.7 Our Terms of Reference, along with information on the conduct of the Inquiry, are in Appendix A.
- 1.8 We conduct all of our inquiries in a spirit of openness and transparency. In light of this, in this Inquiry we published on our case page:
- (a) an information page setting out how and when third parties could contribute to the Inquiry;
- (b) our working agreement with Ofcom and the information requests sent to Ofcom and any non-confidential responses;

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<sup>4</sup> Article 6(4) of the Order.

<sup>5</sup> Article 12(5) of the Order.

<sup>6</sup> Article 12(8) of the Order.

<sup>7</sup> News Corp UK and Ireland Limited.

- (c) an issues statement setting out the areas of concern on which the Inquiry would focus;
- (d) 36 submissions to the issues statement (including the submissions from the Parties). A summary of the main points made in the other submissions and a summary of three confidential submissions;
- (e) transcripts of 14 hearings and summaries of a further ten hearings, along with summaries of both main party hearings, and the transcript from a roundtable event on media plurality;
- (f) our provisional findings and notice of possible remedies (the Remedies Notice);
- (g) 11 submissions to the provisional findings (including the submissions from the Parties). A summary of the main points made in the other submissions<sup>8</sup> and a summary of a confidential submission;
- (h) eight submissions to the Remedies Notice (including submissions from the Parties). A summary of the main points made in other submissions;
- (i) the transcript of one third party response hearing and summaries of three main party response hearings (two with Fox, one with Sky); and
- (j) a revised set of undertakings from Fox following the response hearing, two further sets of undertakings from Fox, and three submissions from third parties in response to the undertakings.

1.9 We reviewed around 100,000 submissions from across the three inquiry phases of the proposed Transaction (Ofcom, Secretary of State and our Inquiry). This included just over 12,600 submissions received during our Inquiry. The submissions from the Parties received during phase 1 were also reviewed.

1.10 This report, together with its appendices, constitutes our findings, notified to the Secretary of State in line with our Mergers Guidance.<sup>9</sup>

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<sup>8</sup> We received 59 other submissions, 53 of which were in response to both our provisional findings and Remedies Notice.

<sup>9</sup> [CMA, \*Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)\*](#), see in particular paragraphs 16.11 and 16.21.

## 2. The Parties

### 21st Century Fox, Inc

- 2.1 Fox is a Delaware corporation<sup>10</sup> whose shares are listed and traded on the NASDAQ Global Select Market. In its Securities and Exchange Commission submissions, Fox is described as a diversified global media and entertainment company with operations in the following five industry segments: (i) Cable Network Programming; (ii) TV; (iii) Filmed Entertainment; (iv) Direct Broadcast Satellite Television; and (v) Other, Corporate and Eliminations.<sup>11</sup>
- 2.2 Prior to 2013, 21st Century Fox, Inc was part of News Corporation. In 2013 News Corporation split into two distinct publicly traded companies, 21st Century Fox, Inc and the new News Corporation (News Corp). News Corp<sup>12</sup> was a newly created listed public company for which shareholders were given one new share for every four shares of the old News Corporation Class A Common Stock or Class B Common Stock, that each shareholder held. The existing News Corporation changed its name to 21st Century Fox, Inc.<sup>13</sup>
- 2.3 In the UK, Fox describes its principal activities as the licensing and distribution of audiovisual works for theatrical exhibition. In its initial submission to us, Fox stated that it does not own newspapers or radio stations broadcasting in the UK; nor does it own news channels available to a UK audience.<sup>14</sup>
- 2.4 According to its most recently available annual report and accounts, in the year ending 31 June 2017, Fox generated revenues of approximately \$29 billion resulting in a net profit of approximately \$3.2 billion.<sup>15</sup>
- 2.5 At present, Fox owns approximately 39% of Sky and, pursuant to a voting agreement between Fox, Sky and affiliated entities, Fox may not hold more than 37.19% of all the votes that could in principle be cast at a shareholders' annual general meeting of Sky. The remainder of Sky's shares are publicly traded and widely held.

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<sup>10</sup> A Delaware corporation is a business entity created under the General Corporation Law of the Delaware State Code.

<sup>11</sup> United States Securities and Exchange Commission (SEC), [FORM 10-K](#).

<sup>12</sup> At the time of the separation, the News Corp, comprised of newspapers, information services and integrated marketing services, digital real estate services, book publishing, digital education and sports programming and pay-TV distribution in Australia.

<sup>13</sup> Fox [statement](#) on Fox separation from News Corporation.

<sup>14</sup> Fox [initial submission on media plurality](#), page 4, paragraph 2.4.

<sup>15</sup> Fox, [Annual report and accounts 2017](#).

## ***News and current affairs at Fox***

- 2.6 Fox News<sup>16</sup> is a wholly owned subsidiary of Fox. Rupert Murdoch is currently its acting Chief Executive Officer (CEO), a position he has held since July 2016 after Roger Ailes stepped down from the role he had held for 20 years in the wake of sexual harassment allegations. Fox News is the premier news outlet for Fox and an important brand for the company.<sup>17</sup>
- 2.7 Fox News was available in the UK solely to customers with a Sky subscription until Fox stopped broadcasting Fox News in the UK on 29 August 2017.<sup>18</sup> When broadcasting, it had an estimated daily reach of around 50,000 viewers.<sup>19</sup> Fox's rationale for removing Fox News from its UK offering on Sky is discussed in paragraph 3.10.

## ***Fox's stated intentions in relation to Sky in the UK***

- 2.8 Following its announcement of its intention to acquire the remaining shares of Sky, Fox made several public statements of intent in relation to Sky and the UK:<sup>20</sup>
- (a) Fox will maintain Sky's UK HQ at the re-developed campus at Osterley and complete the £1 billion investment programme at the site;
  - (b) Fox will continue to support Sky's development of Leeds as its technology hub and its Software Engineering Academy scheme which offers technology apprenticeships and graduate opportunities to young people across the north of England;
  - (c) the UK will be kept as the creative hub of Sky programming and Fox intends to continue to invest in the creative community in the UK;
  - (d) in aggregate, Fox and Sky invested around £700 million last year in TV and film production in the UK alone, and Fox intends to continue at least that level of investment. (Fox fully expects to build on Sky's already outstanding original content pipeline which has 1,000 hours of original programmes and 80 series in development);
  - (e) Fox intends to maintain Sky's standard of excellence in respect of Sky investment in business and community initiatives. Fox is proud of the

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<sup>16</sup> Fox News Network, LLC.

<sup>17</sup> Fox at Morgan Stanley Technology, Media and Telecom Conference, 28 February 2017.

<sup>18</sup> Reuters (2017) *Murdoch switches off Fox from UK's Sky*.

<sup>19</sup> Ofcom (2017) *Public interest test for the proposed acquisition of Sky plc by 21<sup>st</sup> Century Fox, Inc* (Ofcom Public Interest Report), page 8.

<sup>20</sup> Fox, *Intentions in relation to the UK*.

journalistic tradition of Sky News which has been one of the great innovators; and

- (f) Fox will continue to broadcast news under the Sky brand, maintaining its excellent record of compliance with the Ofcom Broadcasting Code.

### ***Fox's proposed creation of 'New Fox' and merger of certain assets with Disney***

- 2.9 On 14 December 2017 Fox announced that it intended to spin-off to its shareholders a portfolio of its news, sports and broadcast businesses to create 'New Fox'.<sup>21</sup>
- 2.10 New Fox will include the branded properties of the Fox News Channel, Fox Business Network, Fox Broadcasting Company, Fox Sports, Fox Television Stations Group, and sports cable networks FS1, FS2, Fox Deportes and Big Ten Network (BTN). It will also include the company's studio lot in Los Angeles and equity investment in the streaming firm Roku.<sup>22</sup>
- 2.11 On the same date, Fox announced that it had entered into a definitive agreement for The Walt Disney Company (Disney) to acquire the remainder of Fox for \$52.4 billion in shares. The proposed deal would see Disney gain ownership of assets such as the Twentieth Century Fox Film and TV studios, along with cable and international TV businesses. Under the terms of the agreement, shareholders of Fox will receive 0.2745 Disney shares for each Fox share they hold.<sup>23</sup>
- 2.12 Disney will also acquire Fox's shareholding of Sky along with FX Networks, National Geographic Partners, Fox Sports Regional Networks, Fox Networks Group International, STAR India and Fox's interests in Hulu, Tata Sky and Endemol Shine Group. The Disney deal is subject to various regulatory approvals and Fox intends to complete the acquisition of the 61% of Sky it does not already own prior to the deal with Disney completing.<sup>24</sup>
- 2.13 On 12 April 2018, the Takeover Panel ruled that following completion of the acquisition by Disney of Fox, Disney will be required to make a mandatory offer to the holders of ordinary shares in Sky pursuant to note 8 on rule 9.1 of the Takeover Code as a result of Fox's stake of approximately 39% in Sky.<sup>25</sup>

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<sup>21</sup> Fox (2017) *21st Century Fox to Spin off Businesses and Create New 'Fox'*.

<sup>22</sup> Fox (2017) *The Walt Disney Company to acquire Twenty-First Century Fox, Inc.*

<sup>23</sup> Fox (2017) *The Walt Disney Company to acquire Twenty-First Century Fox, Inc.*

<sup>24</sup> Fox (2017) *The Walt Disney Company to acquire Twenty-First Century Fox, Inc.*

<sup>25</sup> The Panel on Takeover and Mergers, 12 April 2018 ruling.

## Sky Plc

- 2.14 Sky is a FTSE 100 public company whose shares are listed on the London Stock Exchange.
- 2.15 Sky is a leading entertainment and communications business, with the UK being its largest and most profitable market.<sup>26</sup> Sky is active in a number of business segments in the UK including: licensing and acquisition of audiovisual programming; the creation and distribution of 'linear' TV channels on a wholesale basis; retailing audiovisual programming to subscribers; provision of retail fixed-line telephony and broadband services; provision of mobile communication services; provision of technical platform services to broadcasters on Sky's Direct To Home (DTH) platform; provision of access to public Wi-Fi hotspots; and the sale of advertising and sponsorship on Sky services and platforms.
- 2.16 Sky provides pay TV services to residential and commercial premises in the UK, Ireland, Germany, Austria and Italy.<sup>27</sup> In the financial year ending 2017, Sky had revenues of approximately £13 billion of which £8.6 billion related to the UK and Ireland.

### *The history of Sky*

- 2.17 As the CEO of News Corp during the 1980s, Rupert Murdoch had a key role in the establishment of Sky. Below we outline the dates in the creation of Sky:
- (a) 1983: News Corporation set up Sky Channel, a satellite-to-cable broadcaster providing a mix of English language sports and entertainment programming to much of Europe's cable TV systems;
  - (b) 1988: a consortium of media companies established British Satellite Broadcasting (BSB). In the same year, Sky Television Plc (Sky TV) was formed by News Corporation;
  - (c) 1989: Sky TV launched a nine-channel satellite TV service, including Sky News, a 24-hour news channel;
  - (d) 1990: BSkyB is formed out of the merger of Sky TV and BSB. The newly merged company, known as British Sky Broadcasting, or BSkyB, represented a 50/50 ownership between Rupert Murdoch and the four remaining BSB investors;

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<sup>26</sup> Sky, *Annual report and accounts*, year-end 30 June 2017.

<sup>27</sup> Fox previously owned Sky Deutschland and Sky Italia which were sold to Sky in November 2014.

- (e) 1995: BSkyB went public, entering The FTSE 100 index. The offering of 20% of BSkyB's shares valued the company at £4 billion. The flotation reduced News Corporation's holding to 40%; and
- (f) 2013: News Corporation was separated into two separately listed companies, Fox and News Corp, with the BSkyB shares held by Fox.

## **Sky News**

- 2.18 Sky's portfolio of TV channels includes Sky News, a 24-hour TV news channel available in the UK and the Republic of Ireland to Sky's retail pay TV subscribers, other retail pay TV services and free-to-air TV. Outside the UK and the Republic of Ireland, Sky also offers Sky News International, a channel which has the same news content as Sky News but with bespoke content shown during advert breaks in Europe, Africa, Asia and the US. Sky News is provided under the broadcast licences held by Sky's subsidiary Sky UK Limited.
- 2.19 In addition to its broadcast news channels, Sky News provides news content in the form of videos, graphics, written articles and analysis on its website ([www.news.sky.com](http://www.news.sky.com)). The Sky News App also allows users to livestream the Sky News channel and otherwise access and share Sky News content.
- 2.20 Sky also owns and operates Sky News Radio, the radio arm of Sky News, which supplies news to the Independent Radio News (IRN) network of radio stations in the UK. The IRN network provides more than 280 stations (including well known brands such as Absolute Radio, Capital, Classic, Heart, Magic, LBC, Smooth and talkSport) with a continuous service of national and international news, comprising live hourly news bulletins, scripts, audio clips and a suite of pre-recorded news content. Stations incorporate this content into the bulletins they prepare, or at certain times simply rebroadcast the bulletin created by Sky News Radio. Sky News Radio also supplies digital content such as news stories in text and video to the websites of the IRN network radio stations.
- 2.21 John Ryley is the current Head of Sky News with overall responsibility for editorial standards at Sky News. Jonathan Levy is the Director of News-Gathering and Operations at Sky News and Cristina Nicolotti Squires is the Director of Content at Sky News. Mr Levy and Ms Nicolotti Squires report to Mr Ryley. In turn, Mr Ryley reports to Gary Davey, Managing Director, Content, at Sky.

## **Alternative offer to acquire Sky**

2.22 On 27 February, Comcast Corporation published [a rule 2.4 announcement](#) (under the City Code on Takeovers and Mergers) regarding a possible offer which would be a cash proposal to acquire Sky.

2.23 Within the context of this possible offer, Comcast made the following statement in relation to Sky News:

Comcast recognises that Sky News is an invaluable part of the UK news landscape and the Company intends to maintain Sky News' existing brand and culture, as well as its strong track record for high-quality impartial news and adherence to broadcasting standards.<sup>28</sup>

2.24 Comcast's intention to make an offer was confirmed on 25 April 2018, pursuant to rule 2.7 of the City Code. Comcast made a pre-conditional cash offer for the entire issued and to be issued share capital of Sky of £12.50 per share.<sup>29</sup> Comcast's announcement of £12.50 per share represented a 16% increase in value over the existing Fox's offer for Sky. Comcast's proposal implied an equity value of £22 billion for Sky. The offer includes commitments regarding Sky and investment in the UK, including a commitment to the continuation of Sky News.

2.25 Subsequent to this, Sky released the following statement:

As a result of the announcement of this higher cash offer, the Independent Committee is withdrawing its recommendation of the offer announced by 21CF on 15 December 2016 ("21CF Offer") and is now terminating the Co-operation Agreement entered into with 21CF on the same date.<sup>30</sup>

## **Related parties**

### ***The Murdoch Family Trust***

2.26 The MFT is a trust, formed under Nevada law, for the benefit of Rupert Murdoch's family and charities. The principal beneficiaries of the MFT are

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<sup>28</sup> Comcast, [Rule 2.4 announcement](#), page 5.

<sup>29</sup> Comcast, [Rule 2.7 announcement](#).

<sup>30</sup> [Response to all-cash offer for Sky by Comcast Corporation](#).

Rupert Murdoch's six children<sup>31</sup> with permissible beneficiaries also including the children's descendants and organisations formed for their benefit.

2.27 The MFT owns a number of assets. The MFT's current holdings are:

- (a) 38.4% of Fox's Class B Common voting stock and less than 1% of non-voting stock;<sup>32</sup>
- (b) 38.4% of News Corp's Class B Common voting stock and less than 1% of non-voting stock;<sup>33</sup>
- (c) a farm in Australia, art work and cash.

2.28 The MFT owns 38.4% of the Class B voting shares and less than 1% of the Class A non-voting shares of Fox. Its overall economic interest in Fox is 16.6%. The MFT acts through its sole trustee, Cruden Financial Services LLC (Cruden). Cruden is managed by its six directors, who are appointed by Rupert Murdoch and his four adult children. All six directors have served since 2012.

2.29 Table 2.1 sets out the directors of Cruden and [REDACTED].<sup>34</sup>

**Table 2.1: Directors of Cruden and [REDACTED]**

Name	Class	[REDACTED]
Jesse Angelo	Class B	[REDACTED]
Gina Cass-Gottlieb	Class B	[REDACTED]
Mark J. Devereux	Class B	[REDACTED]
David F DeVoe	Class A	[REDACTED]
Richard J. Oldfield	Class B	[REDACTED]
Arthur M. Siskind	Class A	[REDACTED]

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<sup>31</sup> Prudence MacLeod, Elisabeth Murdoch, Lachlan Murdoch, James Murdoch, Grace Murdoch and Chloe Murdoch.

<sup>32</sup> As of 18 September 2017, Rupert Murdoch additionally owned less than 1% of Class B voting stock, and less than 1% of Class A non-voting stock.

<sup>33</sup> As of 7 August 2017, Rupert Murdoch additionally owned 1% of the company's Class B Common voting stock and less than 1% of the company's Class A Common voting stock.

<sup>34</sup> Rupert Murdoch's teenage children, Grace and Chloe are both beneficiaries of the MFT.

- 2.30 There are two classes of directors. Currently Class A directors have two votes and Class B directors have one. Each director must act on his or her own, consistent with the discharge of Nevada state law duties of care and loyalty.
- 2.31 [REDACTED] appointed Arthur Siskind and David DeVoe to Cruden in 2012. Both directors have held several positions within News Corporation, latterly now called Fox, and both have held positions within Sky. Both directors are Class A directors of Cruden and therefore control 50% of the votes at directors' meetings.<sup>35</sup>
- 2.32 The other four directors are Class B directors of Cruden and as such have one vote each. Each director therefore controls 12.5% of the votes at directors' meetings.
- 2.33 Cruden also told us that [REDACTED].

### **News Corp**

- 2.34 News Corp is a Delaware corporation whose shares are listed and traded on the NASDAQ Global Select Market. In its annual report and accounts, News Corp is described as a global diversified media and information services company.<sup>36</sup>
- 2.35 Prior to 2013, News Corp was part of News Corporation. In 2013 News Corporation split into two distinct publicly traded companies, 21st Century Fox, Inc and the new News Corporation (News Corp).
- 2.36 According to its Annual Report on Form 10-K filed with the SEC, for the fiscal year ending 30 June 2017, News Corp had revenues of approximately \$8.1 billion, total segment EBITDA of \$885 million and a net income loss of approximately \$643 million.<sup>37</sup>

### *News and current affairs at News Corp*

- 2.37 News Corp holds certain of Fox's former businesses including its news and information services, book publishing, digital real estate services, and its Australian cable network programming business.
- 2.38 News Corp's operations in the UK are principally conducted through News Corp UK and Ireland Limited, trading as News UK and HarperCollins Publishers Limited. News UK publishes the following newspaper titles in print

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<sup>35</sup> [REDACTED].

<sup>36</sup> News Corp, [2016 Annual report](#).

<sup>37</sup> [SEC filing](#).

and digital formats: The Times, The Times Literary Supplement (a weekly periodical literary review), The Sunday Times, The Sun, The Sun on Sunday and The Sun Online (the combined online offering of The Sun and The Sun on Sunday). In 2016, News Corp acquired Wireless Group, which in the UK operates the talkSport, talkRadio and Virgin Radio UK national radio stations, as well as a portfolio of predominantly music-based local radio stations.

### *The 1981 Times Undertakings*

- 2.39 When News International acquired The Times, The Sunday Times and The Times Supplements in 1981, undertakings were given to the Secretary of State for Trade (the 1981 Times Undertakings).<sup>38</sup> These undertakings are concerned with protecting the editorial quality and integrity of The Times, The Sunday Times, and The Times Supplements and their future ownership.
- 2.40 The principal undertaking for protecting The Times papers was through the Independent National Directors who serve on the board of Times Newspapers Holdings Ltd. The 1981 Times Undertakings provided for an increase in the number of Independent National Directors from four to six. Key to their role, the Independent National Directors were, and still are, required to approve appointments and dismissal of editors as well as subsequent Independent National Director appointments. The editors, to be appointed by the board, may be appointed or removed only by the agreement of a majority of the Independent National Directors.
- 2.41 Rupert Murdoch also undertook to preserve the separate identities of The Times and The Sunday Times; to maintain the independence and authority of their editors in the appointment and control of their staff, in any political comment, and in expressing opinion or in reporting news that might directly or indirectly conflict with the opinions or interest of any of the newspaper proprietors; and to maintain the titles as editorially independent newspapers of high quality. The 1981 Times Undertakings formed part of the consent<sup>39</sup> given by the then Secretary of State to the transfer of the newspapers and provided for the Articles of Association of Times Newspapers Limited to be amended to reflect the undertakings given, including that:

The Editor of each newspaper shall retain control over any political comment published in his newspaper and, in particular, shall not be subject to any restraint or inhibition in expressing

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<sup>38</sup> A copy of the 1981 Times Undertakings is available at [Exhibit KRM 6](#) to the evidence given by Rupert Murdoch to the Leveson Inquiry.

<sup>39</sup> A copy of the consent given by the then Secretary of State for Trade, John Biffen, on 27 January 1981 to the transfer of The Times and The Sunday Times is available at [Exhibit KRM 11](#) to the evidence given by Rupert Murdoch to the Leveson Inquiry.

opinion or in reporting news that might directly or indirectly conflict with the interest of any of the newspaper proprietors (within the meaning of Section 57 of the Fair Trading Act 1973) of The Times or The Sunday Times.

- 2.42 However, as Fox noted in its submission, the 1981 Times Undertakings ‘did not include a commitment preventing the news proprietor from expressing views, whether directly or indirectly, in relation to editorial output’.<sup>40</sup> Accordingly, the 1981 Times Undertakings did not ring-fence The Times and The Sunday Times’ editorial output from influence by Rupert Murdoch, rather they were aimed at making clear that the respective editors retained control of that output.

### **Key positions held by members of the Murdoch family**

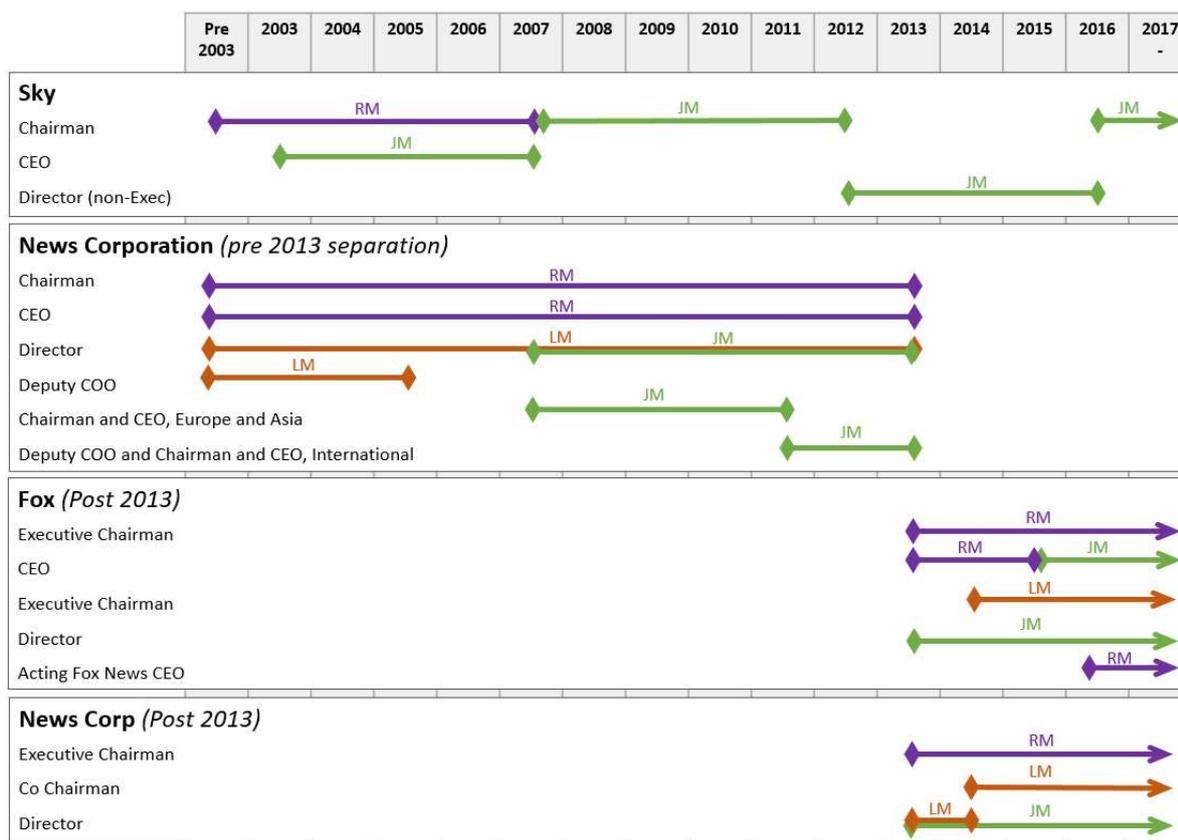
- 2.43 Rupert Murdoch and his sons, Lachlan and James Murdoch, have all held various positions within Fox,<sup>41</sup> News Corp and Sky over many years. Figure 2.1 outlines what we consider to be the key senior positions held by each of them since 2003.

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<sup>40</sup> Fox [response to Remedies Notice](#), paragraph 3.15.

<sup>41</sup> News Corporation pre-2013.

**Figure 2.1: Senior positions held by Rupert, Lachlan and James Murdoch since 2003**



Source: CMA.

2.44 Rupert Murdoch’s history with News Corporation stretches back to the 1970s, becoming its CEO in 1979. Having established Sky in the 1980s, Rupert Murdoch became a director at Sky in 1990, before taking on the role of Chairman in 1999, a position he held until James Murdoch took on the role in 2007.

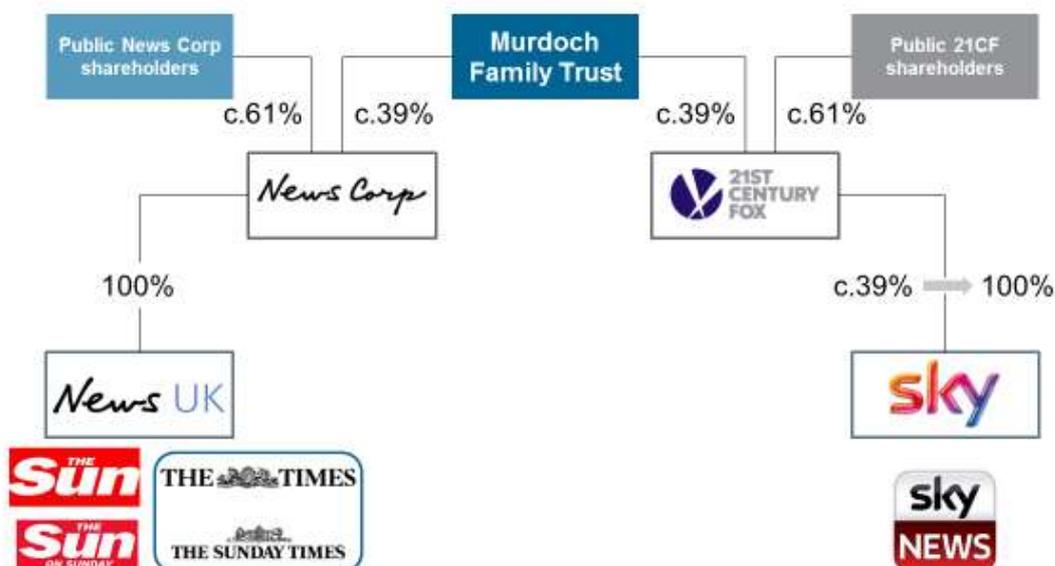
2.45 Rupert Murdoch’s two sons started working for Fox (then called News Corporation) in the 1990s. Lachlan Murdoch started working for News Corporation in 1994, with James Murdoch joining Fox (then called News Corporation) in 1996.

### 3. The Transaction

#### Transaction history

3.1 On 15 December 2016, Fox announced its intention to acquire the fully diluted share capital of Sky not already owned by Fox and its affiliates, after a Sky committee of independent directors reached agreement with the Fox board on the terms of the deal. The Transaction would result in Fox increasing its existing shareholding from approximately 39% to 100%.

Figure 3.1: The Transaction



Source: The Parties.

- 3.2 On 3 March 2017, Fox notified the European Commission of its intention to buy the shares in Sky that it does not already own.<sup>42</sup>
- 3.3 On 16 March 2017, the then Secretary of State issued a European Intervention Notice (EIN) requiring Ofcom to advise her on the effects of the Transaction on the media plurality consideration and the broadcasting standards consideration.<sup>43</sup>
- 3.4 On 7 April 2017, the Transaction was cleared unconditionally by the European Commission under the EU Merger Regulation.<sup>44</sup>
- 3.5 In its final report on the two public interest considerations published on 20 June 2017 (Ofcom Public Interest Report),<sup>45</sup> Ofcom concluded in relation to the media plurality consideration:

The transaction raises public interest concerns as a result of the risk of increased influence by members of the Murdoch Family Trust over the UK news agenda and the political process, with its unique presence on radio, TV, in print and online. We consider

<sup>42</sup> Secretary of State for Digital, Culture, Media and Sport, *European Intervention Notice given pursuant to section 67 Enterprise Act 2001 anticipated acquisition of Sky plc by Twenty-first Century Fox, Inc.*

<sup>43</sup> *European Intervention Notice.*

<sup>44</sup> European Commission (2017) *Mergers: Commission clears 21st Century Fox's proposed acquisition of Sky under EU merger rules.*

<sup>45</sup> *Ofcom Public Interest Report.*

that these concerns may justify a reference by the Secretary of State to the Competition and Markets Authority.<sup>46</sup>

3.6 In relation to the broadcasting standards consideration, Ofcom concluded:

In light of Fox's and Sky's broadcast compliance records and taking account of our separate assessment of whether Sky remains fit and proper to hold broadcast licences following the Transaction, we do not consider that the merged entity would lack a genuine commitment to the attainment of broadcasting standards. Therefore, we consider that there are no broadcasting standards concerns that may justify a reference by the Secretary of State to the Competition and Markets Authority.<sup>47</sup>

3.7 Also on 20 June 2017, the CMA delivered its phase 1 report on jurisdictional matters to the then Secretary of State.

3.8 After the then Secretary of State had considered the phase 1 reports from Ofcom and the CMA alongside representations from the Parties to the Transaction and third parties, the then Secretary of State confirmed in a statement to parliament on 29 June 2017 that she was 'minded to' refer the Transaction for a further, more detailed phase 2 investigation on media plurality grounds. After further consideration of representations received and having considered further advice that she had requested from Ofcom, the then Secretary of State announced on 12 September 2017 that she was now also minded to refer the Transaction to the CMA on commitment to broadcasting standards grounds.

3.9 On 20 September 2017 the then Secretary of State referred the proposed Transaction to the CMA on both public interest considerations.

## **Transaction rationale**

3.10 Fox's stated rationale for the Transaction is as follows:

The acquisition of the entire share capital of Sky brings clarity to 21CF's capital allocation strategy and constitutes an opportunity for 21CF to achieve financial consolidation with a company in which it has held a substantial stake from the outset. The Transaction will also allow 21CF to diversify its activities

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<sup>46</sup> [Ofcom Public Interest Report](#), page 4.

<sup>47</sup> [Ofcom Public Interest Report](#), page 5.

geographically, by acquiring a significant presence in markets where its activities in the TV sector are limited, and to diversify its sources of earnings towards more stable subscription-based revenues.<sup>48</sup>

- 3.11 Fox told us that it intends Sky News to continue to operate as an editorially independent business unit within Sky. Fox's board of directors have passed a resolution giving the independent directors oversight of the hiring and dismissal of the Head of Sky News, and of any changes to the Sky News Editorial Guidelines.<sup>49</sup>

## **Transaction details**

- 3.12 The Transaction is subject to the City Code on Takeovers and Mergers (the Takeover Code) and was announced publicly pursuant to rule 2.7 of the Takeover Code on 15 December 2016 (following the announcement of a possible offer pursuant to rule 2.4 of the Takeover Code on 9 December 2016).
- 3.13 The Transaction was recommended to Sky's shareholders by the Independent Committee of Sky. Fox envisages the Transaction proceeding by way of a court approved scheme of arrangement under part 26 of the Companies Act 2006.<sup>50</sup>
- 3.14 As noted earlier, on 25 April 2018 Comcast made a pre-conditional cash offer for the entire issued and to be issued share capital of Sky. On the same date Sky's Independent Committee withdrew its recommendation of the offer announced by Fox on 15 December 2016 and terminated the Co-operation Agreement entered into with Fox.
- 3.15 Sky's shareholders are yet to vote on the proposed acquisition as the Parties await regulatory approval in the UK.

## **4. Jurisdiction and counterfactual**

- 4.1 In accordance with Article 6(2) of the Order, and pursuant to our Terms of Reference, we must decide whether arrangements are in progress or in

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<sup>48</sup> Fox initial submission, paragraph 2.23.

<sup>49</sup> Fox initial submission, paragraph 2.26.

<sup>50</sup> Fox initial submission, paragraph 2.21.

contemplation which, if carried into effect, will result in the creation of an ERMS.<sup>51,52</sup>

- 4.2 Article 8(2) of the Order requires reasons for this decision to be set out in the report to the Secretary of State. The Secretary of State is required to accept our decision on jurisdiction.<sup>53</sup>
- 4.3 In terms of the substantive assessment of the effects of the Transaction in relation to the two public interest considerations referred by the then Secretary of State, as explained in chapter 6, (see section on the Legal basis for our assessment of the media plurality consideration), section 58A of the Act enables us to take into account the activities of the MFT and the other media enterprises over which it has control or material influence, including News Corp.
- 4.4 An ERMS is defined in section 68(2) of the Act as follows:
- 4.5 ‘European relevant merger situation’ means a relevant merger situation —
- (a) which has been created or will be created if arrangements which are in progress or in contemplation are carried into effect;
  - (b) by virtue of which a concentration with a Community dimension (within the meaning of the [EU] Merger Regulation), or a part of such a concentration, has arisen or will arise; and
  - (c) in relation to which a reference was prevented from being made under section 22 or 33 (whether or not there would otherwise have been a duty to make such a reference) by virtue of EU law or anything done under or in accordance with it.

## Creation of a relevant merger situation

- 4.6 The Transaction must meet the following criteria to constitute a relevant merger situation for the purposes of the Act.<sup>54</sup>

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<sup>51</sup> An ERMS is defined in section 68(2) of the Act.

<sup>52</sup> On 20 June 2017, we provided to the Secretary of State our phase 1 report setting out why we believed it is, or may be, the case that the Transaction will result in an ERMS.

<sup>53</sup> Article 12(5) of the Order.

<sup>54</sup> [Merger assessment guidelines \(OFT1254/CC2\)](#) (September 2010) from paragraph 3.1.3 onwards. The merger assessment guidelines have been adopted by us (see [Mergers: guidance on the CMA's jurisdiction and procedure \(CMA2\)](#) (January 2014) Annex D). See also paragraph 4.1 onwards of the [CMA2 Mergers Guidance](#).

- (a) there must be arrangements in progress or in contemplation which, if carried into effect, will lead to two or more enterprises ceasing to be distinct; and
- (b) either the value of turnover in the UK of the enterprise being acquired exceeds £70 million (the turnover test) or the 'share of supply test' is satisfied.<sup>55</sup>

### ***Enterprises ceasing to be distinct***

- 4.7 The Act provides that enterprises will cease to be distinct when they are brought under common ownership or control.<sup>56</sup> Section 26 of the Act sets out how common ownership or control is to be assessed. In particular, section 26(4)(a) of the Act provides that a person or group of persons may be treated as bringing an enterprise under his or their control if, being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in that body corporate.
- 4.8 At present, Fox owns approximately 39% of Sky. Pursuant to a voting agreement between Fox, Sky and affiliated entities, Fox's voting rights are capped at 37.19% of all the votes exercisable at Sky's shareholder meetings.<sup>57</sup> The remainder of Sky's shares are publicly traded and widely held. There are currently no special rights attached to the shares held by Fox. Fox accounted for an average of 44.35% of all votes cast over the period 2012 to 2016.
- 4.9 [REDACTED].
- 4.10 Sky's board has 11 members. Fox does not have the right to appoint directors to Sky's board, but three of the directors are affiliated with Fox (James Murdoch,<sup>58</sup> who chairs Sky's board, Chase Carey,<sup>59</sup> and John Nallen,<sup>60</sup> who are both non-executive directors of Sky). The Sky board appoints the CEO of Sky. The CEO in turn appoints senior management within Sky. Sky's board decisions are by majority vote. Strategic decisions (notably those related to the budget and the business plan) in Sky are taken at the level of the board of directors on the basis of a majority of votes.

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<sup>55</sup> Section 23 of the Act.

<sup>56</sup> Section 26(1) of the Act.

<sup>57</sup> Voting agreement between Fox, Sky and affiliated entities dated 21 September 2005.

<sup>58</sup> Chief Executive Officer of Fox.

<sup>59</sup> Vice Chairman of Fox.

<sup>60</sup> Senior Executive Vice President and Chief Financial Officer (CFO) of Fox.

4.11 Based on the factors set out in our Mergers Guidance,<sup>61</sup> we consider that Fox currently has the ability to materially influence the policy of Sky within the meaning of section 26 of the Act. However, given that Fox:

- (a) controls 37.19% of votes exercisable at shareholders meetings and, over the past five years, has not in practice controlled over more than half of the votes actually cast at Sky shareholders meetings; and
- (b) does not have a right to appoint directors to the Sky board;

we consider that Fox does not at present have either de facto control of or a controlling interest in Sky within the meaning of section 26 of the Act.

4.12 Following the Transaction, Fox will own 100% of the issued shares of Sky and will have sole control, thereby acquiring a controlling interest in Sky within the meaning of section 26 of the Act. Fox and Sky would therefore be brought under common ownership or common control within the meaning of section 26(4) of the Act. We therefore find that as a result of the Transaction, two or more enterprises – in this instance Fox and Sky – will cease to be distinct. Fox accepts that the Transaction will result in Fox acquiring a controlling interest in Sky, and that two or more enterprises will thereby cease to be distinct.

### ***Turnover threshold***

4.13 The turnover of Sky is £8.6 billion in the UK and Ireland,<sup>62</sup> of which a substantial majority is generated in the UK. The turnover test is therefore met because Sky's turnover in the UK is greater than £70 million.

### ***Arrangements in progress or contemplation***

4.14 Fox has publicly announced pursuant to rule 2.7 of the UK Takeover Code its firm intention to make an offer to acquire the fully diluted share capital of Sky not already owned by Fox and its affiliates. As at the date of this report, Fox has not completed the acquisition of the remaining shares of Sky. We consider that the withdrawal by the Independent Committee of Sky of their

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<sup>61</sup> *Mergers: guidance on the CMA's jurisdiction and procedure (CMA2)*, paragraphs 4.14 to 4.27, defines material influence as the lowest level of control that may give rise to a relevant merger situation, in which the acquirer has the ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target in this context means the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives. There are different sources of material influence, such as shareholding, board representation, agreements or financial arrangement with a company that enable the acquirer materially to influence policy.

<sup>62</sup> Sky, *Annual report and accounts*, year-end 30 June 2017.

recommendation of the Fox bid on does not affect our assessment as the Independent Committee has made clear that both the bid by Fox and the bid by Comcast remain under consideration.<sup>63</sup> Accordingly, we find that arrangements are in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct.

### ***Concentration with a Community dimension***

- 4.15 The European Commission in its decision of 7 April 2017<sup>64</sup> concluded that Fox does not currently exercise decisive influence over Sky within the meaning of the EU Merger Regulation<sup>65</sup> (whether on a de jure or on a de facto basis) but would acquire decisive influence over Sky as a result of the Transaction, thereby giving rise to a concentration. The European Commission also concluded that the relevant turnover thresholds were satisfied. As a result, the European Commission concluded that the acquisition by Fox of Sky constitutes a concentration with a Community dimension.
- 4.16 We therefore find that as a result of this Transaction, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a concentration with a Community dimension.
- 4.17 In relation to those arrangements, a reference was prevented from being made under section 33 of the Act by virtue of EU law since the European Commission has asserted its exclusive jurisdiction based on Article 21(3) of the EU Merger Regulation.

### ***Conclusion on European relevant merger situation***

- 4.18 For the reasons given earlier, we conclude that arrangements are in progress or contemplation which, if carried into effect, will result in the creation of an ERMS.

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<sup>63</sup> Sky's [response to the all-cash offer by Comcast on 25 April 2018](#) states: 'At this time, the Independent Committee notes that both offers are subject to pre-conditions and neither offer is currently capable of being put to shareholders. The Independent Committee intends to co-operate fully with both parties to secure the relevant approvals in order to satisfy the preconditions for both offers. Until the relevant pre-conditions are satisfied, Sky shareholders are advised to take no action'.

<sup>64</sup> [Case M.8354 - Fox/Sky](#).

<sup>65</sup> Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

## Consideration of a ‘ceasing to be distinct’ between the MFT and Sky

- 4.19 The European Commission’s decision left open the question of whether, for the purpose of its assessment, the MFT or any member of the Murdoch family had decisive influence under Article 3 of the EU Merger Regulation over either Fox or News Corp. However, the European Commission undertook its substantive assessment as if Fox and News Corp were under common control of the MFT as this did not affect the outcome of its competitive assessment.<sup>66</sup>
- 4.20 The ability to materially influence the policy of another enterprise under the Act is a lower standard than the ability to exercise decisive influence under the EU Merger Regulation. We therefore considered whether the change in the quality of control of Fox over Sky may give rise to a separate ‘ceasing to be distinct’ for the purposes of section 26 of the Act.<sup>67</sup>
- 4.21 For the reasons given in chapter 7, we find that the MFT currently has material influence over Sky and, while it will be able to exercise a greater degree of control over Sky after the Transaction, this control will remain at the level of material influence within the meaning of the Act and not amount to de facto control or a controlling interest. This means that the MFT and Sky do not cease to be distinct within the meaning of the Act.

## Counterfactual

- 4.22 To assess the impact of the Transaction on the level of plurality and commitment to broadcasting standards, we compared the situation that we expect to arise following the Transaction to that which would exist in the absence of the Transaction (the counterfactual).
- 4.23 Sky submitted that it is relevant to our consideration of the counterfactual that the continued provision of Sky News should not simply be assumed when considering the level of media plurality absent the Transaction. Sky told us that it would likely be prompted to review the position in the event that the continued provision of Sky News in its current form unduly impeded merger and/or other corporate opportunities available in relation to Sky’s broader

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<sup>66</sup> [Fox/Sky, European Commission decision](#), paragraph 24.

<sup>67</sup> In our phase 1 report, we highlighted that the Transaction, by removing Sky’s independent shareholders, would have the effect of removing a constraint on the MFT’s exercise of control over Sky. As this was a consequence – and therefore an ‘effect’ – of the Transaction, we considered it could be examined as such. This meant it was unnecessary to take a view separately on whether the level of control which the MFT exercises over Sky would increase within the meaning of section 26 of the Act as a result of the Transaction (paragraph 21).

business, such as the Transaction – in particular having regard to any views expressed by shareholders regarding the denial of such opportunities.<sup>68</sup>

- 4.24 However, Sky has also told us that although Sky News accounted for a small part of the Sky business and is loss-making, Sky continues to invest in it because it contributes to Sky's brand value by broadcasting accurate and impartial news.<sup>69</sup>
- 4.25 We consider that in the absence of the Transaction, Sky will continue to support Sky News and we therefore conclude that the plurality of persons with control of media enterprises prior to the Transaction and the commitment to broadcasting standards prior to the Transaction is the most likely counterfactual.

## 5. Regulatory framework

- 5.1 In this chapter, we provide a brief overview of the regulatory framework of broadcast and non-broadcast media in the UK. A more detailed description of the regulatory framework is set out in Appendix B.<sup>70</sup>
- 5.2 This material is intended to help provide context for the analysis set out in this report and is not intended to provide a comprehensive description of the legal and policy frameworks in place.

### Overview of broadcast regulation

- 5.3 The Communications Act 2003 (CA03) introduced new arrangements for the regulation of broadcast media in the UK. CA03 transferred to Ofcom a range of functions previously exercised by the Secretary of State and predecessor regulators.<sup>71</sup> Ofcom is responsible, among other things, for granting licences for the provision of broadcast services in the UK, for ensuring that broadcast licence holders are 'fit and proper' persons to hold such licences and for ensuring that broadcasters comply with its Broadcasting Code which implements the broadcasting standards objectives set out in section 319(2) of CA03.<sup>72</sup> As set out later, Ofcom's powers and duties concern, among other things, the regulation of the broadcasting of TV and radio services, including

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<sup>68</sup> [Sky response to issues statement](#), paragraphs 4.1 to 4.3.

<sup>69</sup> [Summary of main party hearing with Sky](#), paragraph 2.

<sup>70</sup> We note that neither of these frameworks is, in any way, intended to exhaustively describe all of the relevant features of either the broadcast or non-broadcast media framework in the UK. Instead, the material set out is intended to set the analysis in our report into context.

<sup>71</sup> These include the Broadcasting Standards Commission, the Director General of Telecommunications, the Independent Television Commission and the Radio Authority.

<sup>72</sup> Appendix C sets out the sections of the Broadcasting Code.

TV programme services transmitted via the internet where the service falls under UK jurisdiction. Material placed on the internet (including by a broadcaster) which does not involve the distribution of TV or radio programme services with a view to their availability for reception by members of the public does not fall within the scope of the Broadcasting Code. On-demand programme services are subject to different regulation.<sup>73</sup>

## Scope of broadcast regulation

- 5.4 Section 319(1) of CA03 imposes a duty on Ofcom ‘to set, and from time to time to review and revise, such standards for the content of programmes to be included in **television and radio services** as appear to them best calculated to secure the standards objectives’ (emphasis added). In addition, Ofcom has a general statutory duty to ‘secure the application, in the case of all **television and radio services**, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services’ (section 3(2)(e) of CA03) (emphasis added). The concept of ‘television and radio services’ is an important one and is subject to a complex, multi-layered definition in CA03.
- 5.5 An important question concerns the extent to which online content is regulated by the Broadcasting Code and related powers and duties. Insofar as the broadcasting standards objectives are concerned, the position is, in short, that the broadcasting standards apply to TV and radio services, including TV programme services distributed for public consumption on an electronic communications network which includes the internet.<sup>74</sup> Online content, even if provided by a broadcaster, which does not consist of TV or radio programme services produced wholly or partly to be seen on TV and distributed in a way that makes them available for reception by members of the public, is not covered by the Broadcasting Code or the broadcasting standards objectives.
- 5.6 On-demand programme services are subject to different regulation. On-demand programme services are regulated by rules set out in part 4A of CA03.<sup>75</sup> CA03 lays down various rules with which service providers must comply. As well as various administrative rules covering matters such as the notification of changes to the service provided, the payment of fees by the service provider to Ofcom and on the supply of information to Ofcom by the service provider, a number of editorial rules are also imposed. These are

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<sup>73</sup> On-demand services are provided for separately by part 4A (sections 368A to 368R of CA03, including specific standards requirements regarding harmful content, advertising, sponsorship and product placement.

<sup>74</sup> See definition of an ‘electronic communications network’, section 32 of CA03.

<sup>75</sup> From 1 January 2016, Ofcom has acted as sole regulator for on-demand programme services content. The Advertising Standards Authority remains co-regulator in relation to advertising standards content.

currently more limited in scope than those which apply to TV programme services. The rules cover matters including, for example, the protection of under 18s, incitement to hatred and other forms of harmful content, sponsorship and advertising. Duties in respect of due accuracy and due impartiality are not imposed in respect of on-demand programme services. Ofcom has published some guidance in respect of such services.<sup>76</sup>

## Licensing

- 5.7 It is an offence under section 13 of the Broadcasting Act 1990 (the 1990 Act) to provide a ‘relevant regulated television service’<sup>77</sup> without a licence. Section 3 of the 1990 Act and the Broadcasting Act 1996 (the 1996 Act) provides Ofcom with the power to grant broadcasting licences. Ofcom has published guidance for applicants in respect of the various forms of broadcasting licences which may be sought.<sup>78</sup> Ofcom has broad powers to impose conditions on a licence holder. Ofcom may impose any conditions which ‘appear to be appropriate’ to Ofcom in the light of the duties which are, or may be, imposed on Ofcom or upon the licence holder.<sup>79</sup> Ofcom therefore has a significant margin of discretion as to the conditions which it deems appropriate to discharge its own regulatory duties under the 1990 Act, the 1996 Act and CA03. Such conditions may exclude from the scope of a licence, certain forms of content. It is also common for programming commitments to be imposed on certain types of licensee, requiring the licensee to transmit certain forms of content or limiting the nature and extent of permissible advertising.
- 5.8 As regards the granting of a licence, section 3(3) common to both the 1990 Act and the 1996 Act lays down a ‘fit and proper’ person test. Section 3(3) of the 1990 Act states:

Ofcom— (a) shall not grant a licence to any person unless they are satisfied that he is a fit and proper person to hold it; and

(b) shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence.

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<sup>76</sup> See [Rules and guidance: statutory rules and non-binding guidance for providers of on-demand programme services](#).

<sup>77</sup> A ‘relevant regulated television service’ is one which falls to be regulated by Ofcom under section 211 of CA03.

<sup>78</sup> These include, among other types of licence: Digital TV Programme Service/Digital TV Additional Service (DTPS/DTAS); Television Licensable Content Services (TLCS); Local TV (L-DTPS); and Restricted services for an event (RTSL-E).

<sup>79</sup> Section 4(1) of the 1990 Act and of the 1996 Act. See also section 87 of the 1990 Act and section 43 of the 1996 Act.

5.9 A similar provision is also set out in section 3(3) of the 1996 Act. The effect of these provisions is to impose on Ofcom a duty to ensure that any new licence applicant is a fit and proper person to hold a broadcasting licence and, in addition, that any existing licensee continues to be a fit and proper person to hold such a licence. In addition, Ofcom must refuse to issue a licence to a 'disqualified person'.<sup>80</sup> Ofcom has not published general guidance as to the approach it adopts in respect of the fit and proper test set out in section 3 of the 1990 Act and the 1996 Act.<sup>81</sup>

## **Broadcasting standards**

5.10 There are a number of statutory duties imposed on Ofcom in respect of the broadcasting standards. These include, among other duties, the following:

- (a) CA03 imposes a duty on Ofcom 'to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives' (section 319(1), CA03);
- (b) Ofcom has a general statutory duty to 'secure the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services' (section 3(2)(e), CA03); and
- (c) in performing its functions (including in applying the Broadcasting Code) Ofcom must have regard to 'the need to secure that the application in the case of television and radio services of standards ... is in the manner that best guarantees an appropriate level of freedom of expression' (section 3(4)(g) CA03).

### ***The broadcasting standards objectives***

5.11 The broadcasting standards objectives are defined in section 319(2) of CA03. These standards include due accuracy and due impartiality, a restriction on harmful or offensive material, as well as other matters including advertising, product placement, responsible broadcasting in respect of religious programmes, and the control of political advertising.

5.12 Section 320 (referred to in section 319(2)(c) of CA03) imposes additional 'special impartiality' requirements in respect of 'matters of political or industrial

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<sup>80</sup> See schedule 2, part 2 of the 1990 Act.

<sup>81</sup> A short 'Q and A' has been published: ['Fit and proper' in relation to broadcast licensees - updated](#).

controversy' and 'matters relating to current public policy'. Insofar as such matters are concerned, the requirements of special impartiality are that broadcasters must:<sup>82</sup>

(a) exclude from TV and radio services (save for restricted services as per section 245 of CA03) 'all expressions of the views or opinions of the **person providing the service** on any of the matters [specified in section 320(2) of CA03]' (emphasis added);

(b) preserve, in the case of every TV programme service, teletext service, national radio service and national digital sound programme service, 'due impartiality' on the part of the person providing the service in respect of matters in section 320(2) of CA03.

- 5.13 Further specific provision for due impartiality is made in respect of 'major' matters of political or industrial controversy or public policy. Section 320(6) of CA03 provides that the Broadcasting Code 'must, in particular, take account of the need to ensure the preservation of impartiality in relation ... (a) matters of major political or industrial controversy' and (b) 'major matters relating to current public policy'. As explained later, specific provision is made by Ofcom in respect of major matters in section five of the Broadcasting Code. A broadcaster may satisfy the special impartiality requirements of section 320(1)(b) of CA03 by reference to a series of programmes taken as a whole.
- 5.14 The broadcasting standards objectives are given effect by a number of codes including the Broadcasting Code, the Code on the Scheduling of Television Advertising (COSTA), the Cross-promotion Code, the Code on the Prevention of Undue Discrimination between Broadcast Advertisers (CUDBPA) and the UK Code of Broadcast Advertising (the BCAP Code).
- 5.15 All of the broadcasting standards objectives referred to previously are relevant to our consideration of the broadcasting standards consideration in section 58(2C)(c) of the Act. However, in the next section we briefly describe the manner in which certain particular standards are implemented, namely those of due impartiality, special impartiality and due accuracy. These standards are not only relevant to the broadcasting standards consideration but are also relevant to whether the Transaction would result in an insufficiency of plurality insofar as it has been suggested to us that the Broadcasting Code would prevent or inhibit the extent to which editorial alignment could increase in respect of companies controlled by the MFT.

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<sup>82</sup> An additional duty applies in respect of radio services (see Appendix B).

### ***Due impartiality, special impartiality and due accuracy***

- 5.16 The general requirements of due impartiality and due accuracy apply to news. An additional, broader, duty of special impartiality is set out in section five of the Broadcasting Code and applies to the broadcast of 'matters of political or industrial controversy' or 'current public policy'. These standards are discussed later.
- 5.17 Section 319(4) of CA03 makes clear that in 'setting or revising' standards set out in the Broadcasting Code, Ofcom 'must have regard ... to such extent as appears to them to be relevant to the securing of the standards objectives', to various particular matters specified in section 319(4) of CA03. These factors include, among others: the likely size and composition of the potential audience for programmes and the likely expectation of the audience as to the nature of a programme's content. In practice, Ofcom takes these contextual factors into account when applying the Broadcasting Code.<sup>83</sup> In drafting and enforcing the Broadcasting Code, Ofcom must also comply with the rights set out in the European Convention on Human Rights (ECHR) and, in particular, the right to private and family life (Article 8) and the right to free expression (Article 10).

### ***Due impartiality and due accuracy in news***

- 5.18 News must be presented with due impartiality and due accuracy (and as noted earlier, due impartiality is also relevant to coverage of matters of political and industrial controversy and public policy). Section 319(8) of CA03 clarifies that 'news' means news in whatever form it is included in a service. The Broadcasting Code clarifies that news includes news bulletins, news flashes and daily news magazine programmes.
- 5.19 The concepts of due impartiality and due accuracy are important ones. The requirements of impartiality are not absolute. Ofcom provides the following guidance as regards the concept of 'due' impartiality in the Broadcasting Code, making clear that the requirements of impartiality are context dependent:

'Due' is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. 'Due' means adequate or appropriate to the subject and nature of the programme. So 'due impartiality' does not mean an equal division of time has to be given to every view, or that every

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<sup>83</sup> The Broadcasting Code, page 5.

argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience.<sup>84</sup>

5.20 It is important to note at the outset that the requirement of due impartiality in respect of news does not prevent a broadcaster from adopting its own interpretation in respect of the news items it presents. Ofcom's guidance on the application of section five of the Broadcasting Code (the Guidance Notes) makes clear that '[i]n accordance with a broadcaster's right to freedom of expression, the broadcaster has the right to interpret news as it sees fit, as long as it complies with the [Broadcasting] Code'.<sup>85</sup> Thus, in presenting news it is permissible for broadcasters to adopt a particular 'take' on news items subject to the overall duty of due impartiality. This means that the same news item (or news generally) may be interpreted or analysed differently by, for example, Channel 4 News or Al Jazeera or ITN or BBC News. The Broadcasting Code affords a degree of latitude to each broadcaster to adopt its own interpretation.

5.21 As well as the interpretative discretion afforded to broadcasters by the Broadcasting Code, Ofcom's Guidance Notes make clear that contextual factors, such as audience expectations or the degree of public interest attached to a particular item, may be important in determining what due impartiality requires in a particular instance, including in respect of news coverage.<sup>86</sup> For example, in November 2017, Ofcom issued a breach decision against Fox News in respect of 'Hannity' broadcast on 31 January 2017, in which the programme covered Donald Trump's Executive Order restricting travel to the US from seven majority-Muslim countries. In its decision, Ofcom found Fox News to have breached various provisions of the Broadcasting Code<sup>87</sup> but noted that it had 'taken into account the fact that Fox News is a US channel, directed at US audiences, which is available in the United Kingdom' in assessing the requirement of due impartiality.<sup>88</sup> The requirements of due impartiality may therefore vary, to some degree, depending on audience expectations in respect of the channel in question. Despite the fact that there exists a degree of latitude in respect of the presentation of news, it is

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<sup>84</sup> The Broadcasting Code, section five, page 28.

<sup>85</sup> *Guidance notes: due impartiality and due accuracy and undue prominence of views and opinions: guidance notes on section five*, paragraph 1.9.

<sup>86</sup> *Guidance notes: due impartiality and due accuracy and undue prominence of views and opinions: guidance notes on section five*, paragraph 1.4.

<sup>87</sup> The programme breached rules 5.9, 5.11 and 5.12.

<sup>88</sup> *Ofcom Broadcast and On-Demand Bulletin*, 6 November 2017, issue no. 341, page 5.

important to note that the latitude to adopt a particular perspective will typically be significantly greater in the context of authored or personal view programmes. This is discussed further, later.

- 5.22 As well as the duty of due impartiality, news must also be presented with due accuracy. The concept of due accuracy is not expressly defined in the Broadcasting Code. However, in its supplementary Guidance Notes, Ofcom makes clear that the reference to due accuracy indicates that, like impartiality, the degree of accuracy required in a particular instance may vary according to context (for example, the subject matter of the programme or its intended audience).<sup>89</sup> Ofcom also makes clear that where a matter is of particular public interest, the requirement to present that matter with due accuracy will be correspondingly higher.<sup>90</sup> The concepts of due impartiality and due accuracy are interpreted and applied by Ofcom in line with the requirements of the right to freedom of expression set out in Article 10 of the ECHR.<sup>91</sup>

### *Special impartiality in respect of political, industrial and policy matters*

- 5.23 Section five of the Broadcasting Code makes clear that:

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.<sup>92</sup>

- 5.24 The person providing the broadcasting service must not, in general, adopt and express views in respect of any of these matters and must remain impartial in respect of them. This requirement is further explained in rules 5.4 and 5.5 of the Broadcasting Code, which explain:

Programmes ... must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking in a legislative forum or in a

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<sup>89</sup> [Guidance notes: due impartiality and due accuracy and undue prominence of views and opinions: guidance notes on section five](#), paragraph 1.7.

<sup>90</sup> [Guidance notes: due impartiality and due accuracy and undue prominence of views and opinions: guidance notes on section five](#), paragraph 1.7.

<sup>91</sup> [Guidance notes: due impartiality and due accuracy and undue prominence of views and opinions: guidance notes on section five](#), paragraph 1.9.

<sup>92</sup> The Broadcasting Code, section five, page 29.

court of law). Views and opinions relating to the provision of programme services are also excluded from this requirement.

Due impartiality on matters of political or industrial controversy and current public policy must be preserved on the part of any person providing a service (listed earlier). This may be achieved within a programme or over a series of programmes taken as a whole.

- 5.25 The position in respect of personal view or authored programmes is somewhat different. Rule 5.9 of the Broadcasting Code makes clear that - with the exception of news presenters and reporters in news programmes - presenters of 'personal view' or 'authored' programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. The Broadcasting Code makes clear that 'in dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes'. In practice, where a programme covers a major matter, Ofcom will scrutinise the broadcast with a greater degree of intensity.
- 5.26 As with the news, context is also important in the application of the due impartiality standard to matters of political or industrial controversy or public policy. As noted earlier, when assessing due impartiality, Ofcom takes into account a range of factors – including whether the programme, channel or service is aimed at a UK audience. In particular, Ofcom considers that the likely expectation of the audience as to content and the extent to which the content is signalled to the audience, is a key consideration in its assessment. In that regard, Ofcom considers that UK audiences may have different expectations of impartiality for a channel which is aimed primarily at a UK audience than for an overseas channel broadcasting in the UK, but which is aimed at an expatriate audience.
- 5.27 In short, the effect of this approach to the interpretation and application of the Broadcasting Code is that broadcasters are, to some extent, able to adopt their own approach to the presentation of news and current affairs more generally. The degree of latitude or discretion available to broadcasters depends on factors including whether the programme is a news programme, an authored or personal view programme or whether the programme addresses matters of political or industrial controversy or public policy or major matters. As explained earlier, a degree of discretion is available to broadcasters to adopt their own interpretation of the news. A greater degree of discretion to adopt a stance or position is available in respect of personal

view or authored programmes, including various forms of discussion programme. In addition, the requirements of due impartiality will depend on the degree of public interest in the matter discussed and, in particular, whether it is regarded as a major matter of political or industrial controversy or public policy in which case there is a particular onus on broadcasters to canvass alternative viewpoints. Moreover, the requirements of due impartiality depend on a range of other contextual factors including audience expectation and the nature of the programme in question.

- 5.28 There are a number of matters which the Broadcasting Code does not directly address, which are largely left to the editorial judgment of broadcasters. In particular, the Broadcasting Code does not generally seek to address editorial prioritisation or the editorial ‘agenda’ adopted by a broadcaster. As Ofcom noted in its Public Interest Report, in relation to the broadcasting standards consideration:<sup>93</sup>

The provisions of the Broadcasting Code cannot address editorial decision making in terms of which stories may be prioritised. The Broadcasting Code does not seek to influence such editorial decisions and to do so would raise serious concerns around freedom of speech. In any event, such influence may take subtle forms which would not be picked up by the Broadcasting Code, for example through the selection or omission of particular news items.<sup>94</sup>

- 5.29 Ofcom also emphasised this position in chapter nine of its Public Interest Report.<sup>95</sup> We note, therefore, that it is permissible for a broadcaster to have a particular editorial focus or set of interests which it tends to promote or pursue. Such editorial decision making encompasses, among other things: decisions as to which items to cover or which to omit; the amount of airtime to give to particular stories or issues; the prominence accorded to particular types of stories or the tone of coverage or the analytical level at which it is pitched. The Broadcasting Code does not generally seek to regulate these matters. This can be seen in practice. The editorial approach of Channel 4 News, for example, is distinctive from that of ITV or BBC News. Various contributors in our roundtable on media plurality noted that Channel 4 News had distinctive values which informed its editorial approach.<sup>96</sup> Such a distinctive approach to news or current affairs more generally is not precluded

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<sup>93</sup> We note that in its [initial submission on media plurality](#), Fox relied on a joint opinion of Lord Pannick QC and David Lowe, which finds that the Broadcasting Code does apply to the relative prominence afforded to a news story or type of story.

<sup>94</sup> [Ofcom Public Interest Report](#), paragraph 8.39.

<sup>95</sup> [Ofcom Public Interest Report](#), paragraph 9.13.

<sup>96</sup> [Transcript of media plurality roundtable](#), page 20.

by the Broadcasting Code. In addition, it should be noted that the reach of the Broadcasting Code is limited. Online and on-demand content produced by broadcasters, even where relating to news, is not generally covered by the Broadcasting Code unless produced wholly or partly to be seen on TV and distributed in a way that makes it available to members of the public. Broadcasters therefore have greater latitude in editorial decision making in respect of online and on-demand content.

## **Monitoring and enforcement**

5.30 As regards monitoring, Ofcom does not continuously monitor compliance with the Broadcasting Code and licensing requirements by all licensees given the resources required. Ofcom takes a risk-based approach to identifying services which it considers should, from time to time, be monitored. Where Ofcom finds that the Broadcasting Code has been breached it has a range of remedial and punitive powers at its disposal. Remedial measures can include on-air corrections as well as financial penalties, licence suspension and licence revocation, which may be appropriate in the case of more serious or repeated breaches.

## **Newspaper regulation in the UK**

- 5.31 A detailed explanation of the system of newspaper regulation in the UK is set out in Appendix B. However, by way of brief overview, the system for the regulation of newspapers is quite different from the system for the regulation of broadcasting. Crucially, whereas broadcasters are under a duty of impartiality there is no such duty on newspapers. Newspapers are, almost invariably, partisan in their approach to all manner of political or public policy issues. The nature of regulation is also quite different in the context of newspapers. In contrast to broadcasters, which are subject to a regime of compulsory regulation overseen by Ofcom, newspapers are self-regulating.
- 5.32 Following the publication of the findings of the Leveson Inquiry in November 2012,<sup>97</sup> the landscape of newspaper self-regulation in the UK has changed substantially. In line with the recommendations of the Leveson Inquiry, a Press Recognition Panel (PRP) was established on 3 November 2014 by Royal Charter. The PRP is empowered to confer recognition upon a self-regulatory body established by newspapers where that body complies with the Charter Recognition Criteria laid down in schedule three of the Royal Charter. These requirements covered a range of matters including, among others, the

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<sup>97</sup> On 1 March 2018, the Secretary of State confirmed that Part II of the Leveson Inquiry would not be going ahead. See [House of Commons Hansard, 1 March 2018, Volume 636, Leveson Inquiry](#) for the full text.

independence of the regulator, the availability of complaints processes as well as the regulator's investigative and sanctioning powers. Since the Leveson Inquiry, two self-regulatory bodies were established to regulate the press: the Independent Press Standards Organisation (IPSO) and IMPRESS. IPSO was established on 8 September 2014 following the dissolution of the Press Complaints Commission (PCC). IPSO has not sought recognition from the PRP but regulates the vast majority of UK newspapers and almost all major UK national daily titles (90% by circulation) including The Sun, The Times and The Sunday Times. However, not all major publications fall within its remit (for example, IPSO does not regulate The Guardian or The Observer, The Financial Times or The Evening Standard). IMPRESS was approved by the PRP as a recognised regulator on 25 October 2016. Presently, none of the main newspaper publishers in the UK are regulated by IMPRESS. In particular, none of News Corp's UK titles (such as The Sun, or The Times) are regulated by IMPRESS.

- 5.33 There are now two codes of practice for the self-regulation of newspapers in operation in the UK: the Editors' Code of Practice (the Editors' Code) and the IMPRESS Standards Code. IPSO applies the Editors' Code, which sets out the rules that newspapers and magazines regulated by IPSO have agreed to follow. The Editors' Code is written and administered by the Editors' Code Committee and enforced by IPSO. The Editors' Code Committee is separate from IPSO (although the Chair of IPSO, Sir Alan Moses, and the Chief Executive of IPSO, Matt Tee, are also Editors' Code Committee Members).

# MEDIA PLURALITY CONSIDERATION

## 6. Framework for the media plurality consideration

6.1 The media plurality consideration is set out in section 58(2C)(a) of the Enterprise Act 2002 (the Act) as:

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

6.2 The statutory question that we are required to answer is whether, taking account of the media plurality consideration, the anticipated acquisition of Sky by Fox (the Transaction) may be expected to operate against the public interest.<sup>98</sup>

6.3 This chapter sets out:

(a) the legal basis for our assessment of the media plurality consideration;

(b) the analytical framework we used to assess the media plurality consideration, including:

(i) the extent to which the MFT's control over Sky will increase as a result of the Transaction;

(ii) whether, taking into account the extent of the MFT's increased control over Sky, the Transaction may be expected to lead to a reduction in the plurality of persons with control of media enterprises serving the relevant audience; and

(iii) whether the remaining plurality of persons with control of media enterprises would be sufficient following the Transaction.

6.4 Our approach was informed by the context for the introduction of the media plurality consideration into CA03 and the subsequent development of policy discussion regarding media plurality. In that regard, the Explanatory Notes relating to the media plurality consideration state that it is concerned primarily with ensuring that ownership of media enterprises is not overly concentrated in the hands of a limited number of persons.<sup>99</sup>

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<sup>98</sup> Article 6(3) of the Order.

<sup>99</sup> [Explanatory Notes to section 375 of CA03](#).

6.5 Further background to the media plurality consideration and the development of policy relating to media plurality and cross-media ownership is summarised in Appendix D, which sets out:

- (a) the context in which the media plurality consideration was adopted in 2003 and the current rules on cross-media ownership;
- (b) how the concept of media plurality has been interpreted and applied since 2003, including taking into account the Court of Appeal's judgment in 2010 in relation to British Sky Broadcasting Group Plc's acquisition of 17.9% of the shares in ITV plc (BSkyB/ITV);<sup>100</sup> and
- (c) Lord Justice Leveson's consideration of media plurality in the Leveson Inquiry and subsequent developments.

6.6 We were mindful of the importance given to media plurality in statements made by the government, politicians and guidance produced at the time of the insertion of the media plurality consideration into the Act and since. By way of example, a government briefing note prepared around the time of the consultation on the Communications Bill that resulted in the inclusion of the media plurality consideration in the Act, succinctly explains the importance to democracy of a diversity of media content from a plurality of sources:

Our democracy and our cultural vitality depend on the availability of a range of different media voices, views and styles. The ownership of our newspapers, television and radio is therefore of the utmost importance...

Plurality is not about content but the source of that content, the 'voice' behind it – the owner. A plurality of voices should: –

- ensure no individual has excessive control over the democratic process;
- provide a plurality of sources of news and editorial opinion, preserving the culture of dissent and argument on which our democracy rests;
- prevent the emergence of any one source able to control the news agenda by the inclusion / omission of particular stories;

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<sup>100</sup> British Sky Broadcasting Group plc v The Competition Commission [2010] EWCA Civ 2.

- maintain our cultural vitality by ensuring that different companies exist to produce different styles of programming and publishing, each with a different look and feel.<sup>101</sup>

6.7 We set out in Appendix D the development of guidance relating to media plurality and past application by Ofcom and the Competition Commission (CC). We note, however, that the Act itself does not provide any guidance on what constitutes ‘sufficiency’ in the context of the media plurality consideration.

## **Legal basis for our assessment of the media plurality consideration**

6.8 Section 58A of the Act contains definitions and other guidance for the interpretation and application of section 58, including the media plurality consideration in section 58(2C)(a). It includes:

- (a) definitions of what constitutes a ‘media enterprise’ and a ‘newspaper enterprise’;<sup>102</sup>
- (b) guidance relating to the number of media enterprises deemed to be serving a relevant audience;<sup>103</sup>
- (c) guidance relating to the treatment of who should be deemed to control relevant media enterprises;<sup>104</sup> and
- (d) guidance on how to construe the relevant audience served by a media enterprise.<sup>105</sup>

6.9 We consider each of these points in turn below.

### ***Interpretation of a ‘media enterprise’ and ‘newspaper enterprise’***

6.10 Section 58A(1) to (3) states:

- (1) For the purposes of section 58 and this section an enterprise is a media enterprise if it consists in or involves broadcasting.

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<sup>101</sup> Briefing note for the Secretary of State, DCMS relating to ‘the announcement of our consultation on media ownership’, 23 November 2001, Annex B (cited in the Leveson Report, Volume 3, Part I, Chapter C, paragraph 5.12, (page 1,281 and submitted to the Leveson Inquiry as [Exhibit TJ13 to the witness statement of Tessa Jowell MP, 21 May 2012](#)).

<sup>102</sup> Section 58A(1) to (3).

<sup>103</sup> Section 58A(4).

<sup>104</sup> Section 58A(5).

<sup>105</sup> Section 58A(6) to (8).

(2) In the case of a merger situation in which at least one of the enterprises ceasing to be distinct consists in or involves broadcasting, the references in section 58(2C)(a) or this section to media enterprises include references to newspaper enterprises.

(3) In this Part ‘newspaper enterprise’ means an enterprise consisting in or involving the supply of newspapers.

- 6.11 Fox and Sky are both enterprises involved in broadcasting and, as set out in chapter 4, will cease to be distinct as a result of the Transaction. News Corp is an enterprise that is involved in the supply of newspapers and therefore, for the purposes of section 58(2C)(a) and section 58A, is to be considered a media enterprise.
- 6.12 We note that the statutory definition of media enterprise does not specifically include an enterprise that only consists of or involves online media related activities, ie one that provides content using the internet and is not involved in broadcasting or the supply of newspapers. The Parties and News Corp each have online media related activities, but fall within the statutory definition of media enterprise because they are also involved in either broadcasting or the supply of newspapers. However, we also took into account in our assessment the online activities of the Parties and News Corp – and those of other content providers. This reflects the fact that online is one of the main platforms for the delivery of content.<sup>106</sup>

### ***Legal framework for assessment of persons with control of the relevant media enterprises***

- 6.13 Section 58A(4) and (5) of the Act provides guidance relating to the number of media enterprises deemed to be serving a relevant audience and the treatment of who should be deemed to control relevant media enterprises.

#### *Media enterprises serving the same audience*

- 6.14 Section 58A(4) of the Act states:

Wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such

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<sup>106</sup> In that regard, we also note broad consensus that online distribution should be included in any assessment of media plurality. For example, see the recommendation of the Leveson Inquiry and the government’s response to its July 2013 consultation on media ownership and plurality (Leveson Inquiry, Part I, Chapter 9, paragraph 2.11, page 1,464; and DCMS, Media Ownership and Plurality Consultation Report, 6 August 2014, page 12). See also Appendix D.

enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards.

- 6.15 Section 58A(4) operates to ensure that in situations where a relevant merger situation arises from an increase in the level of existing control, eg from material influence to de facto control or from de facto control to a controlling interest, merging enterprises cannot argue that the added level of control makes no difference on the basis that there has been no change to the number of media enterprises serving a particular audience. This view is consistent with the position set out in the relevant Explanatory Notes,<sup>107</sup> the DTI Guidance,<sup>108</sup> and the Court of Appeal's judgment in BSkyB/ITV.<sup>109</sup>
- 6.16 The effect of section 58A(4) is that the assessment of the media plurality consideration should be conducted on the assumption that there were more media enterprises serving the relevant audience before the Transaction than there will be after the Transaction. We do not, however, consider that section 58A(4) creates a presumption that plurality is reduced by the Transaction. It is necessary to establish whether this is in fact the case on the basis of a substantive assessment of the impact of the Transaction.

#### *Treatment of persons with control of media enterprises*

- 6.17 Section 58A(5) of the Act states that:

For the purposes of section 58, where two or more media enterprises –

- (a) would fall to be treated as under common ownership or common control for the purposes of section 26, or

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<sup>107</sup> The Explanatory Notes to section 375 of CA03 (which inserted section 58A into the Act) state: 'New section 58A(4) makes clear that where a merger situation (ie a relevant merger situation or a special merger situation) involves two media enterprises serving the same audience, then there is deemed to be a reduction in the number of such media enterprises for the purposes of the plurality assessment in subsection (2C)(a). This means that all such mergers, including those involving an increase in levels of control of such media enterprises, may be scrutinised for the purposes of subsection (2C)(a), even though the number of enterprises may in fact be unchanged'.

<sup>108</sup> DTI, *Enterprise Act 2002: Public interest intervention in media merger: guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers* (May 2004). See paragraph 7.13 which states that clause 58A(4), 'means that the Secretary of State can assess whether, as a result of the merger, there will be a sufficient plurality of persons with control of enterprises serving the relevant audience even though the number of enterprises serving that audience may be unchanged'.

<sup>109</sup> See paragraph 93 which states that: 'section 58A(4) is a particular provision which is needed because ... the three different levels of control [under s26 of the Act] may mean that an enterprise, A, which already has the lowest level of control over another enterprise, B, so that they have ceased to be distinct, may gain an increased level of control. In that event B is again treated as being brought under the control of A and they cease to be distinct for a second time under section 26(1). Section 58A(4) precludes an argument that, because B is already under the control of A at the start, the added level of control makes no difference, and the number of enterprises serving the relevant audience is the same before and after the RMS'.

(b) are otherwise in the same ownership or under the same control

they shall be treated (subject to subsection (4)) as all under the control of only one person.

6.18 The Court of Appeal considered the statutory interpretation of section 58A(5) in detail in BSkyB/ITV, noting that this was ‘far from easy’ and observing that it was unsatisfactory that the terms of the Act should have been open to conflicting interpretations.<sup>110</sup> It held that:

whereas in reckoning the number of controllers of media enterprises for the purposes of section 58(2C)(a) only one controller is to be counted in respect of both or all of the relevant enterprises ..., nevertheless, when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the [CC] may, and should, **take into account the actual extent of the control exercised and exercisable** over a relevant enterprise by another, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control.<sup>111</sup> (emphasis added)

6.19 The Court of Appeal’s judgment made it clear that section 58A(5) applies to the calculation of the number of controllers of media enterprises serving the relevant audience. We therefore interpreted the statutory framework as permitting us to take into account, in our assessment of the media plurality consideration, those media enterprises serving the relevant audience over which the MFT has common material influence or control. The Parties did not dispute this.<sup>112</sup>

6.20 For the reasons given in chapter 7, we find that the MFT has material influence for the purposes of section 26 of the Act over Fox, Sky and News Corp. We are therefore permitted to take into account Fox, Sky and News Corp, to the extent that they serve the relevant audience, in our assessment of the media plurality consideration.

6.21 However, the Court of Appeal’s judgment made it clear that section 58A(5) does not have an overriding effect. This means that as part of our assessment of the sufficiency of plurality of persons with control of media enterprises following the Transaction, we are required to carry out a qualitative

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<sup>110</sup> Court of Appeal, BSkyB/ITV, paragraphs 119 and 123.

<sup>111</sup> Court of Appeal, BSkyB/ITV, paragraph 121.

<sup>112</sup> Fox [initial submission](#), paragraph 3.5.

assessment of the actual extent of control exercised and exercisable by a controller over the media enterprises it is deemed to control. We therefore did not base our assessment of the media plurality consideration on the premise that the MFT can be deemed to have full control over Fox, Sky and News Corp. In other words, we did not assume that the MFT, Fox, Sky and News Corp are to be treated as a single entity.

- 6.22 We therefore consider that for the Transaction to give rise to concerns in respect of the media plurality consideration it is necessary for there to be a material change in the actual extent of control exercised and exercisable by the MFT over Sky and Sky News<sup>113</sup> as a result of the Transaction.

### ***Interpretation of relevant audience***

- 6.23 Section 58A(6) to (8) of the Act provides guidance on the interpretation of 'audience' for the purpose of the media plurality consideration. This section gives us wide discretion in construing the relevant audience that we consider appropriate for our assessment of the Transaction. We conclude that for the purpose of our assessment the relevant audience is a single national audience for news and current affairs, without identifying particular subgroups, whether based on socio-economic or regional distinctions, as separate audiences.
- 6.24 While the Act does not limit the assessment of the media plurality consideration to a particular genre or type of content, we focused our assessment on the plurality of persons with control of media enterprises involved in news and current affairs. We did this on the basis that there is a broad consensus that this is appropriate and practicable, given that news and current affairs is the type of content that has most relevance to media plurality.<sup>114</sup> We consequently focused our assessment of plurality on Sky News as the broader range of wholly owned Sky channels do not carry news bulletins or regularly provide news or current affairs programming.<sup>115</sup> Our assessment of control took into account control exercised and exercisable over Sky and Sky News.
- 6.25 We took into account in our assessment news and current affairs content provided by media enterprises on TV, radio, online and in newspapers. As explained in paragraph 6.12, while we note that the media plurality

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<sup>113</sup> In relation to the focus on Sky News, see paragraph 6.24 .

<sup>114</sup> See, for example, the Leveson Report, Part I, Chapter 9, paragraph 2.8 (page 1,484); House of Lords Select Committee on Communication, *Report into media plurality*, 4 February 2014, paragraph 27; and DCMS response to the House of Lords Select Committee on Communications report into media plurality, 6 August 2014, page 12.

<sup>115</sup> A possible exception is Sky Sports News, a channel which provides dedicated sports news and current affairs content. We do not, however, consider sports news and current affairs to be within the focus of our assessment.

consideration does not refer to online-only media enterprises, we consider that the online provision of news and current affairs should be included in the assessment of the media plurality consideration.

## **Framework for the assessment of the extent of the MFT's control over Sky**

6.26 We set out in this section the basis for our approach to assessing:

- (a) the actual extent of the control exercised and exercisable by the MFT over Sky and Sky News following the Transaction; and
- (b) our consideration of the implications of 'internal plurality'.

### ***Actual extent of the MFT's control over Sky and Sky News***

6.27 We assessed the actual extent of control exercised and exercisable by the MFT over Sky and Sky News before the Transaction, and the impact of the Transaction on the extent of this control. This assessment is set out in chapters 7 and 8.

6.28 We consider that the extent of control exercisable by the MFT over Sky and Sky News currently and the extent of control exercisable by the MFT post Transaction are most relevant to our assessment. In our view, 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 over media enterprises, leading to an over-concentration of control in the hands of that person.

6.29 The Parties submitted that this is the incorrect legal approach.<sup>116</sup> They submitted that:

- (a) our approach to the assessment of the increase in the MFT's control over Sky and Sky News as a result of the Transaction fails to take into account the extent of control that will actually be **exercised** in practice by the MFT over Sky and Sky News post Transaction. In doing so we fail to undertake 'a broad assessment of the real or likely effect' **of the Transaction as required by the Court of Appeal's decision in BskyB v Competition Commission.**<sup>117</sup>

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<sup>116</sup> See in particular [Fox response to provisional findings](#), paragraphs 2.18 to 2.26 and [Sky response to provisional findings](#), paragraphs 3.1 to 3.9. These arguments are consistent with those raised by the Parties in response to our earlier working papers which were addressed in our [provisional findings](#).

<sup>117</sup> Court of Appeal, BskyB/ITV, paragraph 91.

- (b) the correct application of the test requires an assessment of the extent of control that would likely be exercised in practice. The Parties submitted that this requires the CMA to consider what is likely to happen on the balance of probabilities, having regard to the incentives of the relevant Parties, the practical constraints on the exercise of control, and the time period over which such control would be exercised. The need to assess the relevant Parties' post Transaction incentives is consistent with the general scheme of merger control in the UK; and
- (c) there is sufficient evidence on which to reach a conclusion, on the balance of probabilities, as to the actual extent of control that would likely be exercised by Fox and the MFT post Transaction. Specifically, the Parties submitted that neither Fox nor the MFT has to date sought to influence the content, strategy or editorial direction of Sky News and that neither Fox nor the MFT would exercise control over editorial matters at Sky News following the Transaction. This includes periods when James Murdoch was CEO and then Chairman of Sky. Rupert Murdoch has similarly never sought to influence the content, strategy or editorial direction of Sky News including when he held senior roles in Sky including as Chairman. In addition, there is a commercial interest for MFT in Sky News remaining impartial and independent, supported by economic analysis submitted by Fox and confirmed by the evidence given by a non-executive director of Fox (Viet Dinh) (see 7.69). All of which leads to the conclusion that neither the MFT, nor Fox, would exercise control over editorial matters at Sky News following the Transaction.

6.30 We consider that our approach, in taking into account the extent of exercisable control (both pre and post Transaction) is consistent with the scheme of the statute and the Court of Appeal's judgment in *BSkyB/ITV* (referred to earlier). Addressing in turn the Parties' submissions, as summarised above:

- (a) the Court of Appeal in *BSkyB/ITV* was, among other issues, concerned with whether the operation of Section 58A(5) of the Act meant (in that case) that BSkyB should 'deemed' as having full control of ITV, even though the practical reality was that BSkyB was acquiring a 17.9% share of ITV.<sup>118</sup> In that context, the Court of Appeal rejected the view that the assessment of the merger should proceed on the basis of a degree of control which BskyB did not actually have. Our analysis of control did not rely on the 'deeming' effect of section 58A(5) and was based on an

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<sup>118</sup> In circumstances where it was prevented from increasing that share beyond 20% this is discussed in paragraph 6.40.

assessment of the real and likely effect of the Transaction in terms of the MFT's ability to exercise control over Sky and Sky News;

- (b) the Court of Appeal did not state that the application of section 58(2C) of the Act requires the CMA to conclude, on the balance of probabilities, that the control a controller is able to exercise would be exercised in a particular way. Instead, the Court of Appeal held that the assessment 'should take into account the actual extent of control exercised and exercisable'.<sup>119</sup> In this regard, we note that the statutory scheme is designed to protect the public interest in maintaining a plurality of persons with control of media enterprises. We do not consider that a merger may be expected to operate against the public interest only where it is possible to conclude, on the balance of the evidence, how such control is likely to be exercised. The Parties' proposed interpretation would have the undesirable effect that a media plurality concern would not arise in circumstances where a transaction established a single controller of media enterprises serving a particular audience but where it was not possible to conclude at the point of a reference, that the relevant controller would have the incentives (or a commercial interest) to exercise that control, or to exercise it in a particular way, in the future.

The present context is different from a competition review, where the CMA is required to conclude on the balance of probabilities whether a merger is expected to result in a particular outcome, namely a substantial lessening of competition (SLC). As the purpose of reviewing mergers on public interest grounds, taking account of the media plurality consideration, and the terms in which the statutory scheme is expressed, are both different from a competition review, we did not consider that it was necessary to take the same approach as in a competition case nor that an assessment of the Parties' incentives should play the same part as it may do in a competition review; and

- (c) we disagree with the Parties' submissions that there is sufficient evidence on which we could form a judgement of Fox and the MFT's post Transaction incentives with respect to exercising control over Sky News. Our assessment of the evidence is set out in chapter 8. In any event, our view is that 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, leading to an over-concentration of control of media enterprises in the hands of that person. The fact that a

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<sup>119</sup> Court of Appeal, BSKyB/ITV, paragraph 121.

controller (as presently constituted and taking into account the actual control it has historically exercised) advances a position that it will not, or does not intend to, exercise that control post transaction is not determinative of that concern.<sup>120</sup> The way the MFT has exercised control over Sky and Sky News prior to the Transaction is not determinative of its future behaviour.

- 6.31 We consider that our approach as outlined in paragraph 6.28 properly reflects the purpose and content of the media plurality consideration, which seeks to guard against the potentially harmful effects of the control of media enterprises being overly concentrated in the hands of a limited number of persons and the fact that it would be a concern for any one person to control too much of the media.<sup>121</sup> We therefore assessed whether the Transaction will result in the MFT being able to exercise a greater degree of control, subject to any constraints in that control, which we consider in chapter 8. The fact that the MFT states that, as has been its past practice, it does not intend to exercise control after the Transaction, is not conclusive. We must assess the MFT's ability, rather than its current declared intentions, to exercise a greater degree of control in the future, bearing in mind that the regulatory scrutiny is now, rather than an ongoing assessment.
- 6.32 Furthermore, we consider that it is relevant that an assessment of the kind we have carried out can only be triggered by an intervention in relation to a merger, whereas the qualitative assessment required is not restricted to the extent of control likely to be exercised in the period immediately post Transaction. Subject to the constraints identified by the Parties and discussed below in chapters 7 and 8, any assessment of what control will be exercisable post Transaction must properly take into account the ability of the MFT to increase the degree of control actually exercised over Sky and Sky News in the future.
- 6.33 We consider that the statute, as construed by the Court of Appeal in BSkyB/ITV, takes account of the fact that it would not be possible to review the implications for media plurality arising from any such increase in the control actually exercised (as it would not be subject to regulatory scrutiny). We consider the approach adopted by the statute reflects the fact that: (i) parliament attached considerable importance to the preservation of sufficient

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<sup>120</sup> As stated by Lord McIntosh (then parliamentary Under-Secretary of State for Broadcasting at DCMS) in the House of Lords debates during the passage of the Communications Bill through parliament: 'Media plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any one person to control too much of the media because of his or her ability to influence opinions and set influence the political agenda' (See [Hansard House of Lords debates, 2 July 2003, Cols 912-913](#)).

<sup>121</sup> [Explanatory Notes to section 375 of CA03](#) and [DTI Guidance](#), paragraph 7.7. The Court of Appeal also stated that 'the criterion of sufficiency, for this purpose, seems to be the need to avoid over-concentration of the market' (Court of Appeal, BSkyB/ITV, paragraph 88).

plurality of media controllers in order to avoid an over-concentration of media enterprises in the hands of a limited number of persons; (ii) sufficiency is not subject to continual regulatory scrutiny; and (iii) if sufficiency of plurality is lost, it may be difficult or impossible to restore. In those circumstances, the analysis of the sufficiency of plurality must properly take into account the potentially adverse effects of such an over-concentration as a result of the extent of control, whether formal or informal, which is exercisable post transaction.

- 6.34 As explained in paragraph 6.21, we did not focus disproportionately or place weight upon levels of control which we regard as merely theoretical or ‘hypothetically exercisable’, as Sky’s submission suggests.<sup>122</sup> Our assessment of the level of control that the MFT will be able to exercise in practice and the evidence that underpins that assessment is set out in paragraphs 7 and 8. In considering this issue, we took account of evidence and submissions which were put to us about how any additional control acquired is likely to be exercised in the present case. At the same time, however, for the reasons given from paragraph 6.30, we do not consider that a merger may only be expected to operate against the public interest where it is possible to conclude, on the balance of evidence, that control is likely to be exercised (or to be exercised in a particular way).
- 6.35 In carrying out our assessment, we took account of the fact that the level of control currently exercised by the MFT over Sky and Sky News may be less than the level of control that is currently exercisable. We note that in such circumstances, comparing the extent of control currently exercised with the extent of control exercisable post Transaction would exaggerate the degree of change in control brought about by the Transaction. As set out in chapter 7, we also compared the extent of control currently exercisable by the MFT over Sky and Sky News with the extent of control exercisable by the MFT over Sky and Sky News following the Transaction.

### ***Approach to ‘internal plurality’***

- 6.36 While noting that the concern the statute seeks to guard against is the control of media enterprises being over-concentrated in the hands of a limited number of persons, we also took account of ‘internal plurality’ in our assessment. The Court of Appeal’s judgment in BSkyB/ITV noted that the CC had considered that it was proper and necessary to have regard to the actual degree of control exercised by one media enterprise over another. The Court of Appeal explained the CC’s approach in the following terms: ‘if the control

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<sup>122</sup> [Sky response to provisional findings](#), paragraph 1.52A.

was less than complete, and if in practice it would not enable the controlling enterprise to dominate the policy and output of the controlled enterprise, that was something that should be taken into account'.<sup>123</sup> The concept of internal plurality describes the range of information and views that are provided within individual media enterprises, in contrast to 'external plurality', which relates to the range of information and views that are provided across separate independent media enterprises. In this context, our consideration of internal plurality included the effects of the internal governance in place within the relevant media enterprises, the culture of newsrooms, audience expectations, and the impartiality rules in the Broadcasting Code.

6.37 The concept of internal plurality in relation to the media plurality consideration was considered by the courts in the context of the BSkyB/ITV transaction:

- (a) the CC in BSkyB/ITV considered that it was appropriate to distinguish between external plurality and internal plurality;<sup>124</sup>
- (b) the Competition Appeal Tribunal (CAT) disagreed, referring to the fact that '[i]t would hardly be surprising if parliament, desiring to ensure more than short term protection, took an approach to sufficiency of plurality of media ownership which discounted possibly ephemeral concepts such as 'internal plurality' which may be dependent upon the degree of control remaining static'.<sup>125</sup> The CAT therefore found that the CC had misdirected itself by taking into account irrelevant considerations: 'namely the degree of control which Sky was in fact able to exercise over ITV, together with what the [CC] called the "internal plurality" or range of information and views provided from within media enterprises';<sup>126</sup> and
- (c) the Court of Appeal, in overturning the CAT's judgment in relation to the assessment of the degree of control which Sky was in fact able to exercise over ITV, noted that it was a 'fair comment that what the [CC] called internal plurality could possibly be reduced in practice without an event occurring which triggered a change in the level of control or deemed control'.<sup>127</sup> However, it further stated that:

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<sup>123</sup> Court of Appeal, BSkyB/ITV, paragraph 80. This paragraph of the Court of Appeal's judgment in BSkyB/ITV is cited in the [Merger assessment guidelines \(OFT1254/CC2\)](#) at paragraph 6.1.14, which itself is intended to reflect the Court of Appeal's judgment.

<sup>124</sup> Competition Commission, BSkyB/ITV, paragraph 5.11.

<sup>125</sup> British Sky Broadcasting Group plc v The Competition Commission [2008] CAT 25, judgment of 29 September 2008, paragraph 263.

<sup>126</sup> British Sky Broadcasting Group plc v The Competition Commission [2008] CAT 25, judgment of 29 September 2008, paragraph 263.

<sup>127</sup> Court of Appeal, BSkyB/ITV, paragraph 104.

where the internal plurality exists despite the merger because one media enterprise has material influence over another, but no more, and the other is largely able to pursue its own independent policy and strategy as regards broadcasting style and content, it is not clear that there is a real risk of significant change in the degree of internal plurality short of an increase in the level of control which, in the present case, cannot happen because of the 20/20 rule.<sup>128</sup>

6.38 We consider that internal plurality is a relevant consideration to take account of in our assessment of the impact of the Transaction, and we have had regard to this in chapter 8. However, for the reasons given in paragraphs 6.27 to 6.35, we considered that we should attach the most weight to the degree of control which would be exercisable by the MFT over Sky and Sky News following the Transaction when assessing:

- (a) the impact of the various constraints and safeguards identified by the Parties (including the resolution that the Fox board passed relating to the governance of Sky News, the culture of the Sky News newsroom, audience expectations and the impartiality requirements of the Broadcasting Code); and
- (b) whether evidence of historic internal plurality within the media enterprises controlled by the MFT mitigates the concerns we identified in our assessment.

6.39 In that regard, we note:

- (a) the CAT's view about the possibility of creeping influence over time and the fact that editorial independence may well be susceptible to change;<sup>129</sup> and
- (b) that, in relation to the CAT's concern, the Court of Appeal stated that where this possibility might exist we are entitled to take it into account in considering the sufficiency of plurality of persons with control of media enterprises.<sup>130</sup>

6.40 We also consider that the specific facts of BSkyB's acquisition of 17.9% of ITV were significantly different from the circumstances in the Transaction,

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<sup>128</sup> Court of Appeal, BSkyB/ITV, paragraph 104.

<sup>129</sup> British Sky Broadcasting Group plc v The Competition Commission [2008] CAT 25, judgment of 29 September 2008, paragraph 263.

<sup>130</sup> Court of Appeal, BSkyB/ITV, paragraph 122.

meaning that there was limited risk of there being a significant change in the degree of internal plurality. In particular, it was highly relevant to the CC's assessment and the Court of Appeal's judgment that the 20/20 rule capped the ability of BSkyB to build up a significantly larger stake in ITV.<sup>131</sup> It was also relevant that ITV contracted out its news programming to ITN and that the transaction did not give BSkyB the ability to exert significant commercial influence over ITV's news output or more widely over ITN.<sup>132</sup>

## **Framework for assessment of the impact of the Transaction on plurality and the sufficiency of that plurality**

- 6.41 The Act does not provide any guidance on what is meant by the phrase 'sufficient plurality of persons with control of ... media enterprises', how to approach answering the question of 'sufficiency' or when a merger may be expected to operate against the public interest in this context.
- 6.42 We considered the limited guidance available, including the Explanatory Notes to section 375 of CA03 and the DTI Guidance, as well as the CC's report in BSkyB/ITV and the subsequent judgments of the CAT and the Court of Appeal in that case. We also considered the debates in parliament at the time the media plurality consideration was enacted, and subsequent deliberations on the question of media plurality by the Leveson Inquiry, Ofcom, parliament, and the government.
- 6.43 The judgment of the Court of Appeal in BSkyB/ITV made it clear that the assessment of plurality requires a qualitative assessment of the position likely to result from the Transaction.<sup>133</sup> It is also clear from that judgment that we are required to consider whether following the Transaction the persons with control of media enterprises serving audiences in the UK, in terms of the number and also of the range and variety of those persons, satisfy the requirement of sufficient plurality.<sup>134</sup>
- 6.44 We note that in the present context the MFT already has material influence over Sky and Sky News. Accordingly, in assessing the question of 'sufficiency of plurality', we took into account the impact on plurality arising from the increased extent of the control (both formal and informal) the MFT will be able to exercise over Sky and Sky News following the Transaction, adopting an approach that considered:

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<sup>131</sup> Court of Appeal, BSkyB/ITV, paragraph 104.

<sup>132</sup> Competition Commission, BSkyB/ITV, paragraphs 5.55 and 5.74.

<sup>133</sup> Court of Appeal, BSkyB/ITV, paragraph 118.

<sup>134</sup> Court of Appeal, BSkyB/ITV, paragraphs 88 and 114.

- (a) the impact of the Transaction on the existing plurality of persons with control of media enterprises; and
- (b) if there is a reduction in that plurality as a result of the Transaction, whether the plurality of persons with control of media enterprises will be sufficient following the Transaction.

### ***Assessing the impact of the Transaction on media plurality***

6.45 We took Ofcom's media plurality measurement framework (the Ofcom measurement framework) as our starting point for assessing the impact of the Transaction on the level of plurality.<sup>135</sup> We used this as a basis for assessing whether the Transaction might lead to harm from a reduction in plurality of persons with control of media enterprises.

#### *Potential harm from the loss of media plurality*

6.46 Ofcom identifies two related strands to the meaning of plurality:

- (a) ensuring that there is a diversity in the viewpoints that are available and consumed, across and within media enterprises; and
- (b) preventing any one media owner, or voice, having too much influence over public opinion and the political agenda.<sup>136</sup>

6.47 We considered that Ofcom's definition provides a helpful way of framing the potential harm to media plurality that might result from the Transaction and a basis for our assessment of the media plurality consideration.<sup>137</sup>

6.48 The first potential effect is that the Transaction reduces the diversity of viewpoints available to and consumed by members of the public.

6.49 The specific concern in this case is the degree to which the Transaction might reduce the independence of Sky's news and current affairs content, and the extent to which this could lead to a reduction in the diversity of viewpoints across the news and current affairs offerings operated by the media enterprises controlled by the MFT, including Sky News, The Sun, The Sun on Sunday, The Times, and The Sunday Times.

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<sup>135</sup> In September 2014, the Secretary of State for Culture, Media, and Sport asked Ofcom to carry out work on a set of indicators to inform a measurement framework for media plurality. Ofcom published its media plurality measurement framework for news and current affairs in November 2015.

<sup>136</sup> Ofcom, November 2015, [Measurement framework for media plurality](#).

<sup>137</sup> For background on the development of the Ofcom measurement framework see Appendix D.

- 6.50 Concerns about a reduction in diversity might arise, in particular, if the increased control that the MFT will be able to exercise over Sky following the Transaction means that the news and current affairs offerings operated by Sky and News Corp could pursue similar editorial positions or story selection following the Transaction. For example, the Transaction might make it more likely that Sky News and the newspapers owned by News Corp could take a coordinated approach on specific topics or issues, push certain stories, or downplay others. These concerns do not rely on full editorial alignment, but rather the potential for increased editorial alignment.
- 6.51 The second potential effect is that the Transaction could increase the influence of the MFT, and by proxy, the Murdoch family on public opinion and the political agenda.
- 6.52 The specific concern is that the Transaction could give the MFT greater control over Sky News, and that, in combination with its existing control over News Corp's newspaper titles, this could lead to too much influence over public opinion and the political agenda.
- 6.53 These two potential effects are closely linked. For example, if the Transaction were to increase the MFT's control over Sky News, this could translate into a reduction in the diversity of viewpoints consumed by the public as a result of the MFT's increased control of Sky News and its existing control over News Corp. Equally, the increased consumption might be expected to increase the ability of the MFT to influence public opinion and the political agenda.
- 6.54 Using both of these theories of harm as a basis for framing our analysis, we considered in the round whether the evidence obtained during our Inquiry indicates that the Transaction is likely to lead to a material reduction in the plurality of persons with control of media enterprises.

#### *Ofcom measurement framework*

- 6.55 Ofcom's measurement framework provided a starting point for developing our own framework for assessing the impact of the Transaction on plurality, and more specifically the theories of harm noted earlier.
- 6.56 The Ofcom measurement framework consists of three categories of quantitative metrics as well as qualitative contextual factors. Within the framework, all forms of media including TV, print, radio, and online are considered.
- 6.57 The quantitative metrics in the Ofcom measurement framework relate to availability, consumption, and impact:

- (a) **availability**: measures the number of providers available at the point of consumption. Ofcom stated that an understanding of the number of sources that people could use is relevant to any assessment, but is insufficient in isolation as it does not recognise the levels of consumption or the ability to influence that each source will have;
- (b) **consumption**: measures the number of people using news sources (referred to as 'reach'), the frequency with which these sources are used and the time spent using them. Ofcom noted that news consumption occurs across a range of media and, as such, consumption should be measured both using sector-specific measures (eg measures of consumption of TV use) and on a cross-media basis. For the latter, Ofcom developed a bespoke 'share of reference' measure of cross-media consumption;
- (c) **impact**: helps inform how news content can influence the formation of people's opinions. Ofcom noted that while quantifying impact is complex, proxies of impact (such as measures of importance and trust) should play a role in an assessment of plurality.

6.58 Ofcom made explicit in its measurement framework that while helpful in assessing plurality, using a cross-media metric of consumption (such as its share of reference metric) has its limitations. It therefore considered that no one metric can be used in isolation and such measures should be used in combination to achieve the best quantitative assessment.<sup>138</sup> Ofcom also considered that 'qualitative contextual factors' are an integral part of its framework, stating that 'there are aspects of the market that cannot be measured in a quantitative manner at all. These aspects relate to the differences between news sources and the organisations that produce them'.<sup>139</sup> Ofcom stated that such qualitative contextual factors are relevant as the operating environment can vary between news sources and news providers. For example, funding models can vary (for example, between public funding and subscription models), the level of editorial control can vary (with, for example, certain proprietors having more or less control), or the level of regulation and oversight can vary (with broadcasters being subject to the Broadcasting Code and the BBC having its own regulatory processes and compliance arrangements).<sup>140</sup>

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<sup>138</sup> [Ofcom measurement framework](#), paragraph 1.19.

<sup>139</sup> [Ofcom measurement framework](#), paragraph 1.20.

<sup>140</sup> [Ofcom measurement framework](#), paragraphs 3.15 to 3.19.

- 6.59 The measurement framework was subject to extensive public consultation by Ofcom before its publication in 2015.<sup>141</sup> This consultation was therefore carried out before the start of our Inquiry and allowed Ofcom to take account of a range of views before deciding on its approach.
- 6.60 In response to Ofcom's consultation on its measurement framework, Fox noted that quantitative measures are not sufficient in measuring plurality, and as such, contextual factors also need to be considered.<sup>142</sup> Sky submitted that measures of availability are most relevant to an assessment of plurality.<sup>143</sup>
- 6.61 In the course of our Inquiry we spoke to a range of third parties about the appropriate measurement framework to use in carrying out our assessment. A number of third parties noted that Ofcom had spent several years developing its thinking on its measurement framework.<sup>144</sup> Most third parties agreed that the Ofcom measurement framework was the only practical measurement framework available for media plurality, noting that in considering availability, consumption, impact and contextual factors, the framework captures most of the relevant factors.<sup>145</sup> However, third parties cautioned that there was judgement required in interpreting the Ofcom measurement framework and that it is not sufficient for our analysis,<sup>146</sup> that there are difficulties in trying to combine consumption metrics,<sup>147</sup> and that qualitative concerns are an important consideration.<sup>148</sup>
- 6.62 Given the work conducted by Ofcom relating to its measurement framework and comments from third parties during our Inquiry, we consider that the Ofcom measurement framework provided an appropriate starting point for developing our own framework for assessing the media plurality consideration, particularly in terms of quantitative evidence relating to availability and consumption. We agree with Ofcom that there are aspects of the market that cannot be measured in a quantitative manner, and note that what it describes as 'qualitative contextual factors' are integral to any overall assessment.
- 6.63 In particular, we consider that a distinction should be drawn between (i) contextual factors that provide background to inform the availability, consumption and impact metrics, and (ii) qualitative evidence, being evidence that is relevant to our assessment and is not easily quantifiable. Both are

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<sup>141</sup> [Ofcom measurement framework](#), paragraph 1.14.

<sup>142</sup> Fox (December 2014) [Response to Ofcom's call for inputs on a measurement framework for media plurality](#).

<sup>143</sup> Sky (November 2014) [Response to Ofcom's call for inputs on a media plurality measurement framework](#).

<sup>144</sup> For example, comments by [Matthew Horsman at the media plurality roundtable](#), transcript page 11, line 2.

<sup>145</sup> For example, comments by [David Levy at the media plurality roundtable](#), transcript page 9, line 13.

<sup>146</sup> For example, comments by [Alice Enders at the media plurality roundtable](#), transcript page 13, line 6.

<sup>147</sup> For example, comments by [David Elstein at the media plurality roundtable](#), transcript page 8, line 24.

<sup>148</sup> For example, comments by [David Levy at the media plurality roundtable](#), transcript page 10, line 17.

important, and our view is that taking into account a range of relevant qualitative evidence forms a key part of our assessment of the media plurality consideration, particularly in terms of the aspects of plurality that are inherently difficult to measure, such as the impact and influence of particular media providers on public opinion and the political agenda.

- 6.64 Ofcom noted that the consumption of a range of sources reduces the potential for any one media owner to exercise too much influence over public opinion and the political process. The report also noted that, even in an environment where a range of news sources is consumed, some news providers have more impact on audiences than others, and that considering the impact of different news sources was therefore an important part of assessing plurality.<sup>149</sup> We undertook a separate and more direct assessment of influence to reach a more complete understanding of the degree to which any media owner has influence over public opinion and the political agenda, or whether there is sufficient diversity of views such that any influence is mitigated.

### ***Assessing whether media plurality remains sufficient***

- 6.65 We are also required to consider whether, if there is a material reduction in media plurality arising as a result of the Transaction, the plurality of persons with control of media enterprises nonetheless remains sufficient.

### ***Consideration of when media plurality may be considered insufficient***

- 6.66 There is very limited guidance or consensus regarding what constitutes a sufficient plurality of persons with control of media enterprises. The lack of consensus was reflected in the submissions we received during the course of our Inquiry and in the views expressed during the expert roundtable on media plurality.<sup>150</sup> Ofcom's view at the time it developed its measurement framework was that ultimately this question was a matter to be determined by government and parliament.<sup>151</sup>

- 6.67 We reviewed the available guidance and a range of other sources, including statements made that the media plurality consideration:

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<sup>149</sup> In this context, we note that paragraph 2.2 of the [Ofcom measurement framework partly defines plurality as](#) '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.' We note that 'so high' is not synonymous with 'very high', but rather that the share of consumption is high enough such that media plurality is insufficient.

<sup>150</sup> [Ofcom measurement framework](#), paragraph 2.9.

<sup>151</sup> [Ofcom measurement framework](#), paragraph 2.9.

- (a) is concerned primarily with ensuring that ownership of media enterprises is not over-concentrated in the hands of a limited number of persons;<sup>152</sup>
- (b) is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality;<sup>153</sup> and
- (c) in requiring there to be a sufficient plurality of persons with control of media enterprises, the criterion of sufficiency, for this purpose, seems to be the need to avoid over-concentration of the market.<sup>154</sup>

6.68 The Parties submitted that the DTI Guidance indicates that the threshold for identifying plurality concerns is a high one and that whether the Transaction will result in an unacceptable level of media and cross-media dominance is the test that should be applied when considering the statutory question that we must answer, ie whether the Transaction will result in insufficient plurality.

6.69 We agree that, because the purpose of the media plurality consideration is to ensure that the control of media enterprises is not over-concentrated in the hands of a limited number of persons, it is therefore intended to prevent media and cross-media dominance and ensure a minimum level of plurality. However, we disagree with the Parties' characterisation of the DTI Guidance as indicating that the threshold for identifying plurality concerns is a 'high one'.

6.70 Our view is that, in the context of assessing whether the plurality of persons is sufficient, it is important to not read into the terms such as 'over-concentration' and 'dominance' used in the DTI Guidance, the understanding or interpretation that would be applied when measuring competition in a market in order to identify an SLC or for other purposes such as Article 102 or the Chapter II Prohibition. This is because 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.<sup>155</sup> It follows from this that parliament attached considerable importance to the preservation of plurality of media controllers and it is in that context that the purpose of the media plurality consideration should be viewed.

6.71 Under the present statutory scheme, we consider that the concepts of concentration or dominance should be interpreted with reference to the two

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<sup>152</sup> [Explanatory Notes to section 375 of CA03](#).

<sup>153</sup> [DTI Guidance](#), paragraph 7.7.

<sup>154</sup> Court of Appeal, [BSkyB/ITV](#), paragraph 88.

<sup>155</sup> See, for example, Lord McIntosh's speech during the passage of the Communications Bill in 2003, [Hansard \(HL Debates\)](#), 2 July 2003, [Cols 912 to 913](#). See also Appendix D, paragraph 9.

key aspects of our framework for assessing the media plurality consideration, that is the extent to which any one person:

- (a) has control of the diverse viewpoints that are available and consumed across and within media enterprises; and
- (b) can influence public opinion and the political agenda.

6.72 In this context, we 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. This view is based on our review of the evidence we obtained and, particularly, the fact that parliament was clearly mindful of the importance and sensitivity of ensuring a sufficient level of plurality in order to support a healthy and informed democratic society when it included specific statutory provisions over and above existing competition law to safeguard plurality.

6.73 In that regard, we note that Lord Justice Leveson stated in the Leveson Inquiry – based on his hearing of evidence relating to plurality and media ownership – that the importance of plurality of news and current affairs provision is a qualitatively different issue to those arising from general competition concerns.<sup>156</sup> Lord Justice Leveson therefore recommended 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.<sup>157</sup> We agree with the view that Lord Justice Leveson expressed in making this recommendation.

6.74 The Parties objected to the weight placed, by us, on the statements and recommendations made by Lord Justice Leveson. They submitted that the remit of the Leveson Inquiry was to address the different question of the culture, practice and ethics of the press, rather than a detailed review of plurality and media ownership issues and, as acknowledged by Lord Justice Leveson himself, that he was neither qualified or required to give a view on what level of plurality would give rise to concerns.<sup>158</sup>

6.75 We agree that the remit of the Leveson Inquiry was broad and that it arose from concerns regarding the press. Nonetheless, the terms of reference for the Leveson Inquiry specifically required it to look into the relationships between the press and politicians, and it took account of a comprehensive range of evidence from politicians, officials, journalists and media owners

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<sup>156</sup> [Leveson Report](#), Volume 3, Chapter 1, paragraph 4.19, page 1,470.

<sup>157</sup> [Leveson Report](#), Volume 3, Chapter 1, paragraph 4.19, page 1,470.

<sup>158</sup> [Leveson Report](#), Volume 3, Chapter 1, paragraph 1.1, page 1,461 and paragraph 4.19, page 1,470.

(including Rupert and James Murdoch) in reaching its conclusions in this regard. We also consider it relevant that Lord Justice Leveson was specifically required to make recommendations for a more effective regulatory regime which supported, among other things, the plurality of the media and how future concerns about cross-media ownership should be dealt with.<sup>159</sup>

Furthermore, in response to the Parties' point about Lord Justice Leveson's acknowledgement of his lack of qualification in relation to plurality, we note that he made this comment in relation to giving a view on the specific levels of the various metrics that he considered it would be sensible for Ofcom to identify through consultation, not to suggest that he was not qualified to conclude that plurality concerns would be observed at lower levels of concentration than competition concerns.<sup>160</sup>

- 6.76 In addition to these observations about the levels of concentration in the market on a quantitative basis, we considered the sufficiency of plurality with reference to qualitative factors, such as the range of platforms over which a person has control, and the significance of those platforms (for example the position of traditional media such as newspapers and TV as against online news).

#### *Consideration of the relevance of a historic benchmark*

- 6.77 The Parties submitted that our assessment of what constitutes 'sufficient plurality' should be set by reference to a historic benchmark when plurality may be deemed to have been sufficient, such as in 2003 when the CA03 was enacted. In particular, Fox suggested that it is implausible that parliament considered media plurality to be insufficient when passing legislation that relaxed controls on media ownership and, particularly, cross-media ownership.<sup>161</sup> Third party submissions, including those from the Rt. Hon Ed Miliband, the Rt. Hon Kenneth Clarke, Sir Vince Cable and Lord Falconer (Ed Miliband et al) and Avaaz, did not support such an approach, outlining that there have been significant changes in the market since that time, making comparisons between 2003 and the present difficult, and that it was equally plausible that at least some MPs may have voted for the enactment of CA03 even if they did not consider plurality to be sufficient at that time.<sup>162</sup>
- 6.78 Sky submitted that an approach that presumes that the cross-media ownership of TV and newspaper assets per se raises concerns is incorrect, as the simple addition of TV news to newspapers has no bearing on whether the

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<sup>159</sup> [Leveson Inquiry, Terms of reference](#).

<sup>160</sup> [Leveson Report](#), Volume 3, Chapter 1, paragraph 4.19, page 1,470.

<sup>161</sup> [Fox initial submission](#), paragraph 3.14.

<sup>162</sup> [Transcript of hearing with politicians](#).

Transaction will result in ‘unacceptable levels of media and cross-media dominance’. As explained previously, we do not consider that the reference to ‘unacceptable levels of media and cross-media dominance’ in the DTI Guidance should be equated with the concept of dominance in a competition context, and that plurality concerns may arise at a lower level of concentration. However, we agree that the combination of TV and newspaper assets does not in and of itself necessarily mean that there is a plurality concern. As set out previously, any assessment carried out in relation to the media plurality consideration is on a case by case basis, meaning that we have focused on assessing whether any concerns may arise in relation to the control exercised and exercisable over the specific TV and newspaper assets relevant to the Transaction. We cannot therefore draw any lessons for this Inquiry, as Sky submitted we should, from the fact that there was no public interest intervention made in relation to Northern and Shell’s acquisition of Channel 5 in 2010. That was a matter for the Secretary of State to intervene in at the relevant time by reference to the particular facts of that merger.<sup>163</sup>

6.79 We note that in its advice to the Secretary of State in 2012 regarding media plurality, Ofcom stated that:

it is unrealistic to seek an absolute statutory definition of sufficiency, as the market is dynamic and unpredictable. What is considered sufficient or not will vary with time and needs to be considered in reference to the broad market and political context of the times. Notions of sufficiency today are likely to be somewhat different from those of ten years ago, or ten years hence.<sup>164</sup>

6.80 We agree with Ofcom on this point. We therefore considered that it is not appropriate to undertake our assessment of the media plurality consideration against a particular historic benchmark on the basis that this assessment needs to be undertaken by reference to the current market and political context, particularly given the developments in media and communications over recent years.

#### *Our approach to assessing sufficiency*

6.81 In light of the earlier considerations, we considered that it is appropriate to take an approach to the assessment of the media plurality consideration that takes into account a range of evidence – both quantitative and qualitative –

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<sup>163</sup> We note that Northern and Shell has since sold Channel 5 to Viacom in 2014.

<sup>164</sup> Ofcom (June 2012) *Measuring media plurality, advice to the Secretary of State for Culture, Olympics, Media and Sport*, paragraph 5.118. See also Appendix D, paragraph 31.

and considers that evidence in the round in order to inform our view on whether the plurality of persons with control of media enterprises is likely to be sufficient post Transaction, having regard to any change in plurality that arises as a result of the Transaction.

- 6.82 While there is a lack of consensus about precisely what level of plurality of persons should be considered insufficient, we consider that any such level is likely to be lower than equivalent measures of dominance or concentration that may be used in the context of a competition assessment.
- 6.83 As set out above, we carefully considered whether it would be possible to determine a threshold at which plurality might be deemed insufficient. However, we do not believe that there is a set of quantitative indicators which could adequately capture the intention of the media plurality consideration and be applied across the range of cases which may arise. In the present case, the assessment of sufficiency following the Transaction depends on how the MFT's control and influence may change taking into account its control of a number of platforms considered both separately and together. Any reference under the media plurality consideration needs to be considered on its individual facts and merits, and we did not identify a single threshold for sufficiency which would enable us to assess cases in general or the present case in particular.
- 6.84 Instead of specifying a certain threshold at which plurality would become insufficient, we considered it more appropriate to assess directly whether the Transaction is likely to lead to an insufficient plurality of persons with control of media enterprises taking account both the existing position (including the position of the MFT) and the change resulting from the Transaction. We assessed sufficiency following the Transaction in relation to two key factors, having considered the range of qualitative and quantitative evidence in the round:
- (a) the MFT's position, following the Transaction, as the person with control of News Corp and increased control of Sky and Sky News in relation to the two core elements of plurality – the diversity of the viewpoints consumed, and ability to influence public opinion and the political agenda. In this context, we have considered the availability, consumption and impact of the viewpoints over which the MFT has control; and the strength of the MFT's influence over public opinion and the political agenda;
  - (b) the wider context of other media enterprises serving the relevant audience. In this context, we have considered the alternative viewpoints provided by other media enterprises, and the extent to which an increase

in the degree of influence of the MFT might be mitigated or moderated by other media enterprises.

- 6.85 We note that Ofcom's measurement framework provided a basis for assessing both these elements, because it allowed us to compare the position of the MFT following the Transaction with that of other media enterprises (and persons with control of those other media enterprises). In our analysis we set out the measures of availability, consumption and impact for Sky and News Corp and compared these with equivalent metrics for other media enterprises serving the relevant audience, while also taking account of relevant qualitative evidence.
- 6.86 We found it important in our assessment to consider the extent to which recent developments (including the growth of online news) have reduced or increased the level of plurality. However, it would not be appropriate – given the inherent uncertainty of doing so – for us to speculate on possible ways in which plurality might change in the future.

### ***Structure of our assessment under the framework***

- 6.87 In chapters 7 and 8, we set out our conclusions regarding the extent of control exercised and exercisable by the MFT over Fox, Sky/Sky News and News Corp and the change brought about by the Transaction, taking into account internal plurality. After considering the UK news landscape in chapter 9 we set out our assessment of the impact of the Transaction, using the framework of the two theories of harm described previously and outlining the position of the Parties and News Corp pre and post Transaction and how this compares with other media enterprises serving the relevant audience (chapters 10 and 11). We then set out our assessment of whether there is likely to be sufficient plurality of persons with control of media enterprises serving the relevant audience (chapter 12) in the concluding chapter on the media plurality consideration, applying the framework set out earlier and having taken into account all the evidence in the round.<sup>165</sup>

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<sup>165</sup> We note that we received submissions from Lord Puttnam raising concerns regarding the potential misuse of data relating to Sky's subscriber base in order to increase political influence. We also note that the [Secretary of State's letter to the Parties dated 20 September 2017](#) referred to the fact that we may wish to consider whether this could be relevant to our plurality assessment. We considered this point and conclude that while relevant to a competition assessment (which the European Commission has carried out) we do not consider that it is directly relevant to the media plurality consideration (or broadcasting standards consideration). We also note that, in any event, personal data held by Sky about its customers must be processed in accordance with the Data Protection Act 1998 and that the Information Commissioner has powers to take enforcement action against data controllers that breach that legislation.

## 7. Assessment of the MFT's control over Fox, Sky and News Corp

7.1 For the reasons given in paragraph 6.21 and in accordance with the approach set out in paragraph 6.26 onwards we set out in sections 7 and 8 our assessment of:

(a) the actual extent of control exercised and exercisable by the MFT over each of Fox and News Corp, noting that the extent of this control is not affected by the Transaction; and

(b) the actual extent of control exercised and exercisable by the MFT over Sky and Sky News before the Transaction and the impact of the Transaction on the extent of this control.

7.2 Our assessment of the MFT's control set out in this section therefore needs to be read in conjunction with our assessment of internal plurality and other potential constraints on control set out in the next section - that is, Fox's board resolution, the culture of the Sky News newsroom, audience expectation of Sky News and the Broadcasting Code restrictions. We also took into account the diversity of editorial output within News UK. This allowed us to conclude on the change in the actual extent of control of Sky and Sky News exercisable by the MFT brought about by the Transaction, having proper regard to the level of control that the MFT will be able to exercise in practice.

7.3 We preface this by setting out how we treat the MFT and its relationship with Rupert, Lachlan and James Murdoch for the purpose of our assessment. This relied on our factual assessment of that relationship.

### How we treat the MFT

7.4 As described above, the MFT acts through its sole trustee, Cruden Financial Services LLC (Cruden). The affairs of the MFT are controlled by Cruden, which is, in turn, controlled by the votes of its six directors. [REDACTED] of the directors are appointed by [REDACTED]. [REDACTED] of the [REDACTED]. Each director must act in the best interests of Cruden and, consistent with the discharge of Nevada state law, owes common law fiduciary duties of care and loyalty to that company. It is notable that, as the sole trustee of the MFT, Cruden owes a fiduciary duty to the MFT and its beneficiaries, who are principally Rupert Murdoch's six children. As stated above, Rupert Murdoch and four of his adult children have appointed directors of Cruden. It follows that the reference to the duties of Cruden's directors is made in the context that Cruden must at all times act in

the best interests of the MFT, which, in practical terms, means acting in the best interests of the MFT's beneficiaries.

7.5 [REDACTED].

7.6 We consider that there are sufficient grounds for us to find that the MFT and Rupert, Lachlan and James Murdoch are likely to act together, and in each other's interests, in exercising control for the purpose of our assessment. This finding is based on the close association between Rupert, Lachlan and James Murdoch as family members; their close association with the MFT as described earlier; [REDACTED]; the fact that (as set out in more detail later) it is customary for the MFT to vote in accordance with the recommendations of the boards of Fox and News Corp; and the close association of these members of the Murdoch family with, and role in establishing certain parts of, the Fox, Sky and News Corp businesses.

7.7 We note that under the Takeover Code, members of the Murdoch family and the MFT would be presumed to be persons 'acting in concert'. The Takeover Code sets out nine examples of persons who will be presumed to be persons acting in concert unless the contrary is established.<sup>166</sup> Two of the definitions of persons presumed to be acting in concert in the Takeover Code apply to the relationship between the MFT and Rupert, Lachlan and James Murdoch:

(a) a person, the person's close relatives, and the related trusts of any of them, all with each other; and

(b) the close relatives of a founder of a company to which the Takeover Code applies, their close relatives, and the related trusts of any of them, all with each other.

7.8 In our view, these provisions of the Takeover Code reflect an assumption that persons falling within the above-mentioned categories are likely to act together. This is consistent with our assessment of how Rupert, Lachlan, James Murdoch and the MFT are likely to act for present purposes. We also considered section 127 of the Act, which defines associated persons. In particular, section 127(4) sets out who should be regarded as associated with one another such that they may be treated as one person for, among other things, the purpose of section 58(2C) of the Act. This includes:

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<sup>166</sup> The [Takeover Code](#), page 48.

- (a) any individual and that individual's relatives (which includes brothers, lineal ancestors and descendants);<sup>167</sup> and
- (b) any person in their capacity as trustee of a settlement and the settlor or grantor and any person associated with the settlor or grantor.<sup>168</sup>

7.9 We did not have sight of the trust agreement of the MFT, but we understand from Cruden's response to our information request that the MFT was established by a declaration of trust by Cruden,<sup>169</sup> as a successor to a trust formed under Australian law in 1970 for the benefit of Rupert Murdoch's family and charities, originally settled by Albert Edward Harris for the purpose of securing the future financial stability of the Murdoch family. We therefore note that the deeming effect of section 127 of the Act is not applicable. As a result, we based our approach on an assessment of the practical reality of the position.

7.10 Therefore, on the basis of our finding in paragraph 7.6 our view is that we should consider that the MFT and Rupert, Lachlan and James Murdoch act together for the purpose of our assessment of the extent of control exercised and exercisable by the MFT over Fox, Sky and News Corp. For convenience, references to control being exercised and exercisable by the MFT should therefore be considered to include control exercised by any or all of Rupert, Lachlan and James Murdoch, unless otherwise indicated.

## **The MFT's control over Fox**

7.11 The MFT exerts control over Fox through the following:

- (a) the MFT and Rupert Murdoch's shareholdings; and
- (b) the Murdoch family's roles on the Fox board (James Murdoch as CEO and Rupert and Lachlan Murdoch as co-executive chairmen).

7.12 Given the Murdoch family's close association with the MFT, we considered whether it would underestimate the actual extent of the MFT's control over Fox to assume that relationship as being equivalent to that of an institutional investor. In our assessment of the MFT's control over Fox, as with News Corp and Sky, we therefore considered the extent to which additional control is and can be exercised as a result of the historic relationship between the MFT and each of Fox, Sky and News Corp. This assessment is consistent with the view

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<sup>167</sup> Section 127(4)(a) and section 127(6) of the Act.

<sup>168</sup> Section 127(4)(b) of the Act.

<sup>169</sup> This is pursuant to Cruden's authority as trustee of the AE Harris Trust.

put to us by one of Fox's independent directors that the MFT controlled companies are 'family companies' (in the sense that the largest shareholder is linked to a single family).<sup>170</sup>

### ***The MFT's and Rupert Murdoch's shareholding***

- 7.13 Fox has two classes of common stock that are authorised and outstanding: non-voting Class A Common Stock and voting Class B Common Stock.<sup>171</sup> With a shareholding of 38.4% of the voting Class B Common Stock, the MFT is by a considerable margin the largest shareholder in Fox.<sup>172</sup> As at 18 September 2017, Rupert Murdoch owned less than 1% of voting Class B Common Stock, and less than 1% of the non-voting Class A Common Stock. The MFT's and Rupert Murdoch's combined voting share of Fox stock is 38.9%. As the MFT owns 38.4% of the Class B voting shares and less than 1% of the Class A non-voting shares, its overall economic interest in Fox is 16.6%.
- 7.14 The MFT has not been on the losing side of a vote in any of the five Fox annual general meetings (AGMs) held between 2013 to 2017. However, there were four instances where the MFT's vote was decisive,<sup>173</sup> ie removing the MFT's vote would have resulted in a different outcome. These motions were:
- (a) in 2013, a motion for the Chairman of Fox to be an independent director (the MFT voted against this);
  - (b) in 2013, a motion to appoint Lachlan Murdoch as a director of Fox (the MFT voted in favour of this);
  - (c) in 2016, a non-binding advisory resolution on executive compensation (the MFT voted in favour of this);
  - (d) in 2017, to end the dual class share structure which, as the motion is reported to have argued, left some shareholders with disproportionate voting power and others with none at all<sup>174</sup> (the MFT voted against this).
- 7.15 The shareholding of the MFT has therefore been sufficient to prevent an independent director being put forward for the board chair and enabled the reappointment of Lachlan Murdoch in 2013, (although Lachlan Murdoch was

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<sup>170</sup> Summary of hearing with [Jacques Nasser, Fox independent director](#), page 1.

<sup>171</sup> Fox, [Form 10-K for the financial year ending 30 June 2017, Note 12](#).

<sup>172</sup> The next largest shareholder is Volpe Velux, L.P. (part of the ValueAct Capital group) with approximately 6.7% of the voting Class B Common Stock in Fox as of 18 September 2017.

<sup>173</sup> In relation to the fourth instance this was identified from [news reports](#). See Reuters (November 2017) [Narrow win for Fox shows restlessness with dual-class shares](#).

<sup>174</sup> See Roxana Tynam quoted in Reuters (November 2017) [Narrow win for Fox shows restlessness with dual-class shares](#).

subsequently re-elected as director with the support of a majority of non-MFT shareholders at each AGM from 2014 onwards). The MFT's shareholding (alongside Rupert Murdoch's) therefore gives it material influence over key decisions relating to Fox, most notably defeating the 2013 vote for an independent Chairman, enabling Rupert and Lachlan Murdoch to take up that position.

### ***The roles on the Fox board and executive positions of members of the Murdoch family***

- 7.16 We have described, from paragraph 2.26, how the MFT is structured; the ability Rupert, Lachlan and James Murdoch have to appoint [X] the directors of Cruden as trustee of the MFT;<sup>175</sup> [X];<sup>176</sup> and Lachlan and James Murdoch's position as two of six principal beneficiaries of the MFT. In addition, we find that the MFT (alongside Rupert Murdoch) holds sufficient shares in Fox to be able to exercise material influence over key decisions.<sup>177</sup> In this section, we look at the roles that Rupert, Lachlan and James Murdoch have in Fox both on the board and as executives. We also set out further links between Fox and the MFT through other Fox directors.
- 7.17 As CEO of Fox, James Murdoch has the formal responsibility for the culture and day to day management of Fox. He is responsible for leading the development and execution of Fox's long-term strategy with a view to creating shareholder value and acts as a direct liaison between the board and management of Fox. He also has direct powers to appoint or oversee the appointment of Fox's senior management.
- 7.18 As executive chairmen on the Fox board, Rupert and Lachlan Murdoch have a very considerable degree of influence on the strategy and overall direction of Fox. In relation to Fox News, this is enhanced by Rupert Murdoch's role as acting CEO, following Roger Ailes' departure in July 2016.
- 7.19 The Murdoch family's influence on the Fox board is further enhanced by the presence of David DeVoe, a director of, and a senior adviser to the Fox board who is also a director of Cruden, the trustee of the MFT.<sup>178</sup>
- 7.20 The Fox board currently has 13 directors, eight of which are independent. Of the eight independent directors on the Fox board, three have served for a

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<sup>175</sup> Alongside Elisabeth Murdoch and Prudence MacLeod.

<sup>176</sup> See paragraph 7.5.

<sup>177</sup> See paragraphs 7.15.

<sup>178</sup> Fox board of directors, [director biographies](#).

significant period of time or appear to have close relationships with the Murdoch family or companies that they control. The three directors are:

- Jacques Nasser was made an independent director of Sky in November 2002 and has worked with Rupert Murdoch since then and James Murdoch since 2003. Mr Nasser held this position for ten years prior to his appointment on the Fox board in 2013;<sup>179</sup>
- Sir Roderick I Eddington has been a director at Fox for 18 years having joined the board in 1999;<sup>180</sup>
- Viet Dinh has been a director of Fox for 13 years having joined the board in 2004 and is a godparent to Lachlan Murdoch's second child. Mr Dinh told us that over the years he and Lachlan Murdoch had become friends.<sup>181,182</sup>

7.21 Further, Chase Carey, Vice Chairman of the board and a consultant to Fox since July 2016 has a longstanding relationship with Fox and the Murdoch family, previously acting as the Chief Operating Officer at Fox, Deputy Chairman from 2009 to 2015, having previously been a director from 1996 to 2007. He is also a director on the Sky board.<sup>183</sup>

7.22 The Fox board and the Sky board contrast in terms of the number of independent directors with a long tenure and/or a close relationship with members of the Murdoch family.<sup>184</sup> As set out above, three independent directors of Fox have served for more than nine years and/or have particularly close relationships with members of the Murdoch family. Our view is that these directors have relationships that could be perceived to make them more inclined to vote in line with the MFT in circumstances where doing so would not conflict with their fiduciary duties, and therefore gives the MFT additional informal control over Fox. This can be contrasted with the Sky board, where the independent directors have not served alongside members of the

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<sup>179</sup> Fox board of directors, [director biographies](#).

<sup>180</sup> Fox board of directors, [director biographies](#).

<sup>181</sup> Fox board of directors, [director biographies](#).

<sup>182</sup> The independence of Jeffrey Ubben as the CEO and Chief Investment Officer of the ValueAct Capital group may also be subject to doubt under the UK Corporate Governance Code. Value Act Capital is the second largest shareholder in Fox with approximately 6.7% of the voting Class B Common Stock. This does not, however, relate to his independence from the MFT.

<sup>183</sup> Fox board of directors, [director biographies](#).

<sup>184</sup> We note that under B.1.1 of the UK Corporate Governance Code the board should, in considering the independence of a director, take into account relevant factors that include (among others) a director's material business relationships with the company in the last three years and whether the director has served on the board for more than nine years. The UK Corporate Governance Code does, however, permit a company's board to determine that a director is independent notwithstanding the existence of such relationships or circumstances, under the principle of comply or explain.

Murdoch family for so long and have not had previous relationships with members of the Murdoch family or the companies they control.

- 7.23 Fox submitted, based on evidence from professors at Yale Law School, that corporate governance requirements imposed by Delaware State law and NASDAQ rules are as strict, if not stricter, than those applicable to Sky. In coming to the above view, we do not suggest – or intend to imply – that Fox’s independent directors do not meet the legal standard required for an independent director under the NASDAQ rules or Delaware State law or that those standards are lower than under UK law. Nor do we question the Fox independent directors’ compliance with their fiduciary duties owed to Fox and its shareholders.

### ***Conclusion on the MFT’s control over Fox***

- 7.24 In terms of the extent of control currently exercised and exercisable by the MFT over Fox, we find that the MFT exercises a significant degree of formal control over Fox. This control is exercised primarily through its shareholding and the presence of James Murdoch as CEO and Rupert and Lachlan Murdoch as co-executive chairmen. We also consider that the MFT’s control over Fox is further enhanced by informal means through relationships between certain directors of Fox and either the MFT or members of the Murdoch family (or both).

### **The MFT’s control over News Corp**

- 7.25 The MFT exerts formal control over News Corp through the following:
- (a) the MFT and Rupert Murdoch’s shareholdings; and
  - (b) the Murdoch family’s roles on the News Corp board, with Rupert and Lachlan Murdoch as co-executive chairmen and James Murdoch as a director.
- 7.26 For the reasons noted in paragraph 7.12, we considered whether the MFT may be able to exert additional informal control over News Corp, and specifically News UK newspapers, through Rupert Murdoch, as a consequence of his close association and long history with them.

### ***The MFT’s shareholding***

- 7.27 We looked at the voting history of the MFT since 2007. Over this period the MFT has consistently voted with the recommendation of the boards of Fox and News Corp. The MFT has not been on the losing side of a shareholder

vote over this time period. As of 7 August 2017, Rupert Murdoch additionally owned approximately 1% of the company's Class B Common Stock and less than 1% of the company's Class A Common Stock.

- 7.28 At each AGM between 2014 and 2016, the majority of non-MFT shareholders in News Corp have voted for the elimination of dual capital structure. For each of these three years, the advisory and non-binding proposal did not pass.
- 7.29 At the 2014 AGM along with a number of other directors, none of the members of the Murdoch family received the backing of a majority of non-MFT shareholders. The MFT's vote was therefore required to ensure their positions on the board.

### ***The Murdoch family's roles on the News Corp board***

- 7.30 The position of all three members of the Murdoch family on the News Corp board, and particularly Rupert and Lachlan Murdoch's role as co-executive chairmen, gives them formal duties for the oversight of News Corp, which includes News UK.
- 7.31 In addition to members of the Murdoch family's positions on the board, Robert Thomson, the News Corp CEO since 2013, has had a longstanding relationship with enterprises controlled by Rupert Murdoch. He has held several positions within News Corp over many years, having been a former Editor of The Times (of London) and The Times (US), Editor-in-Chief of Dow Jones & Company, and Managing Editor of The Wall Street Journal.<sup>185</sup>

### ***Exercise of informal control over newspapers owned by News UK***

- 7.32 Rupert Murdoch's history of influence at the newspapers owned by News UK is well documented. For example, Lord Justice Leveson described the 'extraordinary influence that Rupert Murdoch has exercised over the development of the press in Britain, since he purchased The News of the World newspaper in 1969'.<sup>186</sup>
- 7.33 In the subsequent sections we outline how the history of Rupert Murdoch's involvement with News UK newspapers and his position on the News Corp board continues to allow the MFT, and Rupert Murdoch in particular, to have significant influence over News UK.

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<sup>185</sup> News Corp website, [Our Leadership](#).

<sup>186</sup> Leveson Report, Part C: Chapter 2, paragraph 1.1

## *Rupert Murdoch's current influence over News UK titles*

- 7.34 Rebekah Brooks (CEO of News UK) told us that she considers that editorial policy at News UK papers is set by their editors. This was confirmed by the editors themselves. Each of them told us that they have editorial independence and Rupert Murdoch's occasional discussions with them do not affect this.<sup>187</sup>
- 7.35 Notwithstanding this view, News Corp told us that as Executive Chairman of News Corp, Rupert Murdoch interacts on a regular basis with Rebekah Brooks.<sup>188</sup>
- 7.36 Lachlan Murdoch, Co-Chairman of News Corp, communicates with senior management of News UK on corporate and commercial matters at the main meeting each year where the News UK budget is presented.
- 7.37 [✂].
- 7.38 In addition to his interactions with Rebekah Brooks, Rupert Murdoch regularly expresses his views on a variety of issues with the editors of News UK newspapers. News Corp told us that Rupert Murdoch is in occasional contact with:<sup>189</sup>
- the Editor-in-Chief of The Sun;
  - the Editor of The Sun on Sunday although less frequently;
  - the Editor of The Times; and
  - the Editor of The Sunday Times, although again less frequently.
- 7.39 News Corp told us that these occasional communications which Rupert Murdoch had with the editors of The Sun and The Times (notwithstanding the 1981 Times Undertakings discussed in further detail later)<sup>190</sup> may, among other things, include comment on what stories had appeared in UK newspapers that day (News UK titles and competitors) and commentary on world and UK affairs. They also include Rupert Murdoch asking the editors for insights on current events.

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<sup>187</sup> See [summaries of hearings with News Corp, The Times, and The Sun](#).

<sup>188</sup> [Summary of hearing with News Corp](#).

<sup>189</sup> See [summaries of hearings with News Corp, The Times, and The Sun](#).

<sup>190</sup> [Summary of hearing with The Times](#), page 4: 'JW stated that he has contact with Rupert Murdoch (RM) at times. JW explained that RM asks him about the broad political picture in the UK. JW stated that RM does not make comments to him on editorial views, the running order of news or choice of stories. RM may occasionally comment to him that a particular day's newspaper was good.'

- 7.40 Rupert Murdoch's interest in newspapers he has controlled over a long period of time and his longstanding relationships with senior personnel like Rebekah Brooks have supported and enabled Rupert Murdoch in retaining significant links to News UK.
- 7.41 In our view, the combination of Rupert Murdoch being able to express his views to both the editors of News UK newspapers and the News UK CEO, enhance his influence in relation to editorial matters. This influence is only possible due to the acceptance and expectation that Rupert Murdoch will regularly want to be kept up to date on matters, through informal verbal updates.
- 7.42 Rupert Murdoch's involvement in News UK goes beyond telephone calls. In contrast to Sky where there is no indication of any member of the Murdoch family being involved in the hiring of editorial staff at Sky News (beyond their formal role), we have direct evidence of Rupert Murdoch's recent involvement in the hiring of News UK editors. For example, Rebekah Brooks told us that prior to Tony Gallagher's appointment to The Sun, herself, Robert Thomson and Rupert Murdoch had had informal chats with Mr Gallagher.<sup>191</sup> Rebekah Brooks went on to explain that [✂].
- 7.43 Turning to those who worked at News Corp owned papers in the past, Andrew Neil (Editor of The Sunday Times from 1983 to 1994) told us that Rupert Murdoch regarded himself as editor-in-chief of the tabloid papers but that his influence was subtle:

[Rupert Murdoch] would always let know what he thought as opposed to what you should do but you always got the impression that, if you steered away too much from what he thought, then your leasehold on the newspaper may not be for a long while.<sup>192</sup>

- 7.44 Sir Peter Stothard (Editor of The Times from 1992 to 2002) told us that:

There were some serious issues, some important issues where I did not always know what Rupert thought. But there were one or two issues where it was clear that Rupert did have strong views, because he had expressed them either at speeches or I had somehow got to know, where The Times took a different view.<sup>193</sup>

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<sup>191</sup> See [summary of hearing with News Corp](#).

<sup>192</sup> [Transcript of hearing with Andrew Neil](#), page 11, line 4.

<sup>193</sup> [Transcript of hearing with Sir Peter Stothard](#), page 24 line 24 to page 25 line 4.

## *Effect of the 1981 Times Undertakings on Rupert Murdoch's influence*

7.45 We set out in chapter 2 (see from paragraph 2.39) a description of the 1981 Times Undertakings which were concerned with protecting the editorial quality and integrity of The Times, The Sunday Times and The Times Supplements. Questions about the effectiveness of these Undertakings were raised as early as 1982 (the year following their adoption) by the then editor of The Times.<sup>194</sup> However, Rupert Murdoch gave evidence to the Leveson Inquiry that on editorial matters he observed the limitations imposed by the 1981 Times Undertakings.<sup>195</sup>

7.46 More recently, Andrew Neil told us, in relation to the 1981 Times Undertakings:

In terms of public presentation, [Rupert Murdoch] always felt constrained; in reality, he has never felt constrained by that. It was a typical British establishment figment to put around the arrangement. He arranged a similar one for the Wall Street Journal when he took over that. These can be put in place by regulators to allow things to happen. They do not last for too long. I was quite grateful, actually, that he did not often listen to them, because there were several times when the independent directors tried to fire me and he actually stopped the directors from doing that. So, it worked both ways. These things may suit regulators like yourselves. They may suit politicians who want to get things done. At the time, they thought I think wrongly, historically that The Times and The Sunday Times would go bust if he did not get them. In reality, they have had very little constraint on how he has operated.<sup>196</sup>

7.47 Sir Peter Stothard, Editor of the Times between 1992 and 2002, said of the undertakings:

[Rupert Murdoch] had made serious undertakings about the freedom of the Editor of The Times. I do not think I ever needed to refer to those, but I was very conscious of the strengths of

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<sup>194</sup> Harold Evans who served as Editor of The Times when it was first acquired by Rupert Murdoch told the Leveson Inquiry that he recalled being sent 'a stream of memos asking [him] to downplay or suppress news that was bad for the government'. In a letter to the Independent National Directors in February 1982, one month before conflict with Rupert Murdoch led him to resign, Harold Evans stated that Rupert Murdoch attempted repeatedly to circumvent his authority as Editor in order to change the editorial stance of the paper. In evidence given to the Leveson Inquiry, Rupert Murdoch indicated that he himself concluded that Harold Evans should no longer serve as Editor of The Times and had to be let go making Harold Evans 'the only editor of the Times we have ever asked to leave'.

<sup>195</sup> Evidence provided to the Leveson Inquiry.

<sup>196</sup> [Transcript of hearing with Andrew Neil](#), page 11, lines 17 to 25 and page 12, lines 1 to 7.

those undertakings and I got the impression that he was always very careful surrounding them. He was conscious of them. I do not think we ever had a discussion on them,

- 7.48 John Witherow, Editor of The Times, acknowledged the criticism of the efficacy of the 1981 Times Undertakings but rejected it:

I know [the 1981 Times Undertakings] are dismissed but they [work], [there] are effectively independent directors, who I meet every six months to discuss whether the undertakings have been breached in any way so that there is a formal process that goes on and I think they work very effectively.

- 7.49 Similarly, Rebekah Brooks told us:

There is an absolute respect for the undertakings, and I do not know any editor of The Times or The Sunday Times, or any independent director for that matter, where Rupert Murdoch has shown any disrespect for those undertakings.

- 7.50 However, in 2012, James Harding resigned as Editor of The Times and, following his resignation, said, 'It has been made clear to me that News Corporation would like to appoint a new Editor of The Times. I have, therefore, agreed to stand down.'<sup>197</sup>

- 7.51 Our view is that regardless of whether the 1981 Times Undertakings are effective in achieving the purpose for which they were put in place (noting that they do not include a commitment preventing the news proprietor from expressing views, whether directly or indirectly, in relation to editorial output), we do not consider them to have prevented the informal influence of Rupert Murdoch in relation to The Times and The Sunday Times. Overall, the evidence suggests that Rupert Murdoch continues to have significant engagement and a consistent record of significant influence over News UK newspapers, including The Times and The Sunday Times, notwithstanding the constraint of the 1981 Times Undertakings, beyond his formal role as News Corp Co-Executive Chairman through contacts with editors, the CEO of News UK and his involvement in the hiring of editors.

### ***Conclusion on the MFT's control over News Corp***

- 7.52 In terms of the extent of control currently exercised and exercisable by the MFT over News Corp, we find that the MFT exercises a significant degree of

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<sup>197</sup> [Full text of James Harding resignation speech.](#)

formal control over News Corp. This control is exercised primarily through its shareholding and the presence of Rupert and Lachlan Murdoch as co-executive chairmen, with James Murdoch as another director, and Robert Thomson (a long time close associate of Rupert Murdoch) as CEO. As with Fox, we note that the MFT is by a considerable margin the largest shareholder in News Corp and has not lost a shareholders' vote at a News Corp AGM.

- 7.53 In addition to this significant degree of formal control, the MFT through Rupert Murdoch's historic relationship with the News UK newspapers exercises significant informal influence over News UK newspapers, including their editorial positions. This influence is expressed through repeated conversations over several years with each of the News UK owned newspapers' editors and conversations with Rebekah Brooks, the CEO of News UK and former editor of The Sun and The News of the World. These channels of influence are particularly evident in relation to The Sun and The Sun on Sunday. The Times and The Sunday Times are to some extent protected by the undertakings given in 1981 as to their editorial independence, although for the reasons set out previously we placed limited weight on their effectiveness at constraining the informal influence of the MFT.

### **The MFT's control over Sky and Sky News pre Transaction**

- 7.54 In this section, we set out how the MFT currently exercises control over Sky and Sky News indirectly through its shareholding in Fox and James Murdoch's role as Chairman of the Sky board. In each instance we consider constraints to that control. We then take account of other ways in which the MFT may, informally, exercise control over Sky and Sky News currently. Finally, we consider whether, even in the absence of the Transaction, the MFT would be able to exercise significantly more control over Sky and Sky News than the actual extent of control that it currently exercises. This provides the basis on which we form a view of the actual extent of control that is currently exercisable by the MFT over Sky and Sky News.

#### ***Fox's shareholding in Sky***

- 7.55 The MFT primarily exercises formal control over Sky and Sky News through its control over Fox. As discussed earlier (see paragraph 7.24), this is principally, but not solely, through the MFT and Rupert Murdoch's combined 38.9% shareholding in Fox. Fox holds approximately 39.14% of the issued share capital of Sky. A voting agreement in September 2005 between Fox, Sky and affiliated entities, means that Fox's voting at general meetings of Sky

is capped at 37.19%.<sup>198</sup> A vote share of 37.19% gives Fox significant voting power at Sky. For example, Fox has sufficient voting rights to block a special resolution.

7.56 We looked at the voting results of Sky's AGMs since 2012 and note that [REDACTED]. However, Fox's shareholding has been decisive against the majority of non-Fox shareholders on occasion.<sup>199</sup> This includes in 2016 when the majority of non-Fox shareholders who cast a vote, voted against James Murdoch's appointment as Chairman of Sky. [REDACTED] the motion was passed with 71.55% in favour of the motion.<sup>200</sup>

7.57 [REDACTED].

### ***Constraint by other Sky shareholders on the MFT's ability to exercise control over Sky and Sky News through Fox***

7.58 Currently, around 60% of Sky is not owned by Fox. [REDACTED], but if a resolution was put to a shareholder vote that was not in the interests of the non-Fox shareholders these shareholders, acting together, could block it.

7.59 However, there are a number of key issues which would not typically be put to a shareholder vote, and which the non-Fox shareholders would not therefore have the opportunity to defeat. For example, shareholders have no say in the day to day running of a company and would not typically have a say on the appointment of senior executives within a company.

7.60 Ed Miliband et al submitted that Sky's shareholders have shown that they have some constraining impact on Fox and the Murdoch family's influence as evidenced by (i) their public opposition to James Murdoch's appointment and reappointment as Sky Chairman in 2016 and 2017; and (ii) James Murdoch stepping down in 2012 from Sky to protect the company post Leveson Inquiry. Ed Miliband et al submitted that the Sky non-Fox shareholders could raise concerns about the appointment of a new Head of Sky News if that person was seen to be too close to Fox and damaging to the Sky News brand.<sup>201</sup>

7.61 We received differing views from Sky's non-Fox shareholders with some shareholders we spoke to telling us they have the impression that Fox already effectively has control over Sky. Others told us that they consider Jeremy

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<sup>198</sup> Fox [initial submission](#), paragraph 2.5.

<sup>199</sup> [Sky AGM voting results](#).

<sup>200</sup> The 71.55% is calculated using only voting capital that was instructed. Around 15% of Sky's share capital was not instructed at this AGM increasing Fox's share of votes cast beyond 37.14%.

<sup>201</sup> [Ed Miliband et al submission to the issues statement](#).

Darroch, CEO of Sky, to be independent and James Murdoch's influence as Sky Chairman to be no more than that of any board chairman.<sup>202</sup>

- 7.62 The non-Fox shareholders that we spoke to said that Sky News is not a significant part of the Sky business and, while recognising that it has brand value, it was not something that they paid any attention to. Non-Fox shareholders were concerned about the value of Sky overall. Insofar as changes to Sky News would undermine that value they might be expected to raise concerns. For example, one of the non-Fox shareholders at Sky told us it would not be concerned about the replacement of the Head of Sky News (other than to the extent that this might affect its value to the brand, which the shareholder recognised came from its status as a credible news source, comparable to the BBC). It is not, however, clear that a change in Sky's editorial position (whether an increased editorial alignment with News UK newspapers or Sky News becoming more like Fox News or some other change) would be perceived as being likely to undermine Sky's value as a whole, noting that Sky News itself is loss-making.
- 7.63 Fox submitted that we conflate the extent to which non-Fox shareholders act as a constraint over Sky generally with their constraint over Sky News.<sup>203</sup> Fox also submitted that in any event, were one (wrongly) to conclude that Sky's non-Fox shareholders act as a significant restraint regarding Sky News, it would then be necessary to recognise that an equivalent constraint would be imposed by Fox's non-MFT shareholders post Transaction.<sup>204</sup> We consider, however, that this point has limited force. Post Transaction Fox's non-MFT shareholders (operating in the context of a much larger business) will be less focused on Sky (and Sky News) than Sky's non-Fox shareholders are presently. We do not consider that these constraints can be seen as equivalent. Overall, our view is that the presence of non-Fox shareholders provides an important constraint on the ability of the MFT to exercise control over Sky News because that presence is a key reason why Sky overall operates as an independent business. Viet Dinh, an independent director of Fox, identified Fox's current shareholding in Sky as not giving Fox effective control over Sky on the basis that Sky is an independent, publicly listed company.<sup>205</sup> This same constraint would not be present post Transaction and there would no longer be a double layer of independent shareholders, as there is currently.

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<sup>202</sup> [Transcript of hearing with Legal and General](#), page 12, lines 10 to 21.

<sup>203</sup> [Fox response to provisional findings](#), paragraph 2.5.

<sup>204</sup> [Fox response to provisional findings](#), paragraph 2.6.

<sup>205</sup> [Summary of hearing with Viet Dinh](#), page 6.

7.64 Our view is therefore that the presence of non-Fox shareholders in Sky acts as a constraint on the exercise of control by the MFT over Sky including Sky News, which is primarily exercised directly through their votes at the company's AGMs and indirectly through their discussions and relationships with the independent directors.

### ***James Murdoch's role as Chairman of Sky***

7.65 As with the MFT's control over Fox (see paragraph 7.16) we looked at the role James Murdoch has as Chairman of the Sky board to understand the extent to which that enhances the control that the MFT exercises over Sky and Sky News. We also set out further links between Sky and the MFT through other Sky directors.

7.66 As a member of the Sky board, James Murdoch has a role (alongside the other directors) in the appointment of the CEO and the Chief Financial Officer (CFO) because such appointments are made by the board, following recommendations made by Sky's Corporate Governance and Nominations Committee. The Chairman of the Sky board would not have any formal role in appointing other senior staff within Sky including Sky News, although the board would likely be informed of all appointments that the Sky CEO considered significant.

7.67 A key responsibility of the Sky Chairman is being a direct liaison between the board and CEO. Sky told us that its CEO would speak to James Murdoch every couple of weeks in his role as Chairman.<sup>206</sup> Other board members may contact the CEO whenever they have a query and consider it appropriate.

7.68 James Murdoch's ability to influence decisions taken by Sky's board is enhanced by the presence of two Fox affiliated directors, Chase Carey and John Nallen. Nonetheless, collectively they only make up three of Sky's 11 directors and the other eight directors are independent, relatively recently appointed and without any ties to the Murdoch family, Fox or News Corp.<sup>207</sup>

### ***Constraint by Sky's independent directors on the MFT's control of Sky***

7.69 As noted above, Viet Dinh, independent director of Fox, told us that Sky is an independent, listed public company that is not controlled by Fox.<sup>208</sup> Consistent with this view, Mr Dinh told us that the question the Fox independent directors

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<sup>206</sup> [Summary of hearing with Sky](#), paragraph 11.

<sup>207</sup> See by way of contrast the independence of Fox's independent directors, discussed in paragraphs 7.19 to 7.23.

<sup>208</sup> [Summary of hearing with Viet Dinh](#), page 6.

asked themselves when considering the Transaction was ‘Does this make sense where we commit such a significant amount of capital but we do not have effective control and cannot consolidate the operations and finances of Sky?’. Mr Dinh went on to describe the holding in Sky as ‘unstable’ and that the decision the Fox board had had to make was whether they sold their holding in Sky or acquired the remaining 60%.

7.70 From Mr Dinh’s comments, it is apparent that Sky currently enjoys significant independence from Fox and that Fox is seeking greater control of Sky so that it can consolidate its operations with the wider Fox business. This is one of the stated reasons for the rationale for the Transaction.

7.71 Sky told us that Fox does not have effective control of Sky currently. Sky’s board is comprised of a majority of independent directors. Strategy and execution come from Sky’s management.<sup>209</sup> As with all members of the board, the Fox affiliated directors bring a range of insights and experience, and play the role that would be expected of directors in terms of helping to shape Sky’s success. Outside of this, Fox does not influence the broad strategic direction of Sky.<sup>210</sup>

7.72 Sky also told us that there are three pillars that underpin how Sky News operates and ensures its editorial independence. These are (i) the people and culture at Sky News, (ii) its brand and reputation of trust, and (iii) the Broadcasting Code.<sup>211</sup> We consider these in chapter 8.

7.73 We spoke to two of the independent directors at Sky, the Deputy Chairman Martin Gilbert and the senior independent director Andrew Sukawaty, who told us that one of their key responsibilities was to protect shareholder value for Sky’s non-Fox shareholders.<sup>212,213</sup> They considered they would have influence on the appointments of senior management that report to the CEO.<sup>214</sup>

7.74 In relation to Sky News, the independent directors of Sky told us that there is very little oversight of Sky News at the board level (as it is dealt with by management), but it would be discussed at board meetings if necessary (for example where there were health and safety or regulatory issues). One of Sky’s independent directors told us they only met the Head of Sky News once, at an informal lunch, in their time at Sky. The independent directors told

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<sup>209</sup> [Summary of main party hearing with Sky](#), page 2, paragraph 8.

<sup>210</sup> [Summary of main party hearing with Sky](#), page 2, paragraphs 8 and 9.

<sup>211</sup> [Summary of main party hearing with Sky](#), page 1.

<sup>212</sup> [Summary of hearing with Sky independent directors](#), paragraph 2.

<sup>213</sup> [Summary of hearing with Sky independent directors](#), paragraph 14.

<sup>214</sup> [Summary of hearing with Sky independent directors](#), paragraph 7.

us that Sky News was considered a well-run independent unit within Sky with complete editorial independence and minimal input from the independent directors.<sup>215</sup> Sky explained that the Head of Sky News reports directly to the Managing Director of Content of Sky but is largely autonomous.<sup>216</sup>

- 7.75 In relation to the appointment of senior Sky News staff, the independent directors at Sky told us that if John Ryley was replaced as Head of Sky News, they would not be involved in the appointment of his successor.<sup>217</sup> Specifically we were told that it was likely that the CEO would explain his strategy to the independent directors and how he had reached a conclusion on the new appointment, but that the independent directors would not be directly involved in the decision. This would be consistent with the approach taken in relation to other significant appointments, such as the Head of Content, in the past.<sup>218</sup>
- 7.76 We note that John Ryley's tenure as Head of Sky News has been lengthy (it is a post he has held since 2006) and that there is no established process for the appointment of a replacement or clearly established parameters about who should (or should not) be involved in that decision.
- 7.77 We were told by the independent directors that Sky News has complete editorial independence from the board and that in their experience, no concerns had been raised at the board in relation to undue influence by the members of the Murdoch family in editorial decisions. Moreover, Sky's independent directors told us in their experience that if there were any inappropriate attempts to influence the day to day running of Sky, these would be raised by management with the board.<sup>219</sup>
- 7.78 As noted earlier in relation to the non-Fox shareholders, the Parties submitted that the MFT's control over Sky should not be conflated with its control over Sky News specifically.<sup>220</sup> In particular, both Fox and Sky submitted that there is no evidence that any independent director of Sky has been called upon to date to address any effort by the MFT to influence Sky News – and that post Transaction the independent directors of Fox, reinforced by the Fox board resolution, would provide equivalent, protection, against editorial influence.<sup>221</sup> We acknowledge that the independent directors of Sky have not been required to address concerns raised about undue influence of the Sky News

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<sup>215</sup> [Summary of hearing with Sky independent directors](#), paragraph 18.

<sup>216</sup> [Summary of main party hearing with Sky](#), page 3.

<sup>217</sup> [Summary of hearing with Sky independent directors](#), paragraph 18.

<sup>218</sup> [Summary of hearing with Sky independent directors](#), page 16 lines 1 to 11.

<sup>219</sup> [Summary of hearing with Sky independent directors](#), paragraph 18.

<sup>220</sup> [Sky response to provisional findings](#), paragraph 3.15 and [Fox response to provisional findings](#), paragraph 2.5.

<sup>221</sup> [Sky response to provisional findings](#), paragraphs 3.18 and 3.19 and [Fox response to provisional findings](#), paragraphs 2.7 to 2.11.

editorial agenda. However, our view is that this reflects the fact that Sky currently operates as an independent, publicly listed company which has adopted a strategy of operating Sky News as a service to the public by disseminating accurate and impartial news.<sup>222</sup> As explained above in relation to the constraint provided by the non-Fox shareholders, in reaching our conclusions regarding the impact of the Transaction on the MFT's ability to exercise increased control over Sky News we consider that an important constraint is that at present there is a double layer of governance oversight by independent directors – those on the Sky board and those on the Fox board. Following the Transaction, the only independent constraint will be from the Fox independent directors.

- 7.79 The presence of the Sky independent directors contributes to the operation of Sky as an independent business. Given that Sky News is an integral and fully integrated part of Sky's business, controlled by Sky's management structure, we consider that it is reasonable to conclude that a constraint on the ability of the MFT to exercise control over Sky's management generally also acts as a constraint on its ability to exercise control over the management – and therefore the editorial output of – Sky News. We note in that regard, that decision making on issues such as the budget given to Sky News, the appointment of its leadership team, and its strategic direction are a means of influencing the editorial positioning and agenda of Sky News. These decisions are determined by Sky's management with oversight from the Sky board, the majority of whom are independent of the MFT.
- 7.80 Our view is that the statements of Viet Dinh, Jeremy Darroch, Sky independent directors, and John Ryley provide a sound basis to conclude that Sky and Sky News is managed independently from the MFT and that, while the MFT does have material influence over Sky, the extent of control it is able to exercise is significantly constrained by the presence of independent directors. In relation to Sky News specifically, while as noted above there has to date been no intervention by Sky's independent directors in relation to editorial matters, we consider it is reasonable to expect that if there were concerns about undue influence by members of the Murdoch family in relation to editorial matters, these would be raised to the Sky board.

### ***Other ways in which the MFT may exercise control over Sky and Sky News***

- 7.81 Given James Murdoch's previous role as CEO of Sky, Rupert Murdoch's previous time as Chairman and his involvement in the founding of Sky, they,

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<sup>222</sup>[Summary of main party hearing with Sky](#), paragraph 30.

and by extension the MFT,<sup>223</sup> might be expected to be able to exercise a greater degree of influence over Sky and Sky News than James Murdoch's formal position as Chairman of the board might imply.

### *Rupert Murdoch's involvement in the creation of Sky and Sky News*

- 7.82 Fox (at the time it was News Corporation) was a founding shareholder in Sky, when Rupert Murdoch was CEO of News Corporation and has been a shareholder for almost 30 years; a period of time that covers the creation of Sky News.
- 7.83 Rupert Murdoch played a key role in establishing Sky News. Andrew Neil, who launched Sky News in 1989, told us that at no point during his time at Sky did Rupert Murdoch try to influence the content or strategy of Sky News. Mr Neil also told us that both he and Rupert Murdoch were focused on establishing a 24-hour news channel in creating Sky News.<sup>224</sup>
- 7.84 David Elstein, a former Head of Programming at Sky in the 1990s, told us that he was not appointed as Head of Programming at Sky until he had flown out to Los Angeles and met Rupert Murdoch. Mr Elstein told us that if Rupert Murdoch had wanted to alter Sky News he could have, but did not.<sup>225</sup>
- 7.85 In a number of hearings, most notably with the cross-party group of MPs and Lords, we were directed to a comment reportedly made by Rupert Murdoch to the House of Lords Communications Committee in 2008 that the only reason that Sky News was not more like Fox News was that 'nobody at Sky listens to me'.<sup>226</sup> We did not place weight on this comment given its age and the lack of context.
- 7.86 Currently, Rupert Murdoch has no formal responsibilities for the management or governance of Sky. This is in contrast to his involvement in Fox News (where he is acting CEO) and News Corp where he is Executive Chairman and has, over time, had frequent discussions with Rebekah Brooks (as CEO of News UK) and discussions with the editors of The Sun, The Times and The Sunday Times. We did not identify any evidence to suggest that Rupert Murdoch currently exercises informal influence over the editorial position of Sky News.

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<sup>223</sup> As discussed in relation to Fox at paragraph 7.12 and in relation to News Corp from paragraph 7.32.

<sup>224</sup> [Transcript of hearing with Andrew Neil](#), page 9, line 2 to-5, line 12 to 13.

<sup>225</sup> [Transcript of roundtable on media plurality](#), page 57, line 22.

<sup>226</sup> House of Lords Communications Committee (2008), page 119, paragraph 47.

### *James Murdoch's previous role as CEO of Sky*

- 7.87 From 2003 to 2007, as CEO, James Murdoch had responsibility for executing Sky's long term strategy. He was responsible for the appointment of key staff, several of whom remain at Sky and have an ongoing influence on the decisions it makes and its culture. James Murdoch was the CEO of Sky in 2004 when Jeremy Darroch was appointed as Sky CFO, and Mr Darroch became CEO of Sky shortly after James Murdoch stepped down from that role and became Chairman. James Murdoch played a significant role in Mr Darroch's appointment to CFO and to CEO of Sky. A number of other senior executives at Sky, including John Ryley, Head of Sky News, remain in place having been appointed during James Murdoch's time as CEO of Sky. Mr Ryley was appointed the Head of Sky News in 2006.<sup>227</sup>
- 7.88 James Murdoch could potentially seek to increase his informal influence over decisions at Sky due to his previous position and Rupert Murdoch's history with Sky. We found no evidence of this. We do not believe that James Murdoch currently has regular contact with anyone with direct editorial control of Sky News.

### ***Difference between the extent of control exercised by the MFT over Sky and Sky News and the extent of control that is currently exercisable***

- 7.89 We set out earlier our view of how the MFT exercises control over Sky and Sky News through its shareholding and James Murdoch's role as Sky's Chairman. In both instances, our view is that the extent of control exercised by the MFT is significantly constrained by non-Fox shareholders and Sky's independent directors. These constraints apply to the extent of control that is exercisable by the MFT over Sky and Sky News. For example, decisions on matters that can impact on the editorial positioning and agenda of Sky News, such as the budget given to Sky News, the appointment of its leadership team and its strategic direction, are currently overseen by a board with a majority of individuals who are independent of the MFT. In addition, our view is that if members of the Murdoch family were to exercise undue influence in relation to editorial decisions at Sky News, it would be a matter which would be escalated to the Sky board. On that basis we conclude that, absent the Transaction, the MFT would not be able to exercise significantly more control over Sky and Sky News than it currently does.

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<sup>227</sup> James Murdoch was not directly involved in John Ryley's appointment. Mr Ryley was appointed by Dawn Airey in 2006, who was Managing Director of Channels and Services at that time. See [Sky initial submission](#), paragraph 3.13.

## **Impact of the Transaction on the extent of the MFT's control over Sky and Sky News**

- 7.90 In assessing the impact of the Transaction on the extent of control (both formal and informal) exercisable by the MFT over Sky and Sky News, we sought to understand how Sky, including Sky News, will be controlled and operated by Fox once it has full control. An assessment of the impact of the Transaction is necessarily prospective – see section ‘Actual extent of the MFT's control over Sky and Sky News’ (from paragraph 6.27). We therefore considered that it is relevant to take into account the extent of the control exercisable by the MFT following the Transaction (in other words, the control that the MFT would be able to exercise over Sky and Sky News following the Transaction, subject to any constraints on that control). This is relevant to our assessment as it is such control that could enable the MFT to influence the content of Sky News. Accordingly, we focus in this section on the change brought about by the Transaction in the actual extent of control (formal and informal) exercisable by the MFT over Sky and Sky News.
- 7.91 The MFT currently exercises material influence over Sky through its indirect ownership (ie through Fox's approximately 39% holding in Sky), the fact that James Murdoch is Chairman of Sky, having previously been CEO, the presence of two non-independent Fox directors on the Sky board, and Rupert and James Murdoch's close involvement in the development of the Sky business over time. However, we consider that the extent of any additional control exercised and exercisable by the MFT over Sky and Sky News is currently circumscribed by the fact that Sky is a UK listed public company with its own independent board of directors and shareholders that have sought to challenge certain resolutions, including the appointment of James Murdoch as Chairman. Furthermore, evidence we have obtained from Sky and from Fox's independent directors indicates that Sky (including Sky News) currently operates as an independent business over which Fox itself does not exercise and would be unable to exercise effective control. We therefore consider that the control exercised and exercisable by the MFT over Sky currently, although amounting to material influence for the purpose of the Act, is relatively low.
- 7.92 Following the Transaction, Sky will no longer be a UK listed public company and will instead be a wholly owned subsidiary of Fox. James Murdoch was asked, at the main party hearing, whether he would expect there to be a UK board for Sky following the Transaction. His response was that in his experience:

you do not really have a board structure that you manage through. That would seem to be superfluous. That said you

certainly do in many cases bring together groups of people and have advisory boards or other things like that. That has not been decided. At this point the detailed management structure or restructuring that goes on is a question for the future. It is not something that we have decided on. I would like to keep it going. I would like to keep this team in place.

- 7.93 Taking account of this response, our view is that following the Transaction it is likely that there will not be an effective local board equivalent to that at Sky prior to the Transaction providing independent governance over Sky. Instead we believe that Sky (including Sky News) will effectively be controlled by Fox management with governance oversight by the Fox board based in the US. While we expect Fox to maintain Sky's incorporation in the UK, noting that Sky's broadcasting licences are held by UK entities and the statutory requirement under UK company law for a company to have at least two directors, we do not expect its directors to provide a constraint on the exercise of control by Fox. We note in that regard the corporate arrangements that News Corp has in place in the UK, whereby the director appointments of each company appear to be limited to a small number of executives. For example, the directors of News UK (ie News Corp UK & Ireland Limited) listed at Companies House are Rebekah Brooks (CEO), David Dinsmore (COO) and Christopher Longcroft (CFO).<sup>228</sup>
- 7.94 On that basis, the level of control the MFT will be able to exercise over Sky and Sky News following the Transaction will be the same as that it currently exercises over Fox. As set out in paragraph 7.24, that is a high degree of material influence albeit falling short of de facto control within the meaning of the Act. This control is exercised through the MFT's shareholding in Fox and the positions held by Rupert, Lachlan and James Murdoch on the Fox board. The MFT's control over Fox, and post Transaction over Sky and Sky News, is further enhanced by informal means including through the relationships between certain directors of Fox and either the MFT or members of the Murdoch family (or both).
- 7.95 We therefore find that the direct impact of the Transaction will be to allow the MFT to significantly increase the control it is able to exercise over the management of Sky's business through formal mechanisms (over which Fox will have direct control) such as setting the strategic direction, commercial objectives and budget of Sky and Sky News (which as noted in paragraph 7.79 can impact on the editorial positioning and agenda of Sky News). It would also mean the MFT could more easily influence the appointment of

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<sup>228</sup> [Companies House, News Corp UK and Ireland Limited \(Company number 00081701\)](#).

senior staff at Sky and Sky News. We did not find specific incidences where the current independent directors and other shareholders of Sky acted as a constraint in relation to any potential interference in the editorial direction of Sky News by the MFT, but this should be seen in the context of the MFT's limited ability to exercise control over Sky and Sky News currently. In that regard, we consider that the constraint on the MFT's ability to exercise control post Transaction is likely to be considerably weaker than the existing combined double layer of formal constraints on the MFT's exercisable control, in the form of both Fox and Sky's independent directors and shareholders.

- 7.96 The significance of the loss of the double layer of constraints on the ability of the MFT to exercise control is magnified by our finding that among the Fox independent directors some have close ties to the MFT, which is not the case for the independent directors of Sky (see paragraph 7.22). In addition, the independent directors of Sky are particularly familiar with the UK media market and are likely to form their own view on issues of media plurality and broadcasting standards given that the UK forms a very significant part of Sky's business. By contrast, post Transaction, the independent directors of Fox (in circumstances where the UK market forms a relatively much smaller part of Fox's business) are more likely to defer to James, Lachlan or Rupert Murdoch when considering issues that relate to those matters, given the familiarity of, in particular, James and Rupert Murdoch with Sky's UK business and the UK media market.
- 7.97 Furthermore, following the Transaction, the Fox board will have oversight over a range of business divisions of which the Sky business is only one and where Sky News, already a relatively small part of the Sky business, will be a much smaller part of a far larger combined Fox and Sky business.
- 7.98 We note that the increased ability of the MFT to exert influence over Sky News may not manifest itself in full control over editorial output and consider that any exercise of such influence is likely to be more indirect in practice. For example, such influence will be exercisable through changes to the Sky News budget, the strategic direction of the business, the appointment of editorial positions within Sky News or the clear expression of the views of members of the Murdoch family directly to editorial staff, which could lead to changes in the positioning of Sky News or influence over its agenda. In relation to the appointment of editorial positions within Sky News, we note the lack of established process for the appointment or replacement of the Head of Sky News including who should (or should not) be involved in that decision. Our view is that in circumstances where the MFT has increased ability to exercise control over Sky and Sky News post Transaction, this relatively informal process may facilitate the exercise of influence by the MFT over this decision.

- 7.99 Third parties submitted that we should put considerable weight on the fact that the MFT's level of ownership of Sky will be similar to its ownership of News Corp and that the evidence indicates that Rupert Murdoch uses informal channels to speak to the editors of News Corp's UK newspapers. We note that, in contrast, there is no evidence to suggest that this happens currently in relation to Sky News, which we consider in part may be a reflection of the constraints currently in place preventing the exercise of such informal influence. However, after the Transaction, Rupert Murdoch (as Co-Executive Chairman of Fox) will have formal responsibilities towards Sky, and this may facilitate the use of informal channels between him and Sky News. Even if such channels do not develop, and noting the fact that News Corp and Fox are different companies, the example of control exercised in relation to News UK shows how the MFT is able to exercise significant influence over a wholly owned subsidiary of the company in which it holds shares in a way it cannot do over Sky currently.
- 7.100 In light of the above, and in the context of the extent of control currently exercised and exercisable by the MFT over Sky and Sky News, we find that the Transaction will significantly increase the 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.<sup>229</sup>
- 7.101 Our view is that although the MFT will not have full ownership of Sky following the Transaction, the significantly increased control it will be able to exercise 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.
- 7.102 We set out in chapter 8 our conclusions on the effects of internal plurality and other constraints on the exercise of control that might act as safeguards that would counterbalance the increased level of control discussed earlier. The assessment of internal plurality and these other constraints forms an integral part of our overall assessment of, and conclusions reached in relation to, the impact of the Transaction on the extent of the MFT's control over Sky and Sky News. However, first we set out our reasoning in relation to whether, in

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<sup>229</sup> In coming to this conclusion, we do not make any findings as to the strictness of the fiduciary standards that apply to the directors of Sky as a listed company subject to UK law compared to the directors of Fox as a listed company subject to Delaware law.

addition to the ERMS we have found between Fox and Sky, there is an additional ‘ceasing to be distinct’ between the MFT and Sky. This reasoning provides the basis for our jurisdictional finding on this point set out in paragraph 4.21.

### **Assessment of a ‘ceasing to be distinct’ between the MFT and Sky (for jurisdictional purposes)**

7.103 As stated in chapter 4 on jurisdiction and counterfactual (paragraph 4.21) we considered whether for jurisdictional purposes, in addition to Fox and Sky, there is a second ceasing to be distinct between the MFT and Sky. This would depend on there being a change in the level of control. The basis on which we came to the conclusion that the MFT currently has material influence over Sky and will have, in jurisdictional terms, material influence after the Transaction is explained below.

#### ***The MFT’s current material influence over Sky***

7.104 In assessing the level of control for jurisdictional purposes we had regard to our CMA2 Mergers Guidance). Paragraph 4.15 of CMA2 provides:

Assessment of material influence requires a case by case analysis of the overall relationship between the acquirer and the target. In making its assessment, the CMA will have regard to all the circumstances of the case.<sup>230</sup>

7.105 The Mergers Guidance then sets out three potential sources of influence - shareholding, board representation and ‘other sources’ - but notes that the variety of commercial arrangements entered into by businesses makes it difficult to state categorically what will (or will not) constitute material influence.<sup>231</sup>

7.106 In this instance, we took into account the actual extent of control exercised by the MFT over Fox (see from paragraph 7.11) through both its shareholding and the Murdoch family’s role on the Fox board (James Murdoch as CEO and Rupert and Lachlan Murdoch as co-executive chairmen). We consider

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<sup>230</sup> [CMA2 Mergers Guidance](#).

<sup>231</sup> Paragraphs 4.19 and 4.20 of CMA2 indicate that there is a presumption of material influence with a shareholding of above 25% and only exceptionally a shareholding of less than 15% will amount to material influence. This guidance assumes, however, direct ownership and cannot be directly applied in circumstances where there is indirect ownership. It would not, for instance, be appropriate to multiply the MFT’s (including Rupert Murdoch’s) 38.9% share of Fox’s voting rights with Fox’s 37.19% of Sky’s voting rights to calculate a shareholding of 14.4%.

that this gives the MFT the ability to exercise significant influence over Fox's shareholding in Sky. The Sky shareholding is widely held<sup>232</sup> and there are no other substantial shareholders. This is discussed from paragraph 7.55 onwards. Fox's influence over Sky is further enhanced by the presence of two Fox affiliated directors (see paragraph 7.68). In addition, the MFT, through James Murdoch, has a presence on Sky's board as Chairman, a role with particular influence.

7.107 Accordingly, we conclude that the MFT currently has material influence over Sky.

### ***The MFT's material influence over Sky after the Transaction***

7.108 We set out previously, our consideration of the control exercised and exercisable by the MFT over Fox currently and the impact of the Transaction on the actual extent of control exercisable by the MFT over Sky. There is no question that the MFT has, at least, material influence over Fox given its shareholding and the presence of James Murdoch as CEO and Rupert and Lachlan as co-executive chairmen.

7.109 As explained in chapter 4, the European Commission concluded that Fox (with a share of voting rights of 37.19% and three representatives on the board) does not currently have decisive influence within the meaning of Article 3 of the EU Merger Regulation. This was for five reasons:

- (a) Fox does not hold the majority of voting rights;
- (b) there are no special rights attached to the shares held by Fox, which grant it the possibility of exercising control over Sky within the meaning of the EU Merger Regulation;
- (c) Fox did not hold more than 50% of the total of the present shares that voted at AGMs of Sky over the period 2012 to 2016;
- (d) strategic decisions (notably those related to the budget and the business plan) in Sky are taken at the level of the board on the basis of a majority of votes. Fox cannot impose or block decision making at this level. Only three of the 11 directors on Sky's board are affiliated to Fox;

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<sup>232</sup> As at 18 January 2017, the only other shareholders with an interest of more than 2% were: (i) Blackrock, Inc – 5.22%; (ii) Franklin Resources – 4.09%; and Invesco – 3.56% see paragraph 11 of the [European Commission's decision in Case M.8354 – Fox/Sky](#).

(e) ultimately Fox has no rights in relation to the passing or blocking of strategic decisions in Sky.<sup>233</sup>

7.110 The European Commission left open the question of whether the MFT has decisive influence over Fox. While de facto control or controlling interest under section 26 of the Act are distinct from the decisive influence test applied by the European Commission, we consider similar factors apply in relation to the control between the MFT and Fox. On that basis we conclude that while the actual extent of control exercised and exercisable by the MFT over Fox is significant, the level of control for jurisdictional purposes is neither de facto control nor a controlling interest because it does not have the right to appoint directors and does not control more than 50% of the votes at shareholders meetings.<sup>234</sup>

7.111 As the MFT does not have de facto control over Fox currently, there is no basis on which we can conclude that the MFT would have de facto control or a controlling interest over Sky following the Transaction. We note however that the MFT is by a considerable margin the largest shareholder in Fox and has voted in favour of all resolutions passed by shareholders at a Fox AGM. We consider that the significant level of control exercised by the MFT over Fox is therefore at the high end of the scale of material influence within the meaning of the Act, not far short of de facto control.

7.112 Accordingly, based on the findings set out in paragraphs 7.107 and 7.111 we conclude that Sky and the MFT do not 'cease to be distinct' as a result of the Transaction, within the meaning of the Act.

## **8. Internal plurality and other constraints on the MFT's ability to exercise control**

8.1 We considered the Parties' submissions that there are constraints or safeguards on the influence of the MFT over news provision at Sky News which, when considered cumulatively, constrain or provide an effective safeguard against any increased ability of the MFT to exercise control over Sky and Sky News. The constraints they identified are:<sup>235</sup>

(a) the effects of the internal governance in place within Fox, with continued oversight from a majority of independent shareholders and a majority independent board (enhanced by the board resolution);

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<sup>233</sup> [Case M.8354 - Fox/Sky, paragraph 11](#).

<sup>234</sup> With the exception of 2013, the MFT has always had less than 50% of the votes at Fox AGMs.

<sup>235</sup> For example, [Fox initial submission on media plurality](#), paragraph 4.33 and [Sky response to provisional findings](#), paragraphs 3.22 to 3.56.

- (b) the culture of editorial independence in the Sky News newsroom, and practicalities of editorial decision making in a rolling TV news setting;
- (c) editorial independence in UK TV news more broadly and UK audience expectations, and the associated impact on Fox's commercial incentives; and
- (d) legal and regulatory constraints, in particular the requirements of the Ofcom Broadcasting Code.

8.2 The constraints identified by the Parties on the ability of the MFT to exercise control in relation to editorial matters go to the question of the extent to which there will be 'internal plurality' (or, in other words, a range of voices or viewpoints) within the media enterprises controlled by the MFT. We considered these in light of other factors, including the fact that the MFT will not exercise de facto control or have a controlling interest over either Sky or News Corp post Transaction within the meaning of the Act, that it has not historically interfered in relation to Sky News' editorial position, and that different News UK newspaper titles have taken different editorial lines on major issues (such as the EU referendum in 2016 and the endorsement of political parties at general elections).<sup>236</sup>

8.3 Our approach to assessing the extent of the MFT's control over Sky, including our approach to internal plurality, is set out from paragraphs 6.36 to 6.40. In addition, in carrying out our assessment of the weight to attach to internal plurality and the other constraints on the MFT, we took account of the fact 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.

8.4 In addition, we were mindful that we are not only concerned with an outcome whereby there is full editorial alignment across Sky News and News Corp. We consider that even without such full alignment across MFT controlled media enterprises, the Transaction could raise concerns where there is a potential for increased editorial alignment.

## **Board resolution**

8.5 Fox told us that it has no intention to exercise influence over editorial matters at Sky News post Transaction. To ensure the independence and integrity of

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<sup>236</sup> [Fox response to the Secretary of State's provisional decision on reference – Annex 1 of its initial submission on media plurality](#), paragraph 4.33.

Sky News content, Fox proposed independent board oversight of the hiring and dismissal of the Head of Sky News, and of any changes to the Sky News Editorial Guidelines.<sup>237</sup>

- 8.6 To this end, on 20 April 2017, Fox passed a board resolution that stated that the Sky News Editorial Guidelines will remain in place and that the following matters will require approval of the Fox Nominating and Corporate Governance Committee (NCGC):<sup>238,239</sup>
- (a) the appointment or removal of the Head of Sky News (including any material changes in terms and conditions which could give rise to constructive dismissal);
  - (b) any material changes to the authority or reporting relationship of the Head of Sky News; and
  - (c) any future changes to the Sky News Editorial Guidelines.
- 8.7 As noted in paragraph 7.76, the process by which the Head of Sky News is appointed is not well established or subject to clearly established parameters about who should be involved in that decision. In such circumstances, there is unlikely to be a clear basis or criteria on which the independent directors on the NCGC can judge which candidates for the role would be best suited for the position or whether the MFT, through Rupert, Lachlan or James Murdoch, has not exerted undue informal influence over the appointment.
- 8.8 While we expect the independent directors on the NCGC to act in accordance with their fiduciary duties in respect of Fox, we consider that in many instances a decision that might give rise to a plurality concern would be in the commercial interest of Fox (and its shareholders) and therefore consistent with these fiduciary duties. As noted in paragraph 7.98, Fox may seek to make Sky News more commercially successful and appoint editors and make changes to its editorial guidelines to achieve these aims. If such decisions resulted in less plurality (possibly but not necessarily by increasing the role of CEO or co-executive chairmen over editorial policy) it is not clear on what grounds the independent directors' need to comply with their fiduciary duties would prevent this.
- 8.9 Sky News is loss-making and even if, as Fox submitted is the case, the brand value ascribed to Sky News by Sky means it will continue to be a commercial

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<sup>237</sup> Fox initial submission, page 3.

<sup>238</sup> The NCGC is comprised solely of independent directors. The NCGC is responsible for oversight of board appointments and of corporate governance matters generally. See [NCGC charter](#).

<sup>239</sup> Fox initial submission, paragraphs 2.25 to 2.27.

asset under Fox's full ownership, this may not persist over time. In that regard, we note that Sky submitted to us that the continued provision of Sky News should not simply be assumed when considering the level of media plurality absent the Transaction. Sky told us that it would likely be prompted to review the position in the event that the continued provision of Sky News in its current form unduly impeded merger and/or other corporate opportunities available in relation to Sky's broader business, such as the Transaction – in particular having regard to any views expressed by shareholders regarding the denial of such opportunities.

- 8.10 In addition, members of the NCGC have limited experience of the UK TV news sector or UK broadcasting industry more generally.<sup>240</sup> In that context, given their extensive experience of the UK market and direct current and historic involvement with the Sky business, we consider that Rupert and James Murdoch would be likely to have considerable opportunity to influence the recommendation for any new Head of Sky News. This is particularly the case in circumstances where Sky News will comprise a very small part of the overall Fox business and over which the Fox independent directors on the NCGC would have limited visibility. In our view, it is likely that the independent directors will rely heavily on recommendations made to them regarding suitable candidates for the role and may in doing so look to James, Lachlan and Rupert Murdoch to guide them, while still exercising independent judgement consistent with their fiduciary duties.
- 8.11 Finally, as discussed in paragraph 7.45, even when undertakings, such as the 1981 Times Undertakings, have been given as formal commitments (which would not be the case with a board resolution) there is evidence to suggest that Rupert Murdoch continues to have significant involvement and influence, including in relation to editorial matters. In this instance, the board resolution is an internal governance mechanism that ultimately could be revoked by the Fox board, notwithstanding the fact that any such revocation or change would require a majority of independent directors to vote in favour.
- 8.12 Therefore, we conclude that the resolution is unlikely to have a significant effect on the increased ability of the MFT to exercise control over Sky and Sky News which would be brought about by the Transaction.

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<sup>240</sup> [Fox independent director profiles](#). The members of the NCGC are Viet Dinh, James Breyer, Robert Silberman, and Tidjane Thiam.

## Culture of the Sky News newsroom

8.13 The second constraint put forward by the Parties is a culture of independence and the practicalities of devolved editorial decision making in TV news generally, and in particular at Sky News. 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. No one has disputed this view.

8.14 Sky told us in its initial submission that:

Throughout Sky's 28 years of investment in Sky News, Sky News' editorial independence has been enshrined through clearly delineated organisational structures and internal procedures which are ingrained in the culture of Sky and more particularly Sky News. Sky's commitment to editorial independence is driven by the commercial benefits of an independent Sky News to Sky as a broadcaster and pay TV retailer. Those commercial drivers are reinforced by a strong and deep-rooted culture of independence (and vice versa), itself underpinned by rigorous legal safeguards.<sup>241</sup>

8.15 Andrew Neil told us that he considered that Sky News' journalism was of the highest calibre. Mr Neil also told us that Rupert Murdoch had a different attitude towards the newspapers where he regarded himself as editor-in-chief.<sup>242</sup>

8.16 The Sky News editorial team told us that neither Fox, nor anyone at Fox (including Rupert Murdoch), had tried to communicate with anyone within Sky News, nor were they involved in the appointment of John Ryley, the current Head of Sky News. Sky did not consider that the Transaction posed a risk to this.

8.17 Sky submitted that the embedded culture at Sky News was created over a long period of time, entrenched at all levels of the organisation and enshrined in its editorial guidelines and that (i) to change this would require radical and extensive changes of personnel at all levels, and (ii) such change would be highly visible, not readily accepted by Sky News staff and be evident to Sky News' audience who would lose trust, resulting in a loss of audience.<sup>243</sup> Sky

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<sup>241</sup> [Sky initial submission](#), paragraph 3.1.

<sup>242</sup> [Transcript of hearing with Andrew Neil](#), page 4, line 15 to 17.

<sup>243</sup> [Sky response to provisional findings](#), paragraph 3.28.

also submitted that the practicalities of operating a 24-hour TV news service is such that decision making is decentralised, taken by a significant number of individuals at different levels, and in real time.<sup>244</sup>

- 8.18 We do not doubt the professionalism, integrity and reputation of Sky News and the editors and journalists that work there today. We also recognise that they are likely to act as a constraint, at least in the short term, to dramatic changes in Sky News' editorial position or relationship with News UK titles.
- 8.19 The Transaction, however, would increase the MFT's ability to influence the appointment of senior staff. This gives it greater ability to more easily influence the editorial position of Sky News. The MFT would be able to do so without being concerned about the potential for Sky or Sky News staff or executives to raise concerns with Sky's independent directors as these would no longer exist post Transaction. The Transaction would also increase the MFT's ability to set the commercial direction and priorities of Sky and Sky News. This may, for example, be in the form of a greater focus on advertising revenue or types of programming (such as the mix of shows and how they are positioned and promoted). This would not necessarily create a conflict with editorial independence but could create a tension, which over time would change the culture of Sky News.
- 8.20 We recognise that the current culture at Sky News, which has been shaped by its operation as an independent unit with limited board level involvement, may act as a constraint on the ability of the MFT to exercise control in the short term. However, we consider that there is no inherent reason for such a culture to persist and that it could be changed over time with changes in key personnel or strategic direction.
- 8.21 While we accept that decision making in a 24-hour TV news service will often be devolved and require immediate editorial judgements to be made, this is not true of many important decisions. For example, opinion programming is not subject to the same 'real time' editorial decision making process and, clearly, some decisions related to rolling news coverage are taken at a more senior level and subject to greater deliberation. Further, decisions relating to Sky News' budget and commercial strategy which are not made within Sky News can nonetheless have a significant effect on Sky News' editorial approach.
- 8.22 We do not accept that staff changes would need to be made at all levels of the organisation in order for a change in culture to take place. Despite the

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<sup>244</sup> [Sky response to provisional findings](#), from paragraph 3.32.

practicalities of editorial decision making in the context of rolling news production, we consider that the senior team at Sky News plays a significant role in determining its culture – and that replacing key individuals could lead to a change in that culture. We also consider that the risk of some journalists deciding to leave as a consequence would not be sufficient to guard against such changes being made, particularly in view of the fact that Sky News is a high profile news organisation and broadcasting is a competitive industry in which to find employment. Furthermore, we note 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.

- 8.23 This conclusion can be contrasted with the CC’s conclusion in Sky/ITV where (combined with regulatory mechanisms) a strong culture of editorial independence was considered likely to be effective in preventing plurality concerns (see paragraph 8.45). The CC’s finding in that regard was based on the limitations on the extent of control a 17.9% stake in ITV gave BSkyB, which did not for instance give BSkyB the ability to exert significant commercial influence over ITV’s news output or more widely over ITN and where any significant increase in share ownership was limited by the 20/20 rule.<sup>245</sup> For the reasons given in chapter 7, we do not conclude that to be the case in relation to the Transaction, particularly as Sky will be fully owned by Fox.

## **Audience expectations and commercial incentives**

- 8.24 The Parties submitted that UK audiences’ expectations and the commercial incentives regarding the independence and impartiality of broadcast news (and of Sky News in particular) would make any attempt to exercise influence through broadcast news highly visible and self-defeating. Viewers would switch away if they thought that Sky News’ independence and impartiality were diluted, which would adversely impact both the commercial contribution Sky News makes and any influence that it has as a news outlet.<sup>246</sup>
- 8.25 We do not agree that audience expectations are likely to act as a significant constraint for two reasons. First, we consider that it is possible to exercise influence in ways which do not lead to overt changes in viewers’ overall perceptions of a channel’s impartiality. Second, even if the position of Sky News were changed significantly following the Transaction, such that some

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<sup>245</sup> CC report in Sky/ITV, paragraph 40.

<sup>246</sup> See, for example, Sky [initial submission](#), paragraph 3.24 and Fox [initial submission on media plurality](#), paragraph 4.34(iv).

viewers no longer chose to watch it, other viewers attracted to the change in position may start watching and it is not clear why overall there should be a net loss of viewers.

- 8.26 Ofcom concluded in its Public Interest Report that audience expectations in and of themselves are unlikely to ensure the editorial independence of Sky News post Transaction, as such expectations provided less of a constraint where editorial influence is subtle and not immediately obvious.<sup>247</sup> We set out in chapter 11 and in our discussion of the Broadcasting Code that changes which may occur post Transaction, such as story selection, prioritisation and omission, can be subtle. We therefore agree with Ofcom that such changes, which fall short of full editorial alignment or major programming changes, may not be immediately and readily apparent to viewers. This does not mean that such changes would not affect audience perception or have significant effects. Such changes could also develop and allow for greater influence to be exerted by the MFT over time.
- 8.27 The Parties' arguments relating to UK audiences' views on the impartiality of TV news are reflected in the data on impartiality presented in paragraphs 11.37 to 11.46 where we find that, in general, broadcast news is seen as more impartial compared to print media. However, the data does not indicate that views on impartiality are appreciably affected by the different editorial lines taken by different broadcast news providers. For example, Channel 4 News has a different editorial focus compared to the BBC or ITV, and yet its scores in terms of impartiality are broadly comparable.<sup>248 249</sup>
- 8.28 This suggests that members of an audience of a particular broadcast news provider are either broadly sympathetic to the editorial positioning of their chosen channel (such that they consider the output to be impartial), or that editorial positioning within the bounds of what is possible under the Broadcasting Code is such that it does not affect the overall view of impartiality. It is also possible that the general expectation that broadcast TV news is impartial may colour audience perceptions that what they are shown will be impartial.
- 8.29 Further, we note that viewer expectations can change over time and that even if changes result in the loss of some viewers, it may result in gaining others.

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<sup>247</sup> [Ofcom Public Interest Report](#), paragraph 9.14.

<sup>248</sup> In fact, Channel 4 News' NCS score for 'impartial and unbiased content' is marginally higher than the BBC's – see Figure 11.2.

<sup>249</sup> Fox submitted in paragraph 2.33(vi) of its [response to our provisional findings](#), that by the CMA's own analysis, the control exercisable by the MFT over Sky News would be subject to very substantial limitations. For example, any changes in editorial line would be in the nature of the differences between other respected broadcast news providers. The level of differences in editorial line that currently exist is not indicative of the limits of differentiation.

This means that there may not be a significant commercial impact outweighing any gain in influence.

- 8.30 We find that audience expectations do not provide a significant safeguard to counterbalance the increased ability of MFT to exercise control of Sky and Sky News that would be brought about by the Transaction.

## **Broadcasting Code restrictions**

- 8.31 The Broadcasting Code imposes restrictions on broadcast licence holders as to due accuracy and due impartiality in news and as to special impartiality in matters of political or industrial controversy and matters relating to current public policy.<sup>250</sup> However, the terms of the Broadcasting Code and the manner in which it is applied by Ofcom, leave a significant, though not unlimited, latitude to licence holders to produce distinctive output or to align output towards a particular viewpoint.

### ***Editorial prioritisation and agenda setting***

- 8.32 First, an important limitation on the ability of the Broadcasting Code to prevent or inhibit editorial alignment is the fact that the Broadcasting Code does not generally seek to regulate editorial prioritisation or the editorial agenda adopted by a broadcaster.<sup>251</sup> It is perfectly permissible for a broadcaster to have a particular editorial focus or set of interests which it tends to promote or pursue. Such editorial decision making encompasses, among other things: decisions as to which items to cover or which to omit; the amount of airtime to give to particular stories or issues; the prominence accorded to particular types of stories; the nature and tone of coverage (for example, sensationalist, analytical or in-depth); and decisions regarding where to concentrate editorial resources (for example, investigative journalism into public interest issues or discussion programmes). These matters of editorial judgment and decision making are not generally regulated by the Broadcasting Code but, individually and collectively, they can contribute to the editorial alignment of a channel. This can be seen among existing TV news broadcasters, a number of which adopt editorial approaches which are recognised as distinctive. The editorial approach of Channel 4 News, for example, is distinctive from that of ITV or Channel 5. Various contributors in our roundtable on media plurality noted that Channel 4 News had distinctive values which informed its editorial

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<sup>250</sup> The Broadcasting Code, section five.

<sup>251</sup> We note that in Fox's [initial submission on media plurality](#), Fox relies on a joint opinion of Lord Pannick QC and David Lowe from 15 December 2010, which finds that the Broadcasting Code does apply to the relative prominence afforded to a news story or type of story.

approach.<sup>252</sup> Similarly, Al Jazeera adopts a particular focus in its coverage, as does Russia Today.

8.33 As Ofcom stated in its Public Interest Report:

The provisions of the Broadcasting Code cannot address editorial decision making in terms of which stories may be prioritised. The Broadcasting Code does not seek to influence such editorial decisions and to do so would raise serious concerns around freedom of speech. In any event, such influence may take subtle forms which would not be picked up by the Broadcasting Code, for example through the selection or omission of particular news items.<sup>253</sup>

8.34 Ofcom also emphasised that:

The requirement for ‘due impartiality’ is not absolute and broadcasters have a degree of editorial discretion in the style and the tone of a channel. [...] The Broadcasting Code allows us to consider complaints about impartiality or accuracy in relation to specific programmes. It does not provide for us to take a view on the overarching approach of a channel, for example, the specific news stories that it covers or its tone. A channel could become more partisan by sensationalising particular news stories. Alternatively, it could be done through its current affairs programming, where due impartiality is required only on political or industrial issues on which politicians, industry and/or the media are in debate, and on matters that relate to current public policy. [...] In that light, we do not consider that the impartiality rules of the Broadcasting Code are sufficient of themselves to ensure that the editorial stance of Sky News does not become aligned with the other news outlets under the influence of the Murdoch Family Trust.<sup>254</sup>

8.35 We note that in its response to our provisional findings on plurality, Sky made clear that it does not contend that the Broadcasting Code imposes a ‘straight-jacket on editorial discretion preventing broadcasters from differentiating themselves’.<sup>255</sup>

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<sup>252</sup> See, for example, [transcript of the roundtable on media plurality](#), page 20.

<sup>253</sup> [Ofcom Public Interest Report](#), paragraph 8.39.

<sup>254</sup> [Ofcom Public Interest Report](#), paragraphs 9.10 to 9.12.

<sup>255</sup> [Sky response to provisional findings](#) paragraph 3.51.5

## ***News programmes, discussion and personal view programmes***

8.36 In addition, 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. Such an approach is compatible with the impartiality requirements of the Broadcasting Code. Rule 5.9 of the Broadcasting Code provides, among other things:

Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of 'personal view' or 'authored' programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole.

8.37 A key requirement is that alternative viewpoints must be adequately canvassed on such programmes or over a series of programmes as a whole. However, the extent to which alternative viewpoints must be canvassed depends on a variety of contextual factors such as the nature of the topic under discussion, the nature of the programme and audience expectations. In addition, personal view or authored programmes must be clearly signalled to viewers at the outset and presenters should not take advantage of regular appearances to promote their own views in a way that compromises the impartiality requirements. Within this broad framework, it remains possible for a discussion or personal view programme to adopt a particular stance. While Rule 5.9 does not mean that authored or personal view programmes are exempted from the impartiality requirements, the way in which these duties are applied in this context is different. Rule 5.9 affords additional latitude, in practice, for such programmes to adopt a particular stance or viewpoint. The requirements of impartiality do not preclude the possibility of discussion programmes being positioned in a particular manner.

8.38 Insofar as news programming is concerned, broadcasters are free to adopt their own interpretation of the news, subject to the overall requirements of the Broadcasting Code, even though they may not put forward a subjective personal view in news output. The latitude for positioning in respect of news programming is more limited than in respect of discussion or personal view programming. However, the ability of broadcasters to adopt their own interpretation of the news, taken with the limited role of the Broadcasting Code in regulating matters of editorial prioritisation, affords some scope for distinctive positioning in the context of news programming. As noted earlier,

established broadcasters often adopt distinctive approaches to news coverage and this is permitted by the Broadcasting Code.

### ***Online and on-demand content***

8.39 Furthermore, we also note the limited scope of broadcast regulation and, consequently, of the Broadcasting Code and its requirements of due impartiality, special impartiality and due accuracy.<sup>256</sup> The complex jurisdictional requirements of the broadcasting regulation are described in more detail in Appendix B. For present purposes, it suffices to note that online and on-demand content produced by broadcasters, even where relating to news, is not generally covered by the Broadcasting Code unless, among other things, it is produced wholly or partly to be seen on TV and distributed in a way that makes it available to all members of the public. Broadcasters therefore have greater latitude in respect of editorial decision making in respect of online and on-demand content. Such content forms a significant element of the overall package of output produced by broadcasters.

### ***The margin of discretion afforded to editorial judgements***

8.40 Finally, we note that, when interpreting and applying the Broadcasting Code, Ofcom must also act compatibly with the rights set out in the ECHR and, in particular, the right to freedom of expression (Article 10). As such, a degree of latitude is afforded to the editorial judgements of journalists and broadcasters as to the content of programmes in line with Article 10 of the ECHR and, in the context of the exercise of rights of freedom of expression, decision makers must be cautious in making findings that the exercise of such rights has given rise to an infringement of the Broadcasting Code.<sup>257</sup> This is significant in that compliance with the Broadcasting Code often involves editorial judgements, for example, as to the need to air alternative viewpoints. Judgements by an editor as to what is appropriate are accorded a margin of discretion in this regard.

8.41 Overall, we consider that the Broadcasting Code offers some protection against editorial alignment between Sky News and the News Corp newspapers, despite them being media enterprises controlled by the MFT. In particular, the requirements of due impartiality and due accuracy discussed earlier impose constraints in this regard. However, the protection against alignment afforded by the Broadcasting Code is, in our view, limited. Although the Broadcasting Code requires due impartiality and respect for the

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<sup>256</sup> See Appendix B.

<sup>257</sup> See generally *R (Gaunt) v Office of Communications (Liberty intervening)* (CA) [2011] 1 W.L.R. 2355.

requirements of special impartiality, the Broadcasting Code affords licence holders a significant degree of latitude to adopt particular stances or viewpoints in their output, as can be seen in the nature of coverage provided by a number of established broadcasters.

- 8.42 The degree of latitude available to broadcasters to position output is more limited in respect of news coverage. Nevertheless, the Broadcasting Code permits broadcasters to interpret news as they see fit and, as with other forms of coverage, the requirement of due impartiality in respect of news coverage depends on a number of contextual factors. As for other forms of current affairs output, 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. In addition, the Broadcasting Code does not generally seek to regulate questions of editorial prioritisation or decision making in respect of the news or current affairs agenda of a broadcaster. Taking these various factors together, there is substantial scope for permissible changes in alignment or positioning to occur within the framework of the Broadcasting Code.

## **Diversity of editorial output within News UK**

- 8.43 Fox in its response to the Secretary of State's provisional decision to make a reference submitted that the Ofcom Public Interest Report 'disregards the substantial differences between the approach and editorial lines of the News Corp newspapers more generally'.<sup>258</sup> Fox submitted that this is, for example, illustrated in the fact that The Times and The Sun took diametrically opposed editorial positions on Brexit.
- 8.44 We do not dispute that there is editorial diversity within News UK's newspaper titles. However, the media plurality consideration is – importantly – directly concerned with the sufficiency of plurality of persons with control of media enterprises. In that regard, we consider that the significantly increased level of control the MFT would be able to exercise over Sky and Sky News may give rise to a concern based on the potential for increased editorial alignment and the fact that the MFT could use its increased control to influence public opinion and the political agenda through the editorial position of Sky News, in addition to its ability to do so through the newspapers owned by News Corp.

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<sup>258</sup> [Fox response to the Secretary of State's provisional decision on reference – Annex 1 of its initial submission on media plurality](#), paragraph 4.33.

## The cumulative effects of the safeguards proposed by the Parties

8.45 Fox highlighted the CC's decision in Sky/ITV in relation to the need to consider the cumulative effectiveness of different safeguards set out previously. We agree that this is necessary.

**Given the extent of the influence conferred on BSkyB** by its acquisition of a 17.9 per cent shareholding in ITV, we conclude that **the regulatory mechanisms, combined with a strong culture of editorial independence within television news production**, are likely to be effective in preventing any prejudice to the independence of ITV news.<sup>259</sup>

8.46 Our view is that increased influence by the MFT over Sky News is unlikely to manifest itself in full control over editorial output and consider that the exercise of influence while it may occur directly is likely to be more nuanced in practice. Such influence would be exercisable, for example, through changes to the Sky News budget, the strategic and commercial direction of the business, the mix of shows including how they are positioned and promoted, seeking to secure synergies across Fox's news assets, the appointment of editorial positions within Sky News or the clear expression of the views or expectations of members of the Murdoch family to editorial staff. Coordination of editorial outlook could arise in relation to a range of matters. While these may not, generally, tend to be matters subject to intense scrutiny (for example the EU referendum or the outcome of a general election), we consider that coordination could arise in respect of a range of significant matters, for example, those relating to fiscal policy, industrial strategy, environmental protection, immigration and social and criminal justice.

8.47 While the safeguards identified are likely to mean that the MFT could not attempt to exercise its increased level of control over Sky News in certain ways - for example requiring Sky News to back a specific political party would not be possible given the requirement for impartiality in the Broadcasting Code - longer term and more subtle changes in position as a result of the MFT's increased influence would not necessarily engage or be prevented by any of these safeguards, so that their cumulative effects would not be sufficient to allay concerns.

8.48 Therefore, we find that the constraints set out above, whether considered individually or cumulatively, would not act to significantly limit the increased level of control the MFT would be able to exercise over Sky and Sky News

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<sup>259</sup> Fox initial submission, paragraph 4.34. Emphasis added by Fox.

following the Transaction, as set out in paragraph 7.100. This is notwithstanding the fact that the MFT might take into account these constraints in making decisions about how it will exercise its control over Sky and Sky News after the Transaction.

## **Conclusion on the change in the actual extent of control post Transaction**

- 8.49 In the context of the extent of control currently exercised and exercisable by the MFT over Sky and Sky News, we find that the Transaction will significantly increase the level of control the MFT is able to exercise over Sky and Sky News; such control in turn enables it to influence the content of Sky News over time. We consider that the loss of the current Sky board and its independent directors, in particular, will increase the ability of the MFT to exercise control over Sky and Sky News. As part of our assessment of control, we considered the extent to which internal plurality including the constraints or safeguards proposed by the Parties (including the Fox board resolution, the culture of the Sky News newsroom, audience expectations and the Broadcasting Code) would act to limit this increased exercisable control. We concluded in relation to each separately and taken all together cumulatively, that they would not do so.
- 8.50 We therefore conclude that, although the MFT will not have full ownership of Sky following the Transaction, the significantly increased level of 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.
- 8.51 Therefore, in carrying out our assessment of the impact of the Transaction in terms of the theories of harm outlined in chapter 6, it is necessary to analyse whether the combination of Sky News and News Corp is likely to lead to harm in terms of the media plurality consideration. This assessment is set out in chapter 10 and 11, following an overview of the UK news media landscape in chapter 9.

## **9. UK news media landscape**

- 9.1 In considering the current level of media plurality and the impact of the Transaction, we had regard to the way in which different types of news

providers operate, and recent changes to the way that news is consumed, including the growth of online news provision. This chapter sets out this key context which was relevant to our subsequent analysis of measures of plurality, focusing primarily on changes in online news provision. More detailed information on the use of different channels and news providers is contained in chapter 10. Further detail on online news provision is contained in Appendix E.

## **Characteristics of different types of news providers**

- 9.2 Consumers can source their news from four main platforms: TV, print, online and radio. These platforms are subject to different regulatory requirements, and tend to provide different types of content.
- 9.3 TV and radio news providers are required under the Broadcasting Code to present news with due accuracy and impartiality, which limits the extent to which they can promote opinions or take partisan positions. In contrast, newspapers are not subject to the same requirements, and as a result they are free to take a more overt partisan or political or judgemental position. Ofcom's News Consumption Survey (NCS) indicates that consumers understand this distinction, at least in broad terms. For example, they tend to rate broadcasters higher than newspapers on questions of whether a particular source is 'accurate and reliable' or 'impartial and unbiased' (although there are significant differences between providers).<sup>260</sup>
- 9.4 Online news providers are also not subject to the same requirements as TV and radio news providers.<sup>261</sup> We recognise that consumers may understand the distinction between TV/radio news and newspapers, and have certain expectations of different news brands (for example, the extent to which these brands can be trusted), but these expectations may be challenged as more news is consumed online and via intermediaries. We note that providers of news such as Sky have stated that they have a unified approach across both TV and online and apply the same editorial guidelines across both platforms.<sup>262</sup>

## ***Relative importance of different types of news providers***

- 9.5 The structure of the news market is complex, but at a high level it is useful to distinguish between the 'wholesale' production of content and the 'retail'

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<sup>260</sup> See paragraphs 11.37 to 11.39.

<sup>261</sup> See paragraph 5.29.

<sup>262</sup> [Summary of main party hearing with Sky](#), paragraph 40.

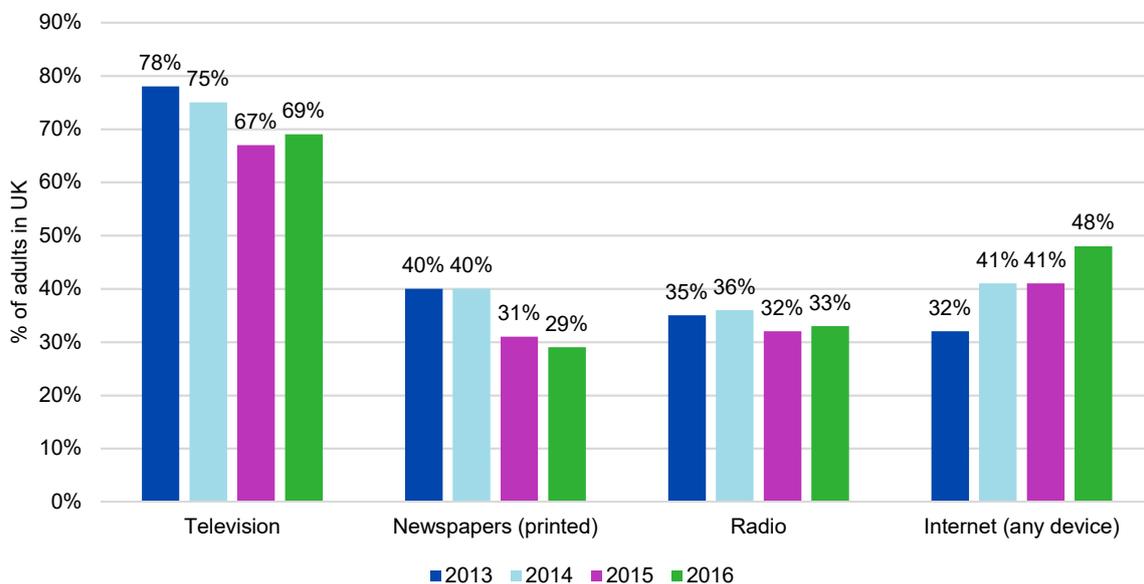
distribution of that content to end users through various platforms.<sup>263</sup>

Traditional news providers are involved at both stages of the chain, but some organisations such as online intermediaries are only involved at the retail stage. Some radio broadcasters source a large share of their news content from other organisations and focus on the retail stage, although they keep a level of editorial control on the content.

9.6 The relative importance of these four platforms is changing, driven primarily by the growth in use of online channels. We have seen an increase in access to the internet (from 60% to 88% over the last 12 years), and rapid growth in smartphone take up (from 51% to 76% over the past five years).<sup>264</sup>

9.7 However, while more people are using the internet, TV remains the most important source of news with newspapers still playing a significant role. According to Ofcom’s NCS, TV is used as a source of news by 69% of the population. Newspapers are also still used by nearly one third of adults as a source of news. In 2016, roughly half of the population consumed some of their news online (rising from 32% in 2013) (see Figure 9.1). The average weekly consumption of TV and radio news has been relatively stable in recent years, whilst daily national newspaper readership has declined. Further details on trends in consumption is included in chapter 10.

**Figure 9.1: Use of four main platforms for news (2013 to 2016)**



Source: Ofcom [NCS 2016](#).  
 Q3a/Q3aa: *Which of the following do you use for news nowadays?*  
 Base: All adults 16+ (2016: 2,894; 2015: 2,921; 2014: 2,731; 2013: 2,862).

<sup>263</sup> Where appropriate we differentiate between wholesale and retail provision of news in terms of metrics such as consumption and reach in chapter 10.

<sup>264</sup> Ofcom, [Communications Market Report 2017](#).

## **Recent changes in business models**

- 9.8 Ofcom found that, despite the decline in TV news consumption, the revenues of TV broadcasters and their spending on news programming have been relatively resilient.<sup>265</sup> TV broadcasters have all started to distribute content online, and we saw no indication that their business models or their viability in news production is under threat. Similarly, the revenues of commercial radio stations have been relatively flat between 2010 and 2015.<sup>266</sup>
- 9.9 In contrast, newspapers are seeing their business models disrupted to a greater extent by the growth in online news. As the circulation of printed newspapers has dropped, so has their attractiveness to advertisers. In most cases, the increase in revenues from digital advertising has not offset the decline in revenues from the print editions. In total, Ofcom found that the advertising revenues of national newspapers dropped from nearly £1.4 billion in 2011 to approximately £0.8 billion in 2016.<sup>267</sup>
- 9.10 Newspapers have responded to these pressures in various ways. While some newspapers have sought to grow subscription revenues from their online editions (for example, The Times), others have dropped their paywalls to maximise their online audience and their digital advertising revenues (for example, The Sun). Some brands have adopted mixed models that rely on partial paywalls or voluntary donations. Most newspapers have also sought to reduce costs through a combination of consolidation, staff reductions, and reductions in the size of their editions.

## **Development of different forms of online news provision**

- 9.11 Within the overall growth in consumption of news online, it is important to distinguish between different types of online news providers. The companies active in the distribution of news online fall into three main categories:
- (a) traditional news providers (ie most broadcasters and newspapers publishers), who have started to distribute their content online as well as on traditional platforms;
  - (b) online-only providers (eg BuzzFeed, HuffPost UK, and The Independent), who only distribute their content online;<sup>268</sup> and

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<sup>265</sup> [Ofcom Public Interest Report](#), paragraph 4.57.

<sup>266</sup> [Ofcom Public Interest Report](#), paragraph 4.59.

<sup>267</sup> [Ofcom Public Interest Report](#), Figure 4.8.

<sup>268</sup> The Independent stopped its print edition in 2016 and as such we refer to it as an 'online-only' provider.

- (c) intermediaries, who do not produce their own content but distribute content from other sources.
- 9.12 Traditional news providers provide the bulk of the news content consumed online (see Appendix E). They distribute this content on their own websites and apps as well as through intermediaries. Traditionally, broadcasters have used more videos and podcasts online while newspapers have used more text. However, this distinction is becoming increasingly blurred and most news providers now use a variety of formats.
- 9.13 Online-only providers have been successful at growing their audiences online and generating engagement on social media. However, they differ from traditional news providers in three main ways:
- (a) **scale:** online-only providers have much more limited resources than traditional news providers (see Appendix H);
  - (b) **focus:** in most cases online-only providers have more focused editorial priorities and narrower sets of target audiences. For example, BuzzFeed told us that it sees itself as ‘a relatively small UK news organisation’ which tended to focus resources on covering stories that are not part of the ‘big media’ news agenda, or which will bring something distinctive to a big rolling story, as well as investigative journalism. BuzzFeed also added that it tends to focus on news that is likely to appeal to consumers under the age of 35;<sup>269</sup>
  - (c) **trust:** online-only providers tend to be trusted less compared to more established news providers. This is discussed further in chapter 11 (see paragraphs 11.38 to 11.46).
- 9.14 The intermediaries are themselves a heterogenous group. Based on the NCS, the four most popular intermediaries for news consumption in the UK are Facebook, Twitter, Google, and YouTube:
- (a) Facebook and Twitter are social media sites which allow users to see news content from various sources. These sources can be, among others, news providers but also individual commentators, politicians and campaign groups. What a user sees on a social media site is determined to a large extent by their own choices in terms of which profiles and pages to follow and groups to join, the choices of the providers and authors in terms of what to post.<sup>270</sup> The algorithms play a role in ranking the content

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<sup>269</sup> [Summary of hearing with BuzzFeed](#), paragraph 1.

<sup>270</sup> We note that in the case of Twitter, text posted on the platform (Tweets) can also be promoted to a wider audience using Twitter's advertising products.

which is responsive to each individual user's preferences and those preferences are largely informed by the activity of the user and the user's friends on the platform and the sources and publishers they find the most meaningful and engaging. For example, Facebook automatically ranks the stories displayed on each user's News Feed based on an algorithm designed to surface the content which is most responsive to individual preferences. This algorithm uses a number of 'signals' to assess the relevance of available posts including the identity of their publisher, their date of publication, and people's engagement with the post. The algorithm displays posts from a users' friends and preferred news providers, but also from unconnected publishers in its Explore Feed;

- (b) Google operates a search engine which allows users to discover web-based information, including news from various publishers by typing news related search terms in the Google search bar. Google also operates the Google News interface, which automatically aggregates news from providers for different topics. The NCS shows that, of the people who use the internet for news, 15% use the Google search engine for news, and 6% use Google News.<sup>271</sup> The Google algorithm ranks results related to news based on signals specific to measuring the relevance of news articles. These news-specific signals include: 'freshness' (ie how recent and timely a given article is); measures of the site's overall quality with respect to news content; user activity (measures of user satisfaction with the results); and 'PageRank' (ie the number and quality of links that a page receives from other pages).<sup>272</sup> The results may also take account of the user's location;
- (c) YouTube (which is owned by Google) could be described as operating a hybrid model, where users either search for videos on current affairs based on specific search terms, or choose to follow the channels of their preferred news providers or commentators.

## Conclusions on UK media landscape

9.15 This chapter has set out contextual issues that are important in our assessment of diversity in the following chapter. In particular, we find that:

- (a) TV and radio news providers are required to present news with due accuracy and impartiality, which limits the extent to which they can

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<sup>271</sup> In 2016. Ofcom, *News Consumption in the UK: 2016*, page 38.

<sup>272</sup> Google told us that PageRank was less important for news related searches than for other searches.

promote opinions or take partisan positions. Newspapers and online news providers are not subject to the same requirements;

- (b) TV remains the platform used by the highest proportion of adults as a source of news, being used by more than two thirds of the population. Newspapers are still used by nearly one third of adults as a source of news;
- (c) the proportion of adults using online news providers as a source of news is increasing, to nearly a half, although this varies significantly by age group. Newspapers have been disrupted by the growth of online news consumption, and have responded by developing their online news provision;
- (d) news providers online can be either traditional news organisations with an online presence, intermediaries, or online-only news providers. Online-only news providers tend to differ from other providers in terms of their scale, their focus, and the level of trust that their users have in them.

9.16 Overall, we observe that online news is changing the way users consume news. However, traditional news providers continue to produce the bulk of the news content that is consumed online, either directly or via intermediaries.

## **10. Assessment of diversity in the viewpoints that are available and consumed**

- 10.1 This chapter considers whether the MFT's increased influence over Sky and Sky News as a result of the Transaction could lead to a reduction in the diversity of viewpoints (both in terms of the number of viewpoints, and the persons with control of those viewpoints) that are available to and consumed by audiences in the UK.
- 10.2 As set out in chapter 6, concerns about a reduction in diversity might arise if the significantly increased level of control that the MFT will be able to exercise over Sky following the Transaction means that the news and current affairs offerings operated by Sky and News Corp (including Sky News, Sky News Radio, The Sun, The Sun on Sunday, The Times, and The Sunday Times) could pursue more similar editorial positions or story selection following the Transaction. For example, 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. These concerns do not rely on full editorial alignment, but rather the potential for increased editorial alignment over time.

- 10.3 We assessed the diversity of viewpoints following the Transaction by considering availability, reach and consumption of different news providers, using quantitative metrics and qualitative evidence. These metrics and evidence allowed us to assess the scale of the potential loss of diversity by analysing the current position of Sky News and the News Corp newspaper titles, and the extent to which the MFT's increased control over Sky and Sky News following the Transaction would strengthen the MFT's position.
- 10.4 Throughout this analysis, we considered measures of reach and consumption for the different news sources owned by Fox, News Corp and Sky separately as well as in aggregate. In response to our provisional findings, Fox and Sky argued that this simple aggregation of consumption metrics for the news sources they own is inconsistent with our findings on control, which indicate that influence could only be exerted in limited and indirect ways. We disagree with this proposition. The main theory of harm explored throughout this chapter is that the Transaction will lead to a reduction in the range of viewpoints available and consumed by members of the public. The Transaction is more likely to raise plurality concerns if both Sky News and one or more of News Corp's news and current affairs offerings have a significant share of current consumption, such that any reduction in the diversity of viewpoints as a consequence of the increased level of control by the MFT over Sky would be expected to affect a significant number of consumers. This theory of harm does not require that influence is used to create a full alignment of the editorial outlooks of News Corp and Sky news outlets, and for this reason we disagree with the proposition that our approach to measuring diversity is inconsistent with our findings on control.
- 10.5 As set out in chapter 6, we have considerable discretion in construing the relevant audience that we consider appropriate for our assessment of the Transaction. In carrying out our assessment, we focused on the impact of the Transaction on a UK audience for news and current affairs. We also sought evidence<sup>273</sup> and considered the impact of the Transaction on different audiences throughout the UK, including different age groups, social groups, and regions and local areas. However, we note that the Ofcom Public Interest Report did not find that a particular subgroup would be significantly more affected as a result of the Transaction.<sup>274</sup> Furthermore, we did not receive substantive evidence that particular audiences would be affected by the Transaction more than others.
- 10.6 The remainder of the chapter is structured as follows:

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<sup>273</sup> See for example, paragraph 21 and footnote 27 of [our issues statement](#).

<sup>274</sup> [Ofcom Public Interest Report](#), paragraph 3.43.3.

- (a) first, we consider how the Transaction is likely to affect the availability of different viewpoints;
- (b) second, we set out evidence on the reach of different providers, and how the reach of Sky and News Corp might be affected by the Transaction;
- (c) third, we consider the consumption of the Sky News and News Corp, including the share of reference metric;
- (d) fourth, we consider the extent of multi-sourcing and whether this might mitigate concerns about a loss of the diversity of viewpoints;
- (e) finally, we set out our conclusions on the extent to which the MFT's increased control of Sky and Sky News as a result of the Transaction might lead to a loss of the diversity of the viewpoints available and consumed.

## **Availability**

- 10.7 Availability of news is the first part of Ofcom's measurement framework. We recognise that while identifying and understanding the range of news providers available is useful, counting the number of news providers gave us only limited insight for our plurality assessment. Measures of availability do not give us any insight into how news sources are consumed or can influence their users.
- 10.8 In its Public Interest Report, Ofcom considered the number and range of news providers available to consumers in the UK. It found that there is a large number of different news sources in total across the four media platforms, such that the Transaction would not result in a significant reduction in the absolute range or number of news providers.
- 10.9 Table 10.1 demonstrates the multi-platform scope of the news offering provided by different media enterprises at a retail level in the UK. This gives an indication of the range of voices currently operating in the market. It also shows that, while many providers operate across two platforms (typically online and newspapers, or online and broadcasting), only a small number operate across three platforms, and only the Parties and News Corp operate across all four platforms.

**Table 10.1: Multiplatform scope of news offer provided by different news providers (UK retail level)**

News outlet	Television (broadcast/ online)	Radio (broadcast/ online)	Newspapers/ print	Online news*
BBC	✓	✓		✓
Sky	✓			✓
Channel 4	✓			✓
Channel 5	✓			✓
ITV	✓			✓
DMGT			✓	✓
News UK		✓		✓
Guardian Media			✓	✓
Trinity Mirror			✓	✓
Lebedev Foundation			✓	✓
Telegraph Media			✓	✓
Northern and Shell			✓	✓
Johnston Press			✓	✓
Nikkei			✓	✓
Global		✓		✓
Bauer		✓		✓
BuzzFeed				✓
HuffPost UK				✓
Vice	✓		✓	✓
The Parties and News Corp	✓	✓	✓	✓

\* Dedicated news channel online, including digital extension of traditional news providers: website, social media, app.  
Source: [Ofcom Public Interest Report](#).

10.10 Ofcom noted some changes in the availability of news providers over recent years.<sup>275</sup> The key points were:

- (a) the closure of The News of the World in 2011;
- (b) the opening and closing of New Day, a newspaper, in 2016;
- (c) The Independent and The Independent on Sunday ceased print publication in 2016 and moved online;
- (d) the launch of two newspapers: The Sun on Sunday in 2013 and The New European in 2016;
- (e) a net reduction of 26 newspapers on a local and regional level between 2012 and 2016; and
- (f) the introduction of online-only news providers, in particular BuzzFeed and Huffington Post.

10.11 Ofcom, Fox and third parties all identified the availability of news online as a significant recent change. The growth of online news has increased the absolute number of news sources available to consumers for those with

<sup>275</sup> [Ofcom Public Interest Report](#).

access to the internet. For example, comScore records 532 different online news and information providers.<sup>276</sup>

- 10.12 However, third parties also noted that the MFT (through Fox and News Corp) will be the only controller of news across all four platforms – TV, print, online and radio (both through direct provision via talkSPORT and through Sky’s provision of content to IRN). These third parties noted that the breadth of the merged entity’s offering will be unmatched, even by the BBC (which does not offer print newspaper titles).<sup>277</sup>
- 10.13 Third parties argued that challenging commercial conditions are leading to closures and downsizing among newspapers, citing the example of redundancies at Guardian Media Group (GMG), potentially further reducing availability in the future.<sup>278</sup>
- 10.14 Overall, we find that a significant range of news sources are currently available, despite recent reductions in the numbers of newspaper titles available. There has been an increase in the number of online news providers, and in the ways in which news can be accessed online. We find that the Transaction will not materially affect the availability of alternative viewpoints. However, we note that merely counting the number of news providers does not give us any insight into the reach of these providers, their level of consumption or their influence.

## Reach

- 10.15 Reach measures the number of people who use a news source in a given time period for a minimum duration.<sup>279</sup> It is a relatively high level measure given that a source will be counted as having ‘reached’ a user even if actual engagement is relatively shallow.<sup>280</sup> The fact that a provider has a large reach may not in itself mean that it has significant influence over the views of that group of consumers.<sup>281</sup> However we considered that reach is a useful starting

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<sup>276</sup> As at 13 December 2017. We note that the number has since increased and comScore noted that the actual number of entities reported depends on the definitions the news providers (publishers) decide to represent their content in comScore data (Dictionary) and the Minimum Reporting Standards.

<sup>277</sup> For example, Media Reform Coalition and Avaaz [submission to on media plurality](#), page 4.

<sup>278</sup> [Ed Miliband et al submission](#), page 54.

<sup>279</sup> Minimum duration varies for different data sources and channels. Reach in relation to BARB is defined as the proportion of the BARB panel who has watched at least three minutes of news on TV in an average week. Reach in relation to NRS is defined as the average issue readership. Reach in relation to RAJAR is defined as the number of listeners to a station for at least five consecutive minutes within a 15-minute period. Reach in relation to comScore is defined as the percentage of the online population that visited the website or app.

Source: [Ofcom Public Interest Report, Annex 3](#).

<sup>280</sup> For example, a TV user who has watched BBC One News for three minutes in a week will be counted as having been ‘reached’.

<sup>281</sup> [David Elstein at roundtable on media plurality](#), transcript page 7, line 23 and Matthew Horsman at [roundtable on media plurality](#), transcript page 15, line 14.

point for showing which consumers come into contact with particular providers.

- 10.16 We first set out evidence on measures of reach by platform, which use a number of different measurement techniques and as such are not directly comparable between platforms. We then summarise evidence on cross-platform reach based on Ofcom's NCS, which allows a comparison across platforms.

### ***Reach by platform***

- 10.17 In our analysis we have used data from the Broadcasters' Audience Research Board (BARB), National Readership Survey (NRS), Radio Joint Audience Research (RAJAR) and comScore:

- (a) **BARB**: measures TV viewing from a panel who have meters installed on TVs and devices. It provides viewing by minute by individual. The key weakness of BARB data is that it is limited in its ability to capture TV viewing that does not happen on a TV – eg online viewing – although this is currently being addressed by BARB;
- (b) **NRS**: measures print newspaper readership, based on a survey of readers. The NRS is a recall based survey and may underreport certain user groups (although a correction is made for this). Longer run information from the NRS tends to be highly correlated with circulation figures;<sup>282</sup>
- (c) **RAJAR**: measures radio listenership. It is based on a panel who complete diaries of listening activities. Listeners complete a diary based on 15-minute listening blocks. The measure may understate listening by light users given the reliance on completing a diary, and does not allow for breakdowns of listening by type of content;
- (d) **comScore**: comScore delivers online audience measurement across different devices (desktop, smartphone, tablet) and for different types of content (including page content, apps, video). comScore is endorsed by UKOM, the body that sets and governs the UK standard for the online industry. We used comScore's MMX Multi-Platform data (this comprises of data from desktop, smartphone and tablet data sources).

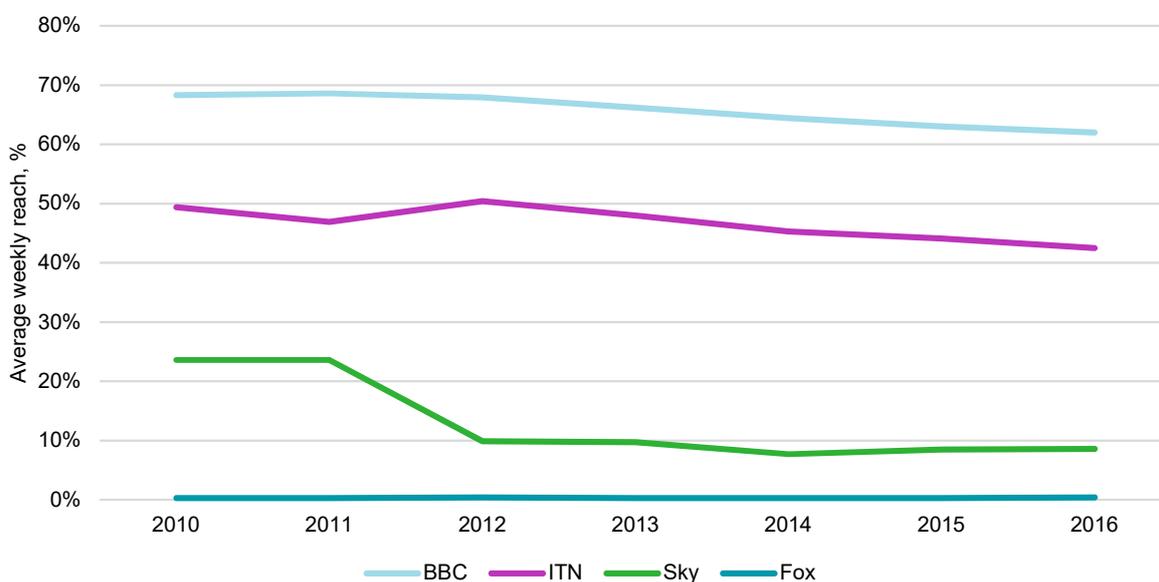
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<sup>282</sup> Circulation data (such as Audit Bureau of Circulation) is also available. We chose not to focus on circulation data as multiple individuals may use a single copy of a newspaper to read news.

10.18 We did not undertake a detailed analysis of the methodology behind BARB, NRS and RAJAR data, noting that these are considered industry standards. Given that it is relatively new and has a complex methodology, we considered the extent to which we can place weight on comScore data. We consider that, subject to certain caveats, comScore is a useful tool for measuring online activity. Full details of our assessment are included in Appendix E.

10.19 For TV broadcast news, BARB data suggests that the average weekly reach of major wholesale news providers has declined in the period 2010 to 2016. Sky's reach declined between 2011 and 2012 on this measure when it lost its role as wholesale supplier of news to Channel 5, as shown in Figure 10.1.

**Figure 10.1: Average weekly reach of national/international news by wholesale television provider, UK, 2010 to 2016**



Note: Adults 16+. Viewing to the BBC, ITN, and Sky wholesale groups is based on viewing to the national/international news genre, while viewing to Fox News is based on viewing to the channel as a whole. In February 2012, Channel 5 moved from Sky as its wholesale supply of news to ITN. This is reflected above (2011= Jan 2011 to Jan 2012 and 2012= Feb 2012 to Dec 2012 for Sky and ITN only).

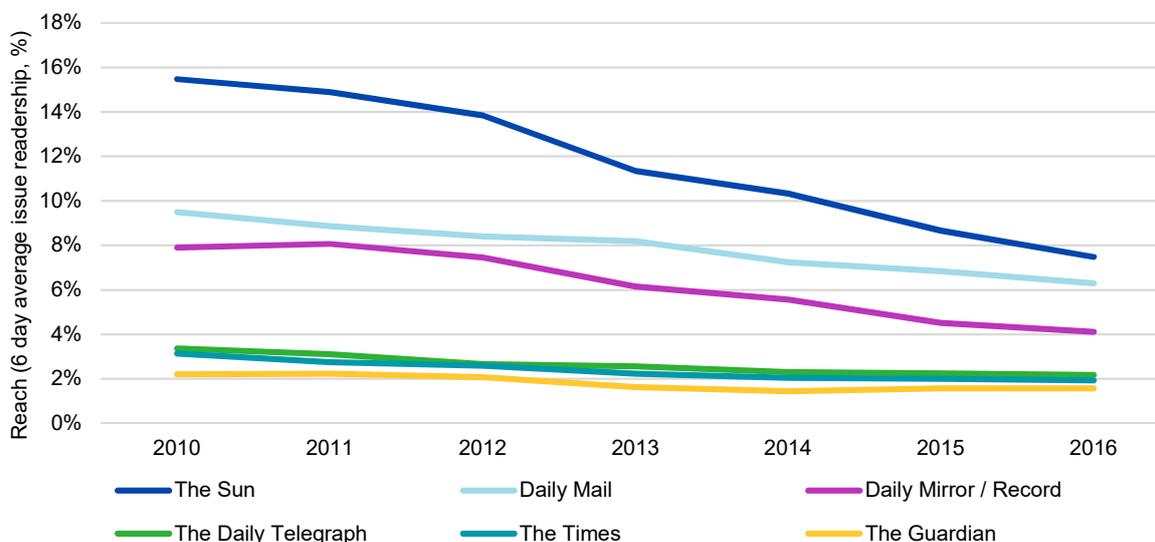
Source: [Ofcom Public Interest Report](#) (based on BARB data).

10.20 In relation to newspapers, the average reach of print newspapers has declined for all major print titles,<sup>283</sup> including The Sun. This is shown in Figure

<sup>283</sup> A respondent is classified as having read a newspaper if they spent more than two minutes reading/looking at it.

10.2. The Sun is the most widely read daily printed newspaper in Great Britain,<sup>284</sup> with a reach of 7% (based on 6-day average issue readership).<sup>285</sup>

**Figure 10.2: Print reach of the six largest national newspapers, 2010 to 2016**



Source: [Ofcom Public Interest Report](#) (based on NRS data).

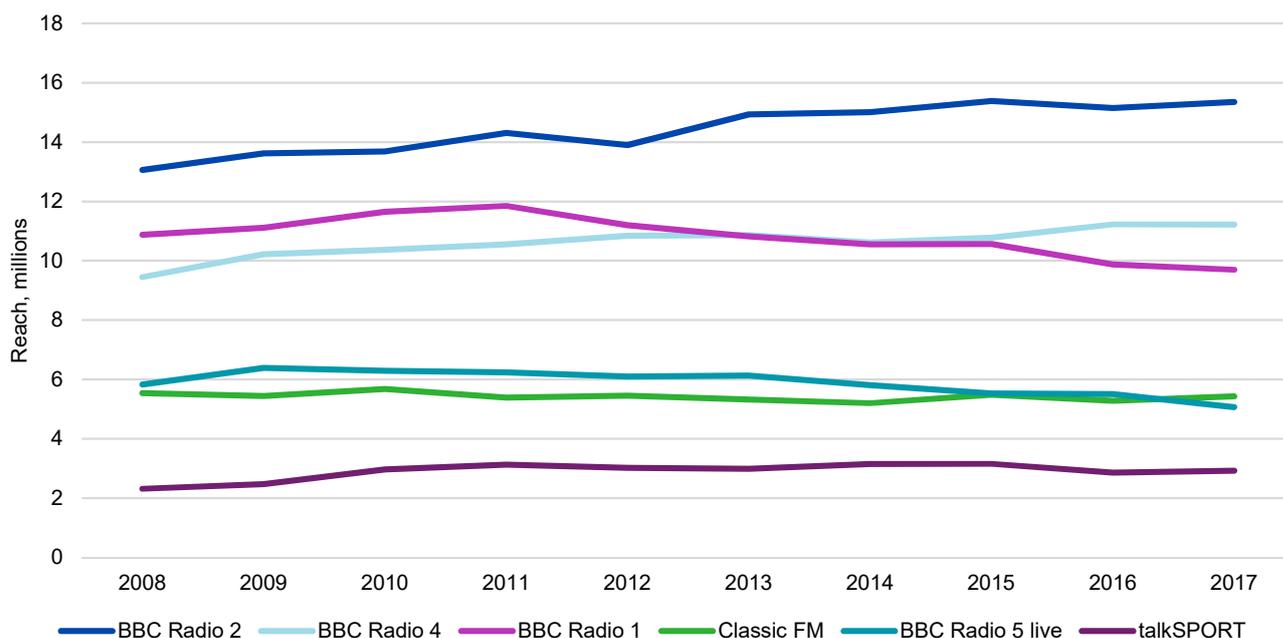
10.21 For radio news providers, we assessed reach using RAJAR figures. RAJAR does not split listening by types of content, so the reach figures are for all content rather than specifically for news and current affairs. This limits the inferences that can be drawn about the reach of radio news.

10.22 Bearing in mind this caveat, four of the top five radio stations by overall reach are BBC stations, a position that has been constant since 2008 (see Figure 10.3). We also assessed the reach of talkSPORT because it is part of the Wireless Group, owned by News Corp. talkSPORT reached fewer listeners compared to the top five radio stations, with a reach of between 2.3 and 3.2 million listeners over the period 2008 to 2017.

<sup>284</sup> NRS data does not include Northern Ireland. We note that circulation data now shows The Metro as the largest newspaper in the UK. As stated previously we chose not to focus on circulation data to measure consumption as multiple individuals may use a single copy of a newspaper to read news.

<sup>285</sup> The NRS asks respondents if they have read a newspaper within its issue period (eg did someone read a daily paper in the last day?). Ofcom's analysis as reported is based on readership of UK-wide daily newspapers published six times a week ([Public Interest Report A3.22 to A3.23](#)).

**Figure 10.3: Reach of top five UK radio stations and talkSPORT,<sup>286</sup> millions of listeners, 2008 to 2017<sup>287</sup>**



Source: CMA analysis of [RAJAR quarterly listening data](#) (based on the quarter ending September of each year).

10.23 In relation to online news, Ofcom considered the reach of the five largest news websites in the UK (BBC websites, The Daily Mail website, The Sun website, Telegraph Media Group website and The Mirror website), finding these websites to have a reach of between 52% to 86% of the online population.<sup>288</sup> We considered the reach of a wider range of news providers and considered data relating to the reach of content identified as news compared to the reach of the overall website.<sup>289</sup> Figure 10.4 shows the average online reach of the news section of the major UK news providers (analysed at the level reported in Table 1 of Appendix E) for the period January to August 2017 (the hatched bars mean that data is only available at the level of the title).<sup>290</sup> The Sun and Sky News have a reach of roughly 20% each on this measure, and The Times has a reach of 7%.<sup>291</sup>

<sup>286</sup> Note there are other radio stations with a wider reach than talkSPORT that are not included. talkSPORT is included as it is a News Corp owned station.

<sup>287</sup> Based on the quarter ending September of each year.

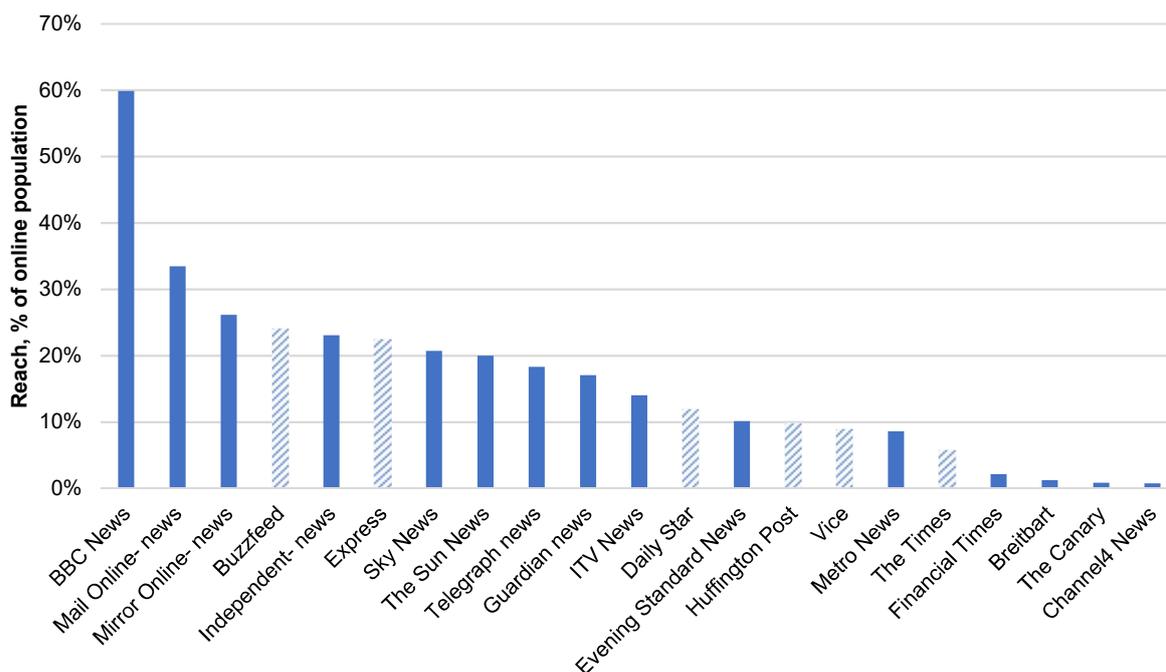
<sup>288</sup> Ofcom considered only the top five news websites when using multiplatform data (ie those sites that are measured across desktop and mobile devices) as these had a comparable unification status (with the exception of the Telegraph Media Group where mobile data was not fully unified- see paragraph A3.19 of the [Ofcom Public Interest Report](#)). For further details on unification please see Appendix E.

<sup>289</sup> Noting that the more granular level of information may not be fully unified or comparable, see Appendix E.

<sup>290</sup> We note that more recent comScore data is available but does not consider there have been material changes in terms of reach since August 2017.

<sup>291</sup> We note that the results are sensitive to the level of comScore data chosen - for example, The Sun Online (media title) had 29 million unique users in September 2017, a reach of 60%.

**Figure 10.4: Online audience reach of selected news providers, January to August 2017**



Source: CMA analysis of comScore MMX Multi-Platform.

Note: hatched bars mean that information is only available at the level of the title.

Data for each news title relates to the media title/channel/sub-channel specified in Table 1 of Appendix E.

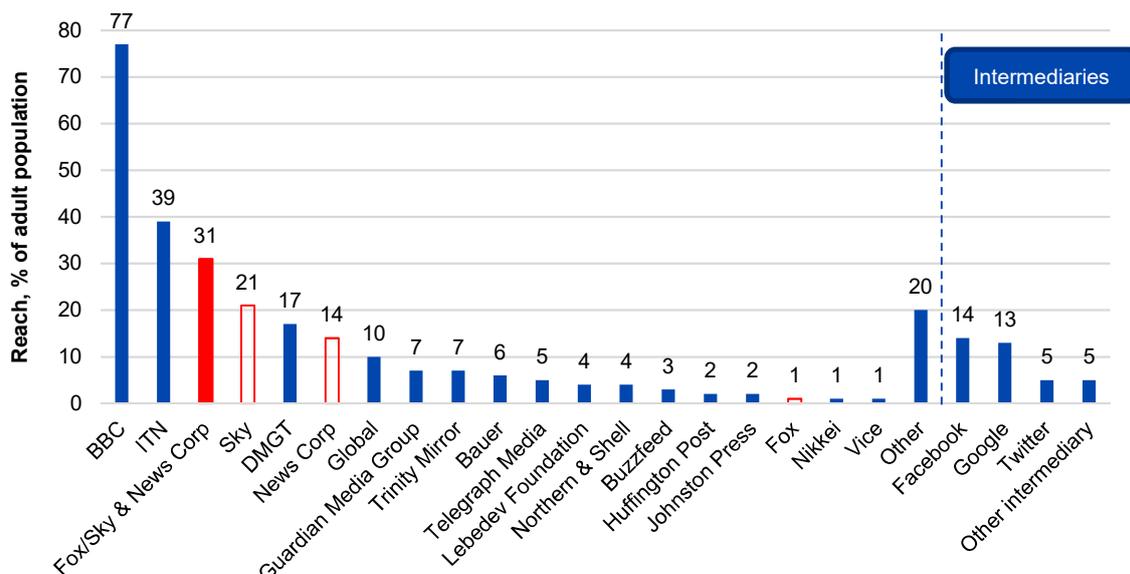
### **Cross-platform measures of reach**

10.24 We used evidence from Ofcom’s NCS to assess the reach of news providers across-platforms.<sup>292</sup> A news provider’s reach may be enhanced if that news provider uses multiple platforms (such as TV and online) with different users on each platform. Cross-platform reach therefore gives a more complete picture of reach compared to platform specific measures of reach.

10.25 Figure 10.5 shows the reach of news providers as measured by the Ofcom NCS. The largest wholesale provider by reach is the BBC, with a reach of 77%. The combined Fox, News Corp and Sky would have a reach of 31%, making it the third largest wholesale provider by reach behind the BBC and ITN. The combined Fox, News Corp and Sky would have a reach nearly double that of the fourth largest provider, DMGT. Only the top four providers will reach more than 10% of the UK population.

<sup>292</sup> Note that, since reach is defined in different ways in the NCS and in the other sources referred to in the previous section, reach figures are not directly comparable between these different sources.

**Figure 10.5: Wholesale cross-platform audience reach of providers used ‘nowadays’ for news: 2016**



Source: Ofcom [NCS 2016](#).

Base: All adults 16+ who use television, printed newspapers, radio, internet, or magazines for news nowadays (2,659)

Notes: ‘Google’ contains all Google-named entities plus YouTube. ‘Other intermediary’ includes MSN, Yahoo, Feedly, Flipboard, News Now.

## Conclusions on reach

10.26 Sky News and News Corp reach a significant proportion of the population:

- (a) Sky News has reach as a TV broadcaster of 9%. Its online reach is 20%;
- (b) The Sun has the largest reach of daily newspapers and an online reach of 20%, while The Times has the second largest reach among broadsheet newspapers;
- (c) talkSPORT reaches between 2.3 and 3.2 million listeners;
- (d) News Corp titles (on a cross-platform basis, based on Ofcom’s NCS) have the second largest reach of print providers at 14% (behind DMGT on 17%);
- (e) The overall combined reach of Sky News and News Corp is 31% based on Ofcom’s NCS, the third largest behind the BBC and ITN, but significantly ahead of the fourth largest (DMGT).

## Consumption – platform specific measures

10.27 Having considered the reach of different news providers, we now set out evidence on levels of consumption. While reach gives an indication of the extent to which consumers access different news voices, we would expect the

extent to which consumers are influenced by a particular media source to depend on the frequency with which they access it and the length of time they spend reading or viewing it.

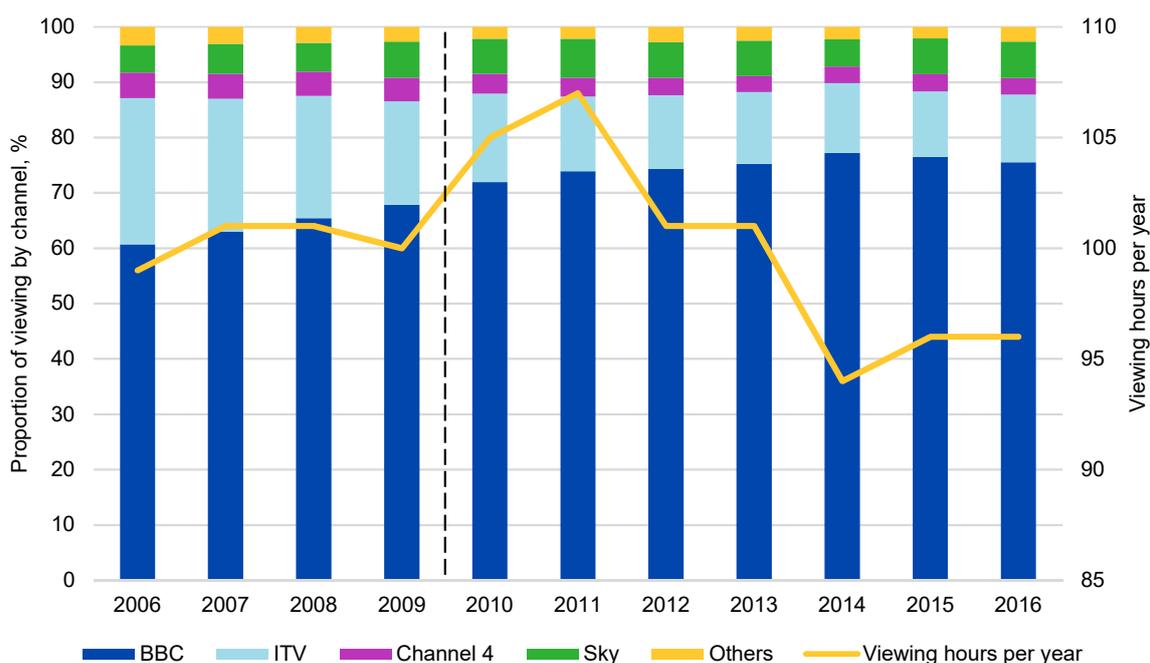
10.28 Consumption measures track the actual amount of time that a consumer has spent engaging with a particular news source (eg watching a news channel or reading a newspaper). As with reach, each platform uses a different measurement technique and as such measures of consumption are not directly comparable between platforms. Ofcom's share of reference metric allows a cross-platform measure of consumption and is discussed after this section.

10.29 In principle, we would expect consumption to be a better measure than reach of the likely impact of the news source on a consumer. However, measuring consumption is typically more difficult than measuring reach, so we needed to be aware of the data limitations in interpreting the results.

### ***Consumption of news on TV, newspapers and radio***

10.30 Figure 10.6 shows that annual consumption of TV news based on BARB data has been steady at around 100 hours per year since 2006. However, during this time the BBC has been able to increase its share of TV news viewing from around 60% to nearly 80%. Most of this increase has been at the expense of ITV, which has seen its share of news consumption roughly halve over the period. Sky's share of news viewing has remained relatively constant. Sky accounted for 7% of news consumption in 2016 on this measure.

**Figure 10.6: TV news consumption and share**



Source: CMA/Communication Chambers analysis of [Ofcom PSB Annual Research Report 2017](#) (based on BARB data).

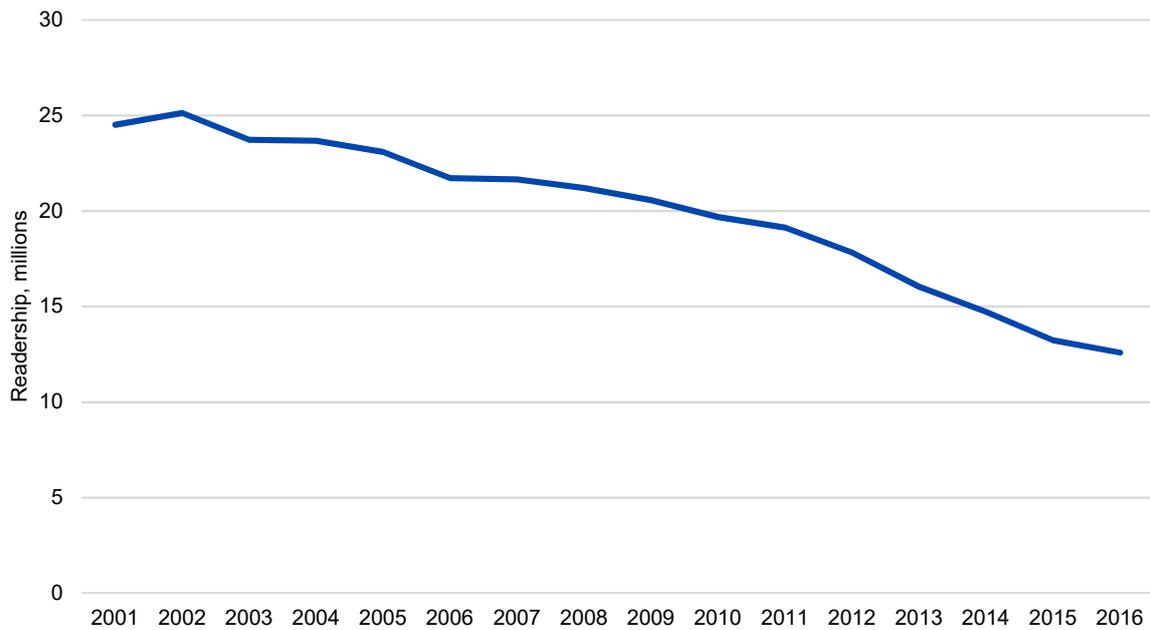
10.31 Sky noted that other terrestrial providers attract far larger audiences to their news services compared to Sky News. We note that Sky News does attract smaller audiences compared to the BBC and ITV in terms of reach (9% reach for Sky compared to 43% for ITN and 62% for the BBC). However as shown by Figure 10.6, on a consumption basis Sky News accounts for only a slightly smaller proportion of hours of news watched than ITV, and is significantly larger than Channel 4 and other channels. This reflects the fact that viewers of Sky News tend to access it more frequently or for longer periods, on average, than viewers of ITV and Channel 4 News. We also note that, while the BBC is the largest provider of TV news, Sky News has been seen by third parties as a positive competitive force in the provision of news.<sup>293</sup>

10.32 Figure 10.7 shows that circulation of daily newspapers has fallen by around a half since 2001. We consider that using readership of newspapers is a preferable measure to circulation given that multiple people may read the same copy of a newspaper. NRS figures show that The Sun had an average daily readership of 3.5 million and The Times an average daily readership of 1.1 million.<sup>294</sup> The Sun has the largest readership of all national daily newspapers, ahead of The Daily Mail's readership of 3.1 million.

<sup>293</sup> See for example comments by Professor Suzanne Franks [at the roundtable on media plurality](#), transcript page 69, line 21.

<sup>294</sup> As at December 2017. Source: [News Works](#).

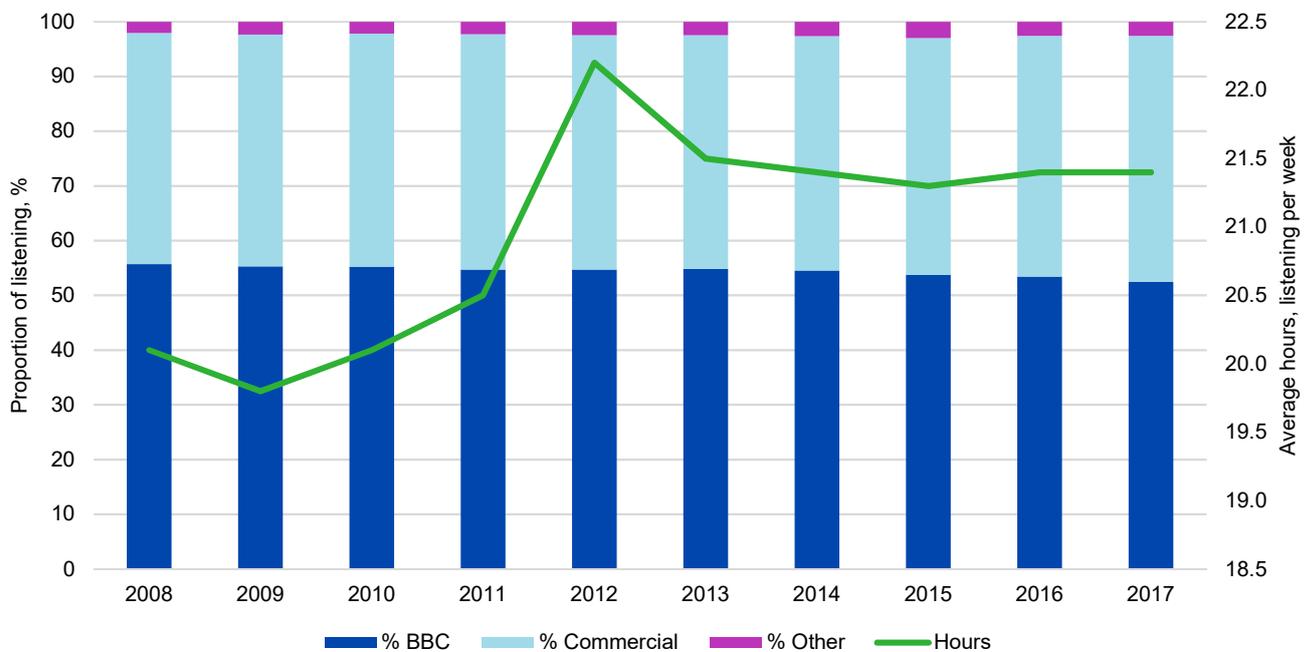
**Figure 10.7: Daily national newspaper readership (millions)**



Source: [Communications Chambers](#), based on NRS data (GB only).

10.33 In terms of consumption, Figure 10.8 shows that the average number of hours listening to the radio has remained relatively stable at around 20 hours per week, with approximately half of this time spent listening to BBC radio stations. We note that this is for all radio listening, as RAJAR does not produce figures for news consumption specifically.

**Figure 10.8: Radio consumption and share**



Source: CMA/Communication Chambers analysis of [Ofcom Communication Market Reports](#).

## **Consumption of news online**

10.34 The 2016 NCS identified the websites and apps used for accessing news. The websites and apps of broadcasters were used by 63% of those using the internet for news (with the BBC and Sky News being particularly popular). 31% of the population using the internet for news used newspapers' websites or apps. Only 11% of the population using the internet for news used an online-only news site, with BuzzFeed and Huffington Post being the most popular.<sup>295</sup> We consider that this demonstrates that traditional news providers (broadcasters and newspapers) retain a significant presence online.

10.35 According to the 2016 NCS, roughly half of the adult population consume some of their news online, but this encompasses a broad range of behaviours. In the first instance, it is useful to distinguish between direct and intermediated access to news online. Online news content can be accessed directly from the websites or the apps of news providers, or can be accessed via an intermediary. Online news users accessing content directly appear to engage with online news and news providers in ways that are similar to their engagement with traditional platforms. Online news users also use intermediaries, with around 40% of online news users using social media sites and around 40% using search engines.<sup>296</sup> These users tend to use a broader range of sources, although the precise extent of their multi-sourcing is difficult to measure. We therefore carried out two pieces of analysis to better understand patterns of consumption of online news:

- (a) we analysed data from comScore, (which is widely used within the media industry to track online consumption) to understand consumption via direct access;
- (b) we gathered information directly from key intermediaries (Facebook, Google, YouTube and Twitter) to better understand consumption through these platforms.

### *comScore measures of online news consumption*

10.36 We considered shares of time spent online for the news providers (at the level listed in Table 1 of Appendix E). In August 2017, BBC News accounted for approximately 60% of news consumption online (measured by time spent for the 20 providers listed in Table 1 of Appendix E). Figure 10.9 shows the shares of other news providers (provided their share exceeds 1%). Based on this metric, Sky News has the largest share of consumption online behind

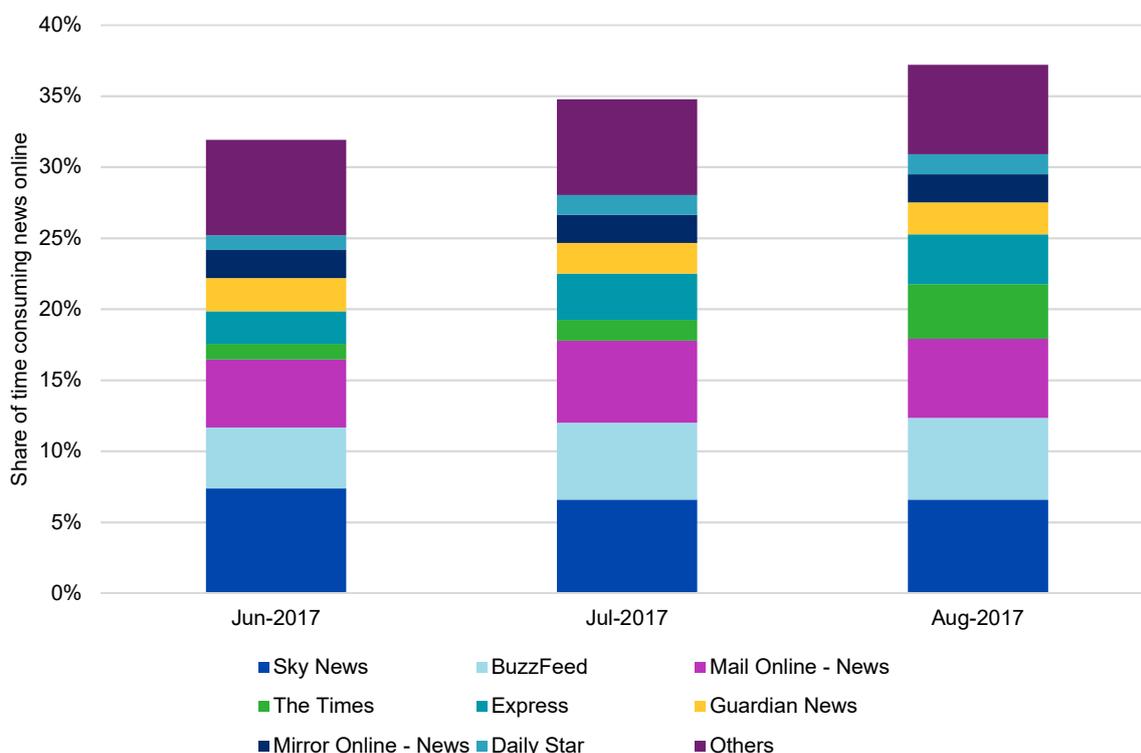
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<sup>295</sup> Ofcom, [News consumption in the UK: 2016](#), page 38.

<sup>296</sup> Ofcom, [News consumption in the UK: 2016](#), page 35.

BBC News, followed by The Mail Online, BuzzFeed and The Times. The relatively strong performance of Sky News on this metric is driven by the fact that users tend to use Sky News' services for longer periods of time compared to competitors (around 20 minutes per month, compared to around 10 to 15 minutes per month for titles such as The Times,<sup>297</sup> The Daily Mail, and The Guardian, and around five minutes per month for The Sun).

**Figure 10.9: share of time spent consuming news online**



Source: CMA analysis of comScore MMX Multi-platform.

Notes: the remainder of the share of time consuming news online in each month is attributable to BBC News.

Data for each news title relates to the media title/channel/sub-channel specified in Table 1 of Appendix E. The CMA notes in Appendix E that due to the measurement issues (outlined in paragraphs 14 to 16) of Appendix E direct comparisons between these media titles/channels/sub-channels is difficult.

The CMA notes that more recent comScore data is available but does not consider there have been material changes in terms of consumption since August 2017.

### *Consumption on intermediaries*

10.37 We attempted to measure the consumption of different news sources on the four largest intermediaries: Facebook, Google, YouTube (owned by Google) and Twitter.<sup>298</sup> Measuring consumption on intermediaries is difficult because intermediaries distribute news in different ways and collect different metrics of consumption. For this reason, we present a summary of results separately for

<sup>297</sup> We note that the monthly usage of the Times increased significantly from August 2017, due to the inclusion of the Times mobile app under the TIMES.CO.UK channel.

<sup>298</sup> As measured by the Ofcom NCS.

the four most popular intermediaries for news: Facebook, Google (including YouTube), and Twitter. Full results are reported in Appendix E.

- (a) **Facebook:** we considered the number of followers that news providers have, the number of click throughs on links by different news providers, and the numbers of likes and shares that different news providers have. Overall, these different metrics provided a complex picture of the relative weight of news providers on Facebook. [X] has the largest audience measured by followers, but [X]. [X] is particularly successful in inducing its followers to click on its posts, whereas its performance in terms of other engagement metrics (likes and shares) is similar to that of other tabloid providers. [X] has a relatively large audience, but attracts low levels of click throughs and engagement. [X] plays a relatively minor role in news diffusion on Facebook. This might be because most of [X], or because its audience does not use Facebook to a significant extent.
- (b) **Google:** a long tail of small news providers contributed a significant share of the links displayed in a sample of Google search results in response to certain news related searches (such as 'Brexit', 'election', 'Grenfell fire', etc). However, the most significant contributors are mostly traditional, UK-based news providers. Sky News and The Sun contribute between [X] of the links displayed in the sample of Google search results for these searches. This is broadly in line with the cross-platform shares of reference of these news sources.
- (c) **YouTube:** of the YouTube channels we identified (and over the period from 1 January 2017 to 22 October 2017), [X] has the largest number of views but is followed closely by [X] and [X]. [X] has a share of [X]% of views in the sample of 32 news providers channels we requested data for. [X] also has a significant number of views in the UK (corresponding to [X]% of views in the sample). Newspaper publishers attract lower number of views than broadcasters, with the exception of [X].<sup>299</sup>
- (d) **Twitter:** we gathered information on the number of impressions and retweets of Twitter posts related to certain news topics using Brandwatch. This analysis indicated that while some individuals manage to achieve significant levels of engagement for the news content they post on Twitter, news providers are still the most widely read contributors on the platform. Broadcasters and broadsheet publishers appeared to do particularly well,

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<sup>299</sup> [X].

and Sky News has a significant presence on Twitter relative to certain other news sources.

10.38 In summary, Sky News has a large number of followers on Facebook, although it draws relatively low levels of engagement compared with some other news sources. It was one of the most viewed channels over the period 1 January 2017 to 22 October 2017 on YouTube (out of a selection of YouTube channels we identified), constituting [ ]% of views of these channels. Sky News also has a significant presence on Twitter when measured by number of impressions.

10.39 We note that the current and future performance of news providers via intermediaries is to some extent driven by the algorithms used by the intermediaries to choose what users will see. Changes in these algorithms may increase, or reduce, the number of people using a particular news source. For example, Facebook recently stated that it will make changes so that its users see more content from friends and family and less public content (such as from media organisations).<sup>300</sup>

10.40 However, there is no evidence that these algorithms favour traditional news providers at the expense of new entrants. The data presented in Appendix E indicates that online-only providers perform relatively well on intermediaries. One independent study also indicates that Google News tends to direct a significant amount of traffic to small news providers.<sup>301</sup>

### ***Conclusions on platform-specific measures of consumption***

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

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

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<sup>300</sup> Facebook (11 January 2018) [News Feed FYI](#).

<sup>301</sup> Athey, S. and Mobius, M. (January 2017) *The impact of news aggregators on internet news consumption: the case of localization*, working paper no. 3353.

## **Cross-platform measures of consumption – share of reference**

10.42 This section focuses on cross-platform measures of consumption, and in particular Ofcom's share of reference metric based on the NCS:

- (a) we first describe the basis for Ofcom's approach and set out third party views on the appropriateness of the share of reference metric as a measure of plurality;
- (b) second, we summarise Ofcom's phase 1 findings in relation to the share of reference of Fox and News Corp, and of other news providers; and
- (c) third, we discuss sensitivity adjustments that might be made to Ofcom's results to reflect different points put to us by Fox and Sky, and by third parties.

### ***Ofcom's share of reference approach***

10.43 Ofcom developed its share of reference metric to assess cross-platform consumption. The share of reference metric defines a 'common currency' of news consumption across different platforms.

10.44 Share of reference is calculated by asking people which news sources<sup>302</sup> they use and the frequency with which they use them. Each reference is weighted according to frequency of use, and summed to create a total number of news references. The share of each news outlet can then be calculated based on the total share of references.

10.45 Although there are some criticisms that can be made about Ofcom's approach, discussed in more detail below, we note that:

- (a) the methodology has been subject to extensive public consultation by Ofcom as part of establishing its measurement framework. This consultation was carried out before the start of the Inquiry and allowed Ofcom to take account of a range of views before deciding on its approach;

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<sup>302</sup> News is not formally defined in the Ofcom NCS. In the introduction to the survey respondents are told 'By news I mean news and current affairs in [your region/Wales/Scotland/Northern Ireland], across the UK and from around the world.'

- (b) while imperfect, the share of reference approach is recognised as the best available methodology of comparing news consumption across platforms;<sup>303</sup>
- (c) the NCS asks users about use of both national and regional/local news sources, and the share of reference takes account of consumption of all these news providers.

10.46 For these reasons, we agree with Ofcom that the share of reference methodology should form a basis for considering the impact of the Transaction on consumption. However, we note the following in interpreting the share of reference:

- (a) a range of different assumptions are made in calculating the share of reference, and it may be appropriate to undertake sensitivity analysis to understand how these assumptions affect the share of reference;
- (b) shares of reference in a plurality assessment should not necessarily be interpreted in the same way as market shares in a competition assessment. We note that the shares of reference of established news providers can be relatively low;<sup>304</sup>
- (c) finally, share of reference should not be considered in isolation, but alongside the platform specific measures of reach and consumption, as well as alongside measures of impact and influence. Measures such as share of reference are an important part of assessing plurality, and can inform this judgement but are not in themselves sufficient.

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<sup>303</sup> We held a roundtable on media plurality involving media experts. Attendees recognised the Ofcom approach as the best available approach, for example, Matthew Horsman noted that the share of reference was an attempt to move towards a quantifiable basis for looking at relative engagement. See [the roundtable on media plurality](#), transcript line 15, page 16.

<sup>304</sup> The [Leveson Report](#) (page 1,470) supports this statement:

'The argument for mechanically applied fixed caps or limits does not seem to me to be made out. Given the importance of having both public consensus on what constitutes sufficient plurality and sufficient clarity in the market to encourage investment, it would be sensible for Ofcom to carry out a consultative process designed to identify indicative levels of the various metrics that they are proposing to use that would give rise to plurality concerns. I am neither qualified, nor required, to give my own view on what such levels should be, and I have no intention of doing so. I do, however, accept that the importance of plurality of news and current affairs provision is a qualitatively different issue to those arising from general competition concerns. **I therefore recommend 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.**' (emphasis added).

We note the recommendation of the Leveson Inquiry that levels of influence that would give rise to concerns in relation plurality are lower than those levels of concentration giving rise to competition concerns.

## **Ofcom's phase 1 estimates of share of reference**

- 10.47 In its Public Interest Report, Ofcom noted that the Parties and News Corp would have a combined wholesale share of reference of around 10% based on the results of the 2016 NCS. We confirmed Ofcom's calculations and note that the share of reference of Sky News and News Corp will round up to 10% (over 6% for Sky and over 3% for News Corp).<sup>305,306</sup>
- 10.48 We note that the combination of a share of reference of Sky News at over 6% and News Corp of over 3% is not an insignificant increment in terms of share of reference and media plurality. The MFT will be increasing its control over Sky News which has a share of reference of 6%, significantly larger than established news providers such as DMGT, GMG and Trinity Mirror.<sup>307,308,309</sup>
- 10.49 As shown in Figure 10.10, Sky currently has the third largest share of reference at both retail and wholesale level, with a share of reference of over 6% on a wholesale basis. The BBC remains significantly larger than all other news providers with a 42% share of reference.

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<sup>305</sup> With the share of reference of Fox in 2016 being negligible. We note that Fox News no longer broadcasts in the UK, although STAR, another Fox channel still does.

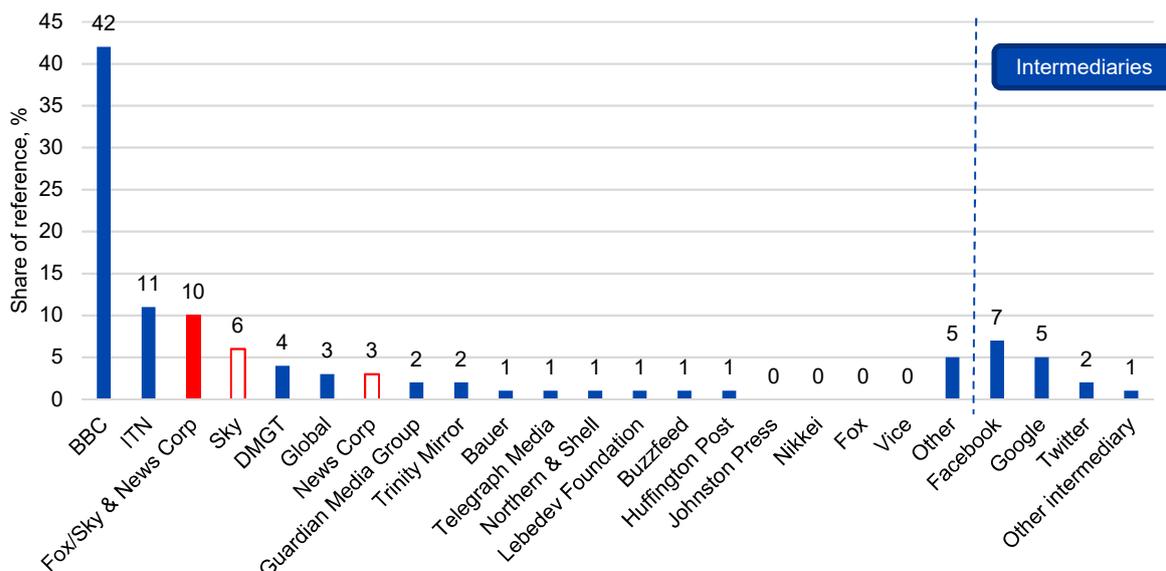
<sup>306</sup> We calculated slightly different shares of reference as Ofcom uses a larger number of sources in its calculation (in particular, including news sources when the respondent selected 'other'). The differences were not material.

<sup>307</sup> We also note that the Transaction will specifically increase the control of Fox and the MFT over Sky, which has a share of reference of 6%.

<sup>308</sup> Fox argued that what matters is how much larger the 'combined entity' is post Transaction compared to the largest entity pre Transaction. Furthermore, Fox argued that the increment, when put at 3%, is smaller than the growth of increment of providers such as Facebook over recent years ([Fox response to provisional findings](#), paragraphs 3.59 and 3.60). We do not consider that this is appropriate, as we are assessing the increased control that the MFT will have over Sky, and, as such, this is not equivalent to the approach we would take when assessing concentration in a competition inquiry. In relation to the size of the increment, we note that while Facebook has increased its share of reference, Facebook is an intermediary and not does create news content for consumption (it is for this reason that we reallocate intermediaries' share of reference in Appendix F).

<sup>309</sup> Trinity Mirror [announced on 1 March 2018](#) the completion of its acquisition of Northern and Shell's UK publishing assets (including The Daily Express, Sunday Express and Daily Star titles).

**Figure 10.10: Wholesale share of reference following the proposed Transaction, 2016**



Base: All who use a news source nowadays (2,583).  
 Source: [Ofcom Public Interest Report](#).

10.50 We also considered the share of reference of the remaining news providers post Transaction.

10.51 First, we considered the split between consumption across the four platforms using the share of reference of individual titles for the largest wholesale providers of news. We note that, combined, Sky and News Corp are the only providers with a presence across all four news platforms (TV, print, online and radio) meaning that the MFT is the only person with control of media enterprises with a presence across all four news platforms:

- (a) **BBC:** Ofcom’s Public Interest Report stated that the BBC has a 42% share of reference. We estimate that this is made up of a share of reference of 16% for BBC One, 11% for BBC Radio stations, 9% for the BBC website and the remainder coming from other BBC channels;
- (b) **ITN:** Ofcom’s Public Interest Report stated that ITN has an 11% share of reference. The majority of this is from ITV (9%), with the rest coming from Channel 4 and Channel 5 TV. We estimate that only a negligible contribution of its share of reference comes from online news (provided through Channel 4 and ITV websites);
- (c) **Sky and News Corp:** Ofcom’s Public Interest Report stated that Sky News has a share of reference of 6% and News Corp 3%.<sup>310</sup> We estimate that Sky News TV’s share of reference is 4% while the website’s share is

<sup>310</sup> The 10% combined of reference is due to rounding.

2%. We estimate that News Corp's share of reference is predominantly derived from its newspaper readership, with online usage adding a negligible contribution to News Corp's share of reference;

- (d) **DMGT**: Ofcom's Public Interest Report stated that DMGT has a share of reference of 4%. We estimate that approximately 3% of this is from use of The Daily Mail brands, evenly split between The Daily Mail website and the print version. The remainder is made up of usage of The Metro print edition and The Metro website.

10.52 Fox and Sky submitted that a 10% share of reference for Sky News and News Corp (compared with Sky News's pre-existing 6% share of reference) does not demonstrate a material share or increase in the share of reference. We do not agree. The MFT's control of Sky News and News Corp means that it controls a group of assets that taken together comprises one of the three largest news providers in the UK. The combined share of reference of Sky News and News Corp would be significantly larger than that of the next largest non-intermediary provider, DMGT (with a 4% share of reference) and the long tail of smaller providers.<sup>311</sup> By significantly increasing the level of control that the MFT is able to exercise over Sky News, the Transaction increases this asymmetry because, combined, Sky News and News Corp represent a larger news provider controlled by the MFT in third position behind the BBC and ITN.<sup>312</sup> Furthermore, Sky News and News Corp have 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.

10.53 We considered the position of the other two larger providers, the BBC and ITN. We do not consider that the wholesale shares of reference for the BBC and ITN are directly comparable to that of Sky News and News Corp, for the reasons set out here.

10.54 The BBC's share of reference is significantly larger than the shares of reference of other wholesale providers of news. However, the BBC has a distinct position in the provision of news in the UK, and has a distinct funding and governance model. As a public service organisation, it has five public purposes set out by the Royal Charter and Agreement, one of which is 'to

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<sup>311</sup> We note that some intermediaries have relatively high shares of reference (for example, Facebook has a share of reference of 7%, higher than that of DMGT). We noted previously that intermediaries do not produce their own content but distribute content from other sources, and as such our analysis focuses on non-intermediaries. Our analysis of consumption on intermediaries shows that The Sun and Sky News do relatively well in terms of engagement and presence on various intermediaries (see paragraph 10.37 onwards).

<sup>312</sup> If ITN's share of reference were split between ITV, Channel 4 and Channel 5, Sky and News Corp would move to second position - see paragraph 10.51(b).

provide impartial news and information to help people understand and engage with the world around them.<sup>313</sup> The BBC explained to us that while it considers that it operates in the competitive market as regulated by Ofcom, it is not driven by commercial imperatives and sees its business as fulfilling its public purpose and Charter. A key issue to the BBC is understanding how its audience scores it on impartiality, accuracy and trust given the BBC's Charter.<sup>314</sup> We are therefore conscious that its funding structure and governance place special constraints on it to be impartial, in a way which goes beyond the requirements of the Broadcasting Code.

10.55 In relation to ITN, we note two important distinctions compared to other wholesale providers of news. First, ITN's customers retain some degree of editorial control, and second, in some instances ITN's customers produce their own news content:<sup>315</sup>

- (a) Ofcom assessed news content on ITV, Channel 4 and Channel 5 to have been provided at a wholesale level by ITN. Ofcom made the distinction between retail news provision (an individual title or brand of each source providing content to a viewer) and wholesale provision (the supply and production of news for a retail source).<sup>316</sup> However, evidence we obtained indicates that there is a degree of editorial control held by the customers of ITN (ITV, Channel 4 and Channel 5) and a degree of differentiation in the news services provided by these channels;<sup>317</sup>
- (b) furthermore, ITV and Channel 5 also told us that they produce their own news and current affairs content (for example, ITV produces Good Morning Britain,<sup>318</sup> its daily morning news and current affairs programme) or use other production companies to produce content (Channel 5 stated that it used Princess Productions to produce some current affairs content).

10.56 ITN therefore faces particular constraints as it provides not one significant voice, but three separate voices as demanded by the TV channels for which it provides news content. We note that the separation of ITV, Channel 4 and Channel 5 contributes to the diversity of viewpoints available to consumers.

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<sup>313</sup> [Inside the BBC: Public Purposes](#).

<sup>314</sup> [Transcript of hearing with the BBC](#), page 19 from line 10 to 25.

<sup>315</sup> We also noted in paragraph 10.51 that ITN is mainly focused on provision of TV news, and derives only a small share of reference from the provision of online news.

<sup>316</sup> [Ofcom Public Interest Report](#), footnote 7.

<sup>317</sup> ITN told us that while some common costs are shared between the customers of ITN, each customer of ITN has its own newsgathering operation with dedicated staff to each channel, and each contract has a detailed editorial specification ([transcript of hearing with ITN](#), page 10 and 11).

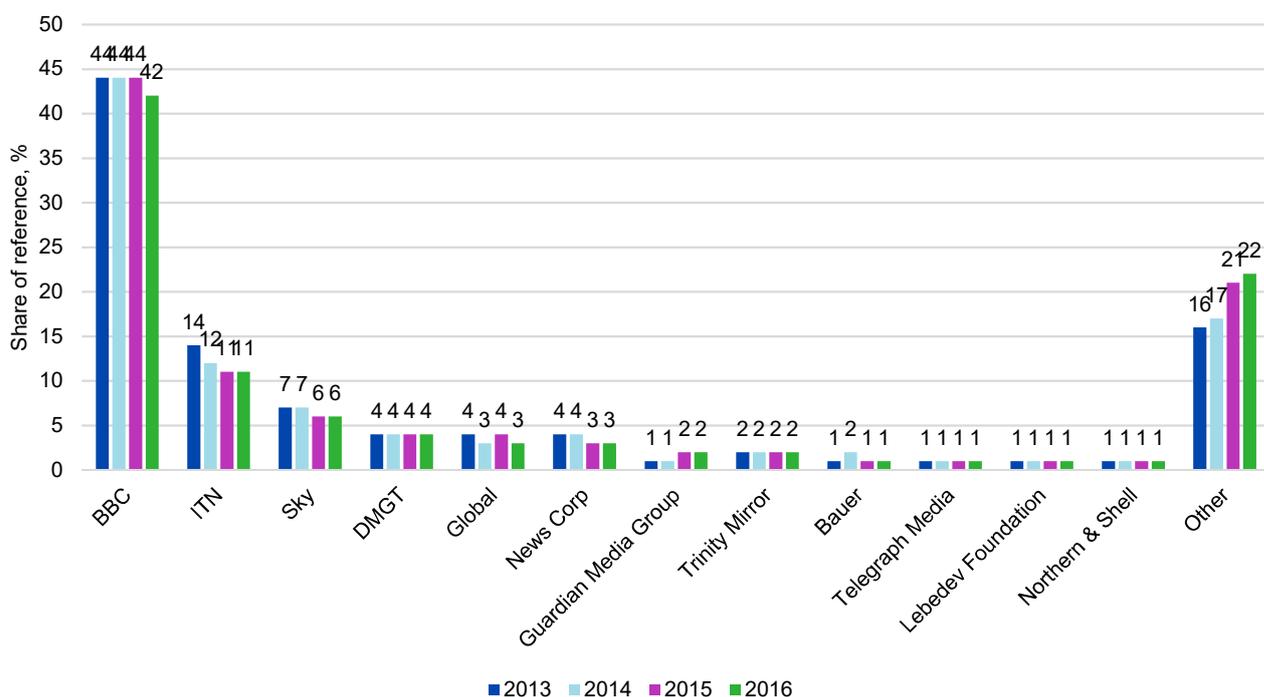
<sup>318</sup> This production of news content by ITV may not be minor - we note that Good Morning Britain (for example) has viewing figures of between 0.8 to 1.2 million, as reported by [The Metro](#).

However, it also highlights the relative size of the share of reference of Sky News and News Corp.

10.57 We also note the presence of intermediaries, some of whom have relatively high shares of reference (for example, Facebook has a share of reference of 7%). We noted previously that intermediaries do not produce their own content but largely distribute content from other sources, and as such our analysis focuses on non-intermediaries. Our analysis of consumption on intermediaries shows that The Sun and Sky News do relatively well in terms of engagement and presence on various intermediaries (see paragraphs 10.26 and 10.38).

10.58 We also considered trends in the share of reference over time. Ofcom’s News Consumption in the UK report provides a comparison of shares of reference over four years (2013 to 2016) as demonstrated in Figure 10.11. This shows that over the past four years the relative positions of major news providers have not significantly changed.<sup>319</sup> However, the share of reference of some providers have seen relatively large changes in percentage terms - for example, ITN has lost over 20% of its share of reference since 2013.

**Figure 10.11: Wholesale provider share of reference: 2013 to 2016**



Source: Ofcom [NCS 2016](#).

<sup>319</sup> We note that Facebook’s share of reference has increased from 3% to 7%, therefore changing its position relative to other providers (*Ofcom, News Consumption in the UK 2016, page 65*). However, we note that Facebook is an intermediary and not producing news content of its own.

10.59 Over this period, there have not been any new entrants with a similar scale to Sky News or the News Corp titles. There have been few new entrants of significant size and newer news providers (who tend to be focused on online news provision) such as BuzzFeed have not managed to build up shares of reference greater than 1% (see Figure 10.10). This suggests that it is unlikely that a significant alternative provider to Sky News and News Corp would emerge through organic growth in the short to medium term.

### ***Sensitivity adjustments to share of reference***

10.60 Third parties raised several criticisms of the share of reference calculations presented by Ofcom at phase 1:

- (a) the share of reference relies on data from the NCS in which recall of news sources used is required. Third parties argued this may understate the use of some news sources, particularly online news. We compared reach statistics from the NCS and compared to other industry measures (eg BARB) and found similar results for newspaper readership and TV viewing, but different results for online usage, suggesting that, other things being equal, recall may be a less accurate method for recording the use of online news;<sup>320,321</sup>
- (b) the share of reference does not allocate the use of news providers via an intermediary to the news provider (for example, news read from the Sky News website via Facebook will not be attributed to Sky News if Facebook is reported as the source of news in the survey response);

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<sup>320</sup> We compared reach measured by the NCS to reach as measured by BARB, NRS and comScore. In relation to BARB and NRS we compared weekly reach and in relation to comScore we compared monthly reach. In relation to the NCS we defined reach as the percentage of respondents who report using a source, and report doing so at least once a week. Those who report using a source less than once a week were included, but weighted proportionally less. Some examples of comparisons include the following:

Weekly reach of BBC One News - BARB 60% (Ofcom, [News Consumption in the UK](#), page 17), NCS 54% (CMA calculation);

Weekly reach of ITV TV News - BARB 35% (Ofcom, [News Consumption in the UK](#), page 17), NCS 33% (CMA calculation);

Weekly reach of Sky TV News - BARB 9% (Ofcom, [News Consumption in the UK](#), page 17), NCS 13% (CMA calculation);

Weekly reach of The Sun - NRS 7% ([Ofcom Public Interest Report](#), paragraph 6.15), NCS 6% (CMA calculation);

Weekly reach of The Daily Mail - NRS 6% ([Ofcom Public Interest Report](#), paragraph 6.15), NCS 8% (CMA calculation);

Weekly reach of The Sunday Times - NRS 3% ([Ofcom Public Interest Report](#), paragraph 6.15), NCS 3% (CMA calculation);

Monthly reach of BBC News Online - comScore 60% (see Figure 5 and Figure 6, Appendix E), NCS 22% (CMA calculation);

Monthly reach of Sky News website - comScore 21% (see Figure 5 and Figure 6, Appendix E), NCS 5% (CMA calculation).

<sup>321</sup> comScore reach is found to be much higher than reach based on NCS results. One explanation could be that users as measured by comScore are not looking at news, but other content. Another is that users of online news in the NCS are selecting intermediaries instead of news websites as a source of news.

- (c) the wholesale share of reference of Global and Bauer radio stations should be attributed to Sky News as Sky News is the sole provider of news to IRN, which supplies Global and Bauer with news content;<sup>322</sup>
- (d) share of reference does not account for intensity or duration of use. As such, someone who reads a newspaper article in-depth is weighted the same as someone who reports having read news online who may have glanced at a story briefly.<sup>323</sup>

10.61 In relation to the first of these criticisms, we note that recall data in the NCS may understate the position of online providers of news if users do not recall using a news source and/or underestimate how frequently they use online news. It is unclear what impact this would have on the share of reference of Sky News and News Corp, although we note our findings in paragraph 10.26 that the reach of The Sun and Sky News websites are relatively high (at around 20%), and the Sky News website has the second highest level of news consumption. We note that nearly all major providers of news have an online presence, meaning that any such bias will affect the shares of reference of all of these providers (with the potential exceptions of ITN, Global and Bauer, who have a relatively weaker online presence).<sup>324</sup> As such, any bias is likely to overstate the positions of ITN, Global and Bauer, and understate the share of reference of other providers.

10.62 We considered the validity of the last three criticisms and possible adjustments that might be made to the share of reference figures where appropriate. Full details of our analysis are included in Appendix F.

10.63 In relation to intermediaries' share of reference, we considered allocating intermediary shares of reference to news providers based on their share of reference. We find that this approach increases the Fox, News Corp and Sky combined share of reference from 10 to 11%.

10.64 In relation to the supply of content to Global and Bauer radio stations we find that that it is unlikely that Sky News has a high degree of control at the wholesale level over the news content provided by Global and Bauer to listeners. However, we consider that there is some control given that these stations tend to rely on the IRN output [redacted], and, as such, it is appropriate to allocate some wholesale supply to Sky News. We consider it is appropriate to allocate up to [redacted]% of Global and Bauer's share of reference to Sky.

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<sup>322</sup> For example, submission from [Media Reform Coalition and Avaaz](#), page 13.

<sup>323</sup> For example, submission from [Ed Miliband et al](#), page 19.

<sup>324</sup> Based on our calculations showing shares of reference attributable to ITV, Channel 4, Channel 5 and Global and Bauer websites. See paragraphs 10.51(b), 10.55 and 10.56, and 10.64.

- 10.65 In relation to duration and intensity of use, we find that users of newspapers and TV news tend to use these sources for longer periods of time compared to users of internet and radio news. Such adjustments increased the share of reference of News Corp, and slightly increased the share of reference of Sky News.
- 10.66 Overall, adjustments for allocation of intermediaries, wholesale supply of news to IRN, and duration of use will all tend to increase the share of reference for Sky News and News Corp. We acknowledge that any estimate of the share of reference after adjustments relies on a number of assumptions. We conclude that the share of reference should be higher than the 10% estimated by Ofcom, and is likely to be between 10 and 13%, once all these adjustments are made.
- 10.67 Fox criticised our analysis on the basis that it only presented adjustments going in one direction (ie increasing Sky News and News Corp's estimated share of reference). Fox submitted a range of alternative adjustments that could be made to reduce the share of reference of Sky News and News Corp. In particular, Fox argued that adjustments should be made to reflect:
- (a) the editorial independence of The Times and The Sunday Times;
  - (b) the lack of complete control by the MFT over Sky post Transaction;
  - (c) the loss of customers that would occur if any Sky/News Corp customers stopped using that source after any editorial changes;
  - (d) different levels of trust across news titles; and,
  - (e) the nature of news content via different outlets (down-weighting titles that may have more entertainment and celebrity content).<sup>325,326</sup>
- 10.68 Fox suggested that if these adjustments were made the combined share of reference of Fox, Sky and News Corp would fall.
- 10.69 We note that Fox's first two proposed adjustments relate to internal plurality rather than external plurality. We do not consider these adjustments to be valid because, as set out previously in chapters 7 and 8, we find that the Transaction will significantly increase the level of control that the MFT will be

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<sup>325</sup> Fox also argued that these suggested downwards adjustments are non-exhaustive and we should consider more adjustments, but has not made any further suggestions as to what we should consider. We considered all adjustments put to us, both upwards, and downwards, and have set our reasoning as to whether we consider these appropriate.

<sup>326</sup> Fox also noted that our analysis is based on the most recent NCS dataset and as such may not be up to date (for example, usage of newspapers is in decline). While newer NCS data is not available at this time, we note changes in consumption behaviour in this chapter on a platform-by-platform basis where data is available.

able to exercise over Sky News. As such, we are seeking to identify the share of consumers who consume news from sources over which the MFT has influence. This theory of harm does not require a wholesale alignment of the editorial outlooks of Sky and News Corp, and so we do not consider that it would be appropriate to 'down-weight' the share of reference of Sky and News Corp to reflect the absence of full control by the MFT.

- 10.70 In relation to the third proposed adjustment, we considered the impact of audience expectations in paragraphs 8.24 to 8.30 and found that viewer expectations can change, and the loss of some customers may result in the gain of others. We did not see any clear evidence to suggest that, were the MFT to attempt to exercise greater influence over Sky News, this would necessarily lead to a net loss of viewers.
- 10.71 In relation to trust, we agree that considering whether a news source is trusted may be relevant to deciding how much influence it might have over public opinion and the political agenda. The importance and influence of different news sources are discussed in chapter 11 of this report. However, we do not consider that an adjustment for trust is appropriate because the share of reference metric is intended to capture levels of consumption rather than influence. We made duration adjustments to reflect issues surrounding the measurement of consumption, not to reflect relative importance or influence.
- 10.72 We agree that an adjustment to reflect the news content of a source may be appropriate in principle, but were not able to gather sufficient data to allow us to make such an adjustment. Fox identified a paper<sup>327</sup> in which the authors review the content of ten printed newspapers and assessed whether the content relates to a number of categories including entertainment and news. We consider that while such an approach is a useful starting point in understanding the news contents of a news source, it is not sufficient to make adjustments to the share of reference for a number of reasons. First, the data relates only to printed newspapers, and will only therefore cover a limited proportion of the news providers included in calculating the share of reference. Second, the data in the paper cited by Fox includes a review of only a limited number of stories in each title reviewed (for example, the data relating to The Sun is based on a review of only 66 stories). Finally, it is not clear that stories classified as 'entertainment' or 'celebrity' have no news value. For example, stories relating to celebrities publicising charities or causes arguably aid a wider public debate on socially important issues. In summary, while we agree that in principle some news sources could be down-

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<sup>327</sup> Tony Harcup and Deirdre O'Neill, [What is News?](#) Journalism Studies, 1 March 2016.

weighted as they carry less news content, there does not appear to be robust way in which to do this. The magnitude of the bias or the direction of any bias to the share of reference of Sky News and News Corp is unclear (as whilst titles like The Sun may be down-weighted, titles such as The Times and Sky News may become relatively more important due to their focus). Furthermore, even if a reader purchases a newspaper primarily for the entertainment or sport content, he or she will still see at least some of the news content and potentially be influenced by it.

### ***Conclusions on consumption and share of reference***

10.73 As a result of the Transaction, the MFT will significantly increase its ability to control Sky News, the third largest news provider by share of reference. This means that because of its existing significant control over News Corp, the MFT will control a share of reference of at least 10%, possibly up to 13%. We note that the increment from the Transaction (ie combining the shares of reference of Sky News and News Corp) is large relative to the shares of reference of other established news providers (with the exception of only the BBC and ITN), and is larger than new entrants who have grown organically.

10.74 In terms of other news providers that may mitigate or moderate the combined share of reference controlled by the MFT, we note that there are two large providers of TV news (the BBC and ITN), both of which have particular characteristics that constrain them: the BBC as a result of its regulatory and funding model; and ITN as it provides not one significant voice, but three separate voices as demanded by the TV channels for which it provides news content. The only other providers with a share of 3% or more are DMGT and Global. After that there are a small number of established traditional news brands such as GMG, Trinity Mirror, and Telegraph Media, and a long tail of much smaller providers.

### **Multi-sourcing**

10.75 Alongside share of reference, we also considered the degree to which consumers multi-source, getting their news from several different providers. Fox submitted that multi-sourcing evidence is the most directly relevant empirical evidence on plurality. In principle, multi-sourcing could act as a constraint on the ability of any particular provider to influence its readers.

10.76 This section uses data from the NCS to examine the number of news sources used by individuals. It sets out evidence on:

- (a) the number of wholesale sources used by individuals, including customers of Fox, Sky News and News Corp; and

- (b) the extent to which individuals use intermediaries, which the Parties argued are inherently plural and on which multi-sourcing will occur.<sup>328</sup>

### ***Cross-platform multi-sourcing***

10.77 Ofcom found that the average number of sources of news consumed by those who use news had been relatively stable since 2013, with an average of 3.8 retail sources of news consumed in 2016.<sup>329</sup>

10.78 In addition to retail sources, we also considered the average number of wholesale sources used by consumers of news. We consider that this provides a more accurate picture of multi-sourcing given that users may be using multiple sources from the same producer of content. Across the period 2013 to 2016 the average news user in the NCS sample used 3.1 wholesale sources of news.<sup>330</sup> However, it is important to note that there is a broad distribution around this average figure, which is shown in Figure 10.12. Roughly two thirds of news users use between one and three sources, implying that the sample average is driven up by a relatively small number of users who multi-source intensively, and almost half of news users use only one or two sources of news.

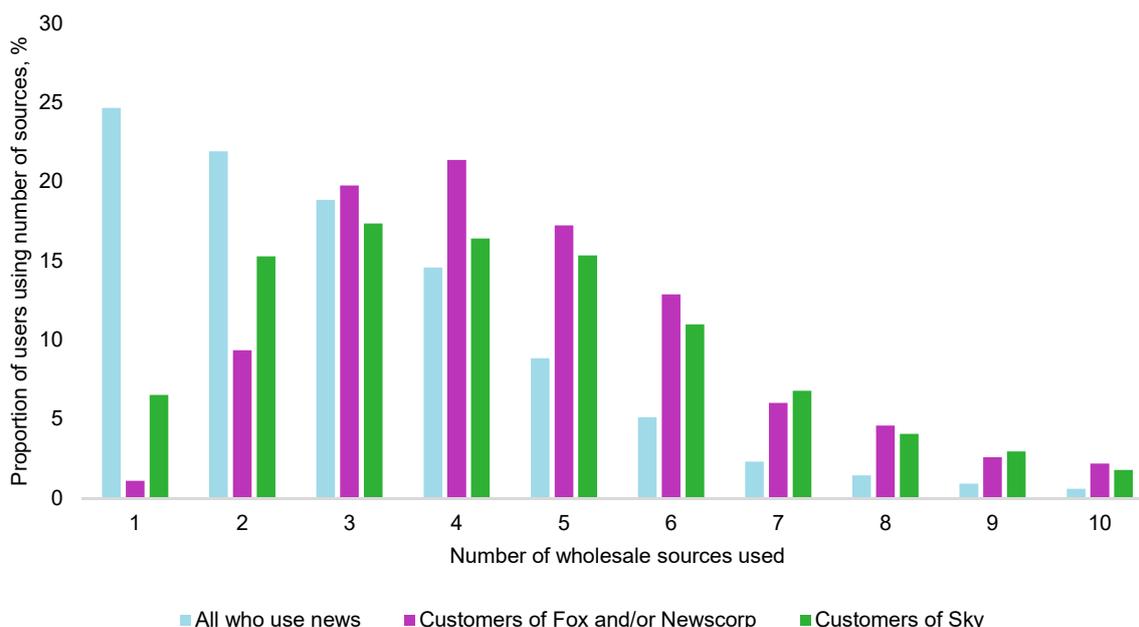
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<sup>328</sup> [Fox initial submission on media plurality](#), page 13.

<sup>329</sup> [Ofcom Public Interest Report](#), Figure 4.7.

<sup>330</sup> We are reporting statistics on multi-sourcing based on the raw data and did not weight the results due to data limitations. We note that not weighting results does not appear to make a significant difference where comparisons are possible, although measurement of online sources tends to be biased downwards when reporting raw results.

**Figure 10.12: Distribution of number of wholesale sources used by those who consume news**



Source: CMA analysis of Ofcom NCS data 2013 to 2016.

Base: all respondents who use news (10,526), all who use Fox and/or News Corp (1,745) and all who use Sky (1,975).

Questions 5a, 5b, 5c, 5d, 5e, 5f of the NCS: *Thinking specifically about TV/daily newspapers/weekly newspapers/Internet or apps or alerts (any device)/magazines, which of the following do you use for news nowadays?*

10.79 In our issues statement, we noted that, in principle, multi-sourcing could act as a constraint on the ability of any particular provider to influence its users. We therefore considered the available evidence on multi-sourcing among the customers of Sky News and Fox/News Corp. We find that, on average, customers of Sky News and Fox/News Corp responding to the NCS tend to use more sources of news than the average UK news user, with Sky News customers using 4.5 wholesale sources and Fox/News Corp customers using 4.9 sources. However, we also find that there is a broad distribution around these average figures, and there is a significant minority of customers of Sky News and Fox/News Corp who tend to use **fewer** sources than the average UK news user. Figure 10.12 shows that 30% of Fox and/or News Corp customers (corresponding to about 2.5 million people) and 39% of Sky News customers (corresponding to about 3.6 million people) use three or fewer news sources.<sup>331</sup>

10.80 There is no objective way of identifying a threshold level of multi-sourcing under which customers might be more liable to being influenced by an individual source. That ‘dilution effect’ is likely to decrease gradually as the number of sources consumed decreases, and it is legitimate to assume that, for customers who only use two or three sources, that effect is limited and the

<sup>331</sup> The percentage figures derived from the Ofcom NCS sample are scaled up to absolute number of news users noting that 81% of the UK population is aged over 16 according to the ONS, and 92% of the UK adult population uses news according to the NCS.

impact of any one provider remains significant. Furthermore, the strength of that dilution effect will be contingent on a number of other factors, such as the type of other sources used and the importance assigned to them, which are difficult to assess. For these reasons, we could not be confident that a high **average** level of multi-sourcing for the customers of Sky News and Fox/News Corp would imply that the influence of these providers is diluted.

10.81 Fox submitted that low levels of multi-sourcing should only be concerning if there was a significant overlap between the audiences of Sky News and News Corp.<sup>332</sup> We disagree with this proposition. The point here is that the Transaction would give the MFT a significantly increased level of control over Sky News and therefore its influence over public opinion might be increased if a significant number of the customers reached by Sky News and News Corp are liable to be influenced by these MFT controlled news providers (for example because they use few other sources).

10.82 If there was a significant overlap between the audiences of Sky News and Fox/News Corp, then another, different concern might emerge whereby the Transaction could cause a reduction in the diversity of viewpoints consumed by certain individuals. We considered this alternative theory of harm, but we found that relatively few customers used news from both Sky News and News Corp,<sup>333</sup> and those that did tended to multi-source extensively.<sup>334</sup> We therefore conclude that this alternative concern is unlikely to materialise.

### ***Multi-sourcing on intermediaries***

10.83 In addition to considering the number of wholesale sources used by respondents to the NCS, we also considered respondents' use of intermediaries. Intermediaries may include using a search engine to find news, use of an aggregator such as Google News, or accessing news via social media (for example, through a Facebook News Feed).

10.84 This is relevant to the plurality assessment as those users finding news via an intermediary (search engine, aggregator, or social media) are likely to be exposed to more viewpoints compared to those who access a news website directly, and as such estimates of the number of news sources used is likely

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<sup>332</sup> [Fox response to the provisional findings](#), paragraph 3.13.

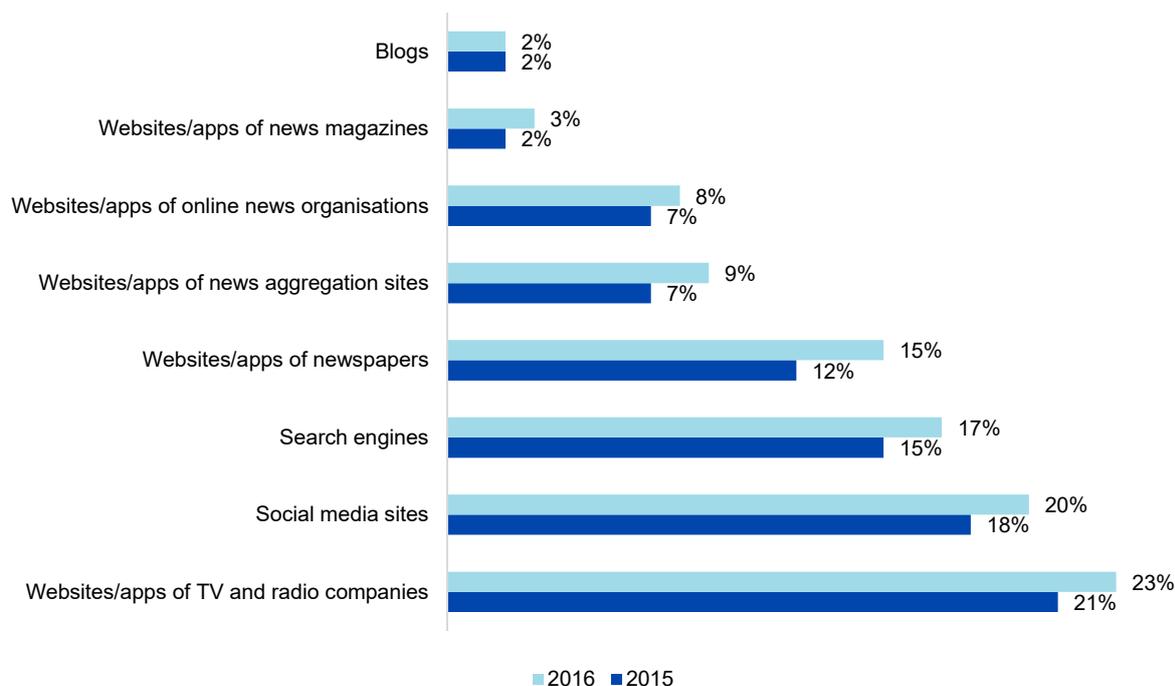
<sup>333</sup> We found that 25% of respondents who used Sky News also used Fox and/or News Corp and 28% of respondents who used Fox and/or News Corp also used Sky News. based on pooling Ofcom NCS data from 2013 to 2016. Base: Sky News (1,975) Fox and/or News Corp (1,745).

<sup>334</sup> We found that respondents to the Ofcom NCS who used sources from both Sky News and Fox/News Corp tended to use 6.5 different wholesale sources on average.

to be an underestimate. We note the extent of this effect is difficult to measure.<sup>335</sup>

10.85 30% of UK news users used an intermediary to access online news.<sup>336</sup> More specifically, 20% of UK consumers used social media, 17% used a search engine, and 9% used an aggregator (Figure 10.13).<sup>337</sup>

**Figure 10.13: Types of news sources used online among all adults**



Source: Ofcom [NCS 2016](#).

10.86 We gathered evidence from Facebook on the extent to which followers of The Sun, The Times, and Sky News follow other news sources.

10.87 Table 10.3 provides some information on multi-sourcing for the followers of Sky News and News Corp profiles on Facebook. The number reported in each cell of the table is the percentage of followers of the row profile who also follow the column profile on Facebook (for example, 42% of followers of The Sun also follow Media Outlet A).<sup>338</sup> Followers of The Times multi-source most frequently: two thirds also follow the Media Outlet A, and significant

<sup>335</sup> A user of an intermediary will be exposed to more sources of news if they view news providers via the intermediary that they would not have viewed otherwise. We did not have evidence on this, although we note that traditional news providers are relatively successful on intermediaries, suggesting that (to some extent) the sources viewed on and off of intermediaries may be similar.

<sup>336</sup> In 2016. Question 3b of NCS: 'You said you use the internet or apps or alerts (on any device) for news nowadays. Which of the following do you use to get news?' Reporting results for respondents who stated they used social media or a search engine or an aggregator (785 respondents). Base: all who consume news (2,659).

<sup>337</sup> There is some overlap between the set of people who use social media/aggregators/search engines with the implication that the proportion of people who use an intermediary is less than the sum of the proportions who use social media, aggregators, and a search engine, respectively.

<sup>338</sup> Anonymised for confidentiality reasons.

proportions follow a broad range of newspapers. In contrast, followers of Sky News multi-source to a much lesser extent: 57% follow Media Outlet A but relatively few follow other titles. Followers of The Sun fall in between these two patterns: 42% follow [✂], and significant proportions follow other news providers, especially other tabloids.

**Table 10.3: Multi-sourcing for Sky News and News Corp Facebook followers**

	thesun	[✂]	[✂]	[✂]	skynews	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	times	[✂]	[✂]
thesun	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
skynews	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
times	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

Source: Facebook.

10.88 This analysis focused on patterns of multi-sourcing on one specific platform, Facebook, so it is difficult to draw comparisons with multi-sourcing in the more general population.

10.89 The evidence we gathered in relation to Facebook [✂]. However, it is not clear that these are different wholesale sources compared to those being used offline (except for online-only wholesale news providers where consumption offline is not possible). Our earlier findings in paragraph 10.37 onward suggest that traditional news providers tend to do relatively well on intermediaries. Furthermore, we note that the argument that online multi-sourcing increases plurality, only holds for the 30% of the population who use online intermediaries to access news.

### **Conclusions on multi-sourcing**

10.90 In sum, our analysis of multi-sourcing patterns indicated that:

- (a) while the average customer of Sky News and News Corp uses between four and five different sources of news, roughly a third of Sky News and News Corp customers use between one and three sources of news. In other words, a significant minority of Sky News and News Corp's customers remain relatively reliant on the news content they produce;
- (b) while news consumers who use intermediaries are likely to be exposed to a broad range of news, this effect is difficult to measure, and it only concerns the 30% of news users who do use intermediaries to access news.

## Conclusion on impact of the Transaction on diversity of viewpoints

- 10.91 In chapters 7 and 8 we conclude that, although the MFT will not have full ownership of Sky following the Transaction, the significantly increased level of 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 assessed how far this increase in control might be expected to lead to a reduction in the diversity of viewpoints consumed.
- 10.92 We find that a large number of news sources are currently available to UK audiences, particularly online, despite recent reductions in the number of newspaper titles available. The Transaction would therefore not have a significant effect on the overall number of viewpoints available.
- 10.93 However, we consider that the Transaction may be expected to result in a significant increase in the level of control the MFT is able to exercise over news providers which are of significant size and position. In particular:
- (a) the MFT, through Sky News and News Corp, will be the only owner with control of media enterprises that have a presence across all four platforms - TV, print, online and radio;
  - (b) the Transaction will significantly increase the level of control that the MFT is able to exercise over one of these media enterprises - Sky News – which is currently the only UK-focused commercial news channel.
- 10.94 Sky News and News Corp will have significant combined reach following the Transaction:
- (a) The Sun has the largest reach of any daily national newspaper, and The Times has the second highest reach of national broadsheet newspapers. The Sky News website and The Sun website reach around 20% of adults in the UK. Sky News TV reaches fewer viewers (9%) than the BBC (62%) or ITN (43%), but is one of a limited number of TV news broadcasters, and as such has the third largest reach in the UK;
  - (b) cross-platform reach is 21% for Sky News, 14% for News Corp, and 31% on a combined basis, meaning that nearly one in three members of the public uses one of their platforms to access news. The combination of News Corp and Sky News would be the third largest behind the BBC (77%) and ITN (39%) but almost double that of the next largest, DMGT (17%).

10.95 Sky News and News Corp will also account for a material share of news consumption on each platform:

- (a) Sky News accounts for 7% of TV news consumption, behind the BBC (76%) and ITV (12%) but significantly greater than other providers. Sky News is only just behind ITV in terms of hours of news watched, as viewers of Sky News tend to access it more frequently or for longer periods, on average, than viewers of ITV news;
- (b) The Sun has the largest readership of all daily national newspapers with an average daily readership of 3.5 million. The Times has an average daily readership of 1.1 million, and as such, both are consumed by a large number of readers on a daily basis;
- (c) Sky News, The Sun and The Times all have significant and growing online presence and brands. Sky News has the second largest share of consumption online behind the BBC, followed by The Mail Online, BuzzFeed and The Times. Sky News tends to do relatively well on intermediaries - for example, it has a large number of followers on Facebook and is one of the most viewed news channels on YouTube.

10.96 On a cross-platform basis, Sky News and News Corp together represent at least 10% of total news consumption using Ofcom's share of reference measure. Sky News alone accounts for around 6% of the total share of reference, larger than all other news providers except the BBC and ITN. We note that the share of reference for Sky News and News Corp may be an understatement as, for example, intermediaries such as Facebook, who have relatively high shares of reference, do not produce their own news content. Therefore, we considered sensitivity adjustments to the share of reference metric. These could increase the combined share of reference of Sky News and News Corp to as much as 13%.

10.97 We considered the extent to which people use multiple sources of news, either in terms of the usage of a range of wholesale providers or through using intermediaries. While the average customer of Sky News and News Corp uses between four and five different wholesale sources of news, roughly a third of their customers use between one and three sources of news. In other words, a significant minority of Sky News and News Corp's customers remain relatively reliant on the news content they produce. In relation to intermediaries, our consumption analysis suggested that traditional news providers do relatively well on intermediaries, suggesting that intermediaries may not be exposing users to new online-only sources. Furthermore, we note that only 30% of consumers use online intermediaries to access news.

Therefore, the evidence of multi-sourcing does not remove our concern about the impact of the Transaction on the diversity of viewpoints consumed.

- 10.98 The Parties submitted that a 10% share of consumption for Sky News and News Corp is not consistent with a finding that the Transaction could lead to a material reduction in the diversity of viewpoints. We do not agree. The increment from the Transaction is large relative to the shares of reference of other established news providers. Sky News and News Corp have a combined share of reference that is significantly larger than the fourth largest news provider, DMGT. There has been limited new entry among major news providers and limited organic growth. Although there is a long tail of news providers, most of these providers only operate on one or two platforms, and many of their individual shares of reference are 1% or less.
- 10.99 ITN would have a similar share of consumption to Sky News and News Corp following the Transaction. However, we note that there is a commercial need for ITN to reflect the preferred style, tone and editorial approach of the retail news providers to which it provides news under contract (ITV, Channel 4 and Channel 5). This contributes to the diversity of viewpoints available to consumers. However, the combined share of reference of Sky News and News Corp would be larger than that of either ITV, Channel 4 or Channel 5. ITN is also focused largely on a single platform (TV), with limited online presence and does not control any newspapers or radio news.
- 10.100 The BBC is the only other provider with a significant presence across multiple platforms. We acknowledge the significant role that the BBC has in informing public opinion but also consider that its role is unique based on the way it is governed and funded. This means that the BBC is under particular pressure to provide impartial and balanced news coverage. Further, unlike the MFT, the BBC does not control any newspapers. We consider that plurality requires not just the availability of a reliable source of impartial and accurate news, but also the coexistence of a diversity of voices, both impartial and opinionated. As such, while the BBC undoubtedly makes a very significant contribution to plurality in the UK, this is not to the extent that we would not be concerned about the loss of a significant independent voice elsewhere in the media landscape.
- 10.101 With the exception of the BBC and ITN, the remaining providers' individual shares of reference are small relative to Sky News and News Corp. These providers are primarily focused on one platform (such as BuzzFeed online, or Bauer on radio). New entrants (such as BuzzFeed or HuffPost UK) have not been able to establish a share of reference above 1%.

- 10.102 We also consider that post Transaction, given the restrictions on the ownership of ITV, the fact that Channel 4 is publicly owned, and the limited share of reference of Channel 5, it is unlikely that another cross-platform provider which includes TV with the scale of the Parties and News Corp combined could emerge.
- 10.103 Fox and Sky argued that these findings do not properly reflect the fact that Fox and News Corp would remain separate entities following the Transaction, with the MFT continuing to exercise material influence rather than full control. We disagree. We carefully considered (as set out in chapters 7 and 8) the degree of control that the MFT would have over Sky News and News Corp following the Transaction. We recognise that the separation of Sky and News Corp is likely to limit the degree to which there could be full editorial alignment or integration of news operations. However, we conclude that the MFT would be able to influence the editorial agenda in other ways, as 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. Given the scale of consumption of Sky News and News Corp relative to other news providers, we conclude that there is the potential for a material reduction in the diversity of viewpoints as a result of the Transaction, even though Fox and News Corp will not act as a single economic entity.
- 10.104 Overall, we conclude that the Transaction has the potential to lead to a material reduction in the diversity of the viewpoints consumed by the public across and within media enterprises because of the significant increase in the level of the MFT's control over Sky News, and given the significant level of consumption and reach of Sky News and News Corp.

## **11. Influence over public opinion and the political agenda**

- 11.1 This chapter assesses the impact of the Transaction on the ability of the MFT to influence public opinion and the political agenda and whether it leads to a reduction in the plurality of persons with control of media enterprises with influence over public opinion and the political agenda.
- 11.2 The concern addressed here is that the Transaction could give the MFT greater control over Sky's news and current affairs content, and that, in combination with its existing control over News Corp's titles, this could give the MFT too much influence over public opinion and the political agenda. More specifically, the Transaction might increase the ability of the MFT to

influence public opinion in its own interests, which in turn may increase the ability of the MFT to influence the political agenda by:<sup>339</sup>

- (a) changing a political decision (either positively to do something or negatively to not do something) because of its ability to influence public opinion or drive the news agenda on that issue;
- (b) receiving favourable policy outcomes in return for support from its media outlets; and/or
- (c) influencing policy outcomes because of fears from politicians of being on the 'wrong side' of the MFT with the resultant negative coverage.

11.3 This concern reflects the second strand to media plurality identified in Ofcom's measurement framework – preventing any one media owner, or voice, having too much influence over public opinion and the political agenda – and relates to one of the key reasons for protecting media plurality. Plurality is not an end in itself but makes an important contribution to a well-functioning democratic society not only by enabling well informed citizens but by preventing too much influence over the political process being exercised by any one media owner.<sup>340</sup> As noted by Ed Miliband et al:

[I]f a widespread perception develops that power over the political process resides in the hands of a few powerful media owners, that could cause apathy and disaffection among citizens, who may feel that by comparison they do not matter in the political process. That could in turn causing them to question or reject the legitimacy of decisions made by democratic institutions.<sup>341</sup>

## Context and approach to assessing influence

### *Third party concerns about cross-media ownership*

11.4 A number of third parties expressed concern about the impact of the MFT increasing the level of control it has over Sky News given that it already controls media enterprises with a substantial presence across print, online and radio platforms. They argued that it will reinforce the ability of the MFT to

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<sup>339</sup> We are agnostic regarding the ends pursued by those interests. Whether positive or negative for society as a whole, the public interest test is based on the principle that it is not healthy for any one media owner to be a position to exert this level of influence, regardless of the aims of those interests.

<sup>340</sup> [Ofcom measurement framework](#), paragraph 2.1.

<sup>341</sup> [Ed Miliband et al response to the issues statement](#), page 8.

lead the news agenda and, therefore, increase its influence over public opinion and the political agenda.

11.5 Cross-media control may increase the influence of a media owner even without a degree of editorial alignment. Third party comments indicated a potential difference between the audience for TV news and the readership of newspapers. [342] and, to an extent, political advisers, noted the broader audience of TV news, while others commented that newspaper readership is narrower (ie comments that newspaper readers tend to reflect the ideological line of the newspaper they read). The control of a wider array of media sources which reach different audiences can allow a person with control of media enterprises to promote different issues which are relevant to different audiences, thus increasing the scope of issues over which they can influence public opinion and the political agenda.

11.6 The Media Reform Coalition (MRC) submitted that:

the merged entity will give the Murdoch family unparalleled control of news providers both within and across all news platforms. In terms of platform breadth, this dominance would be unmatched even by the BBC (which is restricted to broadcasting and online-only).<sup>342</sup>

11.7 and that it could:

genuinely say that if this was a proposed merger between the Telegraph Media Group and Sky or even between the Guardian Media Group and Sky, and the Guardian has a very strong digital presence, [the MRC] would be raising exactly the same alarm bells and exactly the same concerns.<sup>343</sup>

11.8 Ed Miliband et al also stated:

The cross-platform empire that would result would retain its current ability to influence the news agenda on other outlets, including the BBC, through its newspapers but in addition would now be able to amplify that through Sky News and Sky Radio. This power [...] would be unprecedented and would put them in a different league to any other commercial media owner, including ITV.<sup>344</sup>

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<sup>342</sup> [MRC and Avaaz response to issues statement.](#)

<sup>343</sup> [Transcript of hearing with campaign groups.](#)

<sup>344</sup> Ed Miliband et al, [Overview of submission, response to issues statement.](#)

11.9 We note that these third-party concerns related particularly to the ability of the MFT following the Transaction to control media enterprises which operate across different media platforms. Third parties argued that, as different media platforms may reach different audiences, running the same story or promoting the same issue across different media platforms can extend the reach of the particular person with control of media enterprises. This may suggest that cross-media ownership has a much wider impact, as it means that a media owner can influence a much broader audience that might otherwise not choose to read that media owner's newspapers. Further, the repetition of a story across platforms may have an amplification effect, especially if one of the media platforms is seen as more trusted than others.

### ***Approach to assessing influence***

11.10 The concern about the extent of the MFT's influence over public opinion and the political agenda following the Transaction is closely related to the concern about a reduction in the diversity of viewpoints addressed in the previous chapter. Ofcom states that a media owner can be prevented from having too much influence 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.<sup>345</sup> We would also expect influence to be related to the size of a particular news provider's audience – the greater its reach and consumption, the more influence we would expect it to have over public opinion and the political agenda.

11.11 We found in chapters 7 and 8 that the Transaction will significantly increase the level of control that the MFT will be able to exercise over Sky and Sky News. We found in chapter 10 that the Transaction will result in a material reduction in the plurality of persons with control of the viewpoints consumed by the public which could lead to a reduction in the diversity of the viewpoints consumed. All things being equal, we would expect this to enable the MFT to exercise greater influence over public opinion and the political agenda following the Transaction.

11.12 The Parties submitted that the impact of the Transaction will be minimal due to the small size and relative lack of influence of Sky News. They also suggested that [REDACTED]. The Head of Sky News noted that [REDACTED], although we note that [REDACTED].

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<sup>345</sup> [Ofcom measurement framework](#), paragraph 2.2.

11.13 We note that Andrew Neil considered that Sky News' 'small audience' limited any influence that Sky News would provide Fox.<sup>346</sup> ITN also stated that:

The services [ITN] provide[s] 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<sup>347</sup> 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. [...] By far the most watched TV news programmes in this country – by far – are the bulletins on BBC, ITV, Channel 4 and Channel 5. Arguably, far and away the greater impact in terms of awareness of what is going on than 24-hour news, either BBC or Sky News in that regard.<sup>348</sup>

11.14 However, we consider that there are several factors about Sky News which mean that its impact could be larger than raw reach and consumption figures suggest. The analysis set out in this chapter therefore considered whether there are specific characteristics of Sky News, the News Corp titles and their audiences, and of the MFT's control of these news providers, which might indicate a greater or lesser concern about the degree of influence by the MFT over public opinion and the political agenda following the Transaction, building on the analysis in chapter 10. In particular, we assessed whether the MFT's control of cross-platform media enterprises, which is increased as a result of the Transaction, could increase the MFT's influence.

11.15 We consider that significantly increasing its ability to exercise control over Sky News, given its existing significant control over News Corp, could have the potential to increase the MFT's influence in four main ways and our analysis focused on these issues:

(a) by enabling the MFT to exercise influence over the public in a variety of different ways and through different media – allowing it to span a

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<sup>346</sup> [Transcript of hearing with Andrew Neil.](#)

<sup>347</sup> Analysing BARB statistics for the top ten shows on each channel, peak audience in each week were between 170,000 and 239,000. We note that the most popular shows on Sky News are on Sundays and Mondays. However, while 70,000 is an underestimate of the peak number of viewers per day, we recognise the difference between peak audiences of Sky News vs audience of news bulletins on other TV channels.

<sup>348</sup> [Transcript of hearing with ITN.](#)

spectrum from TV news focused largely on factual reporting, through to unregulated opinion and comment in newspapers and online;

- (b) more trusted news providers are more influential and the addition of a trusted news provider will increase the influence of the MFT. A news provider with a small audience but which is highly regarded may be able to influence wider public opinion and the political debate;<sup>349</sup>
- (c) by enabling the MFT to target different groups of customers who might have preferences for consuming news through different platforms. We considered quantitative evidence on audience characteristics to assess whether the MFT's control of news providers can or will enable it to reach out to an audience that is itself influential and/or whether the Transaction will result in the addition of a different type of audience which will result in the MFT being able to influence a wider section of the public; and
- (d) by taking advantage of the interaction between newspapers and TV news in order to increase its influence over the wider news agenda. We considered quantitative and qualitative evidence on the ability of Sky News and News Corp to lead the news agenda – the ability to lead the news agenda is a reflection of influence and if increased by the Transaction would mean the MFT, through its control of these news providers, is more able to influence public opinion and the political agenda.

11.16 Finally, we set out evidence on the MFT's influence on the political agenda through the News Corp titles. This includes the findings of the Leveson Inquiry, quantitative evidence on contact with ministers and qualitative evidence from those involved in political decision making to look at the degree to which the MFT influences the political agenda compared to other persons with control of media enterprises.

## **Impact of the Transaction on the ability of the MFT to influence through different media platforms**

11.17 This section addresses the first way that the MFT's control of media enterprises across each platform following the Transaction might increase its influence: by giving the MFT the ability to influence through Sky News as well as the News Corp titles. We set out how media owners can influence public

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<sup>349</sup> Conversely, it may be that a news provider with the same size audience but which is less trusted may have less ability to influence wider public opinion. However, it is not necessarily the case that a low level of trust will negate the influence of a news provider with a larger audience. As we set out in paragraph 11.10, the size of the audience is still a key factor in the amount of influence wielded by a news provider.

opinion and the political agenda. We then assess the extent to which Sky News might be able to influence in different ways from the News Corp titles following the Transaction.

### ***How media owners influence public opinion and the political agenda***

11.18 The media<sup>350</sup> can influence public opinion in two ways:<sup>351</sup>

- (a) shaping what the public think about through story selection, given the public does not have the capacity to process every issue; and
- (b) shaping how the public think about an issue, through a particular editorial stance.

11.19 Influence over the political agenda is linked to influence over public opinion, although it is not a prerequisite. A person with control of media enterprises, like the MFT, may have influence over the political agenda because:

- a) politicians want to use the media to put their views or policies across to the public;
- b) politicians care about what the media say about them, not directly related to their influence on public opinion;
- c) politicians consider that what the media says reflects public opinion;<sup>352</sup> and/or
- d) politicians are particularly keen to increase their exposure to the public while avoiding negative stories about themselves or their policies.<sup>353</sup>

11.20 Further, the ability to influence the political agenda may in turn lead back to influence over public opinion. As the political agenda is itself news, being able to directly influence what is on the political agenda, and the issues that are raised and debated, will therefore enable the relevant media owner to

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<sup>350</sup> And others seeking to influence public opinion, such as politicians or political parties.

<sup>351</sup> For more discussion on this, see page 2, Weimann, G. and Brosius, H. 'A new agenda for agenda-setting research in the digital era', *Political communication in the online world: theoretical approaches and research designs*, Ed. Vowe, G. and Henn, P. (December 2015).

<sup>352</sup> This may arise through a perception that a particular media owner has the ability to influence public opinion (provided, for example, through attempts, successful or otherwise, to mobilise their audience on a topic that they already care about, even if there is no actual ability to switch minds or votes), rather than evidence of actual ability. However, it is important to stress that, in assessing influence over the political agenda, we looked for evidence of actual influence, and did not seek to measure politicians' perceptions.

<sup>353</sup> See in particular comments by Ed Miliband et al that 'If a company has too much influence over public opinion and the political process, this could make not just politicians, but officials at institutions normally responsible for ensuring enforcement of regulations and laws afraid of 'taking on' the company in question by doing their jobs properly. In this way, excessive influence could corrupt the workings of key civic institutions tasked with investigating wrongdoing, like the police and regulators.'

influence what issues are covered by the rest of the media and, ultimately, influence public opinion.

11.21 While there was a general consensus among third parties that submitted evidence that the media could raise the prominence of particular issues (ie what the public thinks about), there was some debate as to whether the second of these (how they think about it) is possible. A number of third party news providers indicated that at best this was limited to shaping public opinion in ways to which readers or viewers were already sympathetic.

11.22 Peter Wright (Editor Emeritus of The Daily Mail) told us that newspapers:

have a role in bringing to the attention of the public both things that you think are important and may be neglected elsewhere and things that you think they will find important or interesting in one way or another [but] you cannot force stories or opinions down readers' throats. You can only push on an open door.

11.23 Rebekah Brooks noted the 'symbiotic relationship between a newspaper and its readers' and that newspapers 'take on a campaign and an issue and, as an editor, always with your readership.'

11.24 Tony Gallagher of The Sun said:

You do not really want to place yourself wildly at odds with the readers and annoy them [...] Commercially, I think, it is foolish for newspapers to not be close to their readers. Newspapers that get too far away from their readers pay a price in terms of lost newspaper sales. It just annoys the reader.

11.25 The Rt. Hon Kenneth Clarke noted a similar point but also added that editors can lead their audience to some extent:

The newspaper editors, a bit like the politicians, adjust their message and adjust what they give priorities to in response to what they think is the view of their readers or their voters. These two warring professions are not totally different, and a newspaper or a television channel like Fox will not sail in the face of what they rapidly perceive to be the views of their readers, but they do know where they are trying to go and they know how to put their campaign the way it wins.<sup>354</sup>

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<sup>354</sup> [Transcript of hearing with Ed Miliband et al.](#)

11.26 However, even if the media is limited in its ability to change people’s minds on a particular topic (although not completely precluded from doing so), as noted by Ed Miliband et al, even just being able to shape what the public thinks about would still enable a media owner to influence:

opinion about themselves, their political friends and enemies, and their rivals in the markets they operate in. For instance, the news outlets they control could give added prominence to stories which damage the public’s trust in their rivals and enemies, and hide or play down stories which might damage the public’s trust in themselves, or damage other commercial interests of the media owner.<sup>355</sup>

11.27 Further, news providers may be able to convince politicians that they can direct and are reflective of public opinion by focusing on issues their audience already cares about, even if they cannot otherwise in practice direct their views. For example, newspaper charity campaigns, which get considerable responses from their readers, tend to involve issues which already resonate with their readers – such as The Sun’s focus on an armed forces charity and The Independent’s focus on refugees.

11.28 In this context, we note that Fox argued that the News Corp newspapers lack the influence that they used to have due to the overall fall in newspaper readership and, in particular, the fall in the readership of the News Corp titles, in which the MFT has an interest. Fox noted various articles by media commentators which argued that the result of the 2017 general election, directly contrary to the editorial line of much of the press, including all of the News UK newspaper titles controlled by the MFT, is evidence that the influence previously held by those papers is diminished.<sup>356</sup> This argument was echoed by News Corp. For example, Tony Gallagher argued that the influence of The Sun had been historically overplayed, noting low voting turnout of The Sun readers at the 2017 general election.

11.29 However, we also note the EU referendum just a year earlier where the influence of traditional news providers<sup>357</sup> – particularly of the newspapers –

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<sup>355</sup> Ed Miliband et al [response to issues statement](#), page 8.

<sup>356</sup> We note that one of those referenced by Fox, Professor James Curran, told us that Fox had misrepresented his views regarding the influence of the press in the 2017 election and that he considered the press was still highly influential. Even if they had not had an impact in the election, they still have a cumulative effect over months and years through the issues they raise and how they cover them. (James Curran, [Response to issues statement](#)).

<sup>357</sup> By traditional news providers, we mean the News Corp titles (and their associated online operations); The Daily Telegraph, The Guardian, DMGT, the Lebedev titles (The Evening Standard and The Independent), Trinity Mirror titles and their associated online operations; and the BBC, ITV, Channel 4, Channel 5 and Sky News broadcast news programmes and their associated online operations.

was considered important (and when the Editor of The Sun noted ‘so much for the waning power of the press’).<sup>358</sup> As such, we considered that looking at the influence of the media over one-off time limited events is inconclusive, and our analysis needed to take account of additional factors over a longer term.

### ***Differences between the influence of TV broadcasters and newspapers***

- 11.30 Editorial influence may take the form of a direct approach promoting specific partisan editorial lines in an attempt to influence both what issues the public thinks about and how they think about them. Alternatively, it may take a subtler approach involving story selection and prominence which may influence what is thought about, but may only indirectly be able to shape how the public thinks about an issue.
- 11.31 These different approaches are reflected in the way that newspapers, online, and TV news operate in the UK. TV news providers are subject to the Broadcasting Code, with news content particularly constrained by the requirements of due impartiality and accuracy.<sup>359</sup> Conversely, newspapers and online news providers are under no similar constraints.
- 11.32 As such, newspapers and online news providers can and do take expressly partisan editorial lines in their reporting of the news, without having to present a balanced argument. For example, they can be explicitly for or against a particular political party or issue. This means that they can try to both influence what is thought about and how the public thinks about it.
- 11.33 The Broadcasting Code means that TV news providers cannot take a similar approach. Indeed, the Parties argued that the Broadcasting Code means that the ability of any media owner to exert influence through broadcast news is limited and thus the impact of the Transaction is minimal.<sup>360</sup> However, as we note in chapter 5, even within the constraints of the Broadcasting Code, an overall editorial approach involving story selection and prominence is still possible. For example, ITN notes of the channels it provides news services for that:

Channel 5 News tend to do news of the day and follows a slightly more domestic agenda, but still does international news, will do

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<sup>358</sup> See [The Guardian \(24 June 2016\) \*Did the Mail and Sun help swing the UK towards Brexit?\*](#) When asked about this comment in a hearing with The Sun, Tony Gallagher said that the comment was made privately as an observation on comments from Downing Street that, if Remain had won, it would have ‘dealt a mortal blow to the reputations of newspapers’ and undermined their reputation for being on the right side of political arguments.

<sup>359</sup> See chapter 5 for a more detailed discussion of the Broadcasting Code.

<sup>360</sup> For example, see [Fox initial submission on media plurality](#), paragraph 4.33(ii).

features on matters of significant importance, say in the world of healthcare, and will, from time-to-time do investigations to hold power to account. Channel 4 News has a greater investment in revelatory stories, investigations, holding power to account. And so that is an editorial decision. Still operating under exactly the same broadcasting codes, but will have as an ambition to reveal more.<sup>361</sup>

11.34 As such, a TV news provider can at least influence what the public thinks about while still operating within the Broadcasting Code.

### ***Conclusion on the impact of the Transaction on the ability of the MFT to influence through different media platforms***

11.35 While TV news cannot take the same direct approaches as print media, we find that broadcasters like Sky News can still influence their audiences through editorial decisions around story selection and prominence.

11.36 Further, we note comments from Andrew Neil that ‘you cannot really now be big in broadcast news unless you have a 24-hour news channel. You can have other news outlets but you need a 24-hour news’<sup>362</sup> and from ITN that politicians especially value 24-hour news because there are more opportunities to appear on it.<sup>363</sup> In this context, Sky News is one of only three providers of broadcast news (BBC, Sky News and ITN) and the only significant 24-hour news channel in the UK other than BBC News 24.

### **Trust in news providers including Sky News and News Corp**

11.37 Although reach and consumption statistics tell us how many and what type of consumers news providers can impact directly, a news provider may have an impact beyond its existing audience if it is trusted, as set out at paragraph 11.15(b). This may mean both that it is more likely to be picked up by other news providers and so lead the news agenda and that it may have more influence on its audience as people rely more on the news providers they trust most out of those they consume. Conversely, the influence of a news provider might be less than indicated by its reach and consumption if trust is low.<sup>364</sup>

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<sup>361</sup> [Transcript of hearing with ITN.](#)

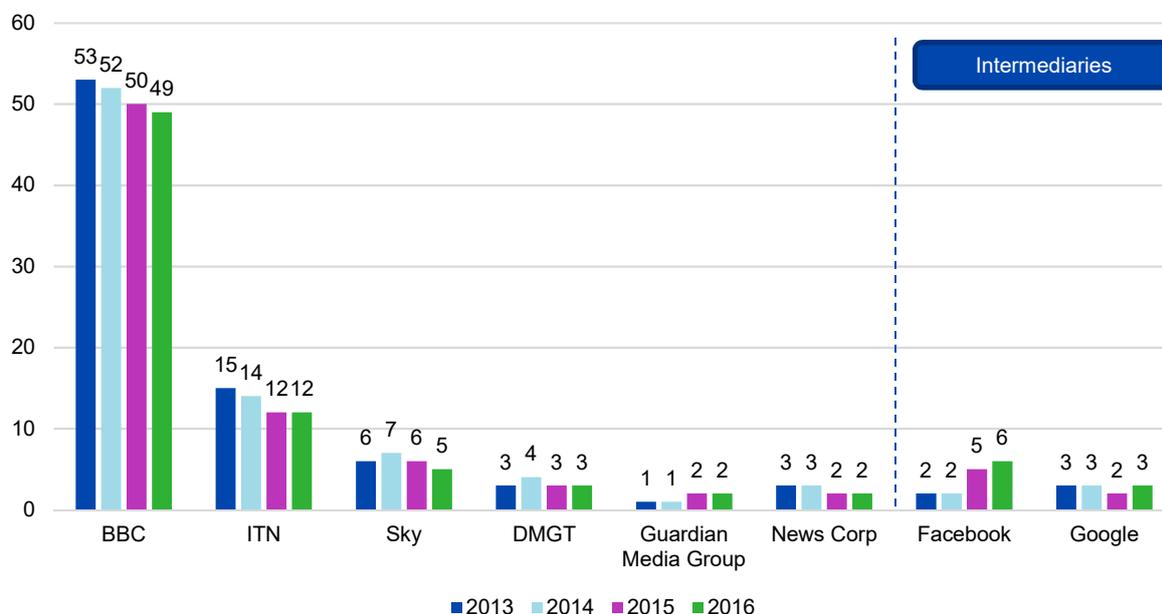
<sup>362</sup> [Transcript of hearing with Andrew Neil.](#)

<sup>363</sup> [Transcript of hearing with ITN.](#)

<sup>364</sup> Although not totally eradicated or even severely reduced. As we note in 11.10, the reach and levels of consumption of a news provider is still a significant indicator of influence, and the greater these are, the more influence that news provider will have. Fox also argued that high levels of trust for other news providers will therefore dilute the influence of a particular news provider relative to its share of reference (see [Fox response to](#)

11.38 Analysis of Ofcom’s NCS shows that in 2016, the BBC was the most important news provider to consumers, with 49% of news consumers saying it was their single most important news provider (see Figure 11.1), followed by ITN (12%), and Sky News (5%). In general, we expect that consumers would trust those news providers that they consider important.

**Figure 11.1: Single most personally important wholesale news provider, 2013 to 2016 (%)**



Source: Ofcom [NCS 2016](#). Q8a: *Looking at all the sources of news you have said that you use, which one is most important to you personally?*  
 Base: All who use any news source nowadays 2016 (2,618), 2015 (2,588), 2014 (2,553), 2013 (2,628).  
 Note: only entities over 1% shown.

11.39 For consumers of the particular news providers, The Parties argued that trust in Sky News would not continue in the event that the MFT were to exercise influence over its editorial output such that it adopted a partisan viewpoint, and this would lead to viewers switching away from the service, as well as damage to the Sky brand with associated repercussions. Accordingly, there is no commercial rationale for such influence. However, we note that both The Times and The Sunday Times remain highly trusted despite being influenced by the MFT. Further, the exercise of such influence may not be easily detectable (see, for example, paragraphs 11.30 onwards).

11.40 Figure 11.2 shows us that the trust scores for all the broadcasters, including Sky News, are relatively high compared to other types of news providers. This is consistent with TV news more generally being considered an influential

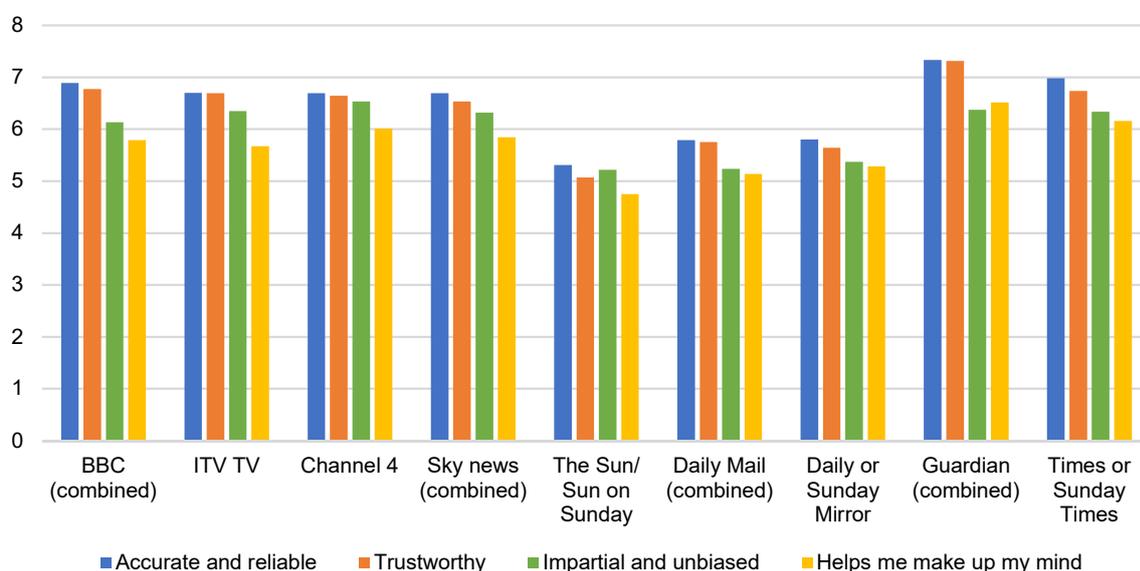
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[provisional findings](#), Annex 2, page 42). We disagree that this will be the case, although we agree that it is appropriate to consider the degree of influence of other news providers (however affected by trust) when concluding on the sufficiency of plurality.

medium.<sup>365</sup> The Guardian and The Times/Sunday Times score highly too, with higher scores than broadcasters on two of the metrics. We note that The Sun and The Sun on Sunday have relatively low levels of trust.

11.41 The Parties argued that trust in Sky News would not continue in the event that the MFT were to exercise influence over its editorial output such that it adopted a partisan viewpoint, and this would lead to viewers switching away from the service, as well as damage to the Sky brand with associated repercussions. Accordingly, there is no commercial rationale for such influence. However, we note that both The Times and The Sunday Times remain highly trusted despite being influenced by the MFT. Further, the exercise of such influence may not be easily detectable (see, for example, paragraphs 11.30 onwards).<sup>366</sup>

**Figure 11.2: Average trust scores (2016)**<sup>367</sup>



Source: Ofcom [NCS 2016](#). Questions 9c of the NCS: *And to what extent do you think the following statements apply to [BRAND] as a news source? Answer using a scale of 1 to 10 where, 1 is NOT AT ALL and 10 is COMPLETELY*  
 Base: those who use BBC (2,313), ITV (947), Channel 4 (184), Sky News (509), The Sun/The Sun on Sunday (184), Daily Mail (358), Daily or Sunday Mirror (114), Guardian (163), Times or Sunday Times (102)  
 Notes: Combined scores are a weighted average of the online and TV/newspaper score. There was a very high degree of correlation between offline and online scores, suggesting that the brand/reputational values of the offline brand is carried through to the online site. We have only included outlets with more than 100 responses in 2016.

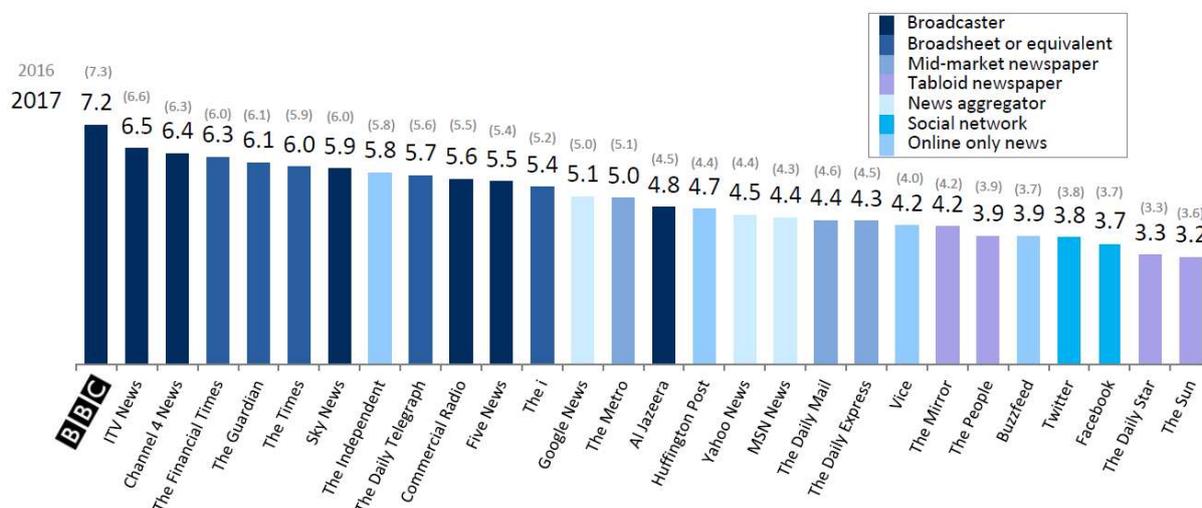
<sup>365</sup> For example, comments by the Editor of an online news provider ([redacted]) that ‘people still have this historical perception that everything they see on television has to be true because they would not let them put it on television’ and more general comments by Andrew Neil ([Hearing with Andrew Neil](#)), [redacted] (Hearing with [redacted]), and the various former special advisers that we heard from that TV is considered highly influential.

<sup>366</sup> [Fox response to provisional findings](#), paragraph 3.36; [Sky response to provisional findings](#), paragraph 5.26.

<sup>367</sup> From the NCS, we primarily relied on the following metrics: (a) is the news provider accurate and reliable; (b) is the news provider trustworthy; (c) is it impartial and unbiased; and (d) does it help me make up my mind. In the NCS, there are two other measures of trust: 1) offers a range of opinions; and 2) is of high quality. We note that there is a high degree of correlation between the different metrics, so chose to display results from only four of the metrics.

11.42 The results from the NCS are consistent with a report from the BBC on public perceptions of its output<sup>368</sup> which takes account of all news consumers, not just the consumers of the particular titles (see Figure 11.3).

**Figure 11.3: Mean trust score of different news providers<sup>369</sup>**



Source: Ipsos MORI for the BBC.

Base: UK adults 15+ who follow the news (half sample answering about trust: 933), Jan to Feb 2017.

Notes: Response to question *To what extent do you trust [insert source] as a news source?*

Newspaper titles include The Sunday edition.

Mean score / 10: 1 = do not trust at all; 10 = trust a great deal.

11.43 Trust levels for tabloid news providers appear to be lower, particularly for The Sun and The Sun on Sunday. Fox submitted that this is a reflection of the type of content which those papers are known for – celebrity gossip rather than detailed and authoritative coverage of political issues (and therefore that such newspapers are not likely to have much influence on political issues).<sup>370</sup> However, we note Tony Gallagher’s comment that The Sun places a high premium on exclusives, giving examples of much ‘harder’ news such as the killing of the so-called ‘White Widow’ in the Iraq/Syria conflict and sexual misconduct among MPs (although we acknowledge that the content of tabloid newspapers online, and particularly the online content consumers engage with, can be substantially different from the print versions and tends to involve less news content).

<sup>368</sup> This report collates data from two surveys about public perceptions of the impartiality and trustworthiness of the BBC. The first is an ongoing monthly nationally representative survey by Kantar Media for the BBC that allows the BBC to gauge public opinion of the BBC on a regular basis. The second is a nationally representative face-to-face survey conducted for the BBC by Ipsos MORI. The survey was designed to understand the range of scores that the public gives to news providers in terms of trust and impartiality, and how the BBC performs in comparison with the wider market.

<sup>369</sup> For further details of this survey see [BBC \(November 2017\) Public perceptions of the impartiality and trustworthiness of the BBC](#), slides 5 to 12.

<sup>370</sup> [Fox response to issues statement](#), paragraph 2.14.

11.44 While having lower trust scores may indicate a lower degree of influence, there are limitations in using the trust metrics above and differences of views regarding how they should be interpreted.

- (a) people may not be aware of the impact that a particular news provider has upon them. News Corp titles (and others) may have the potential to influence all of their respective readers to varying degrees, in ways not picked up by these metrics;<sup>371</sup>
- (b) the metrics may overstate the impact of TV news because broadcasting regulation has ‘helped to construct a strong attachment to broadcasting as a highly trusted medium’;<sup>372</sup>
- (c) an ‘acceptability bias’ may lead to these metrics understating the use of certain sources because ‘the degree to which consumers will be prepared to report, in a face-to-face survey, their attitudes to different news sources is likely to be conditioned by their perception of how socially acceptable it is to have those attitudes’;<sup>373</sup>
- (d) news providers with lower trust scores may nonetheless reach and be consumed by a large number of consumers, or they may have a role in leading the news agenda, both of which will in themselves provide influence.

11.45 This last point demonstrates that the relationship between the factors affecting influence and the raw numbers on reach and consumption can work both ways. A news provider with a small audience may be particularly influential if it is highly trusted as its readers may rely on it more than other news sources they consume, and it may have a greater ability to be picked up by other news providers and drive the news agenda. Conversely, even if not highly trusted, a news provider with a larger audience is still likely to have some influence over its audience and the public in general. As such, in the case of The Sun and The Sun on Sunday, the reach and levels of consumption for these titles is relatively high (see chapter 10), which we consider indicates they will continue to have some degree of influence, even if reduced due to a lower level of trust

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<sup>371</sup> [Ofcom Public Interest Report](#), paragraph 7.15. Fox noted that while respondents may be unaware of the impact upon them, this is different from saying that lower levels of trust do not necessarily lead to lower influence, as wariness about a particular outlet may reduce its potential to persuade a consumer. [Fox response to provisional findings](#), Annex 2, pages 44 and 45.

<sup>372</sup> [Ofcom Public Interest Report](#), paragraph 7.6. View put forward by Professor Steven Barnett. Fox noted that, regardless of the reason that TV is trusted, that trust may nonetheless result in greater influence. [Fox response to provisional findings](#), Annex 2, pages 44 and 45.

<sup>373</sup> [Ofcom Public Interest Report](#), paragraph 7.6. Views put forward in submission from Ed Miliband et al to Ofcom. Fox noted that conversely, views on social acceptability may themselves be suspect, and, points out that despite attracting similar levels of dislike, The Sun has a lower trust level than The Daily Mail. [Fox response to provisional findings](#), Annex 2, pages 44 and 45.

compared to a news provider with a similar share of reference which is more highly trusted.

### ***Conclusion on trust***

11.46 We find in chapter 10 that the reach and consumption figures for The Sun and The Sun on Sunday are relatively high, which means they are likely to be influential. The levels of trust for these titles are lower, which might therefore mean that while they are influential, this influence is lower in degree than it would be otherwise. Conversely, while the reach and consumption figures for the other titles influenced by the MFT – The Times and The Sunday Times – are lower, we find that these titles have relatively high levels of trust, indicating that these titles (and therefore the MFT) may have a greater level of influence than indicated by reach and consumption figures. With respect to the Transaction, we find that Sky News as a broadcaster is particularly highly trusted and likely to have greater influence. Therefore, as a result of the Transaction, we find that the MFT in gaining significantly increased control over Sky News, is increasing its ability to influence public opinion and the political agenda.

### **Impact of the Transaction on the MFT's influence over different audiences**

11.47 This section addresses how the Transaction might enable the MFT to influence different audiences and demographics. As we set out in paragraph 11.15, the Transaction may enable the MFT to influence a wider range of different demographics, some of which may themselves be influential.

11.48 We first outline how the increased control over Sky News will enable the MFT to reach a bigger audience. Second, we set out evidence on the different audience characteristics of Sky News and the News Corp titles.

11.49 We note that the analysis in this section overlaps to some extent with the analysis of reach and consumption in the previous chapter. For example, the combined share of reference of Sky News and News Corp already reflects the fact that Sky News and the different News Corp titles attract different audiences. The purpose of this section is to explore in more detail the characteristics of these audiences.

### ***Impact of the Transaction on audience reach***

11.50 We would expect different individuals to have preferences for different types of news media. Some will largely get their news from TV news; others will

read newspapers or use online intermediaries. Ofcom's NCS provides detailed evidence on the diversity of consumers' preferences in accessing news. Given this diversity, cross-media ownership can enable a person with control of media enterprises to appeal to a wider set of people than would be possible through a single channel.

- 11.51 The evidence in chapter 10 (see Figure 10.5) suggests that Sky News and the News Corp titles have a current reach of around 21% and 14% respectively. The total reach for the two combined would be around 31%. This suggests that there is currently relatively limited overlap between consumers of Sky News and readers of the News Corp titles, and that the Transaction would give the MFT greater influence across a wider customer base.
- 11.52 A similar conclusion can be drawn from direct evidence from the NCS on the degree of overlap between the customer base of Sky News and the News Corp titles. Based on NCS data, 25% of respondents who used Sky News also used either Fox or News Corp and 28% of respondents who used Fox or News Corp also used Sky News.<sup>374</sup>
- 11.53 A cross-media merger may increase the number of times a media owner can reach the same individuals, thus increasing the influence of that media owner. Further analysis of the NCS showed that of the 14% of population that consume news from News Corp, 25% of the time they consume news is from News Corp and 5% is from Sky News.<sup>375</sup> Therefore, by bringing both media sources under the control of the MFT, this would increase the share of times that news is consumed by MFT controlled outlets by five percentage points to 30% for a certain proportion of the population. While we might be concerned in principle with a cross-media merger increasing the number of times a media owner can reach the same individuals, the evidence suggests that this is not a significant issue in this Transaction.

### ***Audience characteristics of Sky News and News Corp***

- 11.54 A media source might have greater influence with lower reach and consumption if it reaches those who are themselves more influential. For example, The Financial Times considers its role is to 'appeal to people who

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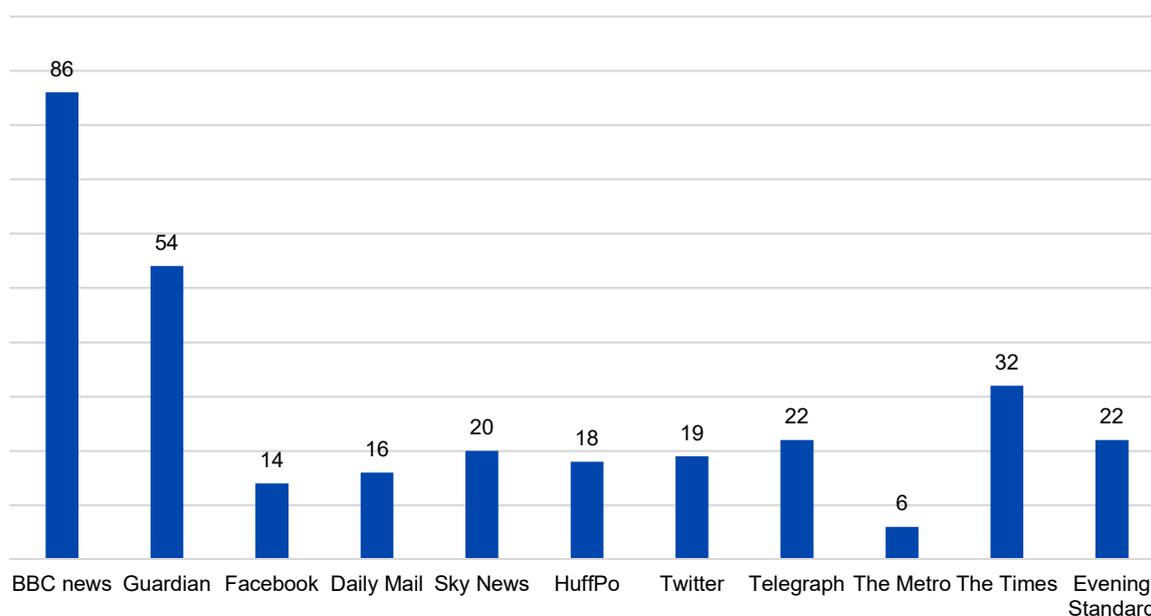
<sup>374</sup> Based on pooling Ofcom NCS data from 2013 to 2016. Base: Sky News (1,975) Fox and/or News Corp (1,745).

<sup>375</sup> Based on analysis of Ofcom NCS 2016 data. The NCS asks respondents how often they use a news source, and assigns weights by frequency of use. Therefore, it is possible to calculate the number of 'contacts' a respondent has with the news in a week. News Corp users report having 56 'contacts' with the news in a course of a week, 14 of which are with News Corp titles and three of which are with Sky News. This means that 25% of 'contacts' are with News Corp and 5% with Sky News. Note that this is the number of times a consumer accesses news rather than the amount of time they spend with each news provider.

make or influence decisions in business, finance and public affairs'. As such, even if The Financial Times has a lower reach or level of consumption, it might still have a much higher influence due to the nature of the people reading it. Similarly, The Times describes itself as 'the paper of record', while we note that Andrew Neil considers TV to be more influential than the press not only due to the number of people that watch it but also the demographic involved.<sup>376</sup> Further, if the audience is more likely to vote then the news provider may be more influential over the political process.<sup>377</sup>

11.55 YouGov has built an online panel of 'opinion formers' in the UK. These are described by YouGov as leaders in their field, drawn from business, politics, media, public sector, charities, academia and beyond. Data from YouGov<sup>378</sup> allowed us to see what news sources are relied on by this panel of 'opinion formers'. The news providers that influence them could be expected to have greater influence overall. The news providers on which they rely can be seen in Figure 11.4.

**Figure 11.4: Commonly used news sources for opinion formers**



<sup>376</sup> [Transcript of hearing with Andrew Neil.](#)

<sup>377</sup> [Analysis by Ipsos Mori](#) shows that in the 2017 general election, the higher social classes and older groups were more likely to vote.

<sup>378</sup> See [YouGov How today's voters get their political news: Polls conducted on behalf of the London Press Club and Society of Editors](#). We note that YouGov use an online panel. Online panel surveys tend not be representative of the target population as online panellists are generally heavier Internet and technology users compared to the general population. It is likely that respondents on YouGov online panel use online news in a different way than online news users in general and they may have different views about them, so the results may be misleading.

Source: YouGov.

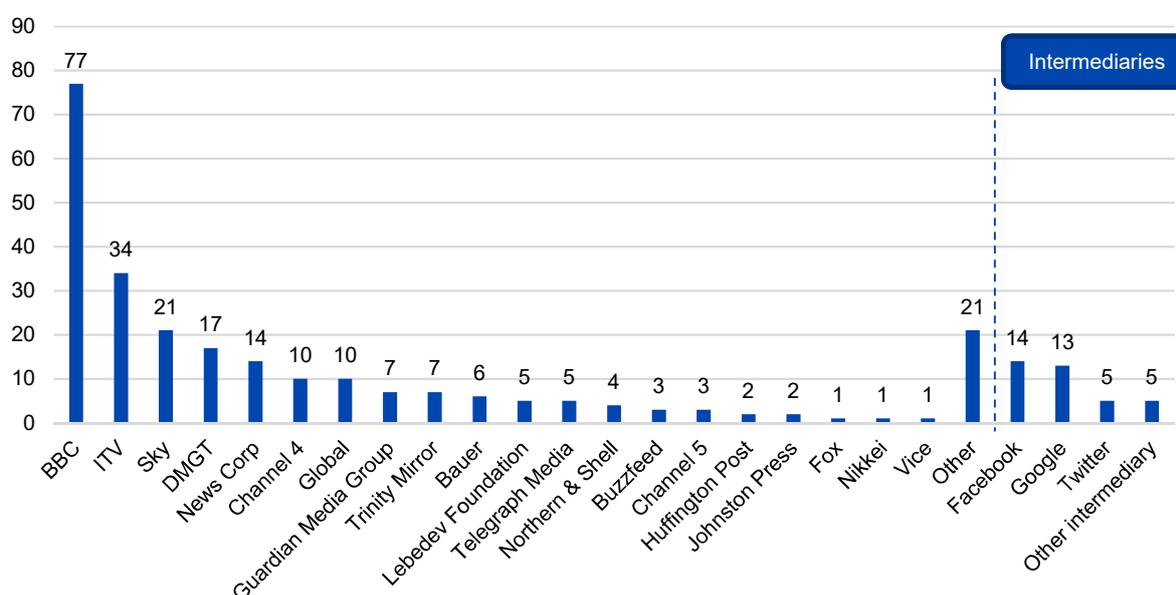
Base: All opinion formers (721).

Notes: Response to *Which of the following do you tend to get political news from, either in printed or online format, very regularly?*

Chart shows top ten responses based on general public data, plus The Evening Standard and The Metro.

11.56 Looking at this data, we see that these opinion formers appear to use broadsheet newspaper brands, such as The Guardian,<sup>379</sup> The Telegraph and The Times, more than the general population (as indicated in the NCS in Figure 11.5). They also appear to consume more news from a wider variety of sources.<sup>380</sup> We further note that opinion formers in the YouGov survey use Sky News broadly in line with the general population, although this may be an underestimate.<sup>381</sup>

**Figure 11.5: Retail cross-platform audience reach of providers used 'nowadays' for news: 2016**



Source: Ofcom [NCS 2016](#).

Base: All adults 16+ who use television, printed newspapers, radio, internet, or magazines for news nowadays (2,659).

Notes: 'Google' contains all Google-named entities plus YouTube. 'Other intermediary' includes MSN, Yahoo, Feedly, Flipboard, News Now.

11.57 We next considered the demographic makeup of consumers of News Corp and Sky News outlets. As with opinion formers, there are certain demographic groups which may be more influential. For example, reaching those groups which are more likely to vote may increase influence. We also considered whether Sky News adds an extra demographic compared to those reached by the News UK titles that the MFT already controls (thus allowing the MFT to

<sup>379</sup> We note that The Guardian moved to a tabloid brand as of January 2018.

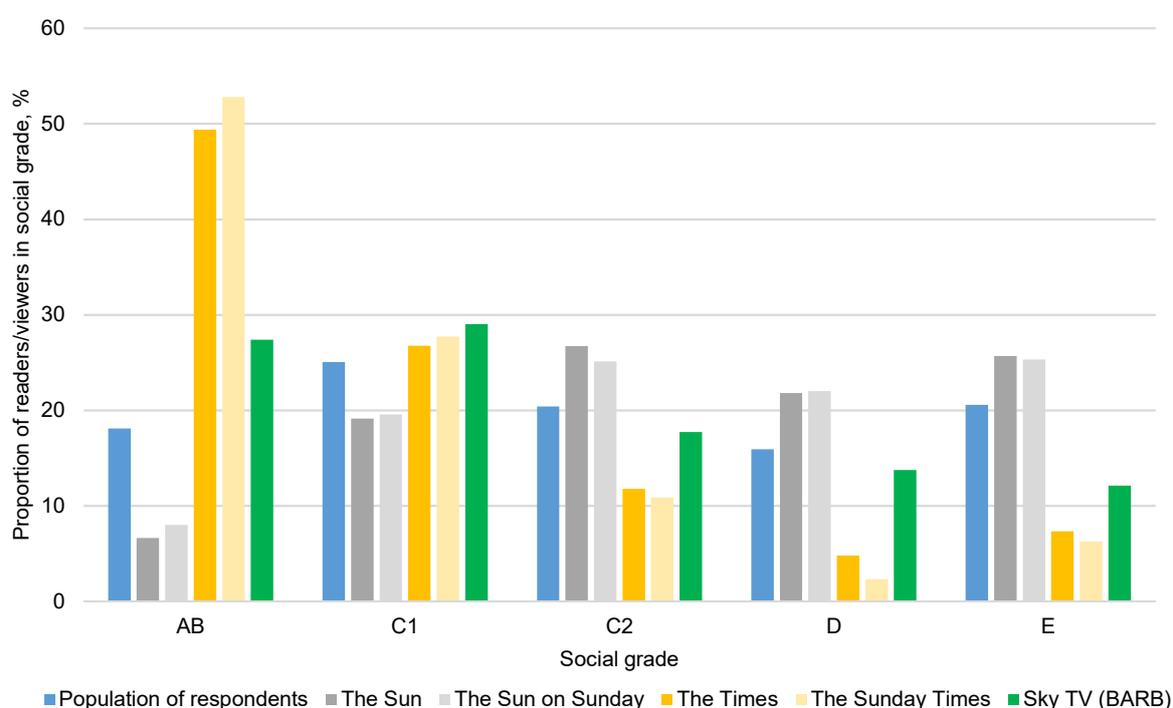
<sup>380</sup> Including online sources such as Twitter and HuffPost.

<sup>381</sup> Figure 11.5 uses retail cross-platform reach, rather than the wholesale measure used in Figure 10.5, to allow us to make a closer comparison with the YouGov data. We note here that the YouGov and NCS surveys are carried out on a different basis, and so are not directly comparable. In addition, the YouGov survey does not include TV news (although it does include online outlets of TV news providers), which could underestimate the results of BBC and Sky News in particular. While we recognise the limitations in comparability we consider the results are broadly indicative.

greater promote interests than it may have been able to with the pre Transaction level of control of Sky News).

11.58 Our analysis of the NCS shows that The Times and The Sunday Times are able to attract more customers from the higher social classes (see Figure 11.6) than in the general population. Data from BARB shows that Sky News (TV) appears to have a more balanced audience across the social classes (although we note that it also outperforms with the higher social classes,<sup>382</sup> meaning that the MFT will benefit from greater access to a more influential audience segment, as well as greater access to other demographics) although the picture is more mixed with respect to its web presence as measured by comScore (see Figure 11.7).

**Figure 11.6: Proportion of readers/viewers in each social grade**



Source: Ofcom [NCS 2016](#) and BARB.

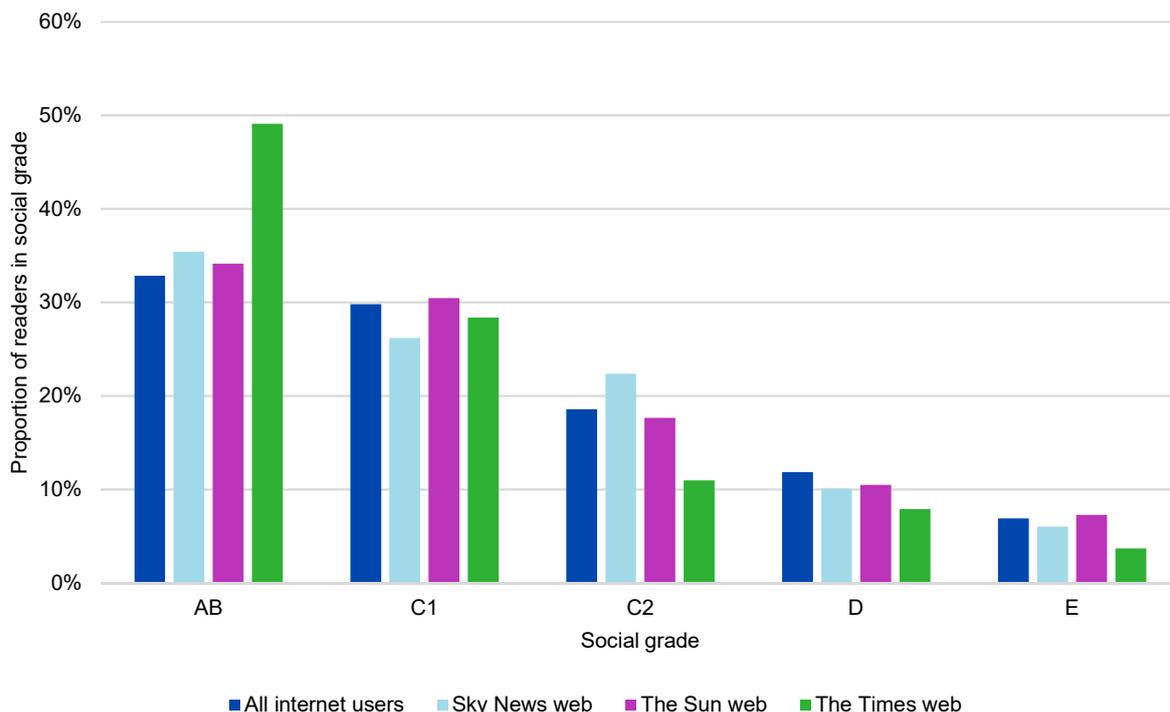
Base: all respondents (11,408)

Questions 5b, 5c of the NCS: *Thinking specifically about daily newspapers/weekly newspapers, which of the following do you use for news nowadays?*

Social grade ascribed by interviewer.

<sup>382</sup> Fox noted that Sky News is outperformed on this metric (appealing to 'higher social classes') by several other TV news outlets, including the BBC News Channel, BBC Two and Channel 4 (see [Fox response to provisional findings](#), Annex 2, page 46.) However, this does not diminish the point about the overall reach of MFT controlled news organisations.

**Figure 11.7: Proportion of online readers in each social grade**

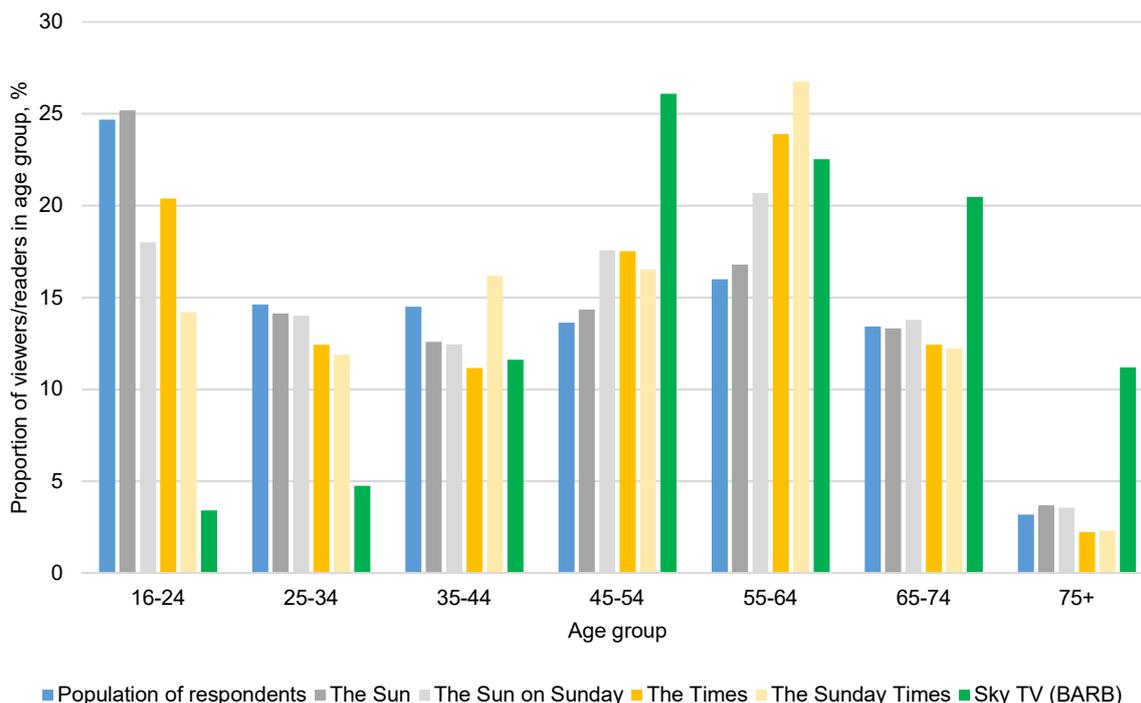


Source: CMA analysis of comScore MMX Multi-platform. The data relates to the following channels and subchannels on comScore: 'Sky News web' relates to the Sky News channel (which includes apps), 'The Sun web' relates to The Sun news subchannel and 'The Times web' relates to the Thetimes.co.uk channel (which includes apps) on comScore. Data is for UK, September 2017.

11.59 In terms of the age profile of the different news outlets, BARB data shows that Sky TV appears to attract an older demographic of customers compared to News Corp newspaper titles (Figure 11.8),<sup>383</sup> although its audience is younger online (Figure 11.9).

<sup>383</sup> The NCS figures show that Sky TV consumption is younger than the newspapers. In the main party hearing, Sky told us that [redacted], which was different from the NCS results. By using BARB data, which is an industry standard, we are better able to assess the TV audience of Sky News. Sky also highlighted [redacted].

**Figure 11.8: Proportion of readers/viewers in each age group**



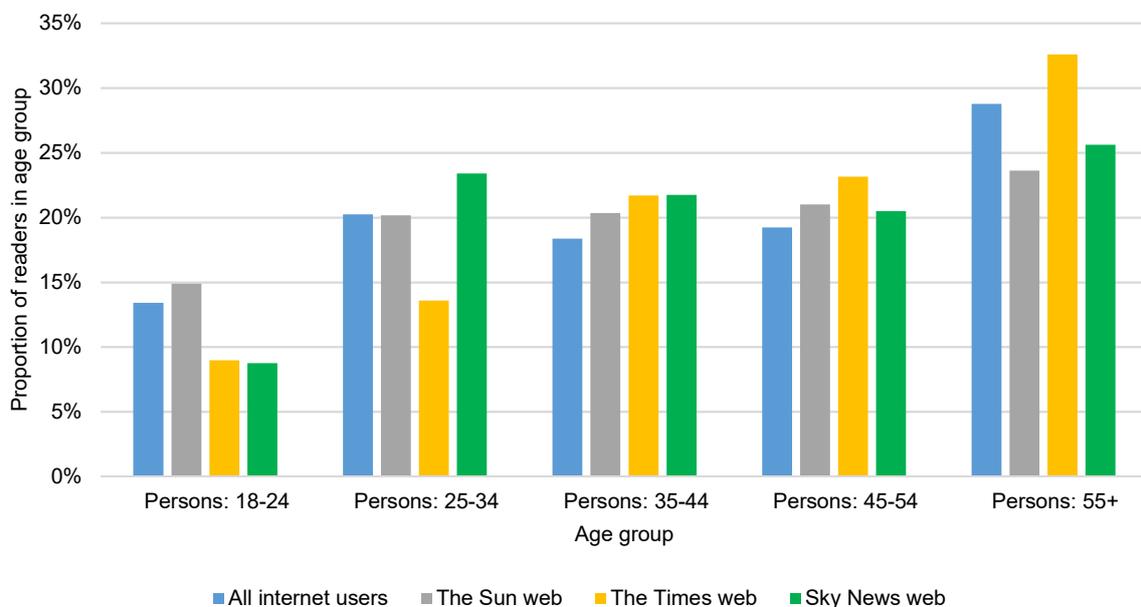
Source: Ofcom [NCS 2016](#) and BARB.

Notes: BARB data for Sky News is the average of the 12 months to November 2017.

Base: all respondents (11,408).

Questions 5b, 5c of the NCS: *Thinking specifically about daily newspapers/weekly newspapers, which of the following do you use for news nowadays?* and question S2: *What was your age last birthday?*

**Figure 11.9: Proportion of readers in each age group**



Source: CMA analysis of comScore MMX Multi-platform. The data relates to the following channels and subchannels on comScore: 'Sky News web' relates to the Sky News channel (which includes apps), 'The Sun web' relates to The Sun news subchannel and 'The Times web' relates to the Thetimes.co.uk channel (which includes apps) on comScore. Data is for September 2017.

- 11.60 Overall, the analysis indicates that consumption of traditional news sources, including those controlled by the MFT (in particular, The Times), is higher among opinion formers, although this group appears to consume more news from a wider variety of sources. In addition, Sky News appears to have a more balanced social demographic audience than the News Corp titles individually (Sky News TV being used by an older population and Sky News online having a younger population). However, as noted by Fox, the MFT already has a broad demographic reach through News Corp titles when considered together, and this broadly matches Sky's demographic reach.
- 11.61 The MFT controls both tabloid and broadsheet newspapers, which in general appeal to different demographic groups, regardless of editorial position. Following the Transaction, it will also have the ability to exercise significantly greater control over Sky News which appeals to a similarly broad demographic. The range of different demographic groups to which the MFT can reach is not replicated by any other media owner, except for the BBC and ITN,<sup>384</sup> and is unlikely to be replicated in future. For example, the print titles of The Guardian and The Telegraph each appeal to the same respective groups, compared to the diverse groups to which The Times, The Sun and Sky News each appeal (see Appendix G for further detail).

### ***Conclusion on audience characteristics***

11.62 In this section, we find:

- (a) by giving it control over Sky News, the Transaction would significantly increase the MFT's audience reach (consistent with the findings on reach and consumption in chapter 10);
- (b) the MFT already reaches a particularly influential audience through its broadsheet titles, and Sky News will add to this audience set; and
- (c) the demographic analysis in this section indicates that the Transaction will reinforce the ability of the MFT to have influence over a broad set of viewers with a significantly wider demographic reach than that of other news providers except the BBC and, to a lesser extent, ITN.

11.63 We therefore find that, by significantly increasing the level of control that the MFT will be able to exercise over Sky and Sky News, the Transaction will

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<sup>384</sup> We note, however, that ITN does not have a common voice or ideology. In a hearing with us, John Hardie said that 'each of the services has a completely separate editorial mandate that is determined by the client, answerable to that client at any time. So there is no kind of common ITN voice or ideology which goes across these services. Our business is a business as a television production company which specialises in journalism and has a history in television news, but is entirely about supplying - it is client servicing and supplying the service that those clients need for themselves'. ([Transcript of hearing with ITN](#)).

reinforce the MFT's ability to have influence over a broad audience and wide range of demographics.

## **Impact of the Transaction on the MFT's ability to lead the news agenda**

11.64 This section addresses the final way in which the MFT's control of media enterprises across each platform following the Transaction might increase its influence: through enabling it to lead the wider news agenda. We first outline evidence on leading the agenda in the current media landscape, including how the growth of online news is affecting the ability of traditional news providers to lead the agenda. Second, we consider the likely impact of the Transaction on the MFT's ability to lead the news agenda, given the scale of its news gathering and production resources and its cross-media position.

### ***How news providers can influence the wider news agenda***

- 11.65 A news provider that leads the news agenda is one which can promote a particular issue beyond its immediate audience by having other news providers cover the same story. Some studies suggest that the more attention the media pays to an issue, the more likely the public is to recall it.<sup>385</sup> Therefore the ability of a news provider to raise an issue which is then covered by other news providers may be sufficient to indicate influence, not least because it can increase the number of people exposed to the story/issue (thus meaning that reach and consumption figures may understate a news provider's level of influence) and may ensure that stories are communicated through at least one trusted news provider (potentially meaning a news provider's level of influence is higher than that indicated by trust metrics).<sup>386</sup>
- 11.66 All news providers we asked indicated that they monitor other news providers and pick up stories originally covered elsewhere where they considered them verifiable and of interest to their respective audiences. For instance, the Editor of The Sun, Tony Gallagher, stated that Sky News was always on in The Sun newsroom as it was good for breaking news.

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<sup>385</sup> See Rudd, C. (February 2016) 'Effects of the media on citizens and politicians', in *Politics and the Media*, ed. Geoff Kemp, Babak Bahador, Kate McMillan and Chris Rudd.

Another study has suggested that media emphasis on particular issues within the general theme of immigration has led to immigration becoming of greater concern to the general public. However, evidence is limited. McLaren, L., Boomgaarden, H. and Vliegenthart R. (January 2017). [News Coverage and public concern about immigration in Britain](#).

<sup>386</sup> The ability to lead the news agenda may also reflect the relative trustworthiness of news provider as other news providers will only likely follow up stories covered by trusted sources.

11.67 Ofcom's analysis considered the influence of newspapers on the news agenda, including that of the News Corp titles. Although finding that online-only providers, social media and intermediaries can influence the news agenda (in particular by 'breaking' news stories, focusing on stories not covered elsewhere or offering a fresh perspective), Ofcom concluded that traditional news providers retained much of their ability to shape the news agenda:

- (a) while they can influence the news agenda by breaking stories, online sources and social media often appeared to follow the agenda set by traditional news providers;
- (b) stories covered by newspapers are generally considered important to understanding the wider political landscape. For example, many news and current affairs programmes (both on TV and radio) feature segments setting out the stories covered by newspapers. These programmes include the Andrew Marr Show and Today, which have audiences of 1.6 million and 7.5 million respectively;<sup>387</sup> and
- (c) Ofcom also noted arguments that well-resourced news providers engage in original news production and the more resources a news provider has, the more stories it will create that other outlets might pick up (and be less dependent on other outlets for stories). Ofcom also noted that intermediaries might increase the ability of existing brands to exert influence on the news agenda.<sup>388</sup>

11.68 We considered whether any particular news provider, including Sky News and News Corp, are able to lead the news agenda. In assessing this, we considered the following:

- (a) studies on agenda leading;
- (b) whether online news availability and consumption dilutes the impact of mainstream media;
- (c) news production capability; and
- (d) the impact of cross-media ownership.

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<sup>387</sup> [Ofcom Public Interest Report](#), paragraphs 8.10 to 8.15.

<sup>388</sup> [Ofcom Public Interest Report](#), paragraphs 8.17 to 8.18.

## **Studies on agenda leading**

11.69 We primarily considered two studies which looked at the impact of news providers on the news agenda:

(a) a Cardiff University study on inter-media agenda setting during the 2015 UK general election campaign;<sup>389</sup> and

(b) analysis on agenda leading submitted by the MRC.<sup>390</sup>

11.70 The Cardiff University study concluded that morning newspapers continued to share a similar agenda to the evening TV news bulletins during the 2015 general election, despite the increasing use of online news. The study found that the largest proportion of stories reported by newspapers before appearing on national TV news bulletins came from News Corp titles (23% overall; 16.3% from The Times/Sunday Times, and 6.7% from The Sun/Sun on Sunday). The next most influential was The Telegraph and The Sunday Telegraph (20.2%). Despite being the largest newspaper group in terms of consumption (according to Ofcom's consumption metrics), DMGT was only the fourth most influential on this measure. The study also concluded that newspapers, particularly broadsheet titles, acted as opinion leaders, and identified what it concluded were clear moments during the 2015 campaign where TV news followed stories originating from newspapers.

11.71 The MRC's analysis sought to assess whether national newspapers play a significant agenda setting role over TV news. Once stories had been filtered out to show a clear agenda leader, it found that, out of the 66 stories, 'News UK accounted for the highest share both in terms of the number of stories and levels of salience.'<sup>391</sup> The MRC said that 'These results are consistent with previous research showing that newspapers continue to play a dominant role in inter-media agenda setting.'

11.72 In summary, we consider that neither study was carried out over a long enough period of time for us to consider the results to be representative of the influence of particular news providers. Nor did they show the proportion of stories generated directly by news providers, which would likely dilute the significance of particular news providers.<sup>392</sup>

11.73 Nonetheless, we consider that these studies provide some indication that traditional news providers (whether through their established print or

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<sup>389</sup> Cushion, S., Kilby, A., Thomas, R., Morani, M. and Sambrook, (April 2016). R. *Newspapers, impartiality and television news: intermedia agenda-setting during the 2015 UK general election campaign*.

<sup>390</sup> MRC and Avaaz response to issues statement.

<sup>391</sup> MRC and Avaaz response to issues statement and the MRC's further submission of 30 November 2017.

<sup>392</sup> Our detailed analysis of these studies is in Appendix G.

broadcast medium or online) together play a significant part in leading the news agenda. However, no single traditional news provider is particularly important in doing so. This was supported by a number of news providers who told us that, while they monitored other news providers for stories, no one news provider was considered as being more important than others in terms of generating news stories.

### ***Impact of online news on the impact of traditional news providers***

- 11.74 In chapter 9 we find that traditional news providers continue to produce the bulk of the news content that is consumed online, either directly or via intermediaries. Traditional providers such as The Sun and Sky News also do relatively well in terms of engagement and presence on intermediaries. However, several news providers agreed with the proposition that online audiences could be more ‘topic driven’, particularly when accessing content through intermediaries.
- 11.75 Conversely, roughly 40% of those who use the internet for news, access the websites and apps of specific providers directly, in which case they are exposed to the hierarchy of stories selected by the news provider. Even though those who access content through intermediaries may be drawn to certain stories and topics initially, if they click on the links to go on to the news provider’s website, they might see a further selection of stories picked by the news provider.
- 11.76 A study by King’s College London suggests that the news agendas of ‘political influencers’ on Twitter closely mapped that of the mainstream media during the 2015 general election.<sup>393</sup> The study suggests that ‘political influencers may have been responding to the mainstream news agenda rather than leading it’, though the responses of political influencers were frequently critical of the news agenda set by the mainstream media, often seeking to subvert it rather than reiterate or support it.<sup>394</sup> This appears to be supported by another study which noted that:

Though politicians and parties on Twitter do not seem to set the agenda of Twitter media users that often (38%), their discussions of particular news stories precede Web sites’ news coverage in a (small) majority of cases (55%). This pattern suggests that

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<sup>393</sup> Moore M., Ramsay G. (October 2015). *UK Election 2015 - Setting the agenda*, Centre for the Study of Media, Communication and Power with support from the Media Standards Trust, the Policy Institute at King’s and Ebay. Inc.

<sup>394</sup> The research identified 309 political influencers on Twitter based on criteria including: number of followers, number of accounts followed, Klout score, and frequency and content of tweets.

political Twitter accounts may function as inspiration or source material for website news more often than that they directly influence 'other' actors' tweets.<sup>395</sup>

- 11.77 Overall, while the distribution of news online may have reduced the relevance of newspapers' front pages, it has not eliminated the ability of news providers to make choices on the prominence of news stories and lead the news agenda.
- 11.78 Fox suggested that the ability of individuals to communicate directly with the public via Twitter and other intermediaries means that the overall influence of traditional media had declined. Since Ofcom's consumption share of reference figures only relate to news providers rather than individual commentators or politicians, the Parties suggested that the amount of influence that a media owner might have as a result of its share of reference had declined over time as other online sources had grown.
- 11.79 Sky argued that there is directly relevant evidence of the role played by online news only providers, indicating that the role of traditional news providers in setting the news agenda is waning and likely to continue to do so.<sup>396</sup>
- 11.80 We recognise that the news media landscape is changing rapidly, in that Twitter and other intermediaries allow politicians and others to communicate directly with the public rather than having to go through traditional news providers, and that this may lessen concerns about mergers of traditional news providers in the future. However, the evidence that we saw suggests that, even if online providers may on occasion be able to lead elements of the news agenda (in particular due to their role in breaking news), traditional news providers currently remain the most influential in leading the news agenda, particularly taking into account that, as we set out in chapter 10, they continue to provide the bulk of the news content consumed online.

### ***News production capability***

- 11.81 Third parties suggested that the financial strength and resources devoted to news production are relevant factors to consider in order to assess influence, and which may have an impact on the ability to lead the news agenda (ie to consistently generate stories a certain level of resourcing is required). In particular, Ed Miliband et al pointed out that the decline in original news

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<sup>395</sup> Harder, R.A., Sevenans, J. and Van Aelst, P., 'Intermedia agenda setting in the social media age: how traditional players dominate the news agenda in election times', *The International Journal of Press/Politics*, 28 April 2017.

<sup>396</sup> [Sky response to provisional findings](#), paragraph 5.22.2.

production is linked to the decline in the resources that news providers are able to muster. They noted that the MFT remains one of the best resourced news providers and that the Transaction will boost its position relative to other news providers.<sup>397</sup>

11.82 Table 11.1 sets out the costs and staffing for major news providers in 2017.

**Table 11.1: Costs and staffing for major UK news providers, 2017<sup>398</sup>**

News title	Staff numbers		Costs (£m, per year)	
	All	Editorial	All	Editorial
<b>Bauer</b> <sup>399</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>BBC</b>	[REDACTED] <sup>400</sup>	[REDACTED]	[REDACTED] <sup>401</sup>	[REDACTED]
<b>BuzzFeed</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Channel 4</b> <sup>402</sup> , <sup>403</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Channel 5</b> <sup>404</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Daily Mail</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Daily Mirror</b> <sup>405</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Evening Standard</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Financial Times</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Global</b> <sup>406</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Guardian</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Independent</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>ITN</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>ITV</b> <sup>407</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Metro</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Northern and Shell</b> <sup>408</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Sky News</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Telegraph</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>The Sun</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>The Times</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: The Parties and third parties.

<sup>397</sup> Ed Miliband et al, [Response to the issues statement](#), page 43 and 44.

<sup>398</sup> We requested data for ‘the last year.’ The precise time period of data supplied by third parties varies.

<sup>399</sup> [REDACTED].

<sup>400</sup> [REDACTED].

<sup>401</sup> [REDACTED].

<sup>402</sup> [REDACTED].

<sup>403</sup> [REDACTED].

<sup>404</sup> [REDACTED].

<sup>405</sup> [REDACTED].

<sup>406</sup> [REDACTED].

<sup>407</sup> [REDACTED].

<sup>408</sup> [REDACTED].

- 11.83 We discuss these figures, along with other relevant information from all major UK news providers as to the costs of their news gathering activities, and the number of full time staff that they engage in news gathering activities in Appendix H.
- 11.84 Based on this information, we estimate that there are 12 media outlets, which equate to ten different media organisations, with more than 400 editorial staff.<sup>409</sup> Some of the smaller players appear to be able to influence the news agenda, even though their news production resources are lower than others. For example, we saw evidence that a number of stories from BuzzFeed, a newer online-only news provider, were picked up by other news providers.<sup>410</sup> We also note in Appendix H that there appears to be little correlation between the number of staff employed by an organisation and its reach. Nonetheless, the traditional news providers that appear more able to lead the news agenda are also those with the greater resources. While Sky argues that we did not identify a correlation between news production and setting the news agenda,<sup>411</sup> we consider that, based on the evidence in relation to which news providers consistently set the news agenda and in relation to their productions capabilities, it is reasonable to conclude that those with greater resources will be able to lead the agenda on a more consistent basis (and, therefore, have greater influence).
- 11.85 Overall, we therefore agree that editorial and journalistic resource is important in allowing news providers to have a sustained level of influence, and the traditional news providers retain the largest resources. We do not however find that News Corp or Sky News have disproportionately larger resources than other traditional news providers. We nonetheless note that the combined resources of Sky News and News Corp mean that the MFT controls more news resources than any other person with control of media enterprises, apart from the BBC. Further, it would be difficult for another person with control of existing media enterprises to match this level of resources, or for a new entrant to do so with a media brand that is trusted and has equivalent reach.

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<sup>409</sup> BBC included in this number.

<sup>410</sup> Fox noted that 'The Evening Standard ... is nonetheless influential in national news, both because of its own substantial readership and because most other news outlets are based in London and so their editors and journalists see it regularly. During the 2017 election [...] The Telegraph published over 50 articles mentioning The Evening Standard.' (Fox initial submission, Annex 2, page 22).

<sup>411</sup> Sky response to provisional findings, paragraph 5.23.

## ***Impact of cross-media ownership on ability to lead the news agenda***

- 11.86 We also considered whether the MFT's control of media enterprises across each platform, which is increased as a result of the Transaction, might enhance its ability to lead the wider news agenda.
- 11.87 As noted in paragraph 11.73, traditional news providers (whether on their established print or broadcast medium or online) together play a significant part in leading the news agenda. The relationship between newspapers and TV broadcasters can be particularly important in this regard – for example TV news broadcasters often report on newspaper stories and vice versa. Having control of news outlets across multiple platforms could therefore increase the likelihood that a particular story could lead the wider news agenda of other news providers.
- 11.88 Fox argued that TV news may pick up stories from other TV news providers, and newspapers from other newspapers, and all from stories first carried online. Therefore, there is nothing particularly significant about a nexus between TV and newspapers.<sup>412</sup> However, as we set out in chapter 9, online-only providers have yet to significantly diminish the impact of traditional providers, who themselves provide the majority of content consumed online. Further, as we note in paragraph 11.4011.39, TV news tends to be more trusted than newspapers, and so the ability to promote a particular story previously run in newspapers will have a significant effect in terms of amplifying the influence that story has. A number of third parties made observations indicating the importance of TV news and how this could potentially amplify news stories. For example, Tony Gallagher stated that getting a story broadcast on the nightly news would increase the chances of people buying the newspaper that broke the story the next morning; and one non-broadcast online news provider told us about how it partnered with a TV news provider to amplify the impact of its investigative journalism.<sup>413</sup>
- 11.89 We also note Lord Falconer's comment that 'the thing that really absorbs politicians is how does the 6 o'clock and the 10 o'clock news on the BBC and the ITV cover things' while the special advisers that responded to our questions stated that politicians very much focus on TV and value the audience it provides.
- 11.90 Baroness Greender, previously acting Deputy Director of Communications for the government, stated that:

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<sup>412</sup> [Fox response to provisional findings](#), Annex 2, pages 5 and 6.

<sup>413</sup> An online news provider ([redacted]) partnered with the BBC over a number of stories to amplify its impact and commented that it would 'sometimes [...] hold a story in order to partner with a broadcaster to amplify something'.

It would be a mistake in this context to separate the media into distinct categories. If a tabloid has dwindling circulation, but has a sensationalist headline which is reviewed on broadcast news or a highly controversial columnist who has a significant social media following, then it has already reached a far wider audience. Broadcast news spends a great deal of time interviewing print journalists as part of their programming – and expect them to be more outspoken than their own presenters or reporters. We would often give keynote interviews to the Independent on Sunday in spite of their poor circulation [...] [who] would probably put the story on the front page, that would get an airing on the all-important Sunday political programmes, which would in turn get good follow-up coverage in all the daily papers on the Monday.

11.91 DMGT noted the increasing importance of video online, and how access to Sky News’s video feed may provide a ‘big advantage.’ In relation to this, we note the relatively large reach of Sky News through YouTube compared to others.<sup>414</sup>

11.92 Considered alongside the evidence set out earlier on how traditional news providers can lead the news agenda, we agree that cross-media ownership creates greater scope to lead the wider news agenda. It is difficult to assess the magnitude or likelihood of this effect because of the absence of UK examples of current cross-media ownership. However, we consider that it is reasonable to conclude that a person with control of media enterprises across platforms would, if it chose to, be able to use this position to amplify its influence over the news agenda.

11.93 The Parties submitted that the differences between TV and newspapers mean that it would not be possible to follow an aligned or integrated cross-platform approach. For example, Sky told us that:

The stories are told in very different ways. Their approach is in completely different ways. If you looked at the front page of The Times this morning there are stories about a potential deal on the border in Ireland, which is an ongoing issue, and that is a story that is made up of completely off the record quotes. You could not tell a story like that on TV. We would need to interview people and have people talking to camera, and visual elements to

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<sup>414</sup> Based on our analysis of a selection of YouTube channels over the period [X].

demonstrate the story. We would come at stories from completely different ways so those kind of synergies do not really exist.<sup>415</sup>

11.94 We agree that there are likely to be limits on the synergies between platforms (at least between newspapers and TV).<sup>416</sup> However, we do not think that these differences mean that the control of media enterprises across different platforms cannot confer increased influence. The very fact that news stories are likely to be told in different ways on TV compared with newspapers or online means that they can be attractive to different audiences, and could be influential in different ways. These impacts do not rely on the same news content being shared between platforms, or the same editorial staff being involved.

11.95 Further, we note that some News Corp Australia journalists appeared on ANC (Sky News Australia) TV programmes as guest commentators, including before the acquisition of ANC by News Corp Australia. A News Corp Australia internal memo recommending the acquisition [redacted]. News Corp also told us that [redacted].<sup>417</sup> This indicates that some sharing of staff and content is clearly possible between print newspapers and TV news. While the requirements of Australia's broadcasting regulations are different from those in the UK, the Broadcasting Code would not prevent similar sharing between print and TV news from occurring in the UK.

11.96 We therefore consider that the increased control the MFT will have over Sky and Sky News and the fact that it controls news providers across different media platforms will increase the ability of the MFT to lead the news agenda.

### ***Conclusion on the MFT's control of media enterprises across each platform***

11.97 Traditional news providers remain the most influential in leading the news agenda. Although there is no one news provider which has overriding importance in this context, the Transaction results in the MFT gaining significantly greater influence over one of these providers (Sky News) to add to the influence it already has over another of these providers (News Corp).

11.98 The cross-media nature of the Transaction will allow the MFT through its significantly increased control over Sky News to reach and influence a broader range of the population. This will give it an increased ability to utilise

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<sup>415</sup> See also [Fox response to provisional findings](#), Annex 2, page 10, and [Sky response to provisional findings](#), paragraphs 5.24.1, 5.24.3 and 5.24.4.

<sup>416</sup> There is clearly already significant sharing of resources and material between TV/newspapers and their online operations. For example, Sky News TV video content is used online; and stories from The Times can be accessed through The Times website.

<sup>417</sup> See Appendix J for more detail.

the different ways that each media platform can influence public opinion and also potentially take advantage of the synergies and interactions between different media platforms, which could in turn increase its ability to lead the news agenda.

## **Evidence of the MFT's influence over the political agenda**

11.99 The impacts of the Transaction outlined earlier add to the MFT's existing influence over public opinion and the political agenda, as exercised in particular through the News Corp titles. We now analyse evidence on the ability of the MFT to influence the political agenda. For context, we start with the Leveson Inquiry. However, given the Leveson Inquiry concluded six years ago, and related to conduct before that time, we then consider more contemporary evidence. We assess quantitative evidence on meetings with government ministers and we consider qualitative evidence from those currently or previously involved with the political process. We consider that this evidence is indicative of influence over the political agenda<sup>418</sup> but note that, while it is set out separately in this section, our overall assessment on the sufficiency of media plurality considers this evidence together with that set out above, as well as with the evidence set out in chapter 10.

### ***The Leveson Inquiry***

11.100 The Leveson Inquiry was set up in 2011 following the phone hacking scandal to investigate the culture, practices and ethics of the press. The terms of reference for the Leveson Inquiry specifically included 'contacts and the relationships between national newspapers and politicians, and the conduct of each.'<sup>419</sup>

11.101 While the overall purpose of the Leveson Inquiry was different to that of this Inquiry, and in terms of its assessment of influence, it was focused more on the press rather than the media as a whole, we nonetheless consider that the Leveson Inquiry's conclusions in relation to the closeness of the press and politicians are clearly relevant to the question of media influence, and therefore to our assessment.

11.102 Over the course of 16 months, the Leveson Inquiry heard from 337 witnesses and received 287 written submissions of evidence (not including over 1,000

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<sup>418</sup> For example, politicians are likely to be more interested in meeting with media owners with greater influence over public opinion and the political agenda, compared to those with less influence.

<sup>419</sup> [The Leveson Inquiry, Terms of reference](#). Note that the Leveson Inquiry was also specifically required to make recommendations for a more effective regulatory regime which supported, among other things, the plurality of the media and how future concerns about cross-media ownership should be dealt with.

submissions sent in via email). Those who provided evidence directly relevant to the matter of the relationship between the press and politicians (and which would thus be relevant to this Inquiry) included the then Prime Minister and his predecessors, past and present senior Conservative, Labour and Liberal Democrat MPs, senior civil servants (including press secretaries and the then Cabinet Secretary and Head of the Civil Service), print and TV journalists, and owners of UK media (including Rupert Murdoch and James Murdoch).

11.103 We consider the size and scope of the Leveson Inquiry to be comprehensive in terms of examining the relationship between the press and politicians. It provides a reasoned and evidenced context about media influence from which to start our analysis and important context about how press influence (and therefore media influence as a whole) operates in the UK.<sup>420</sup> We therefore gave weight to the conclusions reached in the Leveson Inquiry and used the detailed assessment of the relationship between the press and politicians undertaken by the Leveson Inquiry as a starting point for our own assessment.

11.104 On the matter of the relationship between the press and politicians, the Leveson Inquiry concluded:

- (a) politicians spent a surprising amount of time, attention and resource on the relationship with the press in comparison and at the expense of other areas;<sup>421</sup>
- (b) this should not be interpreted as concluding that politicians have made express or implied deals with press proprietors but there are legitimate perceptions and concerns that politicians and the press have traded power and influence;<sup>422</sup>
- (c) some press leaders have been powerful and effective lobbyists for their interests;<sup>423</sup>
- (d) the press campaigns on particular subjects on the basis that it is representing the views of its readers, but that this may have carried more

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<sup>420</sup> Ofcom's conclusion at phase 1 that Rupert Murdoch, and potentially other members of the MFT, already have a degree of influence over the political agenda was partially based on the findings of the Leveson Inquiry ([Ofcom Public Interest Report](#), paragraph 8.36).

<sup>421</sup> [Leveson Report](#), Part I, Chapter 8, paragraph 3.6.

<sup>422</sup> [Leveson Report](#), Part I, Chapter 8, paragraph 3.8.

<sup>423</sup> [Leveson Report](#), Part I, Chapter 8, paragraph 3.19.

weight in political circles than it strictly merited as a matter of evidence of public opinion;<sup>424</sup>

- (e) the press holds powerful weapons of a public megaphone and extensive behind the scenes access;<sup>425</sup> and
- (f) the national press uniquely offers ‘attractively packaged and actively mediated political partisanship’, and so politicians are motivated to get a quantifiable outcome from their investment in relationships with journalists, in the form of new information, political and policy support, or the enhancement of personal reputation and profile.<sup>426</sup>

11.105 In summary, the Leveson Inquiry concluded:

Taken as a whole, the evidence clearly demonstrates that, over the last 30 to 35 years and probably much longer, the political parties of UK national government and of UK official opposition, have had or developed too close a relationship with the press in a way which has not been in the public interest. In part, this has simply been a matter of spending a disproportionate amount of time, attention and resource on this relationship in comparison to, and at the expense of, other legitimate claims in relation to the conduct of public affairs. In part, it has been a matter of going too far in trying to control the supply of news and information to the public in return for the hope of favourable treatment by sections of the press, to a degree and by means beyond what might be considered to be the fair and reasonable (albeit partisan) conduct of public debate.<sup>427</sup>

11.106 We note in particular the conclusions of the Leveson Inquiry, based on extensive evidence gathering, that some press leaders have been powerful and effective lobbyists for their interests and that there are legitimate perceptions and concerns that politicians and the press have traded power and influence. Further, we also give weight to the Leveson Inquiry’s comments regarding Rupert Murdoch’s influence on politicians, including:

In their discussions with him, whether directly or by proxy, politicians knew that the prize was personal and political support in his mass circulation newspapers. The value or effect of such

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<sup>424</sup> [Leveson Report](#), Part I, Chapter 8, paragraph 3.21 and 3.22.

<sup>425</sup> [Leveson Report](#), Part I, Chapter 8, paragraph 3.29.

<sup>426</sup> [Leveson Report](#), Part I, Chapter 8, paragraph 3.32 and 3.33.

<sup>427</sup> [Leveson Report](#), Executive Summary, paragraph 26.

support may have been exaggerated, but it has been treated as having real political value nonetheless.<sup>428</sup>

### ***Meetings with ministers***

11.107 The Parties submitted that '[t]here is nothing to suggest [that access is a good indicator for the ability to leverage editorial control into political influence]'.<sup>429</sup> Sky said that it 'does not consider this data [on ministerial visits] to be at all probative of influence' and that such data 'is not capable of shedding any light on the statutory question which the CMA is charged with answering.'

11.108 However, although it is an imperfect measure, we consider that, other than direct evidence of influence such as records of discussions, meetings between government ministers and media owners provides an indicator of the degree of influence that media owners may have over the political agenda and the degree to which that influence is spread between different media owners.<sup>430</sup> We note here the comment by Lord Justice Leveson that direct evidence of 'quid pro quo' would be unlikely:

It is the 'without having to ask' which is especially important here. Sometimes the very greatest power is exercised without having to ask, because to ask would be to state the blindingly obvious and thereby diminish the very power which is being displayed. Just as Mr Murdoch's editors knew the basic ground-rules, so did politicians. The language of trades and deals is far too crude in this context.<sup>431</sup>

11.109 Our analysis looked at meetings in the period January 2015 to June 2017 between the Prime Minister, Treasury, Cabinet Office, BEIS, Home Office and Ministry of Justice (MoJ) and persons with control of media enterprises and their representatives. We originally included meetings between DCMS ministers and media enterprises in our analysis. However, a number of meetings between DCMS ministers and Sky were part of industry forums and the BBC Charter renewal was likely to have led to significantly more meetings between DCMS ministers and the BBC. We therefore considered that

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<sup>428</sup> [Leveson Report](#), Part I, Chapter 8, paragraph 2.9.

<sup>429</sup> See [Fox further submission](#), [Robert Kenny critique of MRC submission](#), page 39, [Fox response to provisional findings](#), paragraph 3.49, and [Sky response to provisional findings](#), paragraph 5.12.

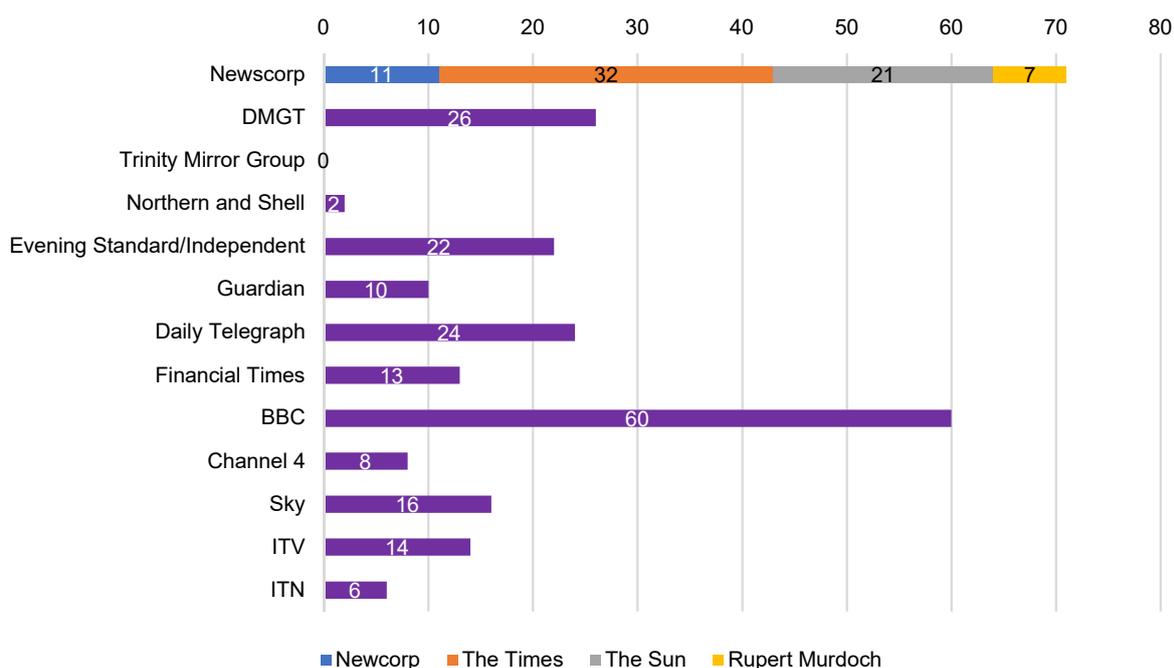
<sup>430</sup> We recognise that meetings between politicians and media organisation may reflect the desires for the media to talk to politicians as well the desire of politicians to meet and influence the media.

<sup>431</sup> [Leveson Report](#), Part I, Chapter 8, paragraph 2.9.

including DCMS figures in our overall analysis risked giving a distorted view of the significance of different media organisations.

11.110 We found that Rupert Murdoch and News Corp representatives<sup>432</sup> met with ministers significantly more than any other media enterprises (see Figure 11.10).<sup>433</sup> When considering meetings just with the Prime Minister, Rupert Murdoch and News Corp representatives had 26 meetings over the period.<sup>434</sup> The next closest media enterprise was the BBC, with 11 meetings.

**Figure 11.10: Total meetings between ministers and media enterprises (January 2015 to June 2017)**



Source: Departmental returns on gov.uk of ministerial gifts, hospitality, travel and meetings.

Notes: Meetings with Rupert Murdoch are counted separately to meetings with News Corp. Where he is representing News Corp, this is only counted in his meetings.

11.111 The pattern observed in meetings with government ministers was similar when we considered hospitality. Where ministers accepted hospitality from Rupert Murdoch and News Corp representatives more than any other media enterprise (see Figure 11.11).<sup>435</sup>

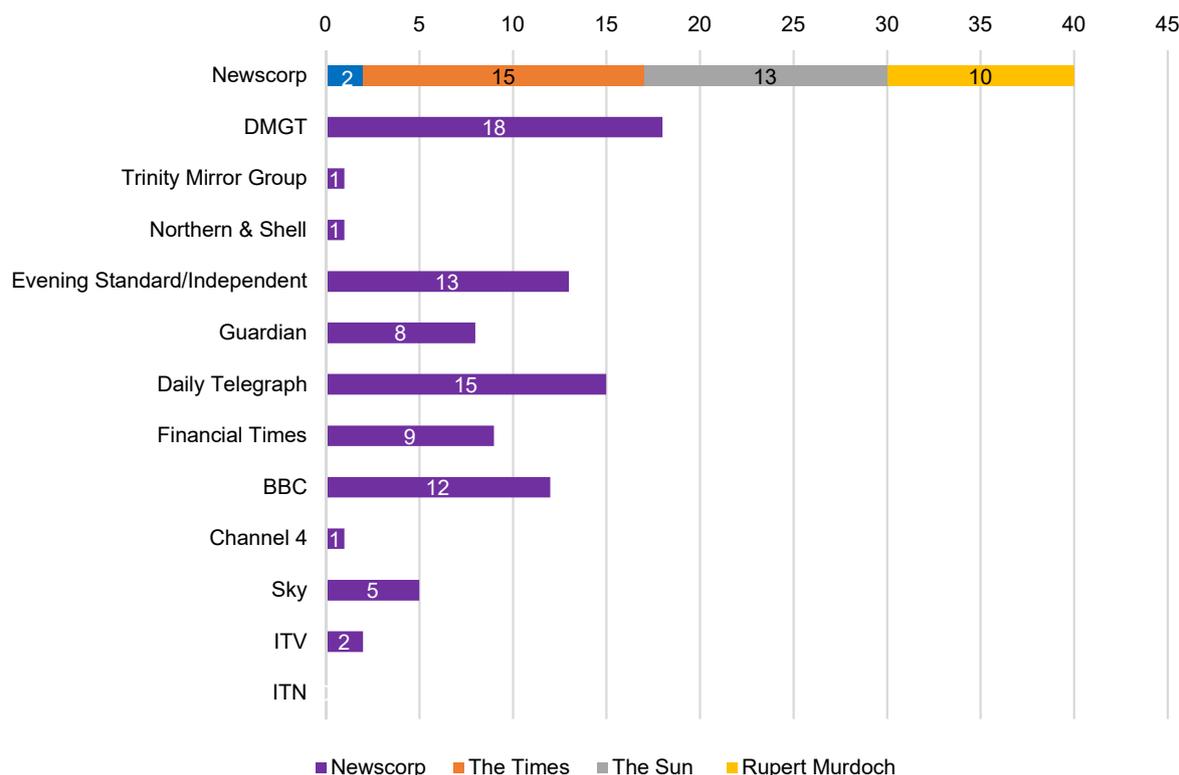
<sup>432</sup> This includes staff of their papers.

<sup>433</sup> After June 2016, the number of meetings between ministers and media organisations reduced, although this may also be explained by the significant changes in ministers after the EU referendum.

<sup>434</sup> Of the 26 meetings with the Prime Minister, 18 were in the period January 2015 to June 2016 and eight were in the period July 2016 to June 2017.

<sup>435</sup> Hospitality offered involves dinner, drinks receptions, and tickets to events such as awards ceremonies or concerts among others. It does not include offers that were declined.

**Figure 11.11: Total hospitality between ministers and media enterprises (January 2015 to June 2017)**



Source: Departmental returns on gov.uk of ministerial gifts, hospitality, travel and meetings.  
 Notes: Meetings with Rupert Murdoch are counted separately to meetings with News Corp. Where he is representing News Corp, this is only counted in his meetings.

11.112 This analysis did not tell us directly whether Rupert Murdoch or News Corp had greater opportunities to access ministers as we did not have the number of meeting invitations sent to other media enterprises which were declined.<sup>436</sup> Nor do we know what was discussed at these meetings or who instigated the meetings. We also recognise that this evidence does not directly tell us whether Rupert Murdoch, or other persons with control of media enterprises, have influence over politicians or the political agenda.

11.113 The Parties disagreed with the significance of the results and submitted that the results are not as stark as they appear at first:

- (a) Fox argued that there is no evidence the News Corp attendees at each meeting were following instructions from the MFT (Fox submitted this would be a highly implausible assumption);

<sup>436</sup> The analysis does not cover all contact between ministers and media organisations as it does not include emails or phone calls, for example.

- (b) Fox stated that the variety of titles operated by News UK, which are subject to editorial independence (including as a result of The Times undertakings) explains the larger number of meetings;<sup>437</sup>
- (c) Sky argued that the data does not take account of industry forums or roundtables with multiple stakeholders, introductory meetings with ministers or meetings to discuss Sky's broadband business; and
- (d) Fox argued that the analysis shows that the Lebedev owned titles (The Evening Standard and The Independent) had a number of meetings comparable to DMGT and substantially higher than The Guardian. This implies that the Lebedev owned new providers have similar influence to The Daily Mail/Mail on Sunday, and substantially more influence than The Guardian, which would indicate caution regarding the value of this evidence.

11.114 We recognise that News Corp has more national titles than other organisations and that therefore there may naturally be a larger number of meetings with News Corp titles. However, we consider that this goes to our argument that the larger number of media enterprises owned confers greater influence. If all newspapers in the News Corp group are aware of the MFT agenda (as we note in chapter 7, Rupert Murdoch has over time been in regular contact with his editors and discusses his views with them) then more meetings may be indicative of a greater opportunity for the MFT to exert influence even without explicit instruction. Further, we note that individually, The Times/Sunday Times meetings are higher in number than other newspaper groups.<sup>438</sup>

11.115 In relation to Sky's arguments, we recognise that some meetings may be industry roundtables. We found this to be particularly the case with meetings between Sky and DCMS ministers, and therefore excluded DCMS from the analysis (which we consider also addressed Sky's points regarding introductory meetings and meetings to discuss broadband).<sup>439</sup> However, for

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<sup>437</sup> Fox told us that 'if anything it serves to evidence the substantial degree of internal plurality and editorial independence between the News UK titles. A reasonable interpretation of the fact that politicians have separate meetings with The Sun and The Times is that they see them as independent titles. If politicians believed that the titles follow a unified editorial line dictated by Rupert Murdoch, then, on the hypothesis that the meetings are explained by efforts to seek favourable coverage, one would expect a larger proportion of the meetings to be with him, not with the individual titles' employees.'

<sup>438</sup> The Parties also noted that The Times and The Sunday Times are separate titles with their own editorial teams. While we recognise this, our approach has been similar with other newspaper groups (of the 32 meetings between ministers and The Times newspapers, 24 were with The Times and eight were with The Sunday Times). Further, the public interest test covers the plurality of media owners and we therefore consider aggregating titles by owner is appropriate.

<sup>439</sup> See paragraph 11.109.

Sky we found five other roundtables<sup>440</sup> and for News Corp, we found only one roundtable.<sup>441</sup> Given other news organisations may also be involved in roundtables the relative positions of different media organisations would not necessarily change. Therefore, we consider the figures mentioned earlier are informative in providing an indication of the relative access of each media organisation to government ministers.

11.116 With respect to the relative influence of different media groups, we note that the number of meetings between ministers and Rupert Murdoch and News Corp representatives is over double the number of meetings with any other media organisation, other than the BBC, which shows the potential for greater influence. The analysis also demonstrates that there are relatively few news providers meeting with ministers, and new online providers such as BuzzFeed and HuffPost do not appear.

11.117 We note that The Guardian had fewer meetings than many of the other newspaper groups, however we consider this is likely to reflect the fact that the government in the analysis period is predominantly Conservative. Fox noted that this is not a clear distinguishing factor between The Guardian and The Independent, since the latter also tends towards the left of the political spectrum.<sup>442</sup> While this is true of The Independent, The Evening Standard (which is part of the same group) has been a predominantly Conservative supporting paper over this period, and it accounts for around half of the meetings<sup>443</sup> and the vast majority of hospitality.<sup>444</sup>

11.118 Fox also noted that, on this reasoning in paragraph 11.113 the fact that The Evening Standard/The Independent had a similar number of meetings to the right-wing Daily Mail becomes even more surprising.<sup>445</sup> However, when considering meetings and hospitality together, The Daily Mail clearly has more contact with ministers than The Evening Standard/The Independent. In any case, there is still a significant difference in contact with ministers between News Corp and other media organisations.

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<sup>440</sup> Four with BEIS and one with HMT. A Sky News journalist also attended one meeting with the Prime Minister where a Sunday Times journalist was also present

<sup>441</sup> A roundtable at BEIS to discuss the Digital Single Market. There were also three other meetings where a News Corp title attended a meeting with one another media organisation present.

<sup>442</sup> [Fox response to provisional findings](#), paragraph 3.50.

<sup>443</sup> The Evening Standard accounts for ten of the 22 meetings for The Independent/Evening Standard group. The Independent accounts for nine meetings.

<sup>444</sup> The Evening Standard accounts for nine of 13 instances of hospitality for The Independent/Evening Standard group.

<sup>445</sup> [Fox response to provisional findings](#), paragraph 3.50.

11.119 While we disagree with the Parties' comments on the relevance of this evidence, we also considered further, qualitative evidence on influence over the political agenda to help put this analysis in context.

### ***Qualitative evidence on political influence***

11.120 Lord Falconer told us that we 'should be under no illusions about how absorbed politicians are [by the media]'.<sup>446</sup> We heard from a number of third parties that are or were involved in the political process on why politicians meet with the media and which media organisations are the most influential.

11.121 A detailed summary of the responses is set out in Appendix K. Here we set out the main themes and conclusions. While the evidence is qualitative in nature, we consider that these views indicate that politicians remain principally concerned with the traditional news providers and that, reflecting the numbers in our analysis of the meetings above, those news providers controlled by the MFT already play a significant role.

11.122 A number of third parties highlighted how the media continued to play an important role in enabling politicians to ensure that policies and proposals were positively received by the public – 'politicians and their advisers are open and available to a wide range of reporters because that is one of the ways of getting across their achievements or explaining their failures to a greater audience.'<sup>447</sup>

11.123 The focus on messaging meant that audience size was generally considered to be indicative of importance. Politicians and advisers were 'concerned about media outlets broadly in proportion to the size of their audience'<sup>448</sup> and were 'motivated to talk to and influence publications and outlets with the greatest number of readers (aka potential voters)'.<sup>449</sup> As such, those organisations with the highest audience reach were seen as the most important (and influential) news providers.

11.124 Consequently, a number of third parties indicated that the BBC was the most influential media organisation, and ITV's news bulletin was also mentioned. One told us that the free-to-air news bulletins (such as ITV and Channel 4) were particularly important as they 'pick up viewers watching other programmes', while another said that 'the biggest cut-through was via TV, particularly the 6.00pm and 10.00pm BBC and ITV news bulletins as it was

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<sup>446</sup> [Transcript of hearing with politicians.](#)

<sup>447</sup> Baroness Greender.

<sup>448</sup> Former senior political adviser ([redacted]).

<sup>449</sup> Former senior political adviser ([redacted]).

and still is one of the few occasions when there is a single mass audience for current affairs and political commentary'.<sup>450</sup>

11.125 However, some of these third parties noted that TV news was nonetheless dependent on the agenda led by newspapers. For example, one told us that 'The BBC, despite its very broad reach is sometimes compromised by its reliance on newspaper agendas and commentators',<sup>451</sup> and Lord Falconer stated that 'the newspapers set the agenda for the radio and the TV'.<sup>452</sup> Others, such as the Rt. Hon Ed Miliband and the Rt. Hon Kenneth Clarke went further and suggested that newspapers were still the key news providers that politicians were concerned with (the Rt. Hon Kenneth Clarke noted that 'political leaders are obsessed with newspapers'). In particular, former Prime Minister Gordon Brown expressed a view that:

[N]ewspaper coverage remains central in setting the media agenda for the day, despite declining circulation numbers [...] All recent evidence is that the Murdoch Group have not changed [...] trying to influence voters and the general public to support causes that may be of commercial benefit, as well as political benefit to their company.

11.126 Similarly, former Prime Minister Sir John Major expressed a view that the confrontational nature of the British political system meant that the media was able to shape the political agenda 'especially [...] if an original report is picked up by a large number of other media outlets. When this occurs a perfect storm can be created out of very little' and that:

the media can, and does, set the political agenda, not least through the 'slant' they give the news. [...] In this fashion newspapers can:

- (i) set the agenda – even a partisan agenda;
- (ii) undermine or support political parties and/or their policies;
- (iii) advance or damage the individual career or reputation of anyone in the public eye.

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<sup>450</sup> Baroness Gabrielle Bertin, previously Director of External Relations at No.10.

<sup>451</sup> Baroness Greender.

<sup>452</sup> [Transcript of hearing with politicians.](#)

It is noticeable that ‘friendlier’ coverage is given to those who share the convictions of the newspaper itself – sometimes coverage is shamelessly partisan.

11.127 The Sun, The Times and The Daily Mail were highlighted as influential newspapers, both in terms of concern with regards to politicians and influencing the political agenda. For example, The Times’ role in adoption reforms and The Daily Mail’s role in the introduction of the plastic bag levy were noted as clear examples of the ability for newspapers to successfully campaign on issues. In particular, the Rt. Hon Ed Miliband indicated that newspapers controlled by the MFT were still particularly influential, noting that:

In October 2015, after the Conservatives won the general election, The Sun, rather surprisingly, decided to launch a campaign against George Osborne's changes to the Tax Credits. These changes had been around for some time. Within a month he had changed his policy. I am not saying it is simply because The Sun did it, but choosing to highlight an issue, choosing to drive the issue through the public agenda, definitely has an impact on people's perceptions and the salience of that issue.<sup>453</sup>

11.128 Sir John Major also noted that:

I do know that some who oppose it have kept silent for fear of subsequent hostile press coverage in the existing Murdoch titles. One said to me ‘I know this is not heroic, but it is prudent’. Whether justified or not, the very fact that such a fear exists suggests the present power of the Murdoch media is already too great.

11.129 In summary, we consider that the qualitative evidence reinforces the quantitative evidence on ministerial meetings. While social media and online sources may be growing in importance, we consider that it seems clear from this evidence that the traditional news providers remain the most influential (and as we note in chapter 10, traditional news providers provide the bulk of the news content consumed online). In particular, traditional news providers continue to play an important role in the presentation and acceptance (or otherwise) of policy, a role which we consider important enough to provide persons with control over such media owners enterprises with influence over

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<sup>453</sup> [Transcript of hearing with politicians.](#)

the political agenda, and we do not yet see the emergence of any new online news providers to counterbalance this.

11.130 Fox argued that this evidence does not support the idea that Sky News is particularly influential and that the Transaction will not therefore materially enhance the MFT's current level of influence.<sup>454</sup> Similarly, Sky argued that this evidence is mostly concerned with the printed press, which is not therefore a Transaction specific concern, and Sky News is not specifically cited as an outlet which concerns politicians or political advisers or which they consider has political influence.

11.131 However, we consider that the evidence overall provides important context for our conclusions on influence and plurality, and the effect of the Transaction, when taken into account with the other evidence in our analysis. In particular, of the traditional news providers, only the BBC and news sources currently controlled by the MFT are highlighted as being particularly important (although there is also mention of the ITV news bulletin and The Daily Mail).

### ***Conclusions on political influence***

11.132 In this section, we find that traditional news providers continue to play a key role for those in the political process such that the persons with control of those news providers have the largest influence over the political process. In that context, the evidence shows that the news providers controlled by the MFT have particularly significant influence, with only a small number of other news providers also having this kind of influence.

### **Conclusion on influence over public opinion and the political agenda**

11.133 The evidence we gathered suggests that the MFT already has significant influence over public opinion and the political agenda through its existing control of the News Corp titles. The Times, The Sunday Times, The Sun and The Sun on Sunday together have one of the highest circulation and readership figures of any of the newspaper groups, and that readership covers a broader range of demographics than any other media enterprise involved in the supply of newspapers. News Corp newspapers also have a significant online presence.

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<sup>454</sup> [Fox response to provisional findings](#), paragraph 3.53.

- 11.134 The influence of the Murdoch family through the MFT was highlighted by a large number of third parties, including politicians and political advisers. In addition, we noted that members of the Murdoch family and representatives of News Corp have met with government ministers more frequently than other media owners over the past two and a half years.
- 11.135 Studies on leading the news agenda show that, even though the reach of print newspapers has been declining, the major national newspapers (including the News Corp newspapers) still have a significant impact on the wider news agenda, including the stories that are carried by TV and radio broadcasters.
- 11.136 There is some evidence to suggest that new online-only news providers can sometimes lead the news agenda and are beginning to be seen as important in influencing the political agenda. However, we consider that it is the traditional news providers that do this on a consistent basis and, due to their resources, this is likely to continue to be the case for the foreseeable future.
- 11.137 We considered the extent to which the significantly increased level of control that the MFT would be able to exercise over Sky News could enable the Murdoch family to exercise increased influence over public opinion and the political agenda as a result of the Transaction. The Transaction would give the MFT significantly increased control over Sky News and therefore significant control over major news providers across all four platforms – TV, print, online and radio.
- 11.138 While the Parties argued that TV news is constrained by the Broadcasting Code, we find that it can nonetheless be used to influence, even if in different ways to newspapers and other media platforms. We are therefore concerned that this Transaction, could increase the influence of the MFT in several ways:
- (a) first, these news providers directly reach nearly a third of the UK population and have a consumption in terms of share of reference of at least 10%. We also find that the Transaction would significantly increase the level of control that the MFT is able to exercise over Sky News, which has the potential for increased editorial alignment with News Corp titles (for example, by taking a similar approach on specific topics or issues, pushing certain stories or downplaying others);
  - (b) second, Sky News is highly trusted, like the other main UK TV news broadcasters, which means its influence is likely to be greater than its reach and consumption figures indicate; and

(c) third, the increased control of Sky News significantly reinforces the broad demographic reach of the MFT, including over a particularly influential audience set.

- 11.139 Further, the significant control over major news providers across all four platforms is not matched by any other person with control of media enterprises. We are concerned that this cross-media control will have an amplification effect on the influence the MFT has over public opinion and the political agenda, beyond the basic numbers indicated by reach and consumption figures. In particular, the ability to repeat on Sky News stories previously covered in the News Corp newspapers (and vice versa) could amplify the effect of those stories (for example, a story originating in The Sun repeated on Sky News is likely to be more influential than if it was simply repeated in The Sun the following day). Combined with its control of media enterprises with a presence online (and in radio), the MFT will increase its ability to lead the news agenda and influence public opinion.
- 11.140 The BBC would continue to have a larger share of overall news consumption following the Transaction, and would match the broad demographic reach of the MFT. However, it lacks a newspaper platform, and faces tighter constraints on pursuing a particular editorial line than the media owned by the MFT (even taking into account the Broadcasting Code). Similarly, although ITN has a similar share of reference to Sky News and News Corp taken together, it is focused largely on one medium – TV news – with no presence in newspapers or radio, and only a relatively small online audience.
- 11.141 Given this context, we consider that the Transaction will give the MFT a unique position from which to influence the news agenda.
- 11.142 Overall, we conclude that the Murdoch family, through the MFT, will be able to exercise a significantly increased level of control over Sky and Sky News as a result of the Transaction. This would enable the MFT to exercise materially greater influence over public opinion and the political agenda through Sky and Sky News. This would add to the MFT's already significant influence over public opinion and the political agenda through its control of the News Corp titles.

## 12. Assessment of sufficiency and finding on media plurality consideration

### Context for assessing whether plurality will remain sufficient

- 12.1 The media plurality consideration is at its heart a protection that seeks to guard against the control of media enterprises being overly concentrated in the hands of a limited number of persons and the fact that it would be a concern for any one person to control too much of the media.
- 12.2 When the media plurality consideration was introduced into the Communications Bill 2003, Lord McIntosh (as the then parliamentary Under Secretary of State for Broadcasting at DCMS) stated that: ‘Media plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any one person to control too much of the media because of his or her ability to influence opinions and set influence the political agenda’. Similarly, when considering amendments to media regulation at the time of consulting on changes to media ownership rules in 2001, the government stated that ‘plurality is not about content but the source of that content, the “voice” behind it – the owner’ and that, among other things, ‘a plurality of voices should ... prevent the emergence of any one source able to control the news agenda by the inclusion/omission of particular stories’.<sup>455</sup>
- 12.3 In our view, these statements reflect the concerns which underlie the media plurality consideration. In this context, we are tasked with considering whether the Transaction is likely to result in there being an insufficient plurality of persons with control of the media enterprises serving audiences in the UK.
- 12.4 In the previous chapters we considered whether there would be a change in the level of control exercisable by the MFT over Sky and Sky News as a result of the Transaction, and what impact this might have on the diversity of viewpoints and the ability of the MFT to influence public opinion and the political agenda. We conclude that, as a result of the Transaction:
- (a) the Murdoch family, through the MFT, will be able to exercise a significantly increased level of control over Sky and Sky News. This, combined with the already significant level of control that the MFT is able to exercise over News Corp, will mean that the MFT will have the ability to

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<sup>455</sup> Briefing note for the Secretary of State, DCMS relating to ‘the announcement of our consultation on media ownership’, 23 November 2001, Annex B (cited in the Leveson Report, Volume 3, Part I, Chapter C, paragraph 5.12 (page 1,281) and submitted to the Leveson Inquiry as Exhibit TJ13 to the witness statement of Tessa Jowell MP, 21 May 2012.

control the way in which these media enterprises provide news to the public; and

- (b) this significant increase in control has the potential to lead to a material reduction in the diversity of the viewpoints that are consumed and would enable the MFT to exercise materially greater influence over public opinion and the political agenda through Sky and Sky News, in combination with its existing level of control over News Corp.

12.5 In reaching these conclusions we find that, although the MFT will not have full ownership of Sky following the Transaction, the significantly increased level of 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. This would risk reducing the independence of Sky News over time, leading to a reduction in the diversity of viewpoints. It would also allow the MFT to influence directly a larger group of news viewers and readers, and to exercise greater influence over the news agenda.

### **Assessment of sufficiency of plurality**

12.6 The final step in our assessment is to consider whether, in light of these effects, there would be a sufficient plurality of persons with control of media enterprises following the Transaction. In considering this question, we took account of all the evidence and analysis set out in the previous chapters.

12.7 In line with the framework set out in chapter 6, in assessing sufficiency we considered:

- (a) the MFT's position, following the Transaction, as the person with control of News Corp and increased control of Sky and Sky News, in relation to the two core elements of media plurality – the diversity of the viewpoints consumed, and the ability to influence public opinion and the political agenda. In this context, we considered the availability, consumption and impact of the viewpoints over which the MFT has control; and the strength of MFT's influence over public opinion and the political agenda; and
- (b) the wider context of other media enterprises serving audiences in the UK. In this context, we considered the alternative viewpoints provided by other media enterprises, and the extent to which an increase in the degree of influence of the MFT over the public opinion and the political agenda might be mitigated or moderated by other media enterprises.

12.8 Based on the analysis in chapters 7, 8 and 10, we conclude that the MFT would have greater control over a substantial share of the range of viewpoints consumed by audiences for news in the UK. For example:

- (a) Sky News and the News Corp titles currently provide news to nearly a third of the population and have a combined share of consumption significantly greater than all other news providers, with the exception of the BBC and ITN;
- (b) Sky News is the third highest consumed TV news provider behind the BBC and ITV. The Sun has the largest readership of all daily national newspapers and The Times also has significant reach and influence. Sky News, The Sun and The Times all have established and growing online brands, which provide a wide variety of content to diverse sections of the population; and
- (c) the MFT will be the only person with control of media enterprises with influence across all four platforms – TV, print, online and radio.

12.9 While we note that the MFT already has material influence over the media enterprises providing these various viewpoints, the Transaction would further concentrate control of these enterprises in the hands of the MFT, in particular by giving the MFT a significantly increased level of control over an important and trusted provider of broadcast news in Sky News.

12.10 The Transaction will also strengthen the ability of the MFT to exercise influence over public opinion and the political agenda from an already strong base, as set out in chapter 11. For example:

- (a) the reach and share of reference of Sky News, in addition to that of the News Corp titles, gives the MFT an increased ability to influence public opinion and set the news agenda. Sky News and The Times are highly trusted and therefore likely to be more influential than raw audience numbers indicate;
- (b) traditional news providers, particularly newspapers and broadcasters, continue to play a key role in leading the news agenda across all media platforms;
- (c) the MFT will obtain significantly increased control of Sky News, strengthening its position as the only person with control of media enterprises across all four platforms;
- (d) members of the Murdoch family and senior executives at News Corp have historically had greater access to ministers than other comparable news

providers, and the scope for access and influence could be increased following the Transaction.

- 12.11 In assessing whether the Transaction will operate against the public interest having regard to the media plurality consideration, we attach significant weight to the points made in paragraphs 12.8 to 12.10. Those points indicate that the MFT is already in a particularly strong and in some respects unique position in relation to its control of media enterprises in the UK across a number of platforms, and the Transaction will significantly enhance that strong position. In our view, the MFT's already strong position means that any material increase in the extent of its control and influence is likely to give rise to concerns in the context of the media plurality consideration.
- 12.12 We however went on to consider the extent to which other news providers will be in a position to mitigate or moderate the influence of the MFT following the Transaction.
- 12.13 We consider that the presence of established news providers in newspaper and TV continues to be the principal factor in determining the extent of media plurality in the UK. We expect that the largest news providers today will continue to be the most significant providers in the near future. These news providers are well funded and have sufficient scale to remain as trusted news sources. They have also developed significant online brands with a wide reach and in some cases a high level of consumption.
- 12.14 In our view two important consequences follow from this. First, as reflected in the statutory limits on cross-platform ownership in relation to ITV and newspapers,<sup>456</sup> we consider that transactions involving such combinations should be placed under close scrutiny, taking into account the relevant evidence on a case by case basis. This is particularly the case given that it is only when there is a merger between media enterprises that it is possible to carry out an assessment of the sufficiency of media plurality. It is difficult to establish a news provider of national significance and as such it is in the public interest to ensure close scrutiny of the loss of an independent voice of such a provider. We consider this factor is a key reason why parliament attached considerable importance to the preservation of plurality of persons with control of media enterprises, as once plurality is lost it may be difficult to restore. These points reinforce our concerns about a further increase in the

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<sup>456</sup> Section 391 of CA03 prohibits a newspaper operator with a market share of 20% or more of newspaper circulation from holding a Channel 3 licence or a stake in a Channel 3 licensee that is greater than 20% (the 20/20 rule). See Appendix B.

MFT's control of media enterprises in the UK, and in particular the strengthening of its control over an established provider of broadcast news.

- 12.15 Second, we consider it is only established news providers with a substantial presence in TV and newspapers who might be in a position to mitigate or moderate the increased influence of the MFT.
- 12.16 While the provision of online news has developed rapidly and there has been entry of online-only news providers and intermediaries, this entry appears so far not to have significantly eroded the influence of the traditional news providers (including through their online presence). The evidence that we gathered indicates that traditional news providers still contribute the majority of the news content that is consumed online, and the Sky News and News Corp newspapers are significant online players.
- 12.17 There are a relatively limited number of national news providers in the UK which we consider have the scope to lead the news agenda on a sustained basis.
- 12.18 We considered how we should take account of the position of the BBC, which is by some margin the largest news provider in the UK. We consider that the maintenance of a sufficient level of plurality in the UK requires not just the availability of a reliable source of impartial and accurate news, but also the coexistence of a diversity of voices, both impartial and opinionated. As such, while the BBC undoubtedly makes a very significant contribution to plurality in the UK, this is not to the extent that we would not be concerned about the loss of a significant independent voice elsewhere in the media landscape.
- 12.19 Looking beyond the BBC, the media enterprises which the MFT controls and over which it would hold greater control following the Transaction are amongst the most significant in the UK in terms of their cross-platform reach and share of reference. In our judgement, the proposed further concentration of the MFT's control over those media enterprises is contrary to the interests against which the media plurality consideration is designed to protect, notwithstanding the strong position of the BBC. We also note that the particular position of the BBC means that the range of content which it is able to provide is constrained by factors going beyond the requirements of the Broadcasting Code (see paragraph 10.54).
- 12.20 In addition to the BBC, we recognise that there will be other news providers, including ITN and the larger newspaper groups, which could also provide a counterpoint to the MFT's influence. However, the MFT will be the only person with control of media enterprises with control and influence across all four platforms – TV, print, online and radio, and all other news providers aside

from the BBC and ITN are of a magnitude smaller than the combination of Sky News and News Corp newspapers. The MFT will be the only person with control of media enterprises that would have brands which span the spectrum of highly trusted broadcast news through to unregulated opinion and comment. For these reasons, we do not believe that the presence of the BBC, ITN and other existing news providers are sufficient to prevent the Transaction from being contrary to the public interest.

12.21 We consider that it is unlikely that another news provider would be able to materially mitigate or moderate the increased control and influence of the MFT post Transaction in terms of the size and cross-platform nature of its media enterprises in the foreseeable future, either through organic growth or by acquisition. In that regard, we consider it is relevant that history indicates the difficulty in building up a significant national news provider through growth, rather than acquisition, and that post Transaction the only other significant TV news providers, other than the BBC, are ITV, in relation to which there are legal restrictions on ownership by newspaper groups of a material size, and Channel 4, which is publicly owned.

### **Finding on the media plurality consideration**

12.22 Taking the points outlined earlier together, and based on our assessment of the evidence in the round, we conclude that the Transaction may be expected to result in insufficient plurality of persons with control of media enterprises serving audiences in the UK because it would lead to the MFT holding too great a degree of control over the diversity of the viewpoints consumed by audiences in the UK and would give the MFT too much influence over public opinion and the political agenda.

12.23 Overall, we find that, on the balance of probabilities, the Transaction may be expected to operate against the public interest, taking account of the need, in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience.

## **BROADCASTING STANDARDS CONSIDERATION**

- 12.24 In the Terms of Reference for this Inquiry, the then Secretary of State specified two public interest considerations: the media plurality consideration and the broadcasting standards consideration. These two public interest considerations are separate and distinct. They are separate subsections in the Act (58(2C)(a) and 58(2C)(c) respectively) aimed at different concerns.<sup>457</sup> Accordingly the framework for the assessment of each one is different, although some of the facts and evidence may be relevant to both public interest considerations.
- 12.25 In turn, the broadcasting standards public interest consideration is separate and therefore distinct from Ofcom's ongoing duty to assess whether a broadcast licence holder is fit and proper to hold a broadcasting licence. The latter is a matter for Ofcom, and is a duty that Ofcom discharges under a separate process and a separate legal framework.<sup>458</sup> However, as we note later, some of the facts and evidence may be relevant to both the broadcasting standards public interest consideration and Ofcom's assessment of a licence holder's fitness and propriety.

### **13. Framework for the assessment of the broadcasting standards consideration**

- 13.1 This is the first time that the broadcasting standards consideration in section 58(2C)(c) of the Act has been considered by us (or our predecessor body the CC). We therefore set out in this chapter the background to the provision, the approach taken in the DTI Guidance and that taken by Ofcom in its Public Interest Report. We then outline our interpretation of the broadcasting standards consideration and the approach we took in carrying out our assessment. In carrying out this assessment we took into account the views and information submitted to us by the Parties and by a wide range of third parties, as regards the proper interpretation of the broadcasting standards consideration and its application to the Transaction.

#### **Background**

- 13.2 The broadcasting standards consideration specified in section 58(2C)(c) of the Act refers to:

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<sup>457</sup> [Explanatory Notes](#) to CA03, paragraph 802.

<sup>458</sup> [Ofcom Public Interest Report](#), paragraphs 3.11 to 3.12.

the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

13.3 For convenience, we refer to the standards objectives set out in section 319 of CA03 as the 'broadcasting standards objectives'. The broadcasting standards objectives are:

- (a) that persons under the age of 18 are protected;
- (b) that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services;
- (c) that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 [eg the duty of special impartiality] are complied with;
- (d) that news included in television and radio services is reported with due accuracy;
- (e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;
- (f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;
- (g) that the product placement requirements referred to in section 321(3A) are met in relation to programmes included in a television programme service (other than advertisements);
- (h) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services;
- (i) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
- (j) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with;
- (k) that the unsuitable sponsorship of programmes included in television and radio services is prevented;

- (l) that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and
- (m) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.

13.4 The broadcasting standards objectives and the Broadcasting Code are clearly closely related, as the Broadcasting Code is developed by Ofcom to give effect to the broadcasting standards objectives. Nevertheless, we note that the broadcasting standards consideration refers to the need for a genuine commitment to the broadcasting standards objectives, which are in the nature of general principles, rather than to the detailed rules of the Broadcasting Code (and other broadcasting regulation that gives effect to the broadcasting standards objectives).

13.5 In our assessment of the broadcasting standards consideration, we had regard to the terms of section 58(2C)(c) of the Act, the scheme of the Act, and materials which help place this provision in context. In particular, the:

- (a) [Explanatory Notes](#) to CA03 (the Explanatory Notes) (in particular paragraphs 7.97 to 8.11); and the
- (b) Enterprise Act 2002: [Public interest intervention in media merger: guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers](#) (the DTI Guidance).

13.6 The Explanatory Notes state that the broadcasting standards consideration looks:

at the content of the media enterprises involved and the extent to which media owners demonstrate a genuine commitment to complying with the standards objectives – ie complying with the spirit and not just the letter of the objectives.<sup>459</sup>

13.7 The DTI Guidance is consistent with the Explanatory Notes, explaining that the intention behind the broadcasting standards consideration is:

to assess whether persons controlling or carrying on media enterprises post-merger are likely to comply with the spirit as well

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<sup>459</sup> [The Explanatory Notes](#), paragraph 802.

as the letter of the broadcasting standards set down in the Communications Act 2003.<sup>460</sup>

- 13.8 As noted above, the assessment required for the purposes of section 58(2C)(c) (ie the broadcasting standards consideration) is different from the fit and proper person assessment which Ofcom must conduct under section 3(3) of the Broadcasting Acts of 1990 and 1996. These provisions impose on Ofcom a duty not to grant a broadcast licence to any applicant unless Ofcom is satisfied that they are a fit and proper person to hold such a licence and that any existing licensee continues to be a fit and proper person to hold such a licence. It does not necessarily follow from the fact that a person is fit and proper to hold a broadcasting licence that they are also ‘genuinely committed’ to the attainment of the broadcasting standards objectives. These two tests are distinct, even if some evidence may be relevant to both.
- 13.9 We note that Ofcom carried out a separate assessment of whether Sky would remain fit and proper to hold broadcast licences in the event of the Transaction going ahead. Ofcom published its decision on 29 June 2017 (the fit and proper decision) and subsequently republished its decision with explanatory wording added on 11 September 2017.<sup>461</sup> Ofcom concluded that ‘the overall evidence available to date does not provide a reasonable basis to conclude that if Sky were 100% owned and controlled by Fox, it would not be fit and proper to hold broadcast licences’.<sup>462</sup> We also note that Ofcom’s fit and proper decision has been challenged by Avaaz and that permission has been granted by the Administrative Court, with a hearing scheduled to take place during June 2018. Ofcom’s fit and proper assessment and decision is separate and distinct from our assessment of, and findings on, the broadcasting standards consideration. In these circumstances, the ongoing judicial review proceedings do not affect our overall conclusions regarding the broadcasting standards consideration.

### ***The approach to the broadcasting standards consideration in the DTI Guidance***

- 13.10 In summary, the factors that the DTI Guidance envisages that the Secretary of State may take into account in an assessment of the broadcasting standards consideration, include:

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<sup>460</sup> DTI Guidance, paragraph 7.22.

<sup>461</sup> Ofcom, *Decision under section 3(3) of the Broadcasting Act 1990 and section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited, published on 29 June 2017 (explanatory wording added on 11 September 2017)*.

<sup>462</sup> Fit and proper decision, paragraph 10.

- (a) the past compliance of broadcasting enterprises controlled by the media owner with broadcasting standards in the UK:
  - (i) based on a qualitative assessment rather than focusing on the number of infringements; and
  - (ii) taking into account the due impartiality and accuracy of news offered;
- (b) the compliance of broadcasting enterprises controlled by the media owner with broadcasting standards in other geographic regions or jurisdictions;
- (c) the compliance of any non-broadcasting media enterprises controlled by the media owner with applicable standards, including those imposed under self-regulatory regimes; and
- (d) all other material factors, including comments, statements and plans made by the acquiring media owner which give an indication as to its commitment to UK broadcasting standards post transaction.<sup>463</sup>

***The approach to the broadcasting standards consideration taken by Ofcom***

13.11 The Ofcom Public Interest Report states that '[w]hile the broadcasting standards consideration can ... be complex and ... requires a qualitative assessment, much of this is related to historical and ongoing compliance with our own Broadcasting Code and other regulatory requirements'.<sup>464</sup>

13.12 Ofcom's assessment of the broadcasting standards consideration is set out in section ten of its Public Interest Report. This assessment addressed, in turn:

- (a) the number of breaches of the Broadcasting Code by Sky and Fox since 2012;
- (b) a comparative assessment of the number of breaches by Sky and Fox in the context of the compliance records of two broadly comparable broadcasters: Viacom<sup>465</sup> and Discovery;<sup>466</sup>
- (c) Fox News' impartiality and accuracy;
- (d) the compliance of News Corp newspapers with the Editors' Code of Practice (the Editors' Code);

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<sup>463</sup> DTI Guidance, paragraphs 7.24 and 7.25.

<sup>464</sup> Ofcom Public Interest Report, paragraph 3.30.

<sup>465</sup> Viacom owns MTV, Nickelodeon, Comedy Central, Paramount, VH1, and Channel 5 (since 2014).

<sup>466</sup> Discovery owns the Discovery Channel, Animal Planet and TLC.

- (e) Fox and Sky's broadcast compliance in other jurisdictions, with most weight given to EU countries where a similar approach to broadcasting standards has been adopted;
- (f) the adoption of new procedures by Fox in May 2017, following a finding that it had not put in place procedures to ensure the compliance of Fox News' content with the Broadcasting Code;
- (g) public statements made by members of the Murdoch family; and
- (h) failures of corporate governance (by reference to the separate assessment set out in Ofcom's fit and proper decision).<sup>467</sup>

13.13 Having taken these factors into account, Ofcom concluded that the evidence did not demonstrate that the merged entity would lack a genuine commitment to the attainment of the broadcasting standards objectives.

13.14 In correspondence between the Secretary of State and Ofcom during August and September 2017, Ofcom provided further reasoning (at the request of the Secretary of State) in relation to its decision on the relevance of – and the weight it gave to – corporate governance concerns at Fox and News Corp in assessing the broadcasting standards consideration. The key points raised by Ofcom in explaining its approach were:

- (a) Ofcom's starting point was that a statutory regime exists for securing broadcasting standards compliance including sanctions, which in its view establishes a framework which incentivises an upfront commitment to compliance through licensing requirements and provides ongoing ex post protection for the public interest in the attainment of broadcasting standards;<sup>468</sup>
- (b) against that framework, in considering corporate governance in relation to the broadcasting standards consideration, Ofcom's approach was that 'something in the nature of the corporate governance concern had to give rise to an identifiable risk in terms of broadcast standards compliance';<sup>469</sup>
- (c) although non-broadcasting corporate governance issues may indirectly be relevant to broadcasting standards, Ofcom considered them to be more directly relevant to the issue of fitness and properness to hold a broadcast licence;<sup>470</sup>

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<sup>467</sup> [Ofcom Public Interest Report](#), footnote 74 and paragraph 10.51.

<sup>468</sup> Ofcom, [Letter to DCMS](#), 25 August 2017, page 2.

<sup>469</sup> Ofcom, [Letter to DCMS](#), 25 August 2017, page 2.

<sup>470</sup> Ofcom, [Letter to DCMS](#), 25 August 2017, page 3.

- (d) Ofcom placed significant weight on the compliance records of Sky (54 UK broadcast licences) and Fox (then 14 UK broadcast licences), which it considered are good, noting that it had considered broadcasting compliance primarily by reference to complaints and that it believed this to be an effective and proportionate approach;<sup>471</sup>
- (e) while Ofcom had concerns about Fox News' lack of adequate procedures for compliance with the Broadcasting Code, it considered it had afforded it sufficient weight when considering it in the round together with other relevant evidence;<sup>472</sup> and
- (f) Ofcom also took account of the incentivising effect of its ability to enforce against any breaches of content standards under the broadcast regulatory framework.<sup>473</sup>

## **Our interpretation of the broadcasting standards consideration**

13.15 We next cover four aspects that informed our framework for the assessment of the broadcasting standards consideration:

- (a) what is meant by 'a genuine commitment to the attainment' of the broadcasting standards objectives;
- (b) the persons whose 'genuine commitment' we should assess;
- (c) the statutory question in Article 6(3) of the Order;<sup>474</sup> and
- (d) the relevance of evidence relating to wider regulatory compliance and corporate governance.

We then outline the framework for our assessment itself.

### ***Genuine commitment to the attainment of the broadcasting standards objectives***

13.16 There is limited guidance and no precedent available on the interpretation of the broadcasting standards consideration, and in particular what is meant by the term 'genuine commitment to the attainment' of the broadcasting standards objectives.

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<sup>471</sup> Ofcom, [Letter to DCMS](#), 25 August 2017, page 4.

<sup>472</sup> Ofcom, [Letter to DCMS](#), 25 August 2017, page 4.

<sup>473</sup> Ofcom, [Letter to DCMS](#), 25 August 2017, page 5.

<sup>474</sup> That is whether, taking account of the broadcasting standards consideration, the Transaction may be expected to operate against the public interest.

- 13.17 We consider that the phrase ‘genuine commitment to the attainment’ of the broadcasting standards objectives should be given its natural and ordinary meaning. Like any phrase in a statute, it must be read in context, having regard to the purposes of the relevant legislation, here the provisions of the Act and the Order relating to public interest interventions in media mergers.
- 13.18 As outlined previously, both the Explanatory Notes<sup>475</sup> and the DTI Guidance<sup>476</sup> refer to the intention behind the broadcasting standards consideration as being to assess compliance with the ‘spirit’ and not just the ‘letter’ of the broadcasting standards objectives and the Broadcasting Code. In contrast, Ofcom considered that the assessment of genuine commitment should focus primarily on historical and ongoing compliance with the Broadcasting Code and other regulatory requirements, and that it does not require a commitment beyond compliance with the Broadcasting Code (for example, to ‘some “spirit” of impartiality not captured by the [Broadcasting] Code’).<sup>477</sup>
- 13.19 A legal opinion submitted by Fox stated that the way one shows a genuine commitment to the attainment of the broadcasting standards objectives ‘is to satisfy the authorities that one complies, and intends to comply, with the relevant standards laid down in the Broadcasting Code’. The same opinion stated that consideration of a commitment to the ‘spirit’ of the Broadcasting Code lacks clarity and would be a disproportionate inhibition on freedom of expression and would result in very substantial uncertainty.
- 13.20 In the Court of Appeal’s assessment of the media plurality consideration, it referred to the ‘clear requirement for a detailed and realistic analysis which is inherent in the statute as a whole’.<sup>478</sup> We consider that such a detailed and realistic analysis is also required in the assessment of the separate broadcasting standards consideration.
- 13.21 We agree with the Parties and with Ofcom that where a media enterprise is already involved in broadcasting in the UK, its record of complying with the Broadcasting Code and other regulatory requirements is of central relevance to the assessment of the broadcasting standards consideration. However, we do not consider that a positive record of compliance is, by itself, a sufficient basis for a conclusion that a relevant person has a genuine commitment to the attainment of the broadcasting standards objectives.

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<sup>475</sup> [The Explanatory Notes](#), paragraph 802.

<sup>476</sup> [DTI Guidance](#), paragraph 7.22.

<sup>477</sup> Ofcom, [Letter to DCMS](#), 25 August 2017, page 5.

<sup>478</sup> Court of Appeal, [BSkyB/ITV](#), paragraph 120.

- 13.22 We note the references in the Explanatory Notes and in the DTI Guidance to the need to show a commitment to the spirit as well as the letter of the broadcasting standards objectives. In our view, these references support the emphasis in the statute on the need for a ‘genuine’ commitment and the reference to the principles contained in the broadcasting standards objectives (rather than the detailed rules of the Broadcasting Code). These points, taken together, reinforce our view that something more than a positive record of compliance is required.
- 13.23 We are nevertheless mindful that a media enterprise’s commitment to the ‘spirit’ of the broadcasting standards objectives may be difficult to observe directly or to test. In that regard, we agree with the point made in the legal opinion submitted by Fox that the concept of spirit is, by itself, too vague to provide meaningful guidance on how to apply the broadcasting standards consideration and assess a genuine commitment. This is particularly so given that the broadcasting standards objectives are themselves not precise legal requirements, but more general principles that in turn require interpretation in their application, including by Ofcom via the Broadcasting Code.
- 13.24 Where, as in the present case, the relevant persons are already involved in broadcasting in the UK, our view is that to demonstrate the genuine commitment required in the broadcasting standards consideration, those relevant persons must show that effective steps have been and will be taken to promote and support a culture within the relevant media enterprises in which the broadcasting standards objectives are attained. We would therefore expect to see observable indicators that provide evidence of those persons having promoted and supported compliance with the Broadcasting Code and the broadcasting standards objectives, and their intention to continue to do so.<sup>479</sup> This would mean the relevant persons having in place effective, up to date policies, systems and procedures that are embedded within the business in a way that supports and promotes the ongoing attainment of the broadcasting standards objectives. In addition, the resources committed to compliance, including in training employees and developing and maintaining their knowledge of the Broadcasting Code and other relevant regulatory requirements, would, in our view, provide evidence of the necessary genuine commitment to the broadcasting standards objectives.
- 13.25 In our view, this is a workable and evidence-based approach to assessing the media enterprises’ commitment to the broadcasting standards regime (both in its spirit and its letter). In contrast, a positive record of compliance with the

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<sup>479</sup> Where a relevant person has not previously been involved in broadcasting in the UK, it would be necessary to base the assessment on evidence relating to their history of broadcasting outside the UK or in other sectors in order to reach a view regarding their intentions and likely commitment to the broadcasting standards objectives.

Broadcasting Code does not by itself necessarily imply that adequate steps have been taken by the media enterprise to attain compliance by design. Instead that record may be by coincidence or as a consequence of the absence of complaints being made to or monitoring being carried out by, Ofcom.

- 13.26 Fox also submitted that the purpose of the broadcasting standards consideration is primarily to ensure that where a UK broadcaster is acquired by an entity without UK broadcast licences, and therefore without a track record of compliance with broadcasting standards in the UK, its commitment to those standards can be tested prospectively.<sup>480</sup>
- 13.27 In our view, this purpose is not suggested by the plain wording of the statute, the Explanatory Notes, or the DTI Guidance. If parliament had intended for the broadcasting standards consideration to be relevant primarily to the acquisition of a UK broadcaster by an entity without UK broadcasting licences then it could have adopted this formulation in the statute.

***The persons whose ‘genuine commitment’ we should include in our assessment***

- 13.28 As set out in chapter 6, section 58A of the Act contains additional provisions concerning the construction of the considerations specified in section 58(2C). In BSkyB/ITV, the Court of Appeal noted that the drafting of section 58A(5) indicates that it applies for the purposes of section 58 as a whole, not just for section 58(2C)(a) (the media plurality consideration), and is therefore also relevant if section 58A(2C)(c) (the broadcasting standards consideration) is invoked.<sup>481</sup>
- 13.29 The MFT ‘controls’ Fox, Sky and News Corp because the MFT has material influence over each of them for the purposes of section 26 of the Act, pre and post the Transaction.<sup>482</sup> The effect of section 58A(5) is that Fox, Sky and News Corp (each being a media enterprise for the purposes of section 58A(1) and (2)) are treated as under the control of only one person, the MFT, for the purposes of our assessment of the broadcasting standards consideration.
- 13.30 As set out in paragraph 4.7 onwards, Fox and Sky are both persons carrying on media enterprises and will cease to be distinct as a result of the Transaction. In addition, the MFT is, pursuant to section 58A(5) of the Act, deemed to be the person in control of Fox and Sky, and will therefore be the

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<sup>480</sup> [Fox initial submission on broadcasting standards](#), paragraph 2.4.

<sup>481</sup> Court of Appeal, [BSkyB/ITV](#), paragraph 115.

<sup>482</sup> See chapter 7 for further detail.

person with control of the media enterprises that are ceasing to be distinct. Accordingly, in our assessment of the broadcasting standards consideration we considered the genuine commitment to the attainment of the broadcasting standards objectives of:

- (a) Fox and Sky, as the persons carrying on the media enterprises that will cease to be distinct as a result of the Transaction; and
- (b) the MFT, as the person that controls these enterprises following the Transaction, informed by the extent to which the media enterprises controlled by the MFT themselves demonstrate such a genuine commitment;

in order to decide whether the Transaction may be expected to operate against the public interest.

### ***The interpretation of the statutory question in Article 6(3) of the Order***

- 13.31 The statutory question we need to decide is whether, taking account of the broadcasting standards consideration, the Transaction may be expected to operate against the public interest.
- 13.32 We consider that the purpose of the broadcasting standards consideration is to guard against the concern that persons who do not have a genuine commitment to the attainment of the broadcasting standards objectives may acquire greater influence, or control, over a media enterprise involved in broadcasting in the UK.
- 13.33 Sky submitted that it was necessary to show that the Transaction is more likely than not to result in Sky failing to have a genuine commitment to broadcasting standards post Transaction. We note that the broadcasting standards consideration refers to the need for both those controlling and those carrying on media enterprises to have a genuine commitment to the broadcasting standards objectives. In our view, the statute requires consideration of the position of those controlling media enterprises (such as the MFT) because, if those persons lack the necessary commitment, that may cause the commitment of the media enterprises which they control to weaken over time.
- 13.34 Consequently, we do not consider it necessary to reach a conclusion on how the lack of a genuine commitment to the attainment of the broadcasting standards objectives by those acquiring greater control or influence would in fact manifest itself in terms of impact on the commitment of the target media enterprise, in this case Sky (for example, that there would be a degradation of the compliance arrangements in place or the level of compliance). Rather, we

consider that a merger may be expected to operate against the public interest because the persons carrying on or controlling the relevant media enterprise post merger lack the necessary commitment, so placing the commitment of the target media enterprise at risk.

13.35 We therefore considered the consequences of the Transaction, in light of the findings in relation to the actual extent of control exercised and exercisable by the MFT and Fox over Sky, and by the MFT over News Corp, set out in detail in chapters 7 and 8.

13.36 In terms of the broadcasting standards consideration, we consider that this involves an assessment of whether each of Fox, Sky and the MFT (taking into account other media enterprises that the MFT controls for the purposes of section 26 of the Act, including News Corp) has a genuine commitment to the attainment of the broadcasting standards objectives.

### ***Relevance of evidence relating to wider regulatory compliance and corporate governance***

13.37 We received a significant volume of submissions raising concerns about certain corporate governance and compliance failures at companies controlled by the MFT, and in which members of the Murdoch family hold senior positions. We therefore considered the appropriate relevance of, and weight to give, such evidence.

13.38 Ofcom's stated approach was that 'something in the nature of the corporate governance concern has to give rise to an identifiable risk in terms of UK broadcast standards compliance'.<sup>483</sup> In her letter to the Parties on 12 September 2017 setting out reasons for her 'minded to' decision to refer the Transaction to us on the broadcasting standards ground, the then Secretary of State stated that:<sup>484</sup>

it is difficult to be sure that any wider failings of corporate governance at 21CF are incapable of affecting broadcasting standards compliance in circumstances where ... 21CF failed to put in place adequate compliance procedures for the broadcast of Fox News in the UK. The representations raise concerns that the various actual and alleged failings might have been a product of a corporate culture that does not prioritise the need for regulatory compliance. In the light of these concerns, the Secretary of State

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<sup>483</sup> Ofcom, [Letter to DCMS](#), 25 August 2017, page 2.

<sup>484</sup> DCMS, [Letter to the Parties](#), 12 September 2017, page 4.

considers that this issue could usefully be considered in further detail by the CMA.<sup>485</sup>

13.39 We consider that evidence relating to wider regulatory compliance and corporate governance failures is potentially relevant to our assessment of the broadcasting standards consideration. For example, it may indicate that a media enterprise's policies, systems and procedures are nominal or ineffective in terms of promoting and supporting a culture of compliance with regulatory standards. However, we are mindful that a person's failure to adhere to one set of rules or regulations does not necessarily mean that the person is not committed to another, different, set of rules or regulations. Although potentially relevant, a further question arises as to the weight that should be attached to evidence of this nature, which we consider later in the context of our assessment.

## **Our framework for the assessment of the broadcasting standards consideration**

13.40 We considered a wide range of evidence, relating to the UK and elsewhere. Informed by our interpretation of the broadcasting standards consideration set out previously, we defined a framework for assessment covering three broad areas:

- (a) **approach to broadcasting standards objectives in the UK:** we looked in detail at evidence of how the Parties approach the broadcasting standards objectives in the UK. We reviewed their policies, systems and procedures to see how they organise their businesses to achieve compliance in order to assess how the broadcasting standards objectives are promoted and supported. We then examined their track records of compliance with the Broadcasting Code and other related regulatory requirements.<sup>486</sup> We reviewed the numbers of breaches and undertook a qualitative assessment of the nature of these breaches, based on Ofcom's decisional practice as the broadcasting regulator.<sup>487</sup> We considered their record in relation to all the broadcasting standards objectives. We looked in particular at Sky and Fox channels that are compiled specifically for UK and European audiences. We then looked separately at Fox News (which is a simulcast of the US channel) and Sky

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<sup>485</sup> DCMS, [Letter to the Parties](#), 12 September 2017, page 4.

<sup>486</sup> Appendix C sets out details of the Broadcasting Code.

<sup>487</sup> Our assessment of the compliance records of broadcasters considered breaches of Ofcom's standards procedures (ie all sections of the Broadcasting Code except sections seven, eight and ten). Sections seven and eight relate to Ofcom's fairness procedures and do not relate to the standards objectives under section 319 of CA03. Section ten applies to radio only. Chapter 15 provides details.

News, noting that due impartiality and due accuracy of news is identified in the DTI Guidance as an appropriate consideration, and in light of the large volume of submissions we received raising concerns regarding impartiality and accuracy at Fox News;

- (b) **approach to broadcasting standards outside the UK:** we examined how the Parties and News Corp (as a media enterprise controlled by the MFT and in which members of the Murdoch family hold senior positions) approach broadcasting standards in countries outside the UK. We examined their policies, systems and procedures and then looked at their track record of complying with broadcasting rules and regulations in other jurisdictions. We spoke to media regulators in other jurisdictions to look behind the numbers and to seek their views on Fox's compliance record and approach. We focused in particular on EU jurisdictions, where prevailing regulation is the most similar to that which exists in the UK; and
- (c) **approach to wider regulatory compliance and corporate governance:** we looked at how Fox and News Corp (as companies controlled by the MFT and in which members of the Murdoch family hold senior positions) meet other, non-broadcasting, legal and regulatory obligations – including regulations relating to newspapers in the UK. We examined their corporate governance and the efficacy of their policies, systems and procedures that seek to ensure wider regulatory compliance and considered the relevance of the evidence for our assessment.

## 14. Approach to broadcasting standards objectives in the UK

- 14.1 The Parties have a long history of broadcasting in the UK. Fox and Sky each hold multiple UK broadcast licences and each air a number of channels that attract tens of thousands of viewers each day.<sup>488,489</sup> Against this backdrop, we consider that of the three areas in our assessment framework, the Parties' approach to the broadcasting standards objectives and records of compliance with the Broadcasting Code in the UK comprise the most direct and relevant evidence. We received a number of submissions from third parties addressing the commitment of both Sky and Fox to the broadcasting standards objectives in the UK. We took these into account in conducting our assessment.<sup>490</sup>

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<sup>488</sup> Fox Broadcasting Company was founded in October 1986. It has held a licence for the National Geographic Channel since September 1997, and currently holds 13 licences.

<sup>489</sup> Sky Television, the satellite TV service, was launched by News International in February 1989. Sky News also began broadcasting in 1989. Sky currently holds 54 licences.

<sup>490</sup> [Submissions from third parties.](#)

- 14.2 For our assessment of the broadcasting standards consideration, we examined the steps that the relevant persons have taken to promote and support the broadcasting standards objectives in their media enterprises; we reviewed the policies, systems and procedures of the Parties, and examined their records of compliance with the Broadcasting Code between January 2013 and November 2017. As well as the number of breaches, we carried out a qualitative review of the breaches recorded against the Parties.
- 14.3 To put the compliance record of the Parties into context, we also carried out comparative analysis beyond that covered by Ofcom in its Public Interest Report. We considered it appropriate to compare broadcasters that were similar in nature and size. In addition to the analysis carried out by Ofcom of Fox and Sky's records against those of Viacom and Discovery, we also compared Fox News' compliance record in the UK with that of other international news providers: Al Jazeera, Russia Today (RT) and CNN; and Sky's with other UK-based broadcasters: the BBC, ITV and Channel 4. In carrying out our assessment, we considered Fox and Sky's records in relation to all of the broadcasting standards objectives, including those relating to news and current affairs programming.
- 14.4 Finally, we reviewed the public comments, statements and plans made by Fox and the MFT to inform our analysis of the acquiring media owners' commitment to the broadcasting standards objectives.
- 14.5 Before examining the Parties' approach to broadcasting standards in the UK and their record of compliance with the Broadcasting Code, we summarise how broadcasting is regulated in the UK.

## **The regulation of broadcasting in the UK<sup>491</sup>**

- 14.6 In the UK, Ofcom is responsible for regulating the broadcasting sector through a licensing system; it is unlawful to broadcast into the UK without holding a licence. Ofcom issues broadcast licences and has a statutory duty to 'not grant a licence to any person unless ... satisfied that he is a fit and proper person to hold it'.<sup>492</sup>
- 14.7 Ofcom also has an ongoing duty to be satisfied that existing licence holders continue to be fit and proper. Ofcom is required by statute to 'do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence'.<sup>493</sup> In

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<sup>491</sup> Chapter 16 provides more detail.

<sup>492</sup> Section 3(3) of the [Broadcasting Act 1990](#).

<sup>493</sup> Section 3(3) of the [Broadcasting Act 1990](#).

practice, this power is rarely exercised: Ofcom has only found two licence holders not to be fit and proper in the past five years, both cases as a result of adverse findings of serious broadcasting content standards non-compliance.

- 14.8 The broadcasting standards objectives are given effect to by a number of codes. These include the Broadcasting Code, the Cross-promotion Code, the Code on the Scheduling of Television Advertising (COSTA), the Code on the Prevention of Undue Discrimination between Broadcast Advertisers (CUDPA) and the UK Code of Broadcast Advertising (the BCAP Code). As explained below, complying with the Broadcasting Code is particularly important because it covers content and includes rules going directly to news and current affairs programming.
- 14.9 The broadcasting standards objectives are defined in section 319(2) of CA03. In short, the broadcasting standards objectives include due accuracy and due impartiality, a restriction on harmful or offensive material, as well as other matters including advertising, product placement, responsible broadcasting in respect of religious programmes, and the control of political advertising.<sup>494</sup>
- 14.10 Some third parties submitted that our assessment of the broadcasting standards consideration should focus primarily on, and give greatest weight to, the broadcasting standards objectives relating to accuracy and impartiality, given their importance and relevance to the Transaction and the separate media plurality public interest consideration.<sup>495</sup> However, as well as the fact that the media plurality consideration and the broadcasting standards consideration are separate and distinct, we note that CA03 does not identify any of the broadcasting standards objectives as inherently more important or less important than others. In other words, there is no hierarchy in the statute in terms of the importance ascribed to the different broadcasting standards objectives.
- 14.11 Accordingly, we assessed the broadcasting standards consideration taking into account Sky, Fox and the MFT's commitment to all of the broadcasting standards objectives, not only a subset of them. We carefully considered the objectives relating to impartiality and accuracy as covered by sections five and six of the Broadcasting Code in view of the large number of submissions we received in relation to Fox News' lack of commitment to those objectives. However, we are mindful that breaches of the other broadcasting standards objectives – such as those relating to incitement of crime or hatred, misleading advertising, or the protection of under 18s – may also give rise to

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<sup>494</sup> Appendix B provides a full list of the broadcasting standards objectives.

<sup>495</sup> For example, [Ed Miliband et al, response to provisional findings, page 1](#); and [Avaaz, response to provisional findings, page 4](#).

significant harm. We are similarly mindful that evidence relating to Sky, Fox and the MFT's commitment to the other broadcasting standards objectives should therefore be taken into account in our assessment of the broadcasting standards consideration.

14.12 Ofcom told us that its interpretation of the broadcasting standards objectives and, by corollary, its application of the sections of the Broadcasting Code, does not reflect a hierarchy attaching more or less importance to any particular broadcasting objective. Ofcom's approach is grounded in context, as explained in more detail later. In that regard, we note that when deciding whether to prioritise and investigate a possible breach of the requirements of the Broadcasting Code, Ofcom takes into account the likelihood that it caused harm or potential harm (and whether the harm is ongoing), rather than basing this decision on which area of the Broadcasting Code the possible breach relates to. We note, however, that Ofcom may decide to prioritise or expedite consideration of a case where content may: pose ongoing harm to children; incite crime, violence, terrorism or hatred; or raise significant impartiality or accuracy issues that might require rapid remedy during an election. Such factors may also be relevant in assessing the seriousness of a given breach and therefore whether it may be appropriate to consider the imposition of a statutory sanction.

14.13 In giving effect to the broadcasting standards objectives by setting out standards for the content of programmes in the Broadcasting Code, Ofcom must have regard to various matters that are 'relevant to the securing of the standards objectives'.<sup>496</sup> These factors are defined by Ofcom as 'context' and are taken into account when applying the Broadcasting Code. As set out by Ofcom, context includes (but is not limited to):<sup>497,498</sup>

- (a) the editorial content of the programme, programmes or series;
- (b) the service on which the material is broadcast;
- (c) the time of broadcast;
- (d) what other programmes are scheduled before and after the programme or programmes concerned;

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<sup>496</sup> The [Broadcasting Code](#), page 5 sets out section 319(4) of CA03. These criteria have informed Ofcom's approach to setting the [Broadcasting Code](#) and therefore must be taken into account by broadcasters when interpreting the rules. Further guidance on context is set out in the [Broadcasting Code](#) (section two and section five).

<sup>497</sup> Definition at paragraph 2.3 and Ofcom's outline of how to use the Broadcasting Code (page 5) (a) to (e).

<sup>498</sup> See also 'Meaning of 'due impartiality'', the [Broadcasting Code](#), section five and see section six for meanings relating to elections and referendums.

- (e) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description;
- (f) the likely size and composition of the potential audience and likely expectation of the audience;
- (g) the extent to which the nature of the content can be brought to the attention of the potential audience for example by giving information; and
- (h) the effect of the material on viewers or listeners who may come across it unawares.

14.14 All licence holders are required to comply with the Broadcasting Code as a condition of their licence. Ofcom is alerted to potential breaches of the Broadcasting Code in two ways: audience complaints and content monitoring. Ofcom receives a large number of complaints each year. For the period between January 2013 and October 2017, Ofcom assessed over 94,000 complaints and, of those complaints, over 15,000 raised substantive issues warranting further investigation. However, Ofcom, told us that the number of complaints against a programme is not a proxy for whether the programme is in breach of the Broadcasting Code. Ofcom may receive a large number of complaints against a programme but decide not to investigate, whereas it has investigated content and found serious breaches when only one complaint has been made or was identified as part of its proactive monitoring of services, which it undertakes from time to time. Ofcom told us that in 2016/17 it had monitored [redacted] services, including Fox News during the 2017 general election.

14.15 Ofcom investigates and, where appropriate, adjudicates on whether a broadcaster has breached the Broadcasting Code. The process for investigating potential breaches of the Broadcasting Code is:

- (a) if Ofcom believes that the complaint raises potentially substantive issues under the Broadcasting Code, Ofcom will begin an initial assessment into the alleged breach of the relevant issues. In cases where Ofcom does not already hold a recording of the content concerned, this will normally begin by asking the broadcaster for a copy of the relevant programme (a 'recording request'). The broadcaster has five days to respond;
- (b) on receipt of the recording from the broadcaster, Ofcom will then assess the content and make a decision on whether to open an investigation;

- (c) if Ofcom decides not to open an investigation, it will publish a 'not pursued' line in the Ofcom Broadcast and On Demand Bulletin – which is published every two weeks;
- (d) if Ofcom decides to open an investigation into a potential breach of the Broadcasting Code, Ofcom will write to the relevant broadcaster summarising the material parts of the complaint(s), setting out the particular provisions of the Broadcasting Code which Ofcom considers are relevant and applicable to the investigation, and invite the broadcaster to make representations in response within ten working days;
- (e) Ofcom will then prepare a 'preliminary view' having taken account of the broadcaster's written representations. All preliminary views are provided to a panel of Ofcom's content board before the preliminary view is provided to the broadcaster.<sup>499</sup> An Ofcom executive will then make the final decision on the preliminary view. Following this, Ofcom will give the broadcaster ten working days to provide any further written representations; and
- (f) on receipt of any further representations from the broadcaster, Ofcom will reach a final decision. The outcome of Ofcom's investigation is published in Ofcom's Broadcast and On Demand Bulletin. The decision will report one of three possible outcomes:
  - (i) **breach**: the content was in breach of the Broadcasting Code; this will be recorded as a breach in the published decision;<sup>500</sup>
  - (ii) **resolved**: the content was in breach of the Broadcasting Code but the broadcaster has taken action to remedy the breach, such as implementing changes to internal processes to reduce the risk of future breaches of the Broadcasting Code; or made an on-air apology for the breach. In these occasions, the published decision will report the breach as resolved; or
  - (iii) **not in breach**: the content was not in breach of the Broadcasting Code; this will be recorded as not in breach in the published decision.

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<sup>499</sup> Ofcom, [General procedures for investigating breaches of broadcast licences](#).

<sup>500</sup> There are often several exchanges between Ofcom and the broadcaster before a breach is finalised. Broadcasters may take action to avoid the designation of breach but in some cases, the nature of the breach is such that a broadcaster is unable to take corrective action.

14.16 When a broadcaster breaches the Broadcasting Code deliberately, seriously, repeatedly or recklessly, Ofcom may impose statutory sanctions. These statutory sanctions include:

- issuing a direction that the broadcaster must not repeat a programme or broadcast;
- issuing a direction requiring the broadcaster to broadcast a correction or statement of Ofcom's findings;
- imposing financial penalties; and
- in particularly serious cases, shortening, suspending or revoking a broadcast licence.<sup>501</sup>

14.17 Ofcom also has powers<sup>502</sup> to include conditions in licences which require licence holders to comply with a direction given by Ofcom in relation to matters as specified in the licence. Ofcom, by issuing directions under licence conditions, can direct a broadcaster, in appropriate cases, to publish a summary of Ofcom's decision and/or require the broadcaster to broadcast a correction or statement of Ofcom's findings. These are similar in nature to the directions that Ofcom can impose under its statutory sanction process, as outlined in paragraph 14.16.

14.18 Regulating broadcasting standards is a resource intensive and complex process. Ofcom currently oversees over 1,000 licence holders who broadcast hundreds of thousands of hours of content in the UK. In the past five years, Ofcom has launched almost 900 investigations under the content standards procedures, and has identified 572 breaches of the Broadcasting Code. On 17 occasions, Ofcom has imposed statutory sanctions on broadcasters for deliberate, serious, repeated or reckless breaches.

14.19 Ofcom is required to balance the need to provide adequate protections to members of the public against content that is harmful and offensive, while ensuring that the broadcaster's freedom of expression and the right of audiences to receive ideas and information, is not unduly restricted. This requires judgement. Ofcom cannot monitor the licensing requirements of all licensees and monitor all content broadcast in the UK. Ofcom told us that it adopts a risk-based approach to identifying services which it considers

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<sup>501</sup> The powers to shorten, suspend or revoke a broadcast licence are not available in respect of all types of broadcast licence.

<sup>502</sup> The relevant powers depend on the type of broadcast licence, but see for example section 4(2) of the Broadcasting Act 1990 and section 4(2) of the Broadcasting Act 1996 in respect of television broadcast licences; section 87(2) of the Broadcasting Act 1990 and section 43(2) of the Broadcasting Act 1996 in respect of radio broadcast licences.

should, from time to time, be monitored. It focuses its resources on ‘the services that it considers are likely to present the greatest risk from a compliance perspective’.

14.20 All broadcasters are required to comply with the same rules set out in the Broadcasting Code, but Ofcom will take into account context, as summarised earlier, in applying the rules.

## **Fox’s approach to the broadcasting standards objectives in the UK**

14.21 A number of third parties submitted that Fox lacks a genuine commitment to the broadcasting standards objectives and that its compliance record with UK broadcasting standards is poor. For example, Media Matters for America submitted that ‘there continues to be an overwhelming pattern of failure by Fox to comply with the broadcasting standards objectives as set out in the Communications Act 2003.’<sup>503</sup> Similarly, the Campaign for Press and Broadcasting Freedom (CPBF) alleged that broadcasters owned or controlled by the MFT lack a commitment to broadcasting standards in general and that Fox News, in particular, had been the subject of a ‘disproportionate number of complaints’ in the UK and does not prioritise regulatory compliance.<sup>504</sup> The National Union of Journalists (NUJ) raised concerns that companies controlled by the MFT prioritise political influence over regulatory standards.<sup>505</sup> Other third parties made broadly similar claims that Fox lacks commitment to regulatory standards in general and broadcasting standards in particular.<sup>506</sup> We took these submissions into account when examining Fox’s approach to compliance and its compliance records, both in the UK and in other jurisdictions.

14.22 Fox is a broadcaster with a longstanding history in the UK. Its current UK channels are broadcast by Fox Network Group (FNG), by National Geographic and by STAR, Fox’s Asian TV business. In total, these divisions currently hold 12 UK broadcast licences.<sup>507,508,509</sup> Fox divisions previously held two other UK broadcast licences: one for the Fox News channel and one

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<sup>503</sup> [Submissions to issues statement.](#)

<sup>504</sup> [Submissions to issues statement.](#)

<sup>505</sup> [Submissions to issues statement.](#)

<sup>506</sup> [Avaaz](#) for example, alleged that Murdoch owned companies exhibit a top-down corporate culture that deprioritises regulatory and ethical compliance.

<sup>507</sup> The 12 Fox channels for which Fox currently holds licences to broadcast in the UK are: FOX; FOX +1; FOX HD; YourTV; YourTV+1; National Geographic Channel; National Geographic HD; Wild; Wild HD; STAR Gold; STAR Plus; and STAR Bharat (formerly STAR Life OK).

<sup>508</sup> In addition, Fox has a 50.1% stake in Baby TV, for which Baby Network Limited is the licence holder. Baby TV is an entertainment channel targeted at infants, toddlers and parents, which is compiled for audiences in the UK and Ireland.

<sup>509</sup> Your TV and YourTV+1 operate under the same licence in respect of their cable and satellite service, and a separate licence in respect of distribution of those channels via Digital Terrestrial Television (Freeview) technologies.

for the STAR Utsav channel. Fox News relinquished its licence to broadcast Fox News in the UK in November 2017 after the decision was taken to stop the international feed in August of that year; and STAR relinquished its licence to broadcast STAR Utsav in January 2018, on the same day that it stopped broadcasting in the UK. Our assessment considered the steps taken by Fox – which the business divisions FNG, National Geographic, STAR and Fox News are part of – to promote and support the broadcasting standards objectives and the compliance record of all of Fox’s 14 UK broadcast licences (ie current and former).

14.23 FNG and National Geographic broadcast entertainment and documentary channels in the UK. While much of the content carried on FNG and National Geographic channels is US-produced (eg FOX and YourTV carries more than 95% US-produced content), the majority of these channels<sup>510</sup> are compiled specifically for audiences in the UK and Ireland and carry some specific UK and European content. Most of the content is pre-recorded.

14.24 Content broadcast on STAR channels is produced in India for viewers in India and members of the South Asian communities globally. The three STAR channels currently broadcast in the UK are (and STAR Utsav was) targeted at audiences across Europe, via the same feed and compiled for a European audience. As with the FNG and National Geographic channels, most of the content is pre-recorded.

14.25 Fox News was broadcast in the UK as a direct simulcast from the US. Fox News is a US news channel, produced in the US, targeted at and therefore covering issues that are most relevant for US audiences. There is only one international feed so the content that was shown in the UK was identical to that shown in other countries outside the US. The only difference between US and UK content was the inclusion of Fox Extra inserts, which replaced US advertising. As it is a 24-hour news channel that focuses primarily on news and current affairs, its content was more likely than the other Fox channels broadcast in the UK to engage the Broadcasting Code’s requirements on due accuracy and due impartiality. Most of the broadcast material on Fox News is ‘live’.

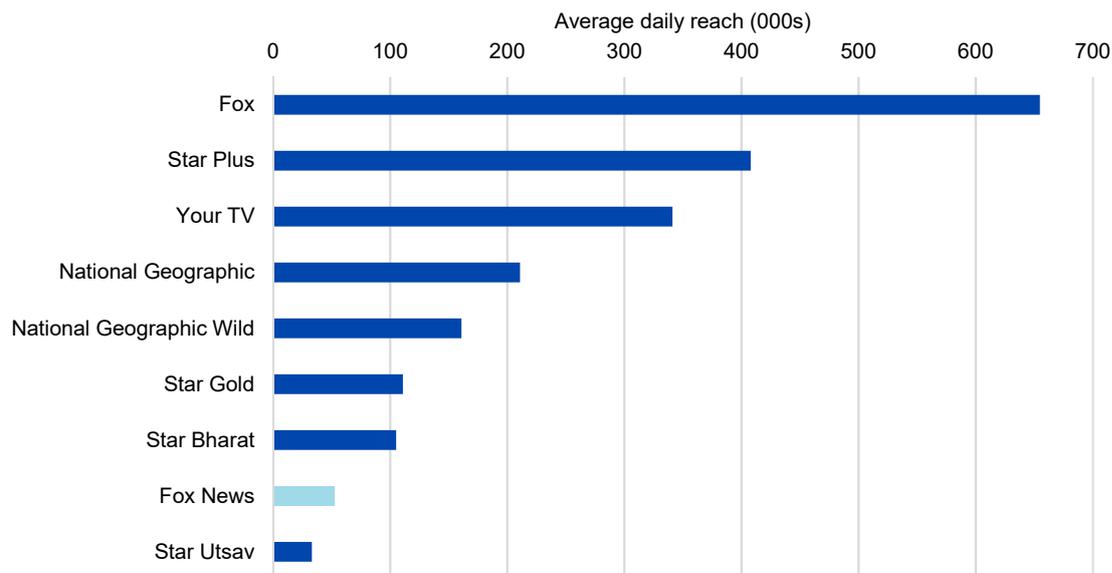
14.26 Figure 14.1 shows the average UK daily audience reach for the Fox channels based on BARB viewing data (see paragraph 10.17 for an explanation of how BARB is calculated).<sup>511</sup>

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<sup>510</sup> With the exception of National Geographic Wild, which is compiled for a European audience.

<sup>511</sup> We derived the average viewing figures using BARB reach data for three weeks (9 to 15 January 2017, 10 to 16 March 2017 and 17 to 23 July 2017).

**Figure 14.1: UK viewing figures by Fox channel**



Source: CMA analysis of BARB viewing data; average viewing figures of three weeks (9 to 15 January 2017, 10 to 16 March 2017 and 17 to 23 July 2017).

14.27 The Fox channels that are compiled specifically for audiences in the UK and Ireland have higher viewing figures in the UK than those compiled for European audiences or Fox News, which is a simulcast from the US and aimed at a US audience. The FOX channel is the most popular channel of all Fox channels broadcast in the UK, with an average daily reach of 655,000.<sup>512</sup> The most popular National Geographic channel attracts an average daily audience of 211,000 and STAR GOLD, the most popular of the STAR channels, has an average audience reach of 111,000. Fox News had much lower audience figures with an estimated daily reach of 50,000 (only STAR Utsav channels had lower audience figures).<sup>513</sup>

14.28 As outlined previously, the risk-based approach taken by Ofcom to monitoring and enforcing the Broadcasting Code takes into account context. This includes the expectations of the audience which are likely to differ depending on whether the content was created and/or compiled specifically for a UK audience. On this basis, the 13 licences of FNG, National Geographic and STAR have a similar context in that these channels primarily produce entertainment and documentary material compiled for UK or European audiences. Fox News has a different context as its primary focus is news and current affairs and it is a direct simulcast from the US targeted at US audiences, with smaller audiences in the UK than almost all of the other Fox channels. We considered these factors in assessing how much weight should

<sup>512</sup> The FOX channel is broadcast by the FNG business.

<sup>513</sup> STAR Utsav stopped broadcasting in the UK on 4 January 2018.

be attached to each of the licensees' approach to broadcasting standards and compliance records when considering Fox's overall commitment to the broadcasting standards objectives in the round.

14.29 First, we considered the policies, systems and procedures Fox has in place to promote and support the broadcasting standards objectives within its businesses that hold licences to broadcast in the UK (FNG, National Geographic, STAR and Fox News), and then assessed the breaches of the Broadcasting Code for all of the licences held by Fox during the past five years.

***Fox's steps to promote and support the broadcasting standards objectives***

14.30 As set out in chapter 13, in order to demonstrate a genuine commitment to the attainment of the broadcasting standards objectives, we consider that the relevant persons in control of or carrying on a media enterprise have to be able to provide evidence of the steps it has taken or will take to promote and support the broadcasting standards objectives within its business.

14.31 We assessed Fox's approach to promoting and supporting the attainment of the broadcasting standards objectives by examining the approach of the three businesses that currently hold UK broadcast licences (FNG, National Geographic and STAR) and that of Fox News. We looked at evidence on:

- (a) the policies, systems and procedures in place to see how up to date and effective they are, including the arrangements that the licence holders have in place to check, monitor and edit content before it is broadcast into the UK;
- (b) the resources committed to compliance, including the makeup and experience of the compliance teams;
- (c) the provision of training to editorial staff and members of the compliance teams;
- (d) the availability of up to date written guidance to support editorial decision making and compliance; and
- (e) Fox's interaction with Ofcom as the broadcasting regulator.

14.32 Fox has one set of compliance arrangements for its FNG and National Geographic channels, and a separate set of compliance arrangements for STAR channels. It also had separate compliance arrangements in place for Fox News when it was broadcasting in the UK.

## *FNG and National Geographic*

- 14.33 Oversight of compliance with UK broadcasting standards for FNG and National Geographic channels, which currently hold nine licences to broadcast in the UK, is undertaken by FNG's compliance team and legal department located in the UK.<sup>514</sup>
- 14.34 FNG has a dedicated team that oversees compliance with the Broadcasting Code for the FNG and National Geographic channels (the Code Compliance Team). The Code Compliance Team consists of four compliance viewers/editors dedicated to UK programming and the Head of Programming Operations and Compliance. Fox submitted that all team members have practical experience of the Broadcasting Code, gained at major broadcasting organisations. New joiners to the Code Compliance Team receive training and shadowing experience, as well as key documents, including an overview of the compliance process.
- 14.35 Any changes to the Broadcasting Code or Ofcom's Guidance Notes on the Broadcasting Code (the Guidance Notes), as well as any important Ofcom rulings, are communicated to the Code Compliance Team by the Head of Programming Operations and Compliance.
- 14.36 All FNG and National Geographic's UK premieres are viewed by the Code Compliance Team in their entirety for compliance with the Broadcasting Code and assessed for suitability against the scheduled time slot. They are then categorised as either:
- (a) fine for their scheduled slot in which case they are processed accordingly;
  - (b) in need of editing for their scheduled slot (in which case, where such editing is straightforward, it takes place before airing; where it is not, it is referred up to the Head of Programming Operations and Compliance for assessment); or
  - (c) unable to be edited for their scheduled slot, in which case the content is referred to the Head of Programming Operations and Compliance for a schedule amendment. The Code Compliance Team recheck the edited material to ensure that the correct version is broadcast.

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<sup>514</sup> In addition, the compliance function for Baby TV is carried out by the Vice President and Deputy General Counsel of FNG's legal team in London under the provisions of a shareholders agreement between FNG and Baby TV.

## STAR

- 14.37 STAR's Standards and Practices department deals with compliance for all STAR channels, including those broadcast in India and internationally. The Standards and Practices department comprises of 24 staff members. Nine members of the department deal with compliance issues with UK broadcasting standards. Content may be edited for broadcasting in the UK to comply with the Broadcasting Code. Edits are identified by the Standards and Practices department and carried out by the relevant production company.
- 14.38 Fox submitted that each member of the Standards and Practices department that deals with UK compliance receives Ofcom training when they join STAR, and team members continue to receive regular training sessions throughout their employment with STAR. Its Ofcom training programme has been in place since 2008. Sixteen members from across STAR's Standards and Practices department (including some members who do not on a day to day basis deal with Ofcom compliance issues), attended a two-day compliance training programme conducted by STAR's external adviser. The training covered the Broadcasting Code and accompanying Guidance Notes, as well as the British board of Film Classification Guidelines. This training was also attended by members of STAR's international business and content teams.

## Fox News

- 14.39 Fox News held a licence to broadcast Fox News in the UK from 2001 until November 2017. As a UK broadcast licence holder, Fox was required to meet certain regulatory standards including having in place adequate compliance arrangements.
- 14.40 All legal and compliance arrangements for Fox News were handled by its New York office. Fox told us that compliance with UK broadcasting standards was dealt with on a case by case basis, under the ultimate supervision of Fox News' General Counsel.
- 14.41 During phase 1, Ofcom found that Fox did not have any specific procedures in place for Fox News in the UK and that neither of the two key members of staff in the Fox News New York office had received specific training on the Broadcasting Code. For instance, Fox did not have:
- (a) a compliance team specifically to monitor the Broadcasting Code in respect of Fox News;
  - (b) a dedicated compliance officer in place to monitor and enforce compliance with the Broadcasting Code at Fox News; and

(c) any standalone training for Broadcasting Code issues at Fox News.

14.42 Fox told us that although it did not have UK specific procedures for Fox News, those members of staff in the US dealing with international broadcasting standards compliance had practical experience with UK broadcasting standards and the Broadcasting Code. Fox said that it addressed some of the requirements of the Broadcasting Code, citing the procedures it had in place for reviewing Fox Extra inserts – which unlike Fox News’ main programming were produced specifically for the international feed – for compliance with the Broadcasting Code. Fox told us that Fox News’ Senior Media Counsel, a member of the Fox News compliance team based in New York, had ‘multiple meetings with the producer responsible for overseeing Fox Extra’ and in these meetings, the Senior Media Counsel ‘outlined the Broadcasting Code requirements’ and ‘provided advice as to appropriate subject matter treatment, and assisted with vetting certain Fox Extra segments’. According to Fox, from these meetings, nearly ‘36% of segments were removed from the international feed to ensure compliance with the [Broadcasting] Code’.

14.43 However, in May 2017, during the course of phase 1 of the Inquiry, Ofcom sent a letter to Fox, stating that it had ‘significant concerns about the adequacy of the arrangements and procedures currently in place to ensure Fox News’ compliance with Ofcom codes and guidance’.

14.44 In response to questions from Ofcom on why Fox News did not have satisfactory processes in place, effectively for the whole period that it was operating in the UK, Fox said that it had considered Fox News’ handling of UK broadcasting standards was ‘appropriate and proportionate’ because:

(a) Fox News had in place ‘general controls and procedures’ that ensured proper source checking and accuracy in factual news prior to it being broadcast;

(b) the nature of the content was news and opinion programming produced for US audiences; and

(c) there was minimal penetration with audiences in the UK.

14.45 Following Fox’s response, Ofcom asked for further information to understand how Fox News went about securing compliance with the provisions of the Broadcasting Code, particularly with reference to impartiality.

14.46 Fox provided a lengthy response to Ofcom. In summary:

(a) Fox News offered UK-based audiences an opportunity to access diverse and alternative information they would not otherwise receive. It provided a

real 'window on the world', offering important variety to the mainstream news agenda;

- (b) Fox understood that Ofcom had always taken into account the importance of 'due' in due impartiality, with the result that preservation of impartiality has to be appropriate to the subject matter and nature of the programme (eg opinion content); the service on which the material is broadcast (eg an international channel); the likely expectation of the audience (eg the UK audience is fully aware that Fox News is a direct feed from the US); and the likely size and composition of the audience (Fox News had a relatively small UK audience);
- (c) Fox News had broadcast in the UK on the assumption that Ofcom agreed with its approach, as reflected in the fact that over the past ten years it had only been found to be in breach of the due impartiality requirements twice (plus one other instance of a breach in relation to the timing of the broadcast of coverage of the EU referendum);<sup>515</sup>
- (d) Fox News did not have special procedures in respect of programming produced for US audiences that specifically related to the Broadcasting Code.

14.47 Following a meeting with Ofcom on 11 May 2017 in which Fox News' compliance with its licence conditions was discussed, Fox wrote to Ofcom setting out the additional compliance arrangements that Fox News was going to put in place. These included:

- (a) the appointment of a dedicated Ofcom compliance officer (Fox News' Senior Media Counsel) with direct responsibility for all UK regulatory matters including the Broadcasting Code, Ofcom's Guidance Notes and all licence conditions. The Ofcom compliance officer would also have the authority to remove content from the international feed, so that it is not available in the UK, where it may raise compliance issues;
- (b) a specific protocol for upward referral for matters with a direct reporting line to Fox's Group General Counsel, Gerson Zweifach;
- (c) a gating process would be put in place for pre-recorded material, whereby the producer would assess the content and consider whether it may conflict with the Broadcasting Code. Where the producer suspects this to

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<sup>515</sup> The requirements applied at the elections/referendums (as per section six of the [Broadcasting Code](#)).

be the case, the matter would be reported to the Ofcom compliance officer or another member of Fox's legal team;

- (d) for live output (which accounted for the majority of Fox News' broadcast), there would be a similar gating process whereby the producer, prior to live output being broadcast, would consider whether the content was likely to conflict with the Broadcasting Code. As with pre-recorded material, this would be escalated to the dedicated Ofcom compliance officer or the legal team. As noted in (a), the dedicated Ofcom compliance officer would have the authority to remove content from the live feed; and
- (e) introduction of training seminars on the Broadcasting Code; and incorporation of Ofcom-specific guidance into compliance, legal and regulatory training under the direct supervision of one of Fox's Group Chief Compliance Officers (GCCOs).

14.48 In order to assess the adequacy of the proposed changes, Ofcom asked Fox to provide further detail on the additional arrangements, including which staff would be involved with UK compliance. Fox responded by saying that it was preparing written instructions to guide producers. The new procedures were codified into written guidance which was shared with all relevant employees at Fox News, including all editorial staff.

14.49 Ofcom concluded in its Public Interest Report that the 'improvements made by Fox to the Fox News compliance arrangements and procedures are sufficient to meet the requirements of its licence'.<sup>516</sup>

*Fox News' compliance record after the introduction of the new compliance arrangements*

14.50 We looked at Fox News' record since the introduction of the new policies, systems and procedures. We note two particular events:

- (a) the first is the decision by Ofcom published on 6 November 2017 finding that an episode of Fox News' Tucker Carlson Tonight breached three of the rules of the Broadcasting Code on: adequate representation of alternative views on discussions programmes; due impartiality on matters of major political or industrial controversy; and inclusion of a wide range of significant views when dealing with major matters of political or industrial controversy.<sup>517</sup> As noted in paragraph 14.74, we consider the decision to broadcast that content in the UK as a significant oversight by Fox News.

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<sup>516</sup> [Ofcom Public Interest Report](#), paragraph 10.42.

<sup>517</sup> [Ofcom Broadcast and On-Demand Bulletin](#), Issue number 341.

The programme was broadcast on 25 May 2017, ten days after Fox said new compliance arrangements were put in place at Fox News. Fox explained to us that this was just after key editorial and legal staff had received training on the Broadcasting Code but before it had put in place new procedures to comply with it. Fox subsequently conducted additional training dedicated to due impartiality for the producers of Fox News' opinion commentary programmes; and

(b) Fox News decided not to broadcast its service in the UK on 8 June 2017, the day of the general election, to avoid any potential breach of the Broadcasting Code. Fox was mindful of the dangers of contravening the Broadcasting Code as it had previously breached rule 6.4 when it covered the June 2016 referendum on the UK's membership of the EU.

14.51 Fox submitted that since introducing the 'enhanced Ofcom compliance arrangements' the decision not to broadcast on the day of the UK general election was the only instance where Fox News needed to change its content to ensure compliance with the Broadcasting Code. It noted that removing content is seen as the option of last resort where it is considered necessary to ensure compliance. It went on to say that the training seminars conducted in May and July 2017 were designed specifically to increase Fox News' employees' (in particular, Fox News' editorial staff) awareness of the Broadcasting Code. According to Fox, this mitigated the need to remove or amend content.

14.52 Following the introduction of the new compliance arrangements, representations were made to the then Secretary of State when she was considering whether to refer the Transaction to us, alleging that the content on ten Fox News programmes was in breach of the Broadcasting Code. Ofcom assessed the content in all of these programmes and concluded that none warranted opening an investigation.<sup>518</sup>

14.53 The new compliance arrangements adopted by Fox News were far more extensive than those that had been in place. We note that the breach in the Tucker Carlson programme was broadcast by Fox News on 25 May 2017, shortly after the new compliance arrangements had been put in place. However, we note that the decision not to broadcast on the day of the 2017 general election suggested that Fox News had taken due notice of the requirements of the Broadcasting Code and the compliance arrangements introduced were being applied. Given Fox News stopped broadcasting in the

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<sup>518</sup> Ofcom, [Letter to DCMS](#), 4 September 2017, page 3.

UK in August 2017, we had limited evidence to assess the efficacy of the new arrangements. However, we note that Ofcom concluded in phase 1 that the improvements made by Fox to the Fox News compliance arrangements and procedures were sufficient to meet the requirements of its licence.<sup>519</sup>

#### *Fox's decision to stop broadcasting Fox News in the UK*

- 14.54 On 29 August 2017, Fox announced that it would no longer broadcast Fox News in the UK. Fox told us that Fox News' agreement with Sky for distribution in the UK was due to expire in December 2017 and that it did not intend to renew the agreement. Fox told us that this was because Fox News had 'minimal audience penetration in the UK' and generated limited revenue from the UK feed. We note that broadcasting Fox News in the UK was not a profitable venture for Fox: Fox News made [redacted] of approximately [redacted] between 2013 and 2017. By comparison, the FNG, National Geographic and STAR UK divisions were far more profitable, generating average net profits in excess of [redacted] and [redacted] respectively over the same period.<sup>520</sup>
- 14.55 In addition, Fox told us that it had become clear that 'Fox News had become the focus of a significant number of complaints to Ofcom and that this would have increased further the cost related to maintaining the service in the UK'. Fox News had received requests from Ofcom for recordings of 11 programmes for the first eight months of 2017; this followed nine instances in 2016, three in 2015 and none in 2014.<sup>521</sup> In view of these considerations, the decision to stop broadcasting Fox News in the UK was brought forward to the end of August 2017. The decision was taken by Rupert Murdoch on 22 August 2017, on receipt of privileged legal advice. Given the limited economic significance of the decision, it did not require board approval.
- 14.56 When questioned about why Fox News had not stopped broadcasting earlier in the UK (given that it has always had a limited audience reach and had made losses in each year since it started, save for one year), Fox told us that the 'material development' that led to the decision was the 'increasing number of complaints received', and not the introduction of the new compliance arrangements.

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<sup>519</sup> [Ofcom Public Interest Report](#), paragraph 10.42.

<sup>520</sup> Fox provided a consolidated profit and loss account for FNG and National Geographic divisions.

<sup>521</sup> Paragraph 14.79 for more detail on complaints about Fox News.

*Summary of the steps Fox has taken to promote and support the broadcasting standards objectives*

- 14.57 We note that there are similarities between STAR, FNG and National Geographic, both in terms of the content broadcast and the compliance measures each have in place. Content broadcast on the five FNG and four National Geographic channels is largely produced in the US, and all but one are compiled specifically for audiences in the UK and Ireland (the exception being National Geographic Wild, which is compiled for a European-wide audience). The three STAR channels (and STAR Utsav when it was broadcast in the UK), while produced in India, are targeted at audiences across Europe and compiled for a European audience.
- 14.58 Each of these channels predominately broadcasts pre-recorded content and very rarely shows news or current affairs or report on matters of political or industrial controversy. All of the divisions have in place similar policies, systems and procedures to support and promote the attainment of the broadcasting standards objectives. These include having in place a dedicated compliance team trained specifically on UK standards and the Broadcasting Code. In addition, all three divisions have effective ex ante controls to monitor, review and edit content to assess compliance with UK standards and the Broadcasting Code, before it is broadcast in the UK and Ireland.
- 14.59 The picture at Fox News was different. Unlike STAR, FNG and National Geographic, Fox News is produced for US audiences, and when it was broadcast in the UK, it was simulcast through an international feed unedited, except for the Fox Extra inserts. We also note that Fox News had a small audience with an average daily reach of 50,000 which was the lowest viewing figures for all of the Fox channels broadcast in the UK (except for STAR Utsav).
- 14.60 All legal and compliance arrangements for Fox News were handled by its New York office. Prior to May 2017, Fox News did not have a compliance team or officers specifically dedicated to monitoring Fox News' content for compliance with UK broadcasting standards. Nor had specific training on the Broadcasting Code been given to members of staff dealing with international broadcasting standards. However, Fox noted that although it did not have UK-specific procedures, its procedures at that time addressed some of the requirements of the Broadcasting Code. Fox cited the example of when the Fox News international compliance team carried out a review of the Fox Extra inserts and removed content to ensure compliance with the Broadcasting Code.
- 14.61 Fox explained that the approach taken by Fox News was appropriate and proportionate. It was founded both on an understanding of the importance of

context in applying the Broadcasting Code to content, highlighting that Fox News was a direct simulcast from the US aimed at a US audience and that it had a small audience in the UK; and on the assumption that Ofcom agreed with the approach it had taken. In Fox's view, this was demonstrated by the fact that, over a ten-year period, Ofcom had only found Fox News to be in breach of the impartiality requirements three times.

14.62 Ofcom, however, during phase 1 of the Inquiry, found that Fox News' compliance arrangements were inadequate and did not satisfy the requirements of Fox News' UK broadcast licence. After Ofcom raised its concerns, Fox News swiftly implemented new arrangements, including the assignment of a dedicated compliance officer to monitor its compliance with the Broadcasting Code, compliance and editorial staff training on the requirements of the Broadcasting Code and the monitoring of content to ensure compliance with the Broadcasting Code. These measures were in place from May to August 2017.

### ***Assessing records of compliance with broadcasting regulation in the UK***

14.63 As explained above, the broadcasting standards objectives are given effect to by a number of codes. These include the:

- **Broadcasting Code:** sets out rules which set the standards for the content of TV and radio programmes;
- **Cross-promotion Code:** sets out rules relating to cross-promotions on TV, ie promotions relating to broadcasting related services (such as promotions of channels or programmes or catch-up players);
- **Code on the Scheduling of Television Advertising (COSTA):** requires broadcasters to ensure that TV advertising and teleshopping are readily recognisable and distinguishable from editorial content and kept distinct from other parts of the programme service, and also includes technical rules which set strict limitations on the amount and scheduling of TV advertising;
- **Code on the Prevention of Undue Discrimination between Broadcast Advertisers (CUDBPA):** sets out rules intended to prevent broadcasters from exercising undue discrimination between advertisers that seek to have their advertisements included in TV or radio services; and
- **UK Code of Broadcast Advertising (the BCAP Code):** sets out rules which set the standards for TV and radio advertising.

14.64 Our starting point to assess the compliance records of the Parties was Ofcom's assessment at phase 1. We asked Ofcom about its approach to examining broadcasters' records of compliance. Ofcom explained its methodology for calculating the number of breaches at phase 1 and highlighted two points as particularly important:

- (a) in its phase 1 review, Ofcom assessed compliance with all the relevant codes which give effect to the broadcasting standards objectives.<sup>522</sup> Therefore in calculating the number of breaches of Fox and Sky (and comparators Discovery and Viacom), it considered breaches of all of the codes. However, Ofcom noted that it generally views breaches of COSTA to be of a lower degree of severity and gravity to breaches of its content rules (ie of the Broadcasting Code) as the content rules are designed to protect audiences from the inclusion of potentially serious harmful or offensive material; and
- (b) while Ofcom will, in its content standards compliance decisions, consider a broadcaster has breached a rule (or rules) in connection with a particular programme (or programmes), for the purposes of compiling the compliance record of a broadcaster, it will count the outcome of each investigation into potential breaches of the relevant rules, as published in its Broadcast and On Demand Bulletin, as the applicable decision. This means that, regardless of whether an investigation covers single or multiple programmes, issues and/or rules, Ofcom records one decision, taken as a whole, at the end of its investigation. Accordingly, when considering the compliance history of a broadcaster, where Ofcom has published one decision about a breach or breaches by that broadcaster, it would count this as one breach.

14.65 The rationale behind Ofcom's methodology is that:

- in any given case, there are often a range of rules that might be breached. Ofcom will therefore tend to investigate content under the most relevant rules. Therefore, the outcome of each investigation would count as a single breach/not in breach outcome, otherwise it would artificially and unfairly inflate a broadcaster's compliance record by counting each separate breach of an individual code rule (even from the same case) as a single breach; and

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<sup>522</sup> See also [Ofcom Public Interest Report](#), paragraph 10.11 and footnote 246.

- Ofcom might consider multiple programmes in the same investigation because they all relate to the same single issue. An adverse finding would count as one breach.

14.66 We applied the same methodology for calculating the number of breaches when we assessed the compliance history of the Parties and other broadcasters.

### ***Fox's record of compliance with the Broadcasting Code***

14.67 Fox has a longstanding history of broadcasting in the UK. In addition to our review of its compliance policies, systems and procedures, we also considered the compliance record of all 14 Fox UK licences over the past five years. We received a number of submissions from third parties, including Media Matters for America,<sup>523</sup> Avaaz<sup>524</sup> and the CPBF<sup>525</sup> alleging that Fox's record of compliance with the Broadcasting Code was poor.

14.68 Ofcom recorded 16 breaches (one was recorded as resolved) against Fox between 2013 and 2017.<sup>526</sup> Table 14.1 provides a breakdown of the breaches by the nature of the breach and Figure 14.2 sets out the breaches by channel.

**Table 14.1: Breaches of the Broadcasting Code recorded against Fox between 2013 and 2017<sup>527</sup>**

<i>Nature of issue</i>	<i>Breached</i>	<i>Resolved</i>
Protection of under 18s	1	1
Harm	2	-
Generally accepted standards	1	-
Sponsorship/Promotion	5	-
Elections/Referendums	1	-
Due impartiality/bias	4	-
Advertising/editorial content	1	-
Total	15	1

Source: CMA analysis of Ofcom data.

<sup>523</sup> [Media Matters for America submission.](#)

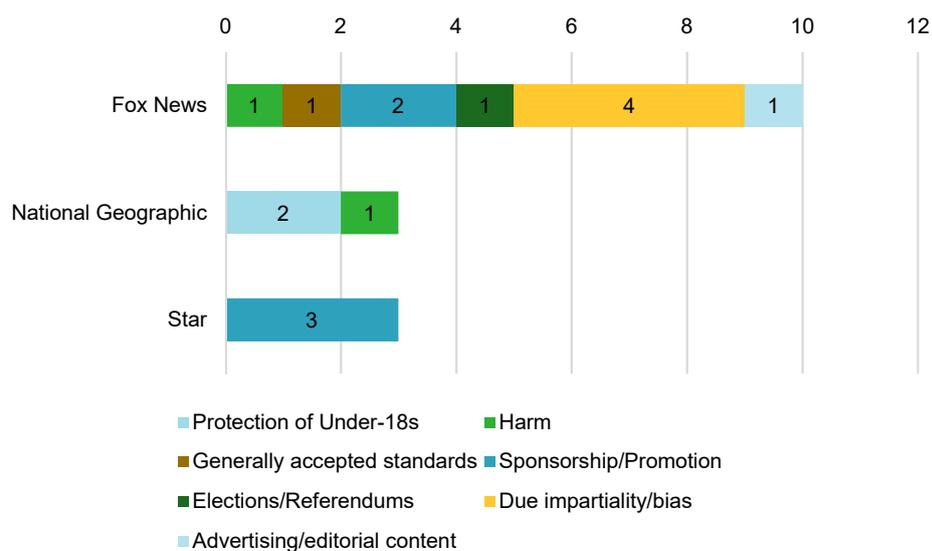
<sup>524</sup> [Avaaz submission.](#)

<sup>525</sup> [CPBF submission.](#)

<sup>526</sup> Table 14.1 for details of 'breached' and 'resolved'.

<sup>527</sup> The breaches included in Table 14.1 and all of the tables and figures hereafter include resolved breaches. See paragraph 14.69 in chapter 14 and Appendix B for an explanation of breaches and resolved breaches.

**Figure 14.2: Number of breaches of the Broadcasting Code recorded against Fox, by channel and type of breach between 2013 and 2017**



Source: CMA analysis of Ofcom data.

14.69 The breakdown of the breaches by Fox channels is as follows:

- (a) more than half of the breaches (ten of the 16) were recorded against Fox News (see paragraph 14.71 onwards for more detail);
- (b) three of the breaches related to programmes shown on the National Geographic Channel; two breaches related to failure to protect under 18s (in its final decision, Ofcom considered one of these breaches resolved<sup>528</sup> as National Geographic had undertaken additional compliance arrangements as a result of this incident) and the other breach was about content that could have caused harm to viewers with photosensitive epilepsy; and
- (c) three of the breaches were recorded against STAR TV, all of them related to breaches of section nine of the Broadcasting Code (commercial references in TV programming) and dated back to 2012 and 2013.<sup>529</sup>

14.70 Fox News has attracted more breaches than any of the other Fox channels broadcast in the UK and is responsible for 62.5% of Fox’s total breaches. We now consider the nature of the breaches by Fox News in more detail.

<sup>528</sup> Footnote 500.

<sup>529</sup> In addition to breaches of the [Broadcasting Code](#), we note that STAR Bharat, a STAR channel, breached COSTA once in 2013.

## *Fox News' compliance with the Broadcasting Code*

14.71 Ten of the 16 breaches Ofcom recorded against Fox were by Fox News.<sup>530</sup> Details of the ten breaches recorded against Fox News between 2013 and November 2017 can be found in Appendix L. We summarise them here.

14.72 Five of the ten breaches related to sections one, two and nine of the Broadcasting Code:

- (a) the first breach concerned section one (protection of children under the age of 18) and related to content that was aired before 2013;
- (b) the breach of section two was in relation to a programme that discussed the attack on the offices of the French satirical weekly newspaper Charlie Hebdo in Paris on 7 January 2015 (the Hebdo Attack) and incidents in the Île-de-France region from 7 January 2015 to 9 January 2015. Assertions were made in the programme to the effect that areas of Paris were 'no-go zones' and that the English city of Birmingham was an example of a city 'where non-Muslims just simply don't go'. Although Fox apologised for these statements, Ofcom found that the corrections did not sufficiently mitigate the materially misleading statements and potential harm and offence caused to viewers by the programme; and
- (c) three of the ten breaches related to section nine of the Broadcasting Code, which is concerned broadly with the inappropriate use of commercial references.

14.73 The other five breaches by Fox News were of the requirement for due impartiality and the specific impartiality requirements relating to broadcasting during elections and referendums (ie section five and section six of the Broadcasting Code). These five breaches related to programmes broadcast on Fox News between April 2016 and May 2017.<sup>531</sup> Details of the five breaches can be found in Appendix L, and are summarised here:

- (a) the first breach related to content broadcast on Fox Extra, which featured a commentator giving their views on and generally criticising abortion using highly emotive language. The subject was relevant to viewers in the UK and in Ofcom's view was a matter of public policy that engaged the impartiality provisions of the Broadcasting Code;

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<sup>530</sup> Ofcom's decision was published in January 2013, which is within our time period of analysis, but related to content broadcast in July 2012.

<sup>531</sup> Ofcom's breach decisions were published in the period between August 2016 and November 2017.

- (b) the second breach concerned the special impartiality required by broadcasters at the time of elections and referendums, where a programme discussed and analysed issues relating to the EU referendum while the polls were still open in the UK. Ofcom noted that it had regard to the fact that the prohibition under this rule was not qualified in any way, such that it would not be possible for a broadcaster to justify the material by context;
- (c) the third breach related to programming that had breached both section five and section six of the Broadcasting Code. Routine monitoring by Ofcom identified three programmes in which a number of highly critical statements were made about Hilary Clinton along with various statements which were described as supporting the policies of Donald Trump. Ofcom concluded that the content did not preserve due impartiality;
- (d) the fourth breach related to content covering President Trump's Executive Order relating to the restriction of travel from seven majority-Muslim countries. Ofcom considered this was a matter of political and public controversy which was of particular relevance and significance to UK viewers. The opening monologue featured several video clips of public figures reacting critically to the Executive Order. Ofcom concluded that the programme had breached impartiality rules; and
- (e) the fifth and most recent breach related to an episode of Tucker Carlson Tonight. In the episode, Tucker Carlson interviewed two people (Nigel Farage and Mark Steyn) to discuss the bomb attack on 22 May 2017 in Manchester. The programme included highly critical statements about: Theresa May; Baroness Hughes; the Deputy Mayor of Manchester; Ian Hopkins; the Chief Constable of Greater Manchester; the UK government; and the UK authorities. These included accusations that particular individuals and public bodies had done nothing to: counter terrorism; stop radicalisation; protect citizens from terrorism; or protect 'thousands of underage girls' from rape and abuse. There was no reflection of the views of the UK government or any of the authorities or people criticised, which Ofcom said it would have expected given the nature and amount of criticism made against them in the programme. Ofcom concluded that the programme had breached impartiality rules.

14.74 Our qualitative review of the breaches recorded against Fox News indicates a mixed picture. Some were more technical breaches of the Broadcasting Code that were similar in nature to breaches by Fox's other channels and other broadcasters operating in the UK. Five, however, were breaches of section five and section six of the Broadcasting Code, where the content was considered by Ofcom to be a matter of political or industrial controversy

relevant to the UK, and therefore required Fox News to offer some degree of impartiality in its discussion of these matters. Fox News, in these instances, did not take the necessary steps to ensure its content complied with the Broadcasting Code. Ofcom considered the content to be in breach even after taking into account all of the context relevant to Fox News, such as audience expectations.

14.75 In particular, we consider that in relation to the material broadcast on Tucker Carlson Tonight on the terrorist attack in Manchester, and against the backdrop of such a significant national tragedy, Fox News, as a UK broadcast licence holder, knowing that such content was specific to the UK, should have taken appropriate steps. These could have included efforts to provide a more impartial viewpoint or editing the international feed so that the programme was not broadcast to viewers in the UK. This editing could have been achieved either by stopping the feed (like Fox opted to do on the day of the UK general election in June 2017) or by replacing the content with another programme.

14.76 Nevertheless, we note that Ofcom did not consider that the breach in relation to Tucker Carlson Tonight or any other programme broadcast on Fox News in the 16 years that it was broadcast in the UK, were serious enough to warrant a sanction. As the regulator in this sector, we place due weight on Ofcom's view on this matter.

14.77 We also note that all ten breaches recorded against Fox News were related to non-news programming or Fox Extra inserts which are by their very nature discussion pieces. We consider the distinction between news and non-news coverage and Fox News' compliance record with respect to each as an important consideration in our assessment of Fox's overall compliance record.

14.78 The number of complaints made against Fox News increased markedly in 2017, following the announcement of the Transaction in December 2016. Ofcom told us that it had assessed 48 complaints about 13 programmes aired on Fox News in 2017,<sup>532</sup> and this followed 11 complaints in the full calendar year 2016, eight complaints in 2015, none in 2014, and four complaints in 2013.<sup>533</sup>

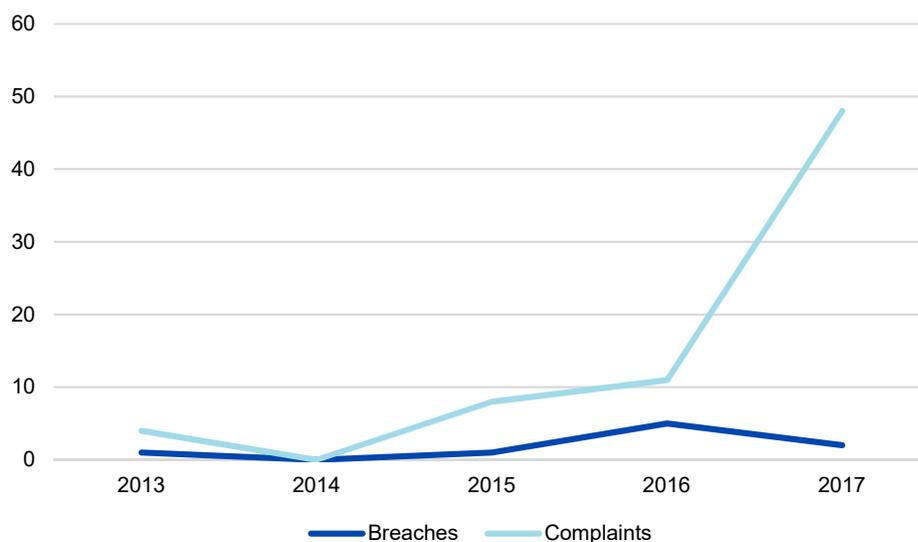
14.79 Figure 14.3 provides a breakdown of the number of complaints made against Fox News and the number of those complaints that resulted in Ofcom finding a breach of the Broadcasting Code.

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<sup>532</sup> Until August 2017 when Fox News stopped broadcasting in the UK.

<sup>533</sup> Ofcom contacted Fox for recordings of programmes 11 times in the first eight months of 2017; nine times in 2016; three times in 2015 and none in 2014. See paragraph 14.55 for further detail.

**Figure 14.3: Number of breaches and complaints against Fox News**



Source: CMA analysis of Fox data.

14.80 In explaining the increase in the number of breaches in more recent years, Fox told us that Fox News had become a ‘lightning rod for complaints’ since the Transaction was announced. It had become a target for campaign groups who were triggered by the Transaction to ‘generate a lot of complaints’.

14.81 Submissions made to the then Secretary of State during her consideration of whether to refer the Transaction to us and on what grounds, argued that the number of complaints against Fox News in the past was low because the audience was small and self-selecting and the viewers were likely to be sympathetic to the style and content of its programming. Avaaz told us that ‘Ofcom’s approach to assessing breaches by Fox was limited and incomplete, as it relied on complaints by a small, self-selecting audience’.<sup>534</sup> Avaaz also stated that Fox’s ‘record of non-compliance was greater than even the complaints against it’.<sup>535</sup>

14.82 However, Ofcom’s position is that all broadcast audiences are self-selecting so the same principle would apply to the compliance history of all broadcasters. Ofcom will investigate programmes which have received one complaint or thousands of complaints such that the relationship between the number of complaints and the number of investigations is not direct. In addition to reviewing complaints, Ofcom also noted that it undertakes targeted monitoring of channels from time to time, which has included Fox News. Ofcom’s approach would have therefore detected non-compliance of Fox as much as it would have for any other broadcaster.

<sup>534</sup> [Avaaz submission, page 2.](#)

<sup>535</sup> [Avaaz submission, page 2.](#)

- 14.83 The increase in complaints meant that the content broadcast on Fox News had come under greater scrutiny from Ofcom. With the increase in the number of complaints, Ofcom was made aware of broadcast material that was potentially in breach of the Broadcasting Code that might otherwise have been undetected had it not been the subject of a complaint. However, we note that while the number of complaints made against Fox News increased significantly during the period that the Transaction has been subject to regulatory approval, Ofcom decided only two of the 48 complaints raised substantive issues warranting further investigation.
- 14.84 The evidence we obtained does not indicate that Ofcom's approach to monitoring and enforcing the Broadcasting Code resulted in undetected breaches at Fox News. We saw little evidence to support the view that there is a correlation between the number of complaints and breaches of the Broadcasting Code. We, therefore, consider that the number of breaches of the Broadcasting Code, as recorded by Ofcom following its investigations, is more informative about a broadcaster's compliance with the Broadcasting Code than the number of complaints. However, we are mindful that a quantitative analysis only goes so far and therefore, in our view, it is our qualitative review of the nature, as well as the number, of these breaches of the Broadcasting Code, alongside our examination of the steps Fox has taken to promote and support compliance with the broadcasting standards objectives, that are particularly informative in our assessment of whether Fox has the necessary genuine commitment.

### ***Comparison with other international news broadcasters***

- 14.85 To understand the relative significance of the breaches by Fox News, we considered the compliance record of Fox News against other international news providers operating in the UK.
- 14.86 Fox submitted a list of 28 companies that it regarded as actual or potential competitors for the provision of news content inside the UK. These included UK broadcasters such as BBC and ITV as well as international broadcasters such as Al Jazeera, CNN and RT.
- 14.87 We consider that the international broadcasters Al Jazeera, CNN and RT are reasonable comparators against which to assess Fox News' compliance record on the basis that they are all international news channels broadcast in the UK. These international broadcasters may also have similar context to Fox News in terms of the application of the Broadcasting Code to content: CNN and Al Jazeera told us that their channels are not compiled specifically for UK audiences, which is similar to Fox News. We also note that the comparator broadcasters have relatively small audience sizes, albeit all of

them attracted more viewers than Fox News when it was broadcasting in the UK.<sup>536</sup> As explained earlier, the way in which the due impartiality requirements are applied by Ofcom depends on context.<sup>537</sup> Ofcom’s approach may vary according to the nature of the subject, the type of programme and channel, the likely expectations of the audience as to content, and the extent to which the content and approach is signalled to the audience.

14.88 We considered a number of different ways in which to compare the compliance record of Fox News with that of the other international news broadcasters (Al Jazeera, CNN and RT), including a quantitative analysis that sought to control for audience size.<sup>538</sup> Following representations from Fox, we consulted with Ofcom on our approach.<sup>539</sup> We concluded that isolating audience size as a means of enabling a meaningful comparison does not adequately capture the range of qualitative factors that Ofcom takes into account when assessing whether a programme is in breach of the Broadcasting Code.

14.89 Table 14.2 and Figure 4 considers the broadcast compliance of Fox News relative to the other international news broadcaster comparators (Al Jazeera, CNN and RT).

**Table 14.2: Breaches of the Broadcasting Code recorded against Fox News, Al Jazeera, CNN and RT between 2013 and 2017**

<i>Nature of issue</i>	<i>Fox News</i>	<i>Al Jazeera</i>	<i>CNN</i>	<i>RT</i>
Protection of under 18s	-	-	-	2
Harm	1	-	-	1
Generally accepted standards	1	-	1	-
Sponsorship/Promotion	2	1	1	-
Elections/Referendums	1	-	-	1
Due impartiality/bias	4	-	1	6
Advertising/editorial content	1	-	-	-
Total	10	1	3	10

Source: CMA analysis of Ofcom data

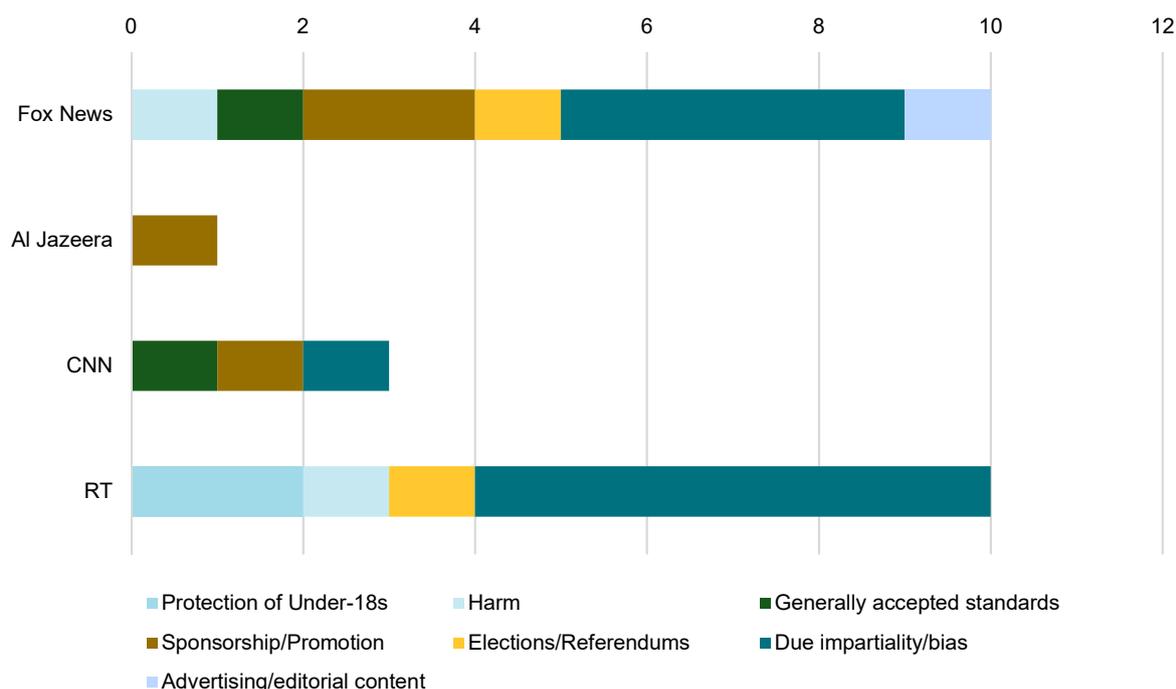
<sup>536</sup> Based on BARB data, the average daily reach of Fox News was 52,000; for RT it was 172,000; and for Al Jazeera it was 269,000. BARB does not provide viewing data for CNN because it is a pan-regional network with international scale. CNN provided survey data about its UK audiences from two independent sources. While comparison should not be made with BARB figures due to different methodology, the independent survey data provided showed average daily audiences in the UK for CNN of up to around one million viewers per day. This is predominantly amongst upscale and affluent demographics.

<sup>537</sup> Paragraph 14.9 for a description of ‘context’. See ‘Meaning of “due impartiality”’, the [Broadcasting Code](#), section five and section six, for meanings relating to elections and referendums.

<sup>538</sup> The rationale being that a broadcaster with fewer viewers may be likely to be subject to less scrutiny from the regulator in the longer term. See paragraph 14.84.

<sup>539</sup> [Fox response to provisional findings](#), paragraph 5.18.

**Figure 4: Breaches of the Broadcasting Code recorded against Fox, Al Jazeera, CNN and RT between 2013 and 2017**



Source: CMA analysis of Ofcom data.

14.90 Table 14.2 shows that in absolute terms, Fox News had more breaches of the Broadcasting Code than Al Jazeera and CNN, and the same number of breaches of the Broadcasting Code as RT. However, we note that RT had two breaches of COSTA (which were in addition to the ten breaches of the Broadcasting Code listed in Table 14.2), which Ofcom generally views to be of ‘lower degree of severity and gravity’ compared with breaches of the Broadcasting Code.<sup>540</sup> Below, we consider the compliance record of the three comparable broadcasters.

14.91 Al Jazeera’s only breach of the Broadcasting Code between January 2013 and October 2017 was in relation to sponsorship of Al Jazeera weather reports by Qatar Airways. Ofcom found that Al Jazeera had breached rules 9.19 and 9.22 (a) of the Broadcasting Code. Given the nature of the breach, and noting that it took place nearly five years ago, we do not consider that the breach recorded against Al Jazeera was particularly serious.

14.92 Two of the three breaches recorded against CNN resulted after a lengthy investigation in which Ofcom focused on the funding of factual programmes by third parties likely to have vested interests in the content of those programmes. This was different from a normal investigation in that it covered programmes broadcast in over 200 countries by three channels (CNN, BBC

<sup>540</sup> Paragraph 14.64 for further details on assessing records of compliance with broadcasting regulation in the UK.

World News and CNBC). Ofcom concluded that although the investigation identified a number of practices which took place between 2009 and 2011 that were at odds with the Broadcasting Code, Ofcom did not find evidence that the way programmes were funded compromised the broadcasters' editorial independence.

14.93 In relation to CNN specifically, Ofcom found that CNN had breached rule 5.8 on four occasions and the provisions relating to commercial references a further 22 times during the period under review. However, based on our methodology for counting breaches, these infringements should be recorded only as two individual breaches of the Broadcasting Code. This is consistent with Ofcom's approach.<sup>541</sup> We also note that the content was aired over eight years ago. The third and final breach recorded against CNN was in relation to rules about protecting under 18s. Ofcom found that, although CNN made concerted efforts to alert viewers to the distressing nature of the report broadcast, the content was too graphic for broadcast at 8.00pm, an hour before the watershed.

14.94 We note that RT breached the Broadcasting Code ten times between January 2013 and October 2017, which is the same number of infringements as Fox News. Seven of the ten breaches recorded against RT were on the provisions of due impartiality and special impartiality (sections five and six of the Broadcasting Code). By comparison, as outlined in paragraph 14.73, Fox News breached these provisions of the Broadcasting Code five times in the past five years.<sup>542</sup>

14.95 For two of the ten breaches recorded against RT, Ofcom found that the content was of such a serious nature that it directed the licence holder to broadcast a summary of its decisions. Both breaches related to content broadcast as part of an investigative current affairs series called 'The Truthseeker'.<sup>543</sup>

14.96 Ofcom told us that it could have chosen to impose a statutory sanction (under its separate procedures for issuing sanctions for breaches of broadcast licences)<sup>544</sup> but considered that in these cases it would be most appropriate to give a direction under the terms of the relevant licence, to ensure the

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<sup>541</sup> Footnote 487, see paragraph 14.64 for details on methodology for counting breaches.

<sup>542</sup> All five of these breaches were for programmes broadcast specifically within the 13-month period of April 2016 to May 2017 (footnote 530).

<sup>543</sup> 'The Truthseeker' was a series of 13-minute programmes, produced in-house by RT, which has now been terminated. TV Novosti, the licence holder for the RT and RT Europe channels, said that Truthseeker was 'designed to cover news-related events in a non-news format with a focus on topics that were inadequately covered by mainstream media'.

<sup>544</sup> For more detail, see Ofcom's [Procedures for the consideration of statutory sanctions in breaches of broadcast licences](#).

breaches were brought to the attention of the licensee's audiences quickly. Therefore, although Ofcom did not impose a statutory sanction in accordance with its sanctions procedures, this was intended to have an equivalent deterrent effect against future misconduct given the serious nature of the breaches concerned. We note that Fox has not been directed to broadcast a summary of any decision in which it has been found to be in breach of the Broadcasting Code in the past five years.

14.97 Based on our qualitative assessment set out above, we consider that Fox News' compliance record is worse than that of Al Jazeera and CNN, but in our view, it is better than that of RT. We note that Fox News had two fewer breaches of the impartiality provisions of the Broadcasting Code, and unlike RT, Fox News has not been issued directions under its licence conditions in the past five years.

### ***Summary of the compliance records of Fox and Fox News***

14.98 The assessment of Fox's compliance record in the UK is an important part of our assessment of Fox's commitment to the broadcasting standards objectives. We reviewed Fox's compliance records across all 14 licences that it has held during the past five years. Overall, we consider that Fox's record of 16 breaches of the Broadcasting Code in the past five years raises no particular concerns. Fox News was responsible for ten of Fox's 16 breaches. Excluding Fox News, the other 13 licences together breached the Broadcasting Code only six times in total in the past five years.

14.99 We compared Fox News' compliance record with that of Al Jazeera, RT and CNN. More breaches of the Broadcasting Code have been recorded against Fox News than Al Jazeera and CNN whereas the same number has been recorded for RT. We note, however, that Fox News breached the due impartiality provision on two fewer occasions than RT. Furthermore, for two of the RT breaches, Ofcom issued directions to the licence holder to publish a summary of its decisions. Ofcom has not required Fox News to broadcast a summary of any of its decisions in the past five years. On the whole, our review of the evidence shows that Fox News' compliance record is better than RT but worse than Al Jazeera and CNN.

14.100 Half of the breaches by Fox News were not concerned with accuracy or impartiality or took place over five years ago. Five breaches concerned the Broadcasting Code's provisions relating to due impartiality and special impartiality. In relation to these five breaches, while we consider Fox should have taken appropriate steps to either provide a more impartial viewpoint or edited the international feed so that the relevant programme was not broadcast to viewers in the UK, we attach due weight to Ofcom's comments

and decision as the regulator not to impose any sanctions on Fox for any programme that Fox has ever broadcast into the UK.

### ***Public comments, statements and plans made by Fox and the MFT***

14.101 The DTI Guidance refers to comments, statements and any other plans which give an indication as to the acquiring media owners' commitment to UK broadcasting standards post merger. A number of third parties submitted that previous public statements by Rupert and James Murdoch in particular called into question such commitment on the part of Fox and the MFT. Other third parties submitted that we should place limited, if any, weight on the statements of members of the Murdoch family.<sup>545</sup>

#### *Fox*

14.102 In April 2017, the Fox board made a resolution to 'maintain Sky's excellent record of compliance with the Ofcom Broadcasting Code', and 'assure independence and integrity of the Sky News content'. In addition, the board resolved that upon completion of the Transaction, the following matters will require the approval of the NCGC of the board:<sup>546</sup>

- (a) the appointment or removal of the Head of Sky News;
- (b) any material changes to the authority or reporting relationship of the Head of Sky News; and
- (c) any future changes to the Sky News Editorial Guidelines.

14.103 We considered the resolution made by the Fox board in the context of our assessment of the media plurality consideration (see chapters 7 and 8). For the purposes of the assessment of the broadcasting standards consideration, while we note that the resolution has been passed, we consider this has limited weight in terms of our assessment of Fox's commitment to the broadcasting standards objectives as it is simply a statement of intention.

#### *The MFT*

14.104 Members of the Murdoch family have made several public statements in relation to broadcasting standards in the UK. Here we treat these members of

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<sup>545</sup> [Ed Miliband et al submission to issues statement.](#)

<sup>546</sup> Paragraph 16.4616.46 for further details on the functions of the NCGC of the board.

the Murdoch family as acting together with the MFT (see 7.6 for more detail of our rationale).

- 14.105 In Rupert Murdoch's 1989 MacTaggart lecture 'Freedom in Broadcasting', he appeared to be hostile towards the BBC.<sup>547</sup> When talking about the 'British broadcasting elite', he said '[they] argue for special privileges and favours because they are supposed to be in the public interest as a whole. Such special pleading tends to produce a service which is run for the benefit of the people who provide it, rather than the viewers who watch it...'.<sup>548</sup>
- 14.106 As part of the 2008 House of Lords Select Committee on Communications, the inquiry members met with Rupert Murdoch. The minutes of this meeting showed that Rupert Murdoch believed that Sky News would be more popular if it were more like the Fox News Channel, as it would then be a 'proper alternative to the BBC'.<sup>549</sup> Rupert Murdoch stated that Sky News could become more like Fox without a change to the impartiality rules in the UK.
- 14.107 In 2000, in an interview with *The Guardian*, James Murdoch spoke of the UK media regulatory system, saying 'The things that stick out [in the UK] are a draconian regulatory regime and a subsidised, horrific - how shall I put it - evil taxation scheme, subsidising competitors with no accountability.'<sup>550</sup>
- 14.108 Finally, in his 2009 MacTaggart Lecture 'The Absence of Trust', James Murdoch stated that 'Above all we must have genuine independence in news media. Genuine independence is a rare thing.'<sup>551</sup> However, he went on to say that 'No amount of governance in the form of committees, regulators, trusts or advisory bodies is truly sufficient as a guarantor of independence. In fact, they curb speech.' He also spoke of Ofcom in its role as a UK regulator – '...the amount of detailed content regulation in UK broadcasting is astonishing.'<sup>552</sup>
- 14.109 While we consider that these statements are potentially informative, we note that they were made a number of years ago in varying contexts and therefore we attach greater weight in our assessment to the evidence relating to the policies, systems and procedures that Fox has in place in the UK and its record of compliance with the Broadcasting Code.

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<sup>547</sup> *Freedom in Broadcasting, MacTaggart Lecture*, Rupert Murdoch, 1989.

<sup>548</sup> *Freedom in Broadcasting, MacTaggart Lecture*, Rupert Murdoch, 1989, page 4.

<sup>549</sup> House of Lords Select Committee on Communications, *The ownership of the news report*, Appendix 4.

<sup>550</sup> *The Guardian*, 2000, *Murdoch junior damns media regulation*.

<sup>551</sup> *The Absence of Trust, MacTaggart Lecture*, James Murdoch, 2009.

<sup>552</sup> *The Absence of Trust, MacTaggart Lecture*, James Murdoch, 2009.

## ***Conclusion on Fox's genuine commitment to the attainment of the broadcasting standards objectives in the UK***

- 14.110 As set out in paragraph 13.21, our view is that where a media enterprise - in this case Fox - is already involved in broadcasting in the UK, its record of complying with the Broadcasting Code and other regulatory requirements is of central relevance to the assessment of the broadcasting standards consideration.
- 14.111 Accordingly, we looked across all 14 UK broadcast licences that were held by Fox during the period in which the Transaction has been under consideration by the regulatory authorities. This includes Fox News, which Fox ceased broadcasting in the UK on 29 August 2017, and STAR Utsav, which Fox ceased broadcasting in the UK on 4 January 2018. Our review of the steps Fox has taken to attain the broadcasting standards objectives, including whether policies, systems and procedures are embedded within the Fox UK broadcasting divisions in a way that supports ongoing attainment of those objectives, has highlighted a difference between the 13 Fox licences on the one hand (FNG, National Geographic and STAR), and the licence that was held by Fox News on the other.
- 14.112 Although the content broadcast on the five FNG and four National Geographic channels is largely US produced, the channels are compiled specifically for audiences in the UK and Ireland.<sup>553</sup> At FNG and National Geographic we found evidence of Fox embedding policies, systems and procedures into its businesses to support the attainment of the broadcasting standards objectives. This included Fox having detailed, up to date policies, systems and procedures in place and a team dedicated to compliance with the Broadcasting Code. The team comprised experienced staff, trained specifically on UK broadcasting standards and the Broadcasting Code. In addition, we found effective ex ante controls in place to monitor, review and edit content, to assess its compliance with UK broadcasting standards and the Broadcasting Code, before it is broadcast in the UK and Ireland.
- 14.113 Content broadcast on STAR channels is produced in India for viewers in India and members of South Asian communities globally. The three STAR channels broadcast in the UK are (and STAR Utsav was) targeted at audiences across Europe via the same feed and compiled for a European audience. Again, we found evidence of Fox embedding policies, systems and procedures at STAR to support the attainment of the broadcasting standards objectives. Of the large team at STAR dealing with compliance in India and

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<sup>553</sup> Except National Geographic Wild, which is compiled for a European-wide audience.

internationally, over a third deal specifically with compliance with the UK's broadcasting standards, and procedures are in place to edit content for broadcast in the UK to comply with the Broadcasting Code.

- 14.114 The picture at Fox News was different. Fox News is produced for US audiences and, when it was broadcast in the UK, it was simulcast through an international feed unedited, except for Fox Extra content. Fox News had no compliance team or officers specifically dedicated to monitoring Fox News' content for compliance with UK broadcasting standards. Nor had specific training on the Broadcasting Code been given to members of staff dealing with international broadcasting standards. That said, those members of staff in the US dealing with international broadcasting standards compliance did review the Fox Extra inserts and edited some content to be broadcast on the international feed.
- 14.115 When asked about the lack of UK-specific procedures at Fox News, Fox submitted to us, and to Ofcom, that it had believed Fox News' approach was appropriate and proportionate. Fox explained that Fox News' approach was founded both on an understanding of the importance of context in applying the Broadcasting Code to content, and on the assumption that Ofcom agreed with the approach taken. In Fox's view, this was demonstrated by the fact that, over a ten-year period, Ofcom had only found Fox News to be in breach of impartiality requirements three times.
- 14.116 The new measures introduced by Fox in response to the concerns Ofcom raised during its phase 1 assessment were only in place from May to August 2017, when Fox News stopped broadcasting in the UK. Given this, we had limited evidence to assess the efficacy of the new arrangements.
- 14.117 The differences in policies, systems and procedures and other proactive steps to engender compliance with the Broadcasting Code between the 12 current Fox licences (and STAR Utsav previously) on the one hand and Fox News on the other were mirrored in our findings from our review of compliance records. In the past five years, across all of its 12 current licences (and STAR Utsav previously), Fox was only found in breach of the Broadcasting Code six times. Three of these breaches related to broadcasting standards concerning commercial references in programmes and took place nearly five years ago. Conversely, Fox News breached the Broadcasting Code ten times in the past five years (five of which were in 13 months between April 2016 and May 2017), more than all the other 13 Fox licences combined.
- 14.118 In weighing up the evidence across Fox's licences, we consider it important that Fox News is a US news channel, directed at US audiences, that was

simulcast directly into the UK largely without editing. The average audience size for Fox News was small by comparison to other international news channels. In our view, it is likely that Fox News' audience in the UK would have been aware it was a US news channel and are likely to have had expectations corresponding with the type of US-focused news and current affairs content typically shown on Fox News. We also note that Ofcom's regulation of broadcasting content in the UK is grounded in and takes account of context of this nature. Against this backdrop we consider that Fox's explanation for its misinterpretation of the depth and breadth of the requirements of the Broadcasting Code when applied to the context of Fox News, in terms of deficiencies in its procedures, is credible.

14.119 Furthermore, we consider that it is relevant that Ofcom has imposed no sanctions on Fox News or any other Fox channel under licence in the UK. As noted in the assessment of Sky's approach later, this fact contrasts with the record of a UK-based news provider whose content is specifically compiled for UK audiences and who has been sanctioned in relation to breaches in news programming.

14.120 Given that the content broadcast via Fox's 12 current licences is (and the content on STAR Utsav was) compiled specifically for the UK and/or European audiences, we consider that Fox's approach to compliance in those parts of its business is most informative in relation to Fox's commitment to the attainment of the broadcasting standards objectives. At Fox's 12 current UK licences (and STAR Utsav previously), we found both a positive compliance record and evidence of policies, systems and procedures being embedded within the business in order to support a culture in which the broadcasting standards objectives are attained. In our view, this provides strong evidence of a genuine commitment to the attainment of the broadcasting standards objectives.

14.121 In contrast, we consider Fox News' approach and compliance record should not be given undue weight in our overall assessment of Fox's commitment to broadcasting standards in the UK, given the fact that Fox News was broadcasting in the UK as a simulcast of its US feed, the nature of its likely audience, and the importance of context in the regulatory regime.

14.122 We do not therefore consider that the inadequacy of the arrangements in relation to the unedited simulcast of the international feed of Fox News outweighs the positive record and proactive steps Fox took to engender compliance with the Broadcasting Code across its 13 other licences, which all broadcast content specifically compiled for UK and European audiences. Overall, we are satisfied that Fox's approach to broadcasting in the UK,

looked at in the round, demonstrates a genuine commitment to the attainment of the broadcasting standards objectives in the UK.

## **Sky's approach to the broadcasting standards objectives in the UK**

14.123 Sky currently holds 54 licences to broadcast content in the UK, ranging from news to sports to entertainment programmes. Much of the content is specifically designed for UK audiences. We considered the approach and compliance record of all Sky channels but we examined Sky News (where all the content is produced in the UK for UK viewers) in more detail because news and current affairs coverage and opinion is most likely to engage the due accuracy and due impartiality broadcasting standards, which are highlighted as appropriate to consider in the DTI Guidance.

14.124 In its phase 1 assessment, Ofcom suggested that 'it may be the case that Sky had a particularly good record' when compared with Fox.<sup>554</sup> In its most recent fit and proper assessment of Sky, Ofcom noted that Sky's record of compliance is 'in line with other broadcasters'.<sup>555</sup> Sky told us that it has met its broadcasting standards obligations (thereby demonstrating its commitment to the attainment of the broadcasting standards objectives) by maintaining strong internal measures in the form of its Editorial Policy and Compliance teams.<sup>556</sup>

### ***Sky's steps to promote and support the broadcasting standards objectives***

14.125 As set out in 13.24, in order to demonstrate a genuine commitment to the attainment of the broadcasting standards objectives, we consider that the relevant persons in control of or carrying on a media enterprise have to be able to provide evidence of the steps it has taken or will take to promote and support the broadcasting standards objectives within its businesses. We received a large number of submissions from third parties which commended Sky's commitment to broadcasting standards and expressed a desire that this commitment be maintained.<sup>557</sup>

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<sup>554</sup> Ofcom Public Interest Report, paragraph 10.28.

<sup>555</sup> Ofcom, *Decision under section 3(3) of the Broadcasting Act 1990 and section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited, published on 29 June 2017 (explanatory wording added on 11 September 2017)*, paragraph 8.

<sup>556</sup> Sky initial submission, paragraph 4.6.

<sup>557</sup> The NUJ, for example, emphasised that 'Sky News offers a high quality service and should continue to occupy its distinct place in the media landscape'. The NUJ also raised concerns that the Transaction may pose a threat of Sky's existing workplace culture. The NUJ submitted that allowing '[the] Murdoch family to increase their control of Sky risks undermining ... its future as a broadcaster of integrity and high standards'.

14.126 We assessed Sky's approach to promoting and supporting the attainment of the broadcasting standards objectives by examining the approach taken by Sky for all of its UK broadcast licences. We looked at evidence on:

- (a) the policies, systems and procedures in place to see how up to date and effective they were, including the arrangements that Sky had in place to check and monitor content before it is broadcast into the UK;
- (b) the resources committed to compliance, including the makeup and experience of Sky's Editorial Policy and Compliance team;
- (c) the provision of training to editorial staff and members of the compliance team;
- (d) the availability of up to date written guidance to support editorial decision making and compliance, such as the Sky News Editorial Guidelines;
- (e) Sky's interaction with Ofcom.

14.127 In its written submissions, Sky said that we should focus on 'directly relevant evidence of the Parties' broadcast compliance track records and processes'. In the main party hearing, however, Sky explained that a broadcaster would also need to 'engender a spirit in the organisation that takes the [Broadcasting] Code seriously and to employ people and continually train them so they are aware of their responsibilities'. Sky also said that ensuring 'governance measures were in place and up to date' is relevant.<sup>558</sup>

14.128 Paragraphs 14.129 to 14.133 set out the ex ante controls that Sky has in place to promote and support the broadcasting standards objectives and compliance with the Broadcasting Code, while paragraphs 14.134 to 14.137 outline the steps that Sky takes in reaction to occasions where its compliance has fallen short.

14.129 Sky has an Editorial Policy and Compliance team, made up of 28 permanent members of staff. Sky News has its own dedicated compliance lead for monitoring compliance with the Broadcasting Code.

14.130 The Editorial Policy and Compliance team views all non-live programming content on the Sky channels and monitors compliance with the Broadcasting Code. The team is the main point of contact for broadcasting standards issues and viewer complaints about content and standards in relation to non-news content. Sky has technical arrangements in place to make sure that content is not broadcast or that it is interrupted where it may breach the

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<sup>558</sup> [Summary of the main party hearing with Sky.](#)

broadcasting standards. This includes some live non-sport programmes that are transmitted with a delay, where Sky will monitor the content with the ability to edit sound and/or vision as necessary. [REDACTED].

14.131 Sky told us that the senior editorial staff that work for Sky News and supervise the output are experienced journalists who are aware of their obligations at law and under the Broadcasting Code. Training on the broadcast content and standards rules and regulations is delivered to a range of Sky departments dealing with content via an E-Learning programme. [REDACTED]. Sky also submitted that bespoke training is offered throughout the [REDACTED], covering all relevant aspects of the law, the Broadcasting Code and Sky News Editorial Guidelines.

14.132 Sky submitted that its commitment to impartial and accurate journalism has informed its internal governance and operational framework. It said that it has chosen to reinforce the standards in the Broadcasting Code in the Sky News Editorial Guidelines. These state:

- (a) not allowing our personal views or opinions to form a part of our coverage;
- (b) making sure views and facts are not misrepresented;
- (c) making sure all significant opinion is duly reflected on any controversial issues;
- (d) making sure any personal interest of a reporter or presenter is made clear to viewers – they must not use their position to express their own views;
- (e) members of staff have a duty to disclose to senior management any personal interest which may potentially jeopardise their duty to report with due impartiality; and
- (f) making sure particular views and opinions are not given undue prominence over others.

14.133 Sky told us that the Sky News Editorial Guidelines prevent Sky from allowing personal views to form part of its coverage and include a commitment to not show favour to, or be influenced by, any side of the story. In addition to the Sky News Editorial Guidelines, the Sky Editorial Policy and Compliance team makes available guidance to internal producers and third party production companies.

14.134 Sky told us that as soon as it is made aware of a complaint by Ofcom, it would begin its internal investigation. This would involve:

- (a) reviewing the incident and taking an informed view on whether there has been a breach of the Broadcasting Code;
- (b) depending on the circumstances, Sky might decide to take immediate action and inform Ofcom of the steps taken to avoid further concerns. For instance, if Ofcom raised a concern about a promotion being run, Sky may investigate and decide to no longer broadcast and inform Ofcom of the same when responding to the request for the recording; and
- (c) in some circumstances, Ofcom may then decide not to investigate and will consider the matter to have been formally resolved.<sup>559</sup>

14.135 Sky submitted that any time Ofcom issues a request for information or launches a formal investigation (in relation to a potential breach), it will be notified internally to senior management, including Gary Davey (Managing Director of Content) and John Ryley (Head of Sky News) via Sky's weekly Compliance Ofcom Update.

14.136 Sky provided an example of an Ofcom finding, which details its response to a complaint about the use of offensive language in a news report about protests against President Donald Trump. Our summary of Ofcom's decision is set out here:

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<sup>559</sup> Sky's use of the term 'formally resolved' is not synonymous with Ofcom's categorisation of a breach as 'Resolved', as described in paragraph 14.15(f)(ii). In its use of the term 'formally resolved', Sky means that once Ofcom decides not to open an investigation, the matter is closed and the issue will not be investigated again by Ofcom.

## **Complaint**

The live footage of one demonstration featured a protester holding a banner that read 'Trump is a c\*\*t'. This was visible for approximately three seconds. Ofcom considered this raised potential issues under rule 1.14 of the Broadcasting Code which states: 'The most offensive language must not be broadcast before the watershed...'. Ofcom requested comments from the Licensee on how the programme complied with this rule.

## **Response from Sky**

Sky said that the programme was broadcast after 7:00pm on a news programme largely dedicated to politics, public policy, and foreign news and therefore was unlikely to attract children as viewers.

Sky said that 'the movement of the protestors, as well as the fact it was dark, militated against us.' Sky also said that the broadcast was being overseen from a gallery in Millbank where 'the screens are smaller and slightly less clear than in our usual gallery' and therefore the offensive language was not 'immediately picked up by the Output Editor or the Director'. However, Sky added that 'shortly after the live pictures went out, one of the gallery staff raised a concern that there may have been an offensive banner in the crowd' and the gallery staff consequently confirmed the inclusion of the offensive language when they checked the footage during the next commercial break. Sky took the view that 'by the time the content of the banner had been confirmed too much time had elapsed to make an apology beneficial to the viewer'. It said it had also decided not to return for further live coverage of the Cardiff demonstration later that day.

Further, and in conclusion, Sky said that '[e]ven before the period of regular demonstrations against President Donald Trump in the post-inauguration period, it reminded all the staff of the importance of being vigilant over protest banners and placards both on video and in live situations' and 'of the need to be alert to the dangers of live broadcasting'.

## **Ofcom decision**

Ofcom reported that it took into account that: the report was live; the offensive language appeared on screen relatively briefly; and, on becoming aware of the incident, Sky decided not to broadcast further live from this demonstration. Following the incident Sky had also warned its programme teams to be vigilant for any similar banners in Sky News content.

For all these reasons, Ofcom's decision was that the matter was resolved.

14.137 The correspondence between Ofcom and Sky and the final decision provides insight into Ofcom's regulatory approach and Sky's approach to broadcasting standards in the UK. Ofcom's final decision demonstrates how it applies judgement in enforcing the Broadcasting Code and takes the context surrounding the content into consideration. Sky, in its response, outlined the immediate remedial actions it had taken in relation to this incident to prevent broadcasting material that may have breached the Broadcasting Code further. Our view is that this approach and example reflects positively on its editorial team's understanding of and compliance with the Broadcasting Code.

## *Summary of the steps Sky has taken to promote and support the broadcasting standards objectives*

14.138 Our review of Sky's internal policies, systems and procedures indicates that it has in place effective measures that embed the broadcasting standards objectives across the business. Sky's Editorial Policy and Compliance team consist of experienced, knowledgeable staff whose actions and reactions demonstrated an understanding and appreciation of what is required of a licensee broadcasting in the UK. The policies, systems and procedures in place enable staff to make important editorial and compliance decisions and help ensure that Sky fulfils these obligations of promoting and supporting the broadcasting standards objectives. The regular training of Sky staff and the production of guidelines in which the provisions of the Broadcasting Code are enshrined is further evidence of Sky's efforts and commitment to attaining the broadcasting standards objectives. All of the policies, systems and procedures and how they are integrated, taken as a whole, reflect an attitude and culture that goes beyond just simple compliance with the Broadcasting Code.

### ***Sky's record of compliance with the Broadcasting Code***

14.139 Sky breached the Broadcasting Code 27 times between 2013 and 2017 (11 breaches were recorded as resolved). None of the breaches were considered sufficiently serious to warrant a sanction.<sup>560</sup> We note that Sky breached COSTA three times, and the BCAP Code once over the same period. However, as previously mentioned, Ofcom views breaches of COSTA to be of 'lower degree of severity and gravity' compared with breaches of the Broadcasting Code. While breaches of the BCAP Code may be serious – for example if the breach of the requirements relates to the protection of children from harmful advertising, or the prohibition on political advertising – Sky's breach of the BCAP Code took place nearly five years ago and was in relation to misleading advertising on SkyPoker.com. The advertising included offers for 'free bonuses' but Ofcom found that insufficient detail was provided about the conditions that were attached to bonuses and the use of 'free' in the promotion was misleading.<sup>561</sup> Ofcom told us that it did not consider that the omission of information was so serious as to warrant any further regulatory action beyond recording the breaches of the BCAP Code.

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<sup>560</sup> Ofcom may impose a statutory sanction if a broadcaster breaches the [Broadcasting Code](#) deliberately, seriously, repeatedly or recklessly.

<sup>561</sup> Ofcom Broadcast Bulletin, Issue 239, October 2013.

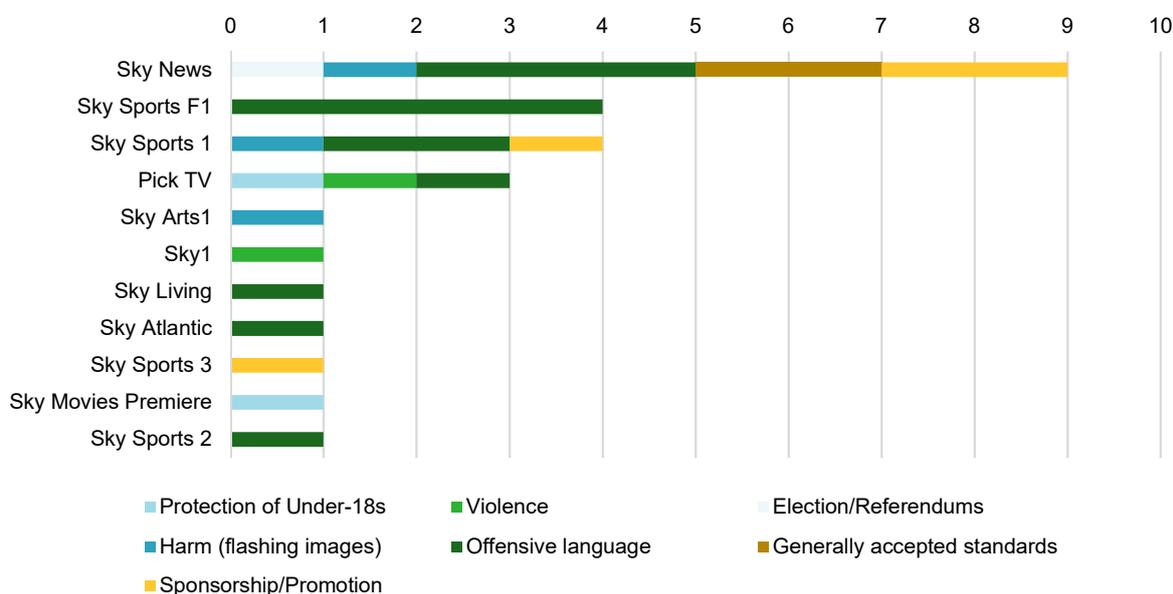
14.140 Table 14.3 outlines the number and nature of the breaches of the Broadcasting Code by Sky during this period, and Figure 14.5 sets out the breaches by channel.

**Table 14.3: Breaches of the Broadcasting Code recorded against Sky between 2013 and 2017**

<i>Nature of issue</i>	<i>Breached</i>	<i>Resolved</i>
Protection of under 18s	2	1
Violence	2	-
Harm (flashing images)	3	-
Offensive language	5	8
Generally accepted standards	-	1
Sponsorship/Promotion	3	1
Election/Referendums	1	-
Total	16	11

Source: CMA analysis of Ofcom data.

**Figure 14.5: Number of breaches of the Broadcasting Code recorded against Sky, by channel and type of breach between 2013 and 2017**



Source: CMA analysis of Ofcom data.

14.141 As can be seen from Table 14.3, just under half the breaches recorded against Sky (13 of the 27), related to the use of offensive language. Other breaches related to the inappropriate use of commercial references in TV programming and the showing of content with flashing images without issuing adequate warning. Sky was found to have breached the special impartiality requirements applied at the time of elections and referendums once, when it failed to list all of the candidates standing in the Vauxhall constituency for the June 2017 general election.

14.142 As noted in paragraphs 13.12 and 14.124, Ofcom compared Sky's compliance record with that of Viacom and Discovery and suggested that

Sky's compliance record was 'particularly good'.<sup>562</sup> For our assessment, we compared Sky's record with that of the BBC, ITV and Channel 4.<sup>563</sup> We chose these comparators because, like Sky, all of them are based in the UK, and primarily produce content for UK audiences. We also note that BBC News, ITV News and Channel 4 News, like Sky News, focus coverage on UK news and current affairs and are aimed at UK audiences.

14.143 Table 14.4 and Figure 14.6 set out the breaches recorded against all four broadcasters across all of their TV channels.

**Table 14.4: Breaches of the Broadcasting Code recorded against Sky, the BBC, ITV and Channel 4 between 2013 and 2017**

<i>Nature of issue</i>	<i>Sky</i>		<i>BBC*</i>		<i>ITV</i>		<i>Channel 4</i>	
	<i>Breached</i>	<i>Resolved</i>	<i>Breached</i>	<i>Resolved</i>	<i>Breached</i>	<i>Resolved</i>	<i>Breached</i>	<i>Resolved</i>
Protection of under 18s	2	1	4	1	5	1	3	1
Violence	2	-	-	-	-	1	-	-
Harm (flashing images)	3	-	2	-	-	-	-	-
Harm (competitions)	-	-	-	-	-	1	-	-
Harm (discrimination)	-	-	2	-	-	-	-	-
Harm (voting)	-	-	-	-	1	-	-	-
Offensive language	5	8	2	7**	-	9	4	3
Generally accepted standards	-	1	-	1	3	-	-	-
Sponsorship/Promotions	3	1	1	-	6	-	5	-
Elections/Referendums	1	-	-	-	-	-	1	-
Due accuracy	-	-	-	-	-	-	4	-
<b>Total</b>	<b>16</b>	<b>11</b>	<b>11</b>	<b>9</b>	<b>15</b>	<b>12</b>	<b>18</b>	<b>4</b>

Source: CMA analysis of Ofcom data.

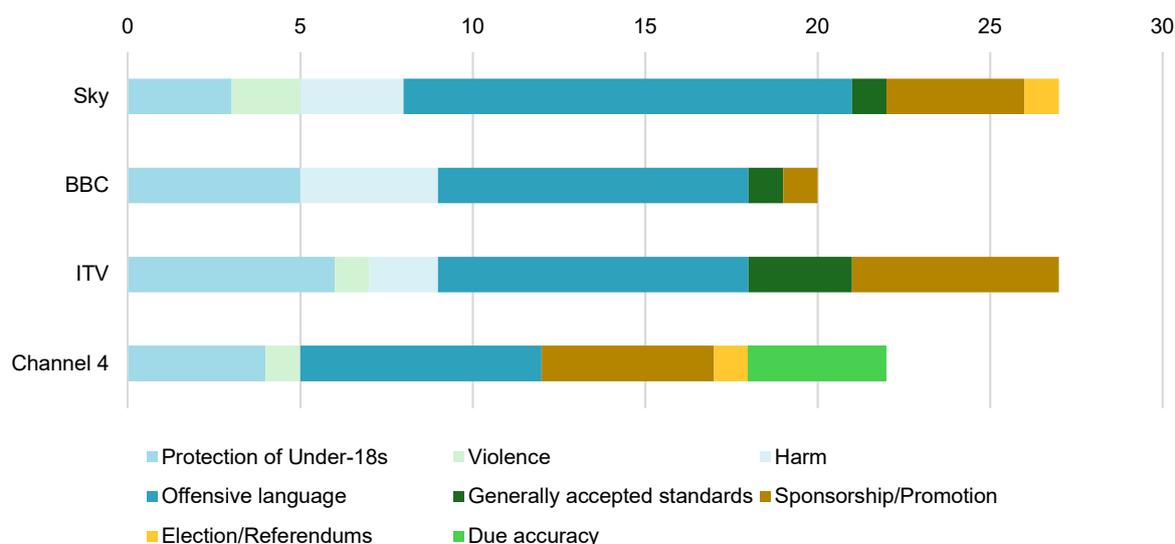
\*Note that Ofcom found the BBC in Breach/Resolved 32 times, including BBC Global News Limited Ltd (which is a commercial service and not a licence fee funded service), or in 31 cases in respect of the BBC's licence fee funded-services. The 20 (of the 32) breaches outlined in this table relate to TV services. The other 12 breaches relate to the BBC's radio services.

\*\*Six of the seven resolved cases for offensive language were in respect of the BBC's licence fee funded TV services.

<sup>562</sup> [Ofcom Public Interest Report](#), page 96.

<sup>563</sup> Ofcom took over from the BBC Trust as the regulator of the BBC on 3 April 2017, under the new Royal Charter and Agreement. Ofcom's new responsibilities included regulating the BBC on due impartiality and due accuracy. As part of Ofcom's new responsibilities, it has published an operating framework containing provisions to secure effective regulation of the BBC. Under the terms of the transitional provisions of the new BBC Charter, the BBC was required to observe the standards set in section five and six of the [Broadcasting Code](#) from 22 March 2017 (paragraph eight of the schedule). Previously, the BBC was required to comply with rules relating to due impartiality and due accuracy enforced by the BBC Trust, rather than the [Broadcasting Code](#) (although the BBC was required to comply with all other sections of the [Broadcasting Code](#), apart from those relating to commercial references).

**Figure 14.6: Breaches of the Broadcasting Code recorded against Sky, the BBC, ITV and Channel 4 between 2013 and 2017**



Source: CMA analysis of Ofcom data.

14.144 In addition to the breaches of the Broadcasting Code outlined in Table 14.4 and Figure 14.6, we note Channel 4 has breached COSTA twice, and ITV has breached COSTA once and the BCAP Code once.<sup>564</sup> Sky’s record in relation to COSTA and the BCAP code is on a par with these broadcasters (see paragraph 14.139).

14.145 We compared Sky’s compliance record with that of the BBC, ITV and Channel 4. Sky News’ compliance record compares well against its peers. Although Ofcom has recorded more breaches against Sky for content broadcast on the Sky News channel than its comparators’ news programmes – (nine for Sky, four for all BBC news content, two for ITV and five for Channel 4), we do not think the difference is material given that:

- (a) the BBC has only been subject to the provisions on due accuracy and due impartiality since April 2017;<sup>565</sup>
- (b) Channel 4 has breached the provisions concerning accuracy and impartiality five times in the past five years. It has also been sanctioned by Ofcom for a serious breach of rule 5.1, the only time that Ofcom has imposed a statutory sanction on a broadcaster for breaching section five or six of the Broadcasting Code in the last five years; and

<sup>564</sup> ITV’s breach of the BCAP Code related to a transmission of a late-night gambling teleshopping feature offering roulette; offers were frequently made for ‘money’ bonuses to be paid to new players. The omission of sufficient detail about the conditions attached to the bonuses and the use of ‘free’ and ‘cash’ in its promotion was misleading. Ofcom Broadcast Bulletin, Issue 233, July 2013.

<sup>565</sup> Footnote 563.

(c) neither ITV or Channel 4 have 24-hour news channels like Sky News.

### *Sky News' record of compliance with the Broadcasting Code*

14.146 Sky News has breached the Broadcasting Code nine times between 2013 and 2017 (see Appendix L for details of these breaches). Special impartiality requirements apply at the time of elections and referendums. One of Sky's recent breaches related to a programme in which Sky failed to list all of the candidates standing in the Vauxhall constituency during a report on tactical voting. Sky told Ofcom that it was 'entirely aware' of the need to carry a full list of candidates in any constituency report, and had done so on numerous occasions throughout the election campaign. It said that this case was an 'aberration rather than regular practice' which it argued had not come about due to a lack of guidance.<sup>566</sup> The evidence suggests that this breach was a technical error rather than any suggestion of bias.

14.147 Table 14.5 sets out the number of breaches of the Broadcasting Code over the past five years in relation to news and current affairs TV programmes broadcast on Sky, the BBC, ITV and Channel 4.

**Table 14.5: Breaches of the Broadcasting Code in relation to news and current affairs programmes broadcast on Sky, the BBC, ITV and Channel 4 between 2013 and 2017**

<i>Nature of issue</i>	<i>Sky</i>		<i>BBC</i>		<i>ITV</i>		<i>Channel 4</i>	
	<i>Breached</i>	<i>Resolved</i>	<i>Breached</i>	<i>Resolved</i>	<i>Breached</i>	<i>Resolved</i>	<i>Breached</i>	<i>Resolved</i>
Protection of under 18s	1	-	-	1	1	-	-	-
Harm (flashing images)	1	-	-	-	-	-	-	-
Offensive language	1	2	-	1	-	1	-	-
Generally accepted standards	-	1	-	1	-	-	-	-
Sponsorship/Promotion	2	-	1	-	-	-	-	-
Election/Referendums	1	-	-	-	-	-	1	-
Due accuracy	-	-	-	-	-	-	4	-
<b>Total</b>	<b>6</b>	<b>3</b>	<b>1</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>5</b>	<b>-</b>

Source: CMA analysis of Ofcom data.

14.148 More breaches have been recorded against Sky News than news and current affairs programmes broadcast on the BBC, ITV and Channel 4.

14.149 Ofcom recorded one breach against ITV national and international news and one breach against ITV London. Both related to the protection of under 18s.

14.150 Four breaches have been recorded against the BBC in news and current affairs programmes. Ofcom has not imposed sanctions on the BBC for any of these breaches. The majority of the breaches related to the use of offensive language and the broadcast of content unsuitable for under 18s, falling under

<sup>566</sup> As published in Ofcom's Broadcast and On Demand Bulletin 334.

section one and section two of the Broadcasting Code. The BBC was found to have infringed section nine of the Broadcasting Code which relates to inappropriate use of commercial references in programming.<sup>567</sup> While Ofcom has not recorded any breaches of section five or section six of the Broadcasting Code, as mentioned previously the BBC has only been subject to these two provisions since April 2017. Since then, the BBC's Editorial Complaints Unit upheld complaints about an item broadcast on the Today programme on Radio 4, in which Lord Lawson gave an opinion on climate change that was left unchallenged.<sup>568</sup> The BBC admitted that a segment of the programme had breached its own editorial guidelines on accuracy and impartiality by allowing Lord Lawson to claim, unchallenged, that global temperatures have not risen in the past decade.<sup>569</sup>

14.151 Five breaches have been recorded against Channel 4's news and current affairs programmes in the past five years, four of which were breaches of the due accuracy provisions and one of section six of the Broadcasting Code on special impartiality (elections/referendums) (see Appendix L for details of these breaches). When in 2015 Channel 4 breached rule 5.1 of the Broadcasting Code<sup>570</sup> for the third time in 12 months, Ofcom asked Channel 4 and ITN (the producers of the content) to attend a meeting to discuss the requirements of the rule. Following that discussion, however, Channel 4 News breached the same rule again in its reporting of the Westminster terror attack in March 2017. Given the serious nature of this breach, Ofcom sanctioned Channel 4 by directing the 'Licensee to broadcast a summary of Ofcom's decision in a form and manner to be decided by Ofcom'. This is the only time in the last five years that Ofcom has imposed a statutory sanction on a broadcaster for breaching the provisions on due accuracy or due impartiality.

### *Summary of the compliance records of Sky and Sky News*

14.152 In the past five years, Sky News has not infringed the Broadcasting Code requirements under section five relating to due accuracy and due impartiality, but it has recently breached section six of the Broadcasting Code on the specific requirements relating to broadcasters covering elections. The evidence suggests that this was a result of human error rather than any bias on part of Sky, or issues with policies, systems and procedures or the knowledge or culture of compliance at Sky.

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<sup>567</sup> This breach was by a licensed BBC commercial service and not a BBC licence fee funded service.

<sup>568</sup> [BBC complaints report](#).

<sup>569</sup> As [reported by the BBC](#).

<sup>570</sup> Appendix C provides for details of section five of the [Broadcasting Code](#).

14.153 Ofcom recorded more breaches against Sky for programmes related to news and current affairs programmes than against the other three broadcasters (the BBC, Channel 4 and ITV). However, we consider that the difference in the absolute number of breaches should be considered in conjunction with a number of factors. First, the BBC has only been subject to the due impartiality and due accuracy provisions of the Broadcasting Code since April 2017 and therefore has not been subject to the same regime as the other broadcasters. Second, although Ofcom has recorded five fewer breaches for Channel 4 than for Sky, Channel 4 has been sanctioned by Ofcom for a serious breach of section five of the Broadcasting Code. Finally, neither ITV or Channel 4 have 24-hour news channels like Sky News. Based on these considerations, we do not think that Sky's compliance record is materially worse than that of these three comparable broadcasters operating in the UK.

14.154 On the basis of our examination of the evidence, our view is that Sky's compliance record in the past five years is broadly in line with comparable broadcasters.

***Conclusion on Sky's genuine commitment to the attainment of the broadcasting standards objectives in the UK***

14.155 Our review of Sky's approach to broadcasting standards in the UK found that Sky has in place extensive and thorough policies, systems and procedures that promote and support compliance with the Broadcasting Code and the attainment of the broadcasting standards objectives. Sky has an experienced and well-staffed compliance team that helps support and inform staff of their regulatory obligations and their responsibilities under Sky's internal systems. Sky has in place procedures to check and monitor content before it is aired. Sky trains its staff on a range of issues including the Broadcasting Code and the broadcasting standards objectives; Sky has written guidelines to help staff understand the legal and regulatory framework in which they operate; and Sky has in place effective policies to remedy any compliance issues if they do arise.

14.156 Across its 54 licences, Sky has breached the Broadcasting Code 27 times in the past five years. None of the breaches were sufficiently serious to warrant a sanction. Sky's record of compliance with the Broadcasting Code is broadly on a par with comparable broadcasters like the BBC, ITV and Channel 4. Our review of Sky's breaches did not identify any issues across Sky's 54 licences.

14.157 Sky News' record of complying with the Broadcasting Code is on a par with other major news providers in the UK like BBC News, ITV News and Channel 4 News. Sky News is a 24-hour news channel and it has not breached the provisions of the Broadcasting Code relating specifically to due impartiality

and due accuracy under section five of the Broadcasting Code and has only breached section six of the Broadcasting Code on specific requirements relating to broadcasters covering elections once in the past five years.

14.158 Having reviewed Sky's record of compliance with the Broadcasting Code and evidence of the other ways in which Sky has acted to promote and support the attainment of the broadcasting standards objectives within its business, we conclude that Sky is genuinely committed to the attainment of the broadcasting standards objectives in the UK.

## **15. Approach to broadcasting standards outside the UK**

15.1 The broadcasting standards objectives and the Broadcasting Code are unique to the UK in their precise form and content. Broadcasting standards differ from one country to another. Different countries have different laws, regulations and regulatory frameworks and the enforcement of broadcasting standards depends on each country's political, economic and cultural makeup. Nevertheless, a review of the Parties' approach to broadcasting standards in jurisdictions outside the UK is relevant to our assessment of the broadcasting standards consideration as it could reveal a broader indication of the approach of the Parties generally to compliance with broadcasting standards.

15.2 We examined the Parties' policies, systems and procedures, and then looked at their track record of compliance with broadcasting rules and regulations in other jurisdictions. We also contacted media regulators in other jurisdictions to seek their views on Fox's compliance record and approach. In assessing the Parties' records of and approach to compliance outside the UK, we kept in mind that no broadcasting standards regime in another jurisdiction mirrors exactly that in the UK.

## **Fox's approach to broadcasting standards outside the UK**

### ***Overview of Fox's offering outside the UK***

15.3 Fox is a global media company providing cable network programming, TV and filmed entertainment, with interests in over 500 channels in over 170 countries. Other than in the US where most Fox content is produced, and India where it has a significant presence with its network of STAR channels, Fox operates and distributes content in other jurisdictions in a manner similar to the UK. Outside the US, Fox channels are principally distributed by FNG, National Geographic and STAR network channels. Although Fox has interests in over 170 countries, under its licensing arrangements (where local distributors are responsible for local compliance), Fox is only directly

responsible for compliance with local broadcasting standards in a few jurisdictions. Within the EU/EEA, under the provisions of the Audiovisual Media Services Directive (the Directive),<sup>571</sup> Fox is only required to hold a licence in any one EEA country in order to broadcast to any other country in the EEA.<sup>572</sup>

### *FNG and National Geographic channels*

- 15.4 FNG Latin America channels are broadcast in 37 countries but Fox is only directly responsible for compliance with broadcasting standards in three of these countries: Argentina, Brazil and Mexico. Likewise, FNG Europe and Africa distributes more than 150 TV channels and premium sports channels which are broadcast in over 90 countries in Europe and Africa. However, none of the FNG channels operating in Africa are required to hold a licence.
- 15.5 In the EEA, the majority of FNG's channels are broadcast through licences held in Bulgaria, Spain, the UK and Italy.<sup>573</sup>
- 15.6 FNG Asia and Middle East broadcasts TV programming covering approximately 50 countries. Fox owns Fox Sports Asia, a sports broadcaster in Asia which operates approximately 20 channels in different languages. Fox is only required to hold a licence in eight countries, and is only directly responsible for compliance with broadcasting standards in six of those countries. For the other two countries in which Fox holds a licence – Japan and Singapore – Fox is not directly responsible for broadcasting standards compliance because Fox distributes its channels through multichannel video programming distributors who themselves must be licensed by the relevant broadcast regulator.

### *STAR India*

- 15.7 STAR India develops, produces and broadcasts 62 channels in eight languages, which are distributed primarily via satellite to local operators in Asia, Europe, North America, the Middle East and parts of Africa. For the 49 countries not within the EEA, Fox is required to hold a licence for STAR India in only two of these countries: India and Nepal. The licences to broadcast in nine EEA countries are held in the UK. Accordingly, Fox is directly responsible

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<sup>571</sup> [EC Directive 2010/13/EU](#).

<sup>572</sup> Under the 'country of origin' principle, the licence holder is required to comply only with the broadcasting standards of the country in which it holds the licence while being able to broadcast to all of the countries in which the Directive has effect. While local variations still exist to the extent permitted by the Directive, there is a large degree of harmonisation between Member States. [Article 3 EC Directive 2010/13/EU](#).

<sup>573</sup> Fox holds a few country-specific individual licences in the EEA. For example, in France, it has a licence for the Voyage channel as this is the only country in which this channel is aired.

for compliance with broadcasting standards in only three of the countries in which STAR India is broadcast: India, Nepal and the countries of the UK.

### *Fox News*

- 15.8 Fox News is a US cable network broadcast via a single feed, ie the same content is broadcast to all viewers in the US. The US has far less regulation around the content of broadcasting material than the UK or other EU countries. The Federal Communications Commission (FCC) – the federal agency responsible for regulating broadcasting in the US – is limited by the US Constitution in its scope to regulate content standards. The FCC’s regulatory responsibilities are contained in *The Public and Broadcasting (the Manual)*.<sup>574</sup> The First Amendment prohibits the FCC from censoring broadcast material and from interfering with freedom of expression in broadcasting.<sup>575</sup> The Manual notes, for example, that the First Amendment’s guarantee of freedom of speech protects programming that stereotypes or may otherwise offend people with regard to religion, race, national background, gender, or other characteristics. The FCC’s role on content regulation is thus largely restricted to enforcing laws that preclude the broadcasting of obscene or indecent material.<sup>576</sup>
- 15.9 With respect to the broadcasting of news content, the US no longer requires broadcasters to be impartial; the so called ‘fairness doctrine’ was removed under the Reagan administration in the 1980s.<sup>577</sup> The Manual notes that while the FCC often receives complaints about broadcasting journalism (and the distortion of news), the FCC will generally not intervene in such cases because it would be inconsistent with the First Amendment to replace the journalistic judgement of licensees with the FCC’s own judgement. Absent a compelling, evidenced case that a broadcast licensee has intentionally distorted the news, the FCC will not intervene. Viewers who are offended by content are advised to contact the relevant broadcast station directly.<sup>578</sup>
- 15.10 Fox News is simulcast from the US to over 100 countries via an international feed. Outside of the EEA, Fox News can be viewed in over 90 countries, where it is typically distributed by a licensed distributor. In most of these countries, the distributor is the licence holder and responsible for compliance

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<sup>574</sup> FCC, [The Manual](#).

<sup>575</sup> FCC, [The Manual](#), chapter on *Broadcast programming: basic law and policy*.

<sup>576</sup> There are a small number of regulations that relate to content, such as obligations to identify programme sponsors, to limit commercials shown during children’s content, and to provide access to the airwaves for certain political candidates. In addition, there are rules prohibiting cigarette advertising and about when telephone conversations may be broadcast.

<sup>577</sup> [Fairness doctrine: history and constitutional issues](#) for an explanation of the Fairness Doctrine.

<sup>578</sup> FCC, [The Manual](#), chapter on *Broadcast programming: basic law and policy*.

with local broadcasting standards. In the EEA, Fox News formerly broadcast into other EEA countries using its UK broadcast licence and was subject to UK regulatory jurisdiction. Since ceasing to broadcast in the UK, Fox News now has broadcasting authorisation in Italy, and broadcasts into other EEA countries (other than the UK) using that authorisation. Fox is only directly responsible for broadcasting standards compliance for Fox News in Argentina, Mexico, Hong Kong, Taiwan, Korea and Italy.

### ***Fox's compliance arrangements outside the UK***

- 15.11 Fox's compliance arrangements outside the UK mirror Fox's approach to compliance in the UK. It has different policies for each of: (i) Fox News; (ii) FNG and National Geographic channels; and (iii) STAR channels. Fox News has limited policies, systems and procedures in place to monitor compliance with the local broadcasting rules of the countries into which it broadcasts. We note that Sky News International which simulcasts content outside of the UK also has limited country-specific policies, systems and procedures, relying instead on its compliance with UK broadcasting standards.
- 15.12 As in the UK, the compliance arrangements for the FNG and National Geographic channels for broadcasting in countries outside the UK are more detailed than the procedures in place at Fox News and take account of local standards, rules and regulations. Finally, the arrangements for STAR channels are exactly the same as in the UK, insofar as it is the same team based in India that manages the compliance of content broadcast in other countries.
- 15.13 All legal and compliance issues involving Fox News are handled centrally from its offices in New York. As Fox News is only directly responsible for compliance with broadcasting standards in a handful of the countries in which Fox News is broadcast, Fox News' legal and compliance team only receives training on legal and compliance issues in jurisdictions where Fox News is the licence holder. However, as noted in paragraph 14.41, no member of the Fox News compliance team received training on the Broadcasting Code prior to the introduction of the new compliance arrangements in May 2017. The inclusion of Fox Extra inserts during advertisement breaks on its international feed is designed to minimise advertising related compliance issues in other jurisdictions.<sup>579</sup>
- 15.14 The content on FNG and National Geographic channels is mostly pre-recorded and produced in the US. Fox submitted that its broadcasting

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<sup>579</sup> Paragraph 13.39 for more detail.

standards compliance processes for FNG channels in countries other than the UK and US reflect relevant local broadcasting standards requirements: in each case provisions are in place to review and edit content before broadcast where appropriate and necessary.

15.15 We saw evidence outlining Fox's compliance arrangements in the regions in which it operates.<sup>580</sup> Fox submitted guidelines, compliance processes and memorandums for a number of countries in the Europe, Middle East and Africa (EMEA) regions. Fox also submitted an overview of FNG's broadcasting standards compliance process for its broadcasting activities in Asia-Pacific and the guidelines for FNG Latin America (covering the relevant rules relating to advertising, promotional and marketing issues). For Latin America, Fox told us that it 'ensures that all departments in Latin America are duly trained in the regulatory obligations that affect its activities in the region' and that 'the programming department is trained on any content quota compliance, parental ratings, and any other applicable regulations, the advertising sales and advertising sales administration teams are trained in the rules relating to advertising in each country'.

### ***Fox's compliance record outside the UK***

15.16 We considered the compliance record of Fox outside the UK. Although a number of third parties raised concerns regarding Fox's commitment to broadcasting and regulatory standards, the submissions largely focused on Fox's conduct in the UK and the US.<sup>581</sup>

15.17 Fox told us that its services have breached local broadcasting rules [✂] times in the past five years in ten jurisdictions: Argentina, Brazil, Bulgaria, India, Indonesia, Italy, Netherlands, South Korea, Taiwan and Turkey. Table 15.1 provides a breakdown of the number of breaches by country.

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<sup>580</sup> The FNG regions are: Latin America; Europe and Africa; and Asia and Middle East.

<sup>581</sup> The [NUJ for example submitted](#) that 'the evidence suggests that there is a lack of commitment to improve standards, comply with appropriate regulatory frameworks or adhere to corporate governance best standards' and that 'the consistency of the patterns suggests the explanation is a specific culture set by the very top'.

**Table 15.1: Breaches of broadcasting standards in countries outside the UK by Fox between January 2013 and October 2017**

<i>Country</i>	<i>Number of breaches</i>
Turkey	[REDACTED]
Argentina	[REDACTED]
India	8
South Korea	5
Brazil	4
Bulgaria	4
Italy	4
Taiwan	4
Indonesia	2
Netherlands	1
<b>Total breaches outside of the UK</b>	<b>[REDACTED]</b>
UK	16

Source: CMA analysis of Fox data.

15.18 Not including the UK, Fox has breached broadcasting standards in the EU nine times between 2013 and 2017: four times in Italy, once in the Netherlands and four times in Bulgaria. In Italy, each breach related to rules limiting advertising, and on each occasion a fine was levied. For these four breaches, the Italian media regulatory authority issued fines to Fox totalling €82,632. The breach in [REDACTED].

15.19 The four breaches in Bulgaria were all different in nature. The breaches resulted from Fox broadcasting:

(a) [REDACTED]; this led to a fine of €1,500;

(b) [REDACTED]; this led to a fine of €7,500;

(c) [REDACTED]; this led to a fine of €4,500; and

(d) [REDACTED]. This led to a fine of €1,500.<sup>582</sup>

15.20 [REDACTED] ([REDACTED]%) of the [REDACTED] breaches by Fox in jurisdictions other than the UK were in Argentina and Turkey.

15.21 In the past five years, Fox has breached broadcasting standards [REDACTED] times in Turkey, where it has a significant presence, broadcasting thousands of hours of local content programming, including the number one news programme in Turkey. This was confirmed by the Turkish Radio and Television Council (RTUK). Most of the breaches related to content in which defamatory statements were made against individuals or organisations. Other breaches covered a range of other issues, including broadcasting content that was unsuitable for minors and advertising related infringements.

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<sup>582</sup> The first of these breaches has been successfully appealed by Fox. The third breach is under appeal.

- 15.22 Fox told us that [REDACTED]. With respect to news coverage, Fox submitted that its record of penalties is at least comparable to equivalent broadcasters in Turkey.<sup>583</sup> We contacted RTUK and took Fox’s comments into account in considering Fox’s record of compliance with broadcasting standards in Turkey.
- 15.23 Fox breached broadcasting standards [REDACTED] in the past five years [REDACTED]. We asked Fox for further detail about this record. Fox told us that Argentina’s media law is under review; [REDACTED].
- 15.24 Other than in Turkey and Argentina, Fox has not had that many breaches of broadcasting rules or standards in jurisdictions outside the UK in the past five years. Fox has not breached broadcasting rules in the US, where it is based. However, as outlined earlier, in contrast to the UK and other EU countries, the US has very limited content regulation.<sup>584</sup>

### ***Views of media regulatory authorities outside the UK***

- 15.25 To help contextualise Fox’s record of compliance in overseas jurisdictions and to verify information provided by Fox, we wrote to 16 international media regulators to obtain their views on Fox’s approach to broadcasting standards and compliance within their respective jurisdictions:
- (a) the regulatory authorities of Argentina, Brazil, Bulgaria, India, Indonesia, Italy, the Netherlands, South Korea, Taiwan and Turkey (the ten countries in which Fox told us that it had breached broadcasting rules);
  - (b) the FCC in the US;
  - (c) the media regulatory authorities in Germany, France, Spain and Iceland (as these were some of the countries in which Fox said that it had not breached broadcasting standards);<sup>585</sup> and
  - (d) the Australian Communications and Media Authority (ACMA) (because we considered News Corp’s broadcasting compliance in Australia, see paragraphs 15.45 to 15.48).

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<sup>583</sup> For example, in 2016, Fox had a total of 15 penalties, compared to 25 penalties for STAR TV (a Turkish nationwide TV channel owned by Ferit Şahenk, Doğuş), 21 penalties for Kanal D, and 11 penalties for ATV.

<sup>584</sup> Paragraph 14.7.

<sup>585</sup> We selected Germany, France and Spain as they are major European countries and have broadcasting standards similar to the UK (Germany and France both have similar impartiality provisions relating to the reporting of news; and Fox holds multiple licences in Spain which enables it to broadcast to other EEA countries). For completeness, we also selected Iceland as it is another European country in which Fox content is broadcast.

- 15.26 Eight regulators responded in writing (Taiwan, Italy, Bulgaria, the Netherlands, Australia, Turkey, Spain and Iceland) and we spoke with [REDACTED]. Seven of the eight regulators who responded provided information that confirmed the accuracy of Fox's submissions on its breaches of broadcasting rules. The eighth, Turkey, was unable to provide us with data and instead referred us to the RTUK website where its decisions are published. Only the National Communications Commission of Taiwan (NCC) and the Spanish National Authority for Markets and Competition (CNMC) commented on Fox's overall compliance record or approach and commitment to broadcasting standards.
- 15.27 The NCC said that although 'the compliance record indicates the Fox group is not perfect, there is no evidence shows (sic) the Fox is not genuinely committed to the broadcasting standards in Taiwan'. The NCC also noted the importance of local rules and standards: 'people's view of the same broadcasting content may vary in different territories' and indicated that an assessment of local compliance record would be a better reference for us to evaluate the Transaction.
- 15.28 The CNMC told us that 'Fox has complied with the Spanish audiovisual media regulation' and that it 'does not have any concern about Fox and its commitment to broadcasting standards'.
- 15.29 None of the evidence provided by international regulators in jurisdictions where Fox is directly responsible for compliance raised concerns regarding Fox's compliance with broadcasting standards or broadcasting regulation more generally.

### ***Conclusion on Fox's approach to broadcasting standards outside the UK***

- 15.30 Fox has had a large number of breaches in Turkey and Argentina. The approach to broadcast regulation and journalism, in Turkey in particular, is quite different from that in the UK. We therefore consider that meaningful inferences cannot be drawn regarding Fox's commitment to broadcasting standards in the UK from the statistics regarding compliance in Turkey and Argentina, given political and cultural differences. Similarly, Fox's strong compliance record in the US is of limited relevance given the minimal regulation of content in the US regime.
- 15.31 Overall, we concur with Ofcom's view which accords more weight to the record of compliance by Fox in EU jurisdictions, where prevailing regulation is broadly similar to that which exists in the UK. Fox's record of compliance in the EU and the EEA is good.

15.32 In forming our overall view, we attached weight to the views of broadcast regulators as to compliance in their own jurisdictions, given their respective expertise and knowledge of their own domestic arrangements. Again, none of the evidence they provided indicated that Fox had a lack of commitment to local broadcasting standards in their jurisdictions. In view of this, we conclude that the evidence from overseas jurisdictions on Fox's record of and approach to compliance outside the UK does not raise concerns about Fox's commitment to broadcasting standards objectives in the UK.

***Other considerations related to assessing Fox's approach to broadcasting standards outside the UK***

15.33 In addition to reviewing the compliance arrangements and record of Fox outside the UK, we also considered two specific case studies that third parties had submitted provide important evidence for our assessment of the broadcasting standards consideration. These were:

- (a) allegations of misreporting by Fox in the US; and
- (b) News Corp's compliance with broadcasting standards in Australia.

15.34 The first relates to alleged misreporting by Fox concerning the death of Seth Rich; and the second concerns News Corp's approach to channel management in Australia. In both cases, third parties raised concerns that the conduct of MFT controlled companies in these instances may be indicative of an approach that may be adopted by Fox post Transaction. We consider each case study in more detail below.

***Allegations of misreporting by Fox in the US***

15.35 Some third parties cited an example of alleged misreporting by Fox as evidence of MFT controlled companies' disregard for proper newsgathering and ethical standards. Here we outline the facts of the case available to us at this time and the potential relevance of it to our assessment of the broadcasting standards consideration.

15.36 On 15 and 16 May 2017, Fox broadcast interviews on its Fox 5 and Fox News channels with Rod Wheeler<sup>586</sup> linking the death of former Democratic National

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<sup>586</sup> Rod Wheeler is a private investigator appointed by the Rich family to investigate Seth Rich's death. Seth Rich was shot dead outside his home in Washington on 10 July 2016. The Rich family believes the death is linked to a robbery attempt, and it is part of an ongoing investigation by Washington's Metropolitan Police Department. For example, [as reported by CNN](#).

Committee (DNC) employee Seth Rich to his (alleged) leaked emails to Wikileaks. The story was also covered online.<sup>587</sup>

15.37 Following the Rich family's request to news providers that the story be retracted,<sup>588</sup> on 17 May 2017, Fox 5 published an updated editor's note stating that Rod Wheeler had 'backtracked' and that Fox 5 wanted to 'make important clarifications to the story'.<sup>589</sup> On 23 May 2017, Fox News published a retraction, stating: 'The article was not initially subjected to the high degree of editorial scrutiny we require for all our reporting. Upon appropriate review, the article was found not to meet those standards and has since been removed. We will continue to investigate this story and will provide updates as warranted.'<sup>590</sup>

15.38 We note that Rod Wheeler has filed a lawsuit against Fox, alleging that Fox falsely attributed quotes to him. Following an investigation by external counsel into the matter, Fox filed a motion to dismiss [§].

15.39 According to third parties, Fox's conduct in this matter is directly relevant to our assessment of the broadcasting standards consideration. The Rt. Hon Ed Miliband told us:

I would also draw your attention to one case in relation to Fox News, the Seth Rich case ... Nothing has happened ... Tragically, it reminds one of what happened with Milly Dowler as well. You have got grieving parents, a grieving family whose lives are made even worse by the actions of Murdoch outlets. If that does not show a disregard for proper standards and proper ethical standards, I do not know what does.<sup>591</sup>

15.40 Avaaz stated:

in court it is alleged that the quotes by the public investigator were concocted - intercepted with the political agenda and led to sloppy material being broadcast which was then retracted by Fox ... So far, we have not seen any evidence that any sanctions or incentives have been given to prevent that happening again. That is a tight intersection of broadcasting standards, what people see

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<sup>587</sup> Fox News (16 May 2017) *Seth Rich, slain DNC staffer, had contact with WikiLeaks, say multiple sources*. See also [Fox 5 website](#).

<sup>588</sup> For example, as reported by [The New York Times](#).

<sup>589</sup> [Fox 5 retraction](#).

<sup>590</sup> [Fox News, Statement on coverage of Seth Rich murder investigation](#).

<sup>591</sup> [Transcript of hearing with politicians](#), page 69 lines 21 to 25 and page 70 lines 1 to 21.

on their screen and the newsgathering methods news selection.<sup>592</sup>

- 15.41 In response to our questions on the procedures Fox had in place in the reporting of the Seth Rich story and how these were applied, Fox told us that Fox News has an editorial process for script production which allows for fact-checking and review and that where appropriate it will broadcast a correction, retraction or clarification statement. Fox explained that in this instance, the usual news gathering procedure had been followed. After the publication of the article on the Fox News website, the matter was internally investigated. Fox News found that those responsible for the story did not engage in a sufficiently rigorous review of the story prior to its publication, and a retraction was authorised. Fox told us that no member of Fox senior management or the Fox board was involved in the decision to publish or subsequently retract the article.
- 15.42 We note that at the then Secretary of State's request,<sup>593</sup> following its phase 1 assessment, Ofcom considered further evidence received on Fox's broadcasting of the Seth Rich story. Ofcom stated in its response:

Whether it [Rod Wheeler's complaint that Fox News knowingly faked a news story for political purposes] might also be of relevance to commitment to broadcasting standards would depend on a number of factors, including in particular the degree (if any) of knowledge and culpability within Fox News beyond the journalist concerned. If evidence of wider wrongdoing were to emerge at some future date it may be significant.

The evidence at present is uncertain ... Commentators on the case have suggested it may be part of some wider wrongdoing, although we are aware of no evidence and no legal claim that this is the case.<sup>594</sup>

### *Conclusion on allegations of misreporting by Fox in the US*

- 15.43 The evidence we obtained indicates that Fox News has procedures in place to review stories for accuracy and ex post controls in place to correct, retract or clarify statements after airing on-screen or publishing online. While the application of these procedures was found wanting in the reporting relating to

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<sup>592</sup> [Transcript of hearing with campaign groups](#), page 78 lines 17 to 23 and page 79 lines 1 to 4.

<sup>593</sup> [DCMS, Letter to Ofcom](#), 7 August 2017.

<sup>594</sup> [Ofcom, Letter to DCMS](#), 25 August 2017, Annex 2.

Seth Rich's tragic death, we note that Fox News responded by undertaking an internal investigation and subsequently retracting the story.

15.44 Nothing further has come to our attention since Ofcom's assessment of this alleged misreporting and, like Ofcom, we did not identify evidence to suggest that this was part of some wider wrongdoing. In that regard, we note that the court case between Rod Wheeler and Fox is still to conclude and therefore there remains some uncertainty about the relevant events. Accordingly, based on the facts available to us, we do not consider that there is sufficient evidence to suggest that an inference can be drawn from this alleged misreporting to inform our assessment of Fox or the MFT's genuine commitment to the broadcasting standards objectives in the UK. We also note that broadcasting standards and rules in the US are very different from those in the UK. In particular they do not impose requirements regarding due accuracy and due impartiality. We therefore attach greater weight to the evidence relating to Fox's approach to broadcasting standards in the UK (set out in chapter 14) in our assessment of the broadcasting standards consideration.

#### *News Corp's compliance with broadcasting standards in Australia*

15.45 We received a number of submissions regarding News Corp's approach to channel management in Australia. It was put to us by third parties<sup>595</sup> that since News Corp's takeover of Australian News Channel (ANC) in December 2016, one of its channels – Sky News Australia – has engaged in a more partisan reporting of news and current affairs. ANC, which broadcasts the suite of Sky News channels in Australia, is a wholly owned subsidiary of News Corp,<sup>596</sup> and is not directly linked to Fox due to the separation of Fox and News Corp. However, given News Corp is a company controlled by the MFT, we consider that the approach of News Corp and its wholly owned subsidiaries to broadcasting standards in Australia is potentially informative to our assessment of Fox's commitment to broadcasting standards in the UK.

15.46 Like those in the UK, Australian broadcasting codes require news coverage and current affairs programming to be presented accurately and fairly. News coverage must also be impartial. The ACMA<sup>597</sup> sets out in published guidance that the different broadcasting codes in Australia 'do not generally deal with

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<sup>595</sup> For example, submissions received from Ed Miliband et al and CPBF, available on the [case page](#).

<sup>596</sup> Of which the MFT own 38.4% of Class B Common Stock.

<sup>597</sup> The ACMA is explained in paragraph 15.25(d).

unlawful, unethical or distasteful journalistic practices'.<sup>598</sup> Third parties told us that Sky News Australia is increasingly veering away from the requirements of the Australian Code (explained in paragraph 15.47) with respect to its current affairs talk show evening programming since the takeover by News Corp.<sup>599</sup>

15.47 In Australia, the holder of the subscription TV licence is bound by the ASTRA Subscription Broadcast Television Code of Practice 2013 (the ASTRA Code). In the case of Sky News Australia, the licensee of the subscription TV licence is Foxtel.<sup>600</sup> As such, any breach of codes, standards or licence conditions resulting from material broadcast by Sky News Australia is a matter for Foxtel. In response to our information request, ACMA told us that Foxtel, the platform on which Sky News Australia is broadcast, has breached the Australian Code once since 2010.

#### *Conclusion on News Corp's approach to broadcasting standards in Australia*

15.48 While it may be the case that there has been a move toward more partisan reporting of news and current affairs, Sky News Australia's approach (if indeed adopted) has not been found to have breached the ASTRA Code. With regards to the broadcasting standards consideration, we do not consider that there is sufficient evidence to suggest that any useful inferences can be drawn to inform our assessment of Fox or the MFT's commitment to broadcasting standards in the UK. We therefore attach greater weight to the evidence relating to Fox's approach to broadcasting standards in the UK (set out in chapter 14) in our assessment of the broadcasting standards consideration. More detailed analysis of Fox's compliance with broadcast regulation in Australia is set out in Appendix J.

## **Sky's approach to broadcasting standards outside the UK**

### ***Overview of Sky's offering outside the UK***

15.49 Sky operates Direct to Home<sup>601</sup> platforms outside the UK in:

- (a) Ireland: Sky UK channels are distributed in Ireland via Sky's UK broadcast licences. Content broadcast in Ireland is therefore regulated by Ofcom;

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<sup>598</sup> [Investigations concepts – Accuracy](#).

<sup>599</sup> For example, submissions received from Ed Miliband et al and CPBF, available on the [case page](#).

<sup>600</sup> Foxtel is 50% owned by News Corp US.

<sup>601</sup> Direct to Home is a form of direct broadcasting, usually using satellite.

- (b) Germany and Austria: Sky Deutschland content is broadcast into Germany and Austria and is subject to German broadcasting rules and standards, [⌘];<sup>602</sup> and
- (c) Italy: Sky Italia content is broadcast into Italy and is subject to Italian broadcasting rules and standards.

15.50 In addition, Sky News International is simulcast to over 100 countries and is distributed to 'third party operators such as pay TV and free-to-air TV platforms'.<sup>603,604</sup> Sky News International is a direct feed of Sky News UK, except for bespoke content that is broadcast during advertising breaks, which is created and inserted into the feed by Sky in the UK. Sky does not provide specific regional feeds or include 'local' content for Sky News International.

15.51 Sky operates its business on a country by country basis and therefore its licensing arrangements are specific to the jurisdiction in which it operates. Other than the UK, Sky is only directly responsible for compliance with local broadcasting standards in Germany, Austria and Italy. We consider these in turn in more detail.

### ***Sky's compliance arrangements outside the UK***

#### *Sky UK and Ireland*

15.52 Sky's arrangements for compliance for services broadcast into Ireland are the same as those in place for the UK. We considered these arrangements in chapter 14 (see paragraphs 14.126 to 14.138).

#### *Sky Deutschland*

15.53 In Germany, there is more than one team in place to manage compliance with different aspects of the broadcasting standards rules and regulations. These compliance teams are advised by the legal department that itself discusses compliance regularly. As well as checking programme content and the existence and efficacy of technical controls, the compliance teams ensure policies, systems and procedures are up to date. Relevant employees receive

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<sup>602</sup> [⌘].

<sup>603</sup> Across Europe, Africa, Middle East and North Africa, Asia and the Americas.

<sup>604</sup> Sky News International Americas is a version of Sky News International that is made available in the US, Canada and the Caribbean and differs in two additional respects: (i) it broadcasts alternative sports bulletins each hour (created separately by Sky Sports to address sports rights restrictions) which replace the Sky News UK sports bulletins; and (ii) it does not include the 'Sportsline' programme which is broadcast on Sky News UK at weekends (due to rights restrictions).

compliance training as part of their induction and receive regular training thereafter.

### *Sky Italia*

15.54 Broadcast compliance in Italy is overseen by a team of people. It advises on broadcasting standards rules and regulations and provides regular updates on new developments. There are specific people responsible for compliance with the broadcasting standards rules that apply to the news. In addition, under Italian law, every journalist is subject to a separate code of conduct that includes rules on impartiality and accuracy. Journalists are personally responsible for compliance with this code.

### *Sky News International*

15.55 Sky News International is licensed and regulated by Ofcom in the UK. Under the provisions of the Directive,<sup>605</sup> Sky News International is only required to hold a licence in any one EEA country in order to broadcast to other EEA countries. Sky News International is broadcast in the EEA via its UK licence.

15.56 Broadcasting via its UK licence, Sky News is therefore required to comply with UK broadcasting standards and the Broadcasting Code. Outside the EU, [✂] distributors are contractually responsible for obtaining and complying with all appropriate and necessary regulatory authorisations, other permissions and licences in their territory. [✂].

15.57 Sky submitted that given the comprehensive nature of the Broadcasting Code, the specific obligations relating to news content and the embedded procedures Sky News has in place to ensure compliance, mean that the simulcast of Sky News as Sky News International is unlikely to contravene national broadcasting rules outside the UK. This has been borne out in practice.

### ***Sky's compliance record outside the UK***

15.58 We reviewed the compliance record of Sky in jurisdictions outside the UK. Sky services breached local broadcasting outside the UK 18 times in the past five years: twice in Germany, three times in Austria and 13 times in Italy.

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<sup>605</sup> EC Directive 2010/13/EU.

## *Germany*

15.59 The first breach in Germany was in 2013. Sky Deutschland broadcast a programme during the day that the German media regulatory authority deemed to be inappropriate for younger children. A fine of €200 was imposed.

15.60 In 2014, the second breach was the broadcast of an advertisement for an amusement park in which Sky's channel Sky Action was mentioned. The Media Authority considered this to constitute on-air promotion, and a fine of €1,000 was imposed.

## *Austria*

15.61 In the past five years, Sky has breached Austrian broadcasting rules five times:

- (a) in 2017 Sky breached the Austrian advertising regulations. Two other breaches were infringements of the Austrian Law on Audiovisual Media;
- (b) one infringement, in 2017, related to Sky Austria not providing recordings requested by Komm Austria (the Austrian media regulatory authority) by the specified deadline. No sanction was imposed;
- (c) the other one infringement, in 2015, related to Sky Austria failing to notify Komm Austria that Sky Sport Austria was broadcast in high definition as well as standard definition. Again, no sanction was imposed.

## *Italy*

15.62 In the past five years, Sky has breached Italian broadcasting rules 13 times:

- (a) violating rules relating to hourly advertising limits on eight occasions – once in 2013, six times in 2016 and once in 2017. This led to a total of fines exceeding €790,000.<sup>606</sup> In addition, there was a case in 2017 where Sky Italia infringed a ban on sponsorship of news programmes;
- (b) violation of the provision requiring the equal treatment of political parties during elections in 2013, which attracted a fine of €50,000;<sup>607</sup> and
- (c) three breaches in relation to the protection of minors, all in 2016. Sky Italia was fined €325,000.

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<sup>606</sup> Sky said that one of the fines was reduced by more than €100,000 by the relevant authority.

<sup>607</sup> Sky Italia is currently appealing the decision with the Administrative Court in Italy.

15.63 Sky told us that all of the nine advertising breaches were attributable to the same underlying cause: technical failures in the software utilised by Sky Italia Group companies.

### ***Conclusion on Sky's approach to broadcasting outside the UK***

15.64 In our view, Sky's approach to broadcasting standards outside the UK in terms of its policies, systems and procedures and its compliance record raises no concerns about Sky's commitment to the attainment of the broadcasting standards objectives in the UK. While its record in the jurisdictions in which it has to comply with local broadcasting rules is not perfect, we note that almost all of the breaches related to advertising. In Italy, the country in which Sky had the most breaches, almost all were attributable to a technical failure of the software used by Sky Italia, rather than any suggestion of issues with Sky's policies, systems and procedures or with the approach to compliance at Sky. Our view is that Sky's approach to broadcasting standards outside of the UK, in terms of policies, systems and procedures and its compliance record, raise no concerns about Sky's commitment to the attainment of the broadcasting standards objectives in the UK.

## **16. Wider regulatory compliance and corporate governance**

16.1 In assessing the broadcasting standards consideration we had regard to wider regulatory compliance and corporate governance at Fox and other companies controlled by the MFT and in which members of the Murdoch family hold senior positions.

16.2 We consider that evidence relating to wider regulatory compliance and corporate governance failures is potentially relevant to our assessment of the broadcasting standards consideration. For example, it may indicate that a media enterprise's policies, systems and procedures are nominal or ineffective in terms of supporting and promoting a culture of compliance with regulatory standards.

16.3 Prior to its split in June 2013, News Corp and Fox were part of the same legal entity – News Corporation. In this chapter, discussion of the activities of 'News Corp' that took place before June 2013 refer to this legal entity. Any reference to the activities of News Corp after June 2013 refer to the legal entity News Corp that is defined in paragraph 2.30 and used generally throughout our report.

16.4 Third parties submitted that companies controlled by the MFT and in which members of the Murdoch family hold senior positions, in general, do not

prioritise compliance with regulatory standards. In particular, a number of third parties submitted that these companies prioritise commercial gain or interests, such as influence, over compliance with regulatory standards.<sup>608</sup> The main issues of concern raised by third parties related to (i) misconduct at News Corp in connection with phone hacking prior to the Leveson Inquiry in 2011, and (ii) more recent allegations of sexual harassment and racial discrimination at Fox News in the US.<sup>609,610</sup> Notably, in relation to sexual harassment allegations, those made against senior staff such as the former CEO of Fox News, Roger Ailes, and the high-profile Fox News presenter, Bill O'Reilly. A small number of third parties also made submissions in respect of claims of misconduct and alleged corporate governance failings at News America Marketing (NAM), a subsidiary of News Corp.

- 16.5 As part of the wider context to our assessment, we note that Ofcom considered wider regulatory compliance and corporate governance as part of its assessment of whether Sky would continue to be fit and proper to hold broadcast licences after the Transaction. In its fit and proper decision, published on 29 June 2017, Ofcom stated:

It seems clear that there were significant failings of the corporate culture at Fox News ... In order to have a concern about fitness and properness we would need to see evidence of misconduct in the parent company Fox. However, we have no clear evidence that senior executives at Fox were aware of misconduct before it was escalated to them. And senior executives put in place new corporate governance arrangements ... In summary, the behaviours alleged at Fox News amount to significant corporate failure, however the overall evidence available to date does not provide a reasonable basis to conclude that if Sky were 100% owned and controlled by Fox, it would not be fit and proper to hold broadcast licences.<sup>611</sup>

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<sup>608</sup> For example, [Avaaz in its further submission](#). Other third parties broadly supported this submission – for example, submissions received from Ed Miliband et al; NUJ; and CPBF, available on the [case page](#).

<sup>609</sup> For example, submissions received from: Avaaz; Media Matters for America; Ed Miliband et al, among others. Available on the [case page](#).

<sup>610</sup> We note US press reports which indicate that the US Department of Justice, joined by the US Postal Inspection Service, are investigating whether Fox News failed to inform shareholders about settlements made with employees who made claims about former chairman and CEO Roger Ailes in relation to sexual harassment allegations. The existence of a federal investigation was reported from early 2017 for example by [CNN in February 2017](#). Later reports indicated that [the investigation was broadened to consider whether Fox used improper accounting practices for these financial settlements, for example as reported by The Washington Post in May 2017](#). Fox submitted that neither Fox nor Fox News had been subpoenaed and it was cooperating with the investigation.

<sup>611</sup> Ofcom, [Decision under section 3\(3\) of the Broadcasting Act 1990 and section 3\(3\) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited, published on 29 June 2017 \(explanatory wording added on 11 September 2017\)](#), paragraphs 9 and 10.

- 16.6 The Ofcom Public Interest Report cross-referred to this fit and proper assessment stating that ‘in light of our conclusions on [the fit and proper assessment], we do not consider that this evidence [regarding alleged failures of corporate governance at News of the World, News Corp and Fox News in the US] demonstrates that the merged entity would lack a genuine commitment’.<sup>612</sup>
- 16.7 Ofcom subsequently republished its fit and proper decision with explanatory wording added on 11 September 2017.<sup>613</sup> Ofcom’s decision has since been challenged by Avaaz, with initial steps launched on 29 September 2017. In February 2018, Avaaz was granted permission by the Administrative Court to proceed in its judicial review, with a hearing scheduled to take place by 30 June 2018.<sup>614</sup> While relevant context to our Inquiry, as set out in chapter 13, Ofcom’s fit and proper assessment and decision is separate and distinct from our assessment of, and findings on, the broadcasting standards consideration. In these circumstances, the ongoing judicial review proceedings do not affect our overall conclusions regarding the broadcasting standards consideration.
- 16.8 DCMS, setting out the reasons for the then Secretary of State’s ‘minded to’ decision to refer the Transaction to us on the broadcasting standards ground, noted that ‘it is difficult to be sure that any wider failings of corporate governance at 21CF are incapable of affecting broadcasting standards compliance’ and that ‘the representations [made in respect of the Transaction] raise concerns that the various actual and alleged failings might have been a product of a corporate culture that does not prioritise the need for regulatory compliance’.<sup>615</sup> The letter continued ‘in the light of these concerns, the Secretary of State considers that this issue could usefully be considered in further detail by the CMA’.<sup>616</sup>
- 16.9 As outlined previously, our view is that where a media enterprise – such as Fox – is already involved in broadcasting in the UK, evidence that directly relates to an intention to promote and support the attainment of the broadcasting standards objectives in the UK, and its record of compliance with the Broadcasting Code, is of central relevance and should be accorded the greatest weight in our assessment. Nevertheless, we note the large number of submissions which raised concerns in relation to wider regulatory

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<sup>612</sup> Ofcom Public Interest Report, page 100, paragraph 10.51.

<sup>613</sup> Ofcom, *Decision under section 3(3) of the Broadcasting Act 1990 and section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited, published on 29 June 2017 (explanatory wording added on 11 September 2017)*.

<sup>614</sup> For example as reported by [The Guardian](#) on 14 February 2018. See also Avaaz press release (29 September 2017) *Avaaz launches legal challenge of Ofcom’s green light for Murdochs’ Fox/Sky merger*.

<sup>615</sup> DCMS, *Letter to the Parties*, 12 September 2017, page 4.

<sup>616</sup> DCMS, *Letter to the Parties*, 12 September 2017, page 4.

compliance and corporate governance. We therefore looked at how Fox and News Corp (as companies controlled by the MFT and in which members of the Murdoch family hold senior positions) meet other, non-broadcasting, legal and regulatory obligations – including regulation relating to newspapers in the UK.

16.10 We looked at News Corp’s approach to wider regulatory compliance in the context of newspaper regulation. We also examined Fox’s corporate governance and the efficacy of its policies, systems and procedures that seek to ensure wider regulatory compliance. We then considered the weight to give this evidence in our assessment of the broadcasting standards consideration.

16.11 In this chapter we first set out third party views on wider regulatory compliance and corporate governance at companies controlled by the MFT and in which members of the Murdoch family hold senior positions. We then look at the main areas of concern put to us, as set out in 16.4. We first consider the misconduct at News Corp in connection with phone hacking prior to the Leveson Inquiry in 2011,<sup>617</sup> and then the record of News Corp in the UK post Leveson. We then look at complaints and settlements relating to corporate governance issues at Fox, and more recent examples of allegations concerning sexual harassment at Fox News in the US. We review how Fox dealt with these serious allegations and consider the efficacy of Fox’s previous and existing policies, systems and procedures, and the timeliness and effectiveness of Fox’s responses.

## **Submissions on wider regulatory compliance and corporate governance**

16.12 Over half of the submissions received in response to the issues statement, and the majority of the submissions received in response to the provisional findings referred to matters of regulatory compliance and corporate governance issues or to allegations of misconduct at companies controlled by the MFT and in which members of the Murdoch family hold senior positions, including News Corp and Fox.<sup>618</sup> Many of these submissions pointed to this as evidence that the Transaction, if it went ahead, would be ‘against the public interest’ and suggested a lack of a genuine commitment to broadcasting standards by MFT controlled companies. The third party submissions made in

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<sup>617</sup> In our report, save where the context indicates otherwise, we use the term ‘phone hacking’ to collectively refer to the following forms of misconduct - phone hacking, impermissible payments to public officials, unlawful access to, and use of, personal data and the exercise of improper influence on public officials.

<sup>618</sup> Submissions are published on the [case page](#).

response to our provisional findings generally reflected or reinforced points raised earlier in our Inquiry, for example in response to the issues statement.

16.13 Ed Miliband et al submitted in response to the issues statement that 'corporate governance failures in Murdoch-controlled companies demonstrate that the MFT has so little commitment to corporate or ethical standards'.<sup>619</sup>

16.14 In a hearing with us Lord Falconer stated:

The corporate governance culture revealed in their conduct, reveals that they put commercial gain above compliance with basic corporate standards... it shows the attitude of the Murdochs...you should not believe, having regard to their record, that they are genuinely committed to complying with standards that they and the regulator say can easily be got around.<sup>620</sup>

16.15 Avaaz submitted in response to the issues statement that allegations of corporate malfeasance at MFT controlled companies is 'directly linked to the Murdoch's' genuine commitment to broadcasting standards' and that evidence of corporate governance failures at these companies is relevant when assessing a genuine commitment to broadcasting standards.<sup>621</sup> In a hearing, Avaaz said:

... if you look across all the corporate governance failures ... you will see a pattern ... the overarching theme here is that the serial failures of corporate governance do not provide us with any confidence that they are genuinely committed to broadcasting standards.<sup>622</sup>

16.16 The CPBF submitted in response to the issue statement that MFT controlled companies 'have a poor reputation for governance and raised concerns that the corporate culture at Fox does not prioritise the need for regulatory compliance'.<sup>623</sup> The CPBF went on to say in a hearing that: 'there is hard evidence of a lack of a culture that takes compliance issues seriously.'<sup>624</sup>

16.17 Third parties submitted that previous issues with regulatory compliance and corporate governance in relation to phone hacking at News Corp<sup>625</sup> in the UK and the more recent allegations against Fox News in the US are evidence of

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<sup>619</sup> [Ed Miliband et al submission to issues statement](#).

<sup>620</sup> [Transcript of hearing with politicians](#), page 66 lines 16 to 17 and page 67 lines 15 to 20.

<sup>621</sup> [Avaaz further submission to issues statement](#).

<sup>622</sup> [Transcript of hearing with campaign groups](#), page 70 lines 13 to 15 and page 71 lines 13 to 17.

<sup>623</sup> [CPBF submission to issues statement](#).

<sup>624</sup> [Transcript of hearing with campaign groups](#), page 71 lines 18 to 21.

<sup>625</sup> Fox was formerly known as News Corporation – see chapter 2 for more detail.

the MFT's lack of commitment to the broadcasting standards objectives. For example, Ed Miliband et al submitted in response to the issues statement that:

The failures at News International... stands as evidence of the Murdoch's real attitude to corporate governance and regulatory compliance, and therefore of the likelihood that a company they control would be genuinely committed to ensuring Sky continues to meet UK broadcasting standards... what precisely the Murdochs knew personally cannot absolve them from responsibility for the massive lack of commitment to media standards and corporate compliance...<sup>626</sup>

... How much confidence this inspires in the new arrangements depends on a judgement about how much the personal assurances of the Murdochs are worth. We contend that the harassment scandal at Fox News suggests they are not worth much...<sup>627</sup>

... Again, the prospect of the concern of others at the revelations, and of their concern causing commercial and reputational damage to 21CF, seems to have been what prompted the Murdochs to dismiss O'Reilly.<sup>628</sup>

16.18 In response to the provisional findings, Ed Miliband et al stated that 'little, if anything, positive can be inferred from the adoption of new compliance procedures at News UK, since - as with the case of Fox News in 2017 - there was a clear short-term commercial self-interest in adopting these procedures. Again, they cannot be evidence of a positive or proactive commitment to compliance.'<sup>629</sup>

16.19 In response to the provisional findings, other third parties also submitted that MFT controlled companies are generally reactive in their approach to wider regulatory compliance and corporate governance, responding to misconduct after the event, rather than being proactive and seeking to prevent misconduct arising in the first place. Such submissions gave the example of action by News Corp following the events in connection with phone hacking. For example, the MRC submitted that 'what is surely germane to the issue of "genuine commitment" in this context ... is the responsiveness of proprietors to such evidence of wrongdoing. On this point the record of the MFT provides

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<sup>626</sup> [Ed Miliband et al submission to issues statement](#), page 81.

<sup>627</sup> [Ed Miliband et al submission to issue statement](#), page 81.

<sup>628</sup> [Ed Miliband et al submission to issues statement](#), page 88.

<sup>629</sup> [Ed Miliband et al submission to provisional findings](#).

little confidence that any failures associated with a breach of broadcasting standards will be dealt with in a manner that is proportionate, timely and effective.<sup>630</sup> Ed Miliband et al submitted that ‘the only positive aspect of this scandal is News UK’s institution of new compliance procedures. But these procedures were again adopted reactively, in response to a major scandal, massive public outrage, an ongoing public inquiry ... and criminal prosecutions against News UK employees. ... Positive conclusions therefore cannot be drawn from any aspect of the record of News Corp’s UK newspaper titles since 2011’.<sup>631</sup>

16.20 We note that allegations of misconduct relating to sexual harassment and racial discrimination at Fox News came to light in 2016 and 2017,<sup>632</sup> as did allegations of bribery and corruption at Fox Sports in 2017,<sup>633</sup> and formed part of the backdrop to our Inquiry. We consider these allegations to be serious in their nature and extent.

16.21 In relation to allegations of sexual harassment at Fox News in the US, Avaaz submitted in response to the issues statement that the acceptance of the Fox board that former presenter Bill O’Reilly had made several personal settlements with employees in relation to allegations of sexual harassment, is evidence that the company does not abide by its stated commitment to ‘meet the highest standards of corporate conduct’. Avaaz also submitted the Fox board’s lack of awareness of the amount of a particularly large settlement involving Mr O’Reilly as evidence that the procedure for reporting and escalating issues to the board as part of Fox’s compliance programme were not effective or properly followed.<sup>634</sup> In its submission to the provisional findings, Avaaz also raised a number of points in relation to decisions made by the Fox board regarding the renewal of Mr O’Reilly’s contract in 2017. Avaaz stated: ‘the Fox Board’s stance on O’Reilly in fact shows a major failure of the 2012 policy ... raising serious questions about how the Fox Board sees the trade-off between governance standards and profits.’<sup>635</sup>

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<sup>630</sup> [The MRC submission to provisional findings](#).

<sup>631</sup> [Ed Miliband et al submission to provisional findings](#).

<sup>632</sup> For example as reported by [The New York Times](#).

<sup>633</sup> We note a small number of third party submissions to the issues statement referred to allegations in 2017 of bribery and corruption at Fox Sports (among other broadcasters), related to payments to FIFA officials in an attempt to secure the broadcasting rights to major South American football tournaments. For example as reported by [The Guardian](#) and [Bloomberg](#). We also note reports of a European Commission raid of media companies across the EU, including Fox’s UK offices on 10 April 2018, as a preliminary step as part of its investigation into a suspected cartel in sports rights distribution and broadcasting, for example as reported by [The Guardian](#) and [Reuters](#).

<sup>634</sup> Avaaz, *Defiance, not compliance: the culture and behaviour of Murdoch-owned companies*.

<sup>635</sup> [Avaaz submission to provisional findings](#), page 10, paragraph 49.

## Wider regulatory compliance at MFT controlled companies

### *Regulatory compliance at News Corp*

- 16.22 News Corp previously operated through its subsidiary News International in the UK and Europe, and published some of its newspaper titles through News Group Newspapers, including The News of the World before its closure in 2011. News Corp's operations in the UK are now principally conducted through News UK.<sup>636</sup> Rupert, Lachlan and James Murdoch each held senior positions in News Corp,<sup>637</sup> and continue to hold similar roles in both Fox and News Corp at the time of writing.<sup>638</sup>
- 16.23 In their submissions, a number of third parties raised concerns regarding the continued involvement of certain individuals in different MFT controlled companies and relied on this as evidence that the MFT would lack a genuine commitment to the UK broadcasting standards objectives post Transaction. For example, in its response to the provisional findings, Hacked Off submitted that Rupert Murdoch, James Murdoch and Rebekah Brooks 'are today instrumental in the application of these [governance, ethics and conduct] codes and yet all three have failed to uphold basic governance standards in very significant ways in the past'.<sup>639,640</sup>
- 16.24 While we recognise that corporate governance failings have occurred at MFT controlled companies in the past, we find that concrete and credible steps

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<sup>636</sup> News UK wholly owns five groups of companies that form its five main divisions: Times Newspapers Holdings Limited; News Group Newspapers Limited; Newsprinters; Wireless Group; and Unruly Holdings Ltd. Times Newspapers Holdings is the holding company for Times Newspapers Limited, which publishes The Times and The Sunday Times. News Group Newspapers owns and publishes The Sun and The Sun on Sunday. The News of the World was published by News Group Newspapers. See chapter 2 for further detail.

<sup>637</sup> Rupert Murdoch was CEO and Chairman of News Corp; James Murdoch was Director from 2007 to 2013, Chairman and CEO, Europe and Asia from 2007 to 2011 and Deputy COO and Chairman, Europe and Asia from 2011 to 2013; Lachlan Murdoch was Director until 2013 and Deputy COO until 2005. Set out in further detail in chapter 2.

<sup>638</sup> Rupert Murdoch currently serves as Co-Executive Chairman of Fox, Executive Chairman of News Corp, and as of July 2016, acting CEO of Fox News; James Murdoch is currently CEO of Fox and a director at News Corp; Lachlan Murdoch is currently Co-Executive Chairman of Fox, a role held since March 2014, and Co-Chairman at News Corp. Set out in further detail in chapter 2.

<sup>639</sup> [Hacked Off submission to provisional findings](#).

<sup>640</sup> Also [Avaaz submission to provisional findings](#), page 9, paragraphs 9 and 10. Avaaz submitted that 'where there had been a significant change of management ...evidence of misdemeanours in a previous decade was no longer relevant to corporate governance attitudes. But in this case, Rupert, James and Lachlan Murdoch all had senior roles then and now'. We note that in its submission Avaaz also identified the roles held by James Murdoch at News Group Newspapers, Sky and Fox, and the consideration of these roles by Ofcom in its fit and proper decisions about Sky in 2012 and in 2017, as of particular relevance. As set out in chapter 13 and paragraph 5.7, the broadcasting standards consideration which we are considering in our Inquiry is separate and distinct from Ofcom's ongoing duty to assess whether a person is fit and proper to hold a broadcasting licence. Separately, we note the judicial review of Ofcom's fit and proper assessment of Sky in 2017, ongoing at the time of writing, which relates in part to the role of James Murdoch as Chairman (and formerly CEO at the time of Ofcom's 2012 fit and proper assessment of Sky). Avaaz press release (29 September 2017) [Avaaz launches legal challenge of Ofcom's green light for Murdochs' Fox/Sky merger](#).

have been taken (and continue to be taken) to address concerns (see 16.40 to 16.52). These measures have been instigated, and their implementation overseen, by senior figures at News Corp and Fox, including the individuals in question. We did not see credible evidence calling into question the ongoing commitment of these individuals to these reforms. Overall, we do not consider that the allegations regarding involvement by these individuals in corporate governance failings in the past is sufficient to indicate a lack of genuine commitment on the part of the MFT to the broadcasting standards objectives in the UK.<sup>641,642</sup>

### *Pre Leveson Inquiry*

16.25 News Corp's compliance arrangements previously included its Standards of Business Conduct (the Standards) issued in 1996 and revised subsequently to provide guidance to staff on conduct and compliance; a Global Anti-Bribery and Anti-Corruption Policy issued in 2009;<sup>643</sup> and formal reporting channels via the Audit Committee as of 2004 and 'Alertline' as of 2005, a free telephone or web service for raising concerns anonymously.

16.26 In 2005, evidence began to emerge of improper or unlawful conduct by certain journalists and investigators in obtaining stories for UK newspapers. The 2005 allegations related to (but were not limited to) certain News Corp titles, including The News of the World, using illicit means to obtain private information without public interest justification. This included phone hacking, impermissible payments to police or other public officials and exercising improper influence to obtain information.<sup>644</sup>

16.27 Following investigation by the Information Commissioner's Office (ICO), two private investigators and a number of police officers were charged with conspiracy to commit misconduct in public office in connection with obtaining and selling personal information to third parties, particularly journalists. The CPS brought a series of criminal prosecutions resulting in nine convictions

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<sup>641</sup> Separately, as set out in further detail in paragraph 16.54, we note ongoing civil proceedings currently before the High Court in relation to the role of Rebekah Brooks and James Murdoch, among others, at News Corp. These claims remain unproven allegations at the time of writing and, as such, we attached limited weight to them.

<sup>642</sup> Insofar as Rebekah Brooks is concerned, we note that she (among others) was acquitted of the criminal charges brought by the Crown Prosecution Service (CPS) in relation to phone hacking at News Corp (paragraphs 16.29 to 16.31).

<sup>643</sup> The policy was revised in 2010 and 2011.

<sup>644</sup> As noted previously, in our report we refer to these allegations as 'phone hacking'. Save where the context indicates otherwise, this term should be taken as short hand for all of these forms of misconduct, including impermissible payments to public officials, unlawful access to, and use of, personal data and the exercise of improper influence on public officials.

following police investigations into phone hacking at News UK and Mirror Group Newspaper titles.<sup>645,646</sup>

16.28 Rebekah Brooks (then Editor of The Sun), Andy Coulson (then Editor of The News of the World) and a number of others were charged with conspiracy to unlawfully intercept telecommunications, conspiracy to commit misconduct in public office and conspiracy to pervert the course of justice. Mrs Brooks and her co-defendants except for Mr Coulson were acquitted. Mr Coulson was convicted of conspiracy to intercept voicemails and subsequently sentenced to a period of imprisonment. In sentencing Mr Coulson, the Hon. Mr Justice Saunders commented:

What is an important matter...is the amount of phone hacking that went on ... It had started by April 2002 when Milly Dowler's phone was hacked and it continued until August 2006 with the arrest of Mulcaire and Goodman. [...] Over the period there were many thousands of phone hacks and many hundreds of voicemails were accessed illegally. [...] They all knew that it was contrary to the PCC code which governs the conduct of journalists and they all knew it was morally wrong. These Defendants have said that they did not realise that it was a criminal offence. [...] It is the duty of senior journalists to know the law particularly in so far as it affects their work.<sup>647</sup>

### *The Leveson Inquiry and other parliamentary inquiries*

16.29 While the Leveson Inquiry<sup>648</sup> was not primarily concerned with corporate governance, it made a number of relevant findings, including:

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<sup>645</sup> Operation Weeting, an operation to investigate allegations of phone hacking at The News of the World; Operation Pinetree, a Metropolitan Police investigation into The News of the World phone hacking allegations covering different facts than the Operation Weeting investigation; and Operation Golding, an operation to investigate allegations of phone hacking in Mirror Group Newspapers.

<sup>646</sup> The CPS also considered bringing corporate charges against News Group Newspapers. However, noting the difficulties of establishing corporate liability under UK law, it stated that 'After a thorough analysis, we have decided there is insufficient evidence to provide a realistic prospect of a conviction and therefore no further action will be taken in any of these cases'. For example as reported by [The Independent of the Statement from the Crown Prosecution Service: No further action to be taken in Operations Weeting or Golding, 11 December 2015](#). See also [CPS blog article](#).

<sup>647</sup> For further detail, see [the Hon. Mr Justice Saunderson's sentencing remarks](#).

<sup>648</sup> At the time it was anticipated that the Leveson Inquiry would comprise of two parts, the second of which would look into, among other things, the extent of unlawful or improper conduct within News International or other media organisations. In 2016 the government announced that it was to hold a consultation on whether to proceed with Part II of the Leveson Inquiry. This consultation ran from 1 November 2016 to 10 January 2017. The [Conservative Party 2017 election manifesto](#) (paragraph 80) included a commitment not to proceed with Leveson Part II. On 1 March 2018, the Secretary of State confirmed that Part II of the Leveson Inquiry would not be going ahead, stating in a speech to the House of Commons 'The Leveson inquiry was a diligent and thorough examination of the culture, practices and ethics of our press in response to illegal and improper press intrusion ... It is clear that we have seen significant progress from publications, from the police and from the new regulator ... We do not believe that reopening this costly and time consuming public Inquiry is the right way forward, so

- that ‘the evidence outlined ... points to a serious failure of governance within The News of the World, News International and News Corp’.<sup>649</sup> In particular, there was a failure on the part of management at The News of the World to take appropriate steps to investigate whether there was evidence of wrongdoing within the organisation.<sup>650</sup> In addition, the Leveson Inquiry found that if James Murdoch was unaware of events due to a cover up then the accountability and governance systems at News International had effectively broken down. If this was not the case, then James Murdoch failed to take appropriate action to deal with allegations of widespread criminality within the organisation;<sup>651</sup> and
- if News Corp management were aware of the allegations, action should have been taken to investigate them. If News Corp were not aware of the allegations, then there would appear to have been a significant failure of corporate governance and in particular, in the effective identification and management of risks.<sup>652</sup>

16.30 A number of parliamentary committees have considered phone hacking and corporate governance at News Corp.<sup>653</sup> For example, the House of Commons Select Committee on Culture, Media and Sport found:<sup>654</sup>

In failing to investigate properly, and by ignoring evidence of widespread wrongdoing, News International and its parent News Corporation exhibited wilful blindness, for which the companies’ directors - including Rupert Murdoch and James Murdoch - should ultimately be prepared to take responsibility.<sup>655</sup>

16.31 In response to revelations regarding illegal voicemail interception, News Corp closed The News of the World in July 2011. That same month, it created an independently chaired Management and Standards Committee (MSC), which operated independently from News International. The MSC had a reporting line to the News Corp board via the independent chairman Lord Grabiner QC

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considering all the factors that I have outlined to the House today, I have informed Sir Brian that we are formally closing the inquiry.’ [House of Commons Hansard, 1 March 2018, Volume 636, Leveson Inquiry](#) for the full text.

<sup>649</sup> [Leveson Report](#), Volume I, Part E, Chapter 4, paragraph 7.49.

<sup>650</sup> [Leveson Report](#), Volume I, Part E, Chapter 4, paragraph 7.49.

<sup>651</sup> [Leveson Report](#), Volume I, Part E, Chapter 4, paragraph 7.51.

<sup>652</sup> [Leveson Report](#), Volume I, Part E, Chapter 4, paragraph 7.52.

<sup>653</sup> These include for example: [the House of Commons Select Committee for Culture, Media and Sport, \*Privacy and media intrusion\*](#) in May 2003; the House of Commons Culture, Media and Sports Committee, [Press standards, privacy and libel](#) in February 2010; [the House of Commons Home Affairs Committee, \*Unauthorised tapping into or hacking of mobile telecommunications\*](#) in July 2011; the House of Commons Select Committee on Culture, Media and Sport, [News International and phone hacking](#) on 30 April 2012.

<sup>654</sup> [House of Commons Select Committee on Culture, Media and Sport, \*News International and phone hacking\*](#).

<sup>655</sup> [House of Commons Select Committee on Culture, Media and Sport, \*News International and phone hacking\*](#), paragraph 275.

reporting to Gerson Zweifach, Senior Executive Vice President and Group General Counsel,<sup>656</sup> and Mr Zweifach reporting to Viet Dinh, independent director and Chair of News Corp's NCGC.<sup>657</sup>

*Ofcom's views on regulatory compliance of News Corp in its 2012 fit and proper assessment of Sky*

- 16.32 In July 2011 Ofcom confirmed that it had a duty to consider whether Sky was fit and proper to continue to hold its broadcast licences.<sup>658</sup> In doing so, Ofcom considered that it was 'in principle relevant' to consider the character and conduct of James and Rupert Murdoch and News Corp 'because they stand in a relationship to Sky of material influence or control such that they are able to exert influence over it'.<sup>659</sup>
- 16.33 In its fit and proper decision Ofcom noted Sky's announcement of 3 April 2012 that James Murdoch had stepped down as Chairman,<sup>660</sup> therefore lessening the extent of his influence over Sky. Ofcom also noted that during James Murdoch's tenure as Chairman and prior to that as CEO of Sky, 'Sky had continued to be a successful company'.<sup>661</sup>
- 16.34 Ofcom stated that on the basis of the evidence available, 'James Murdoch's conduct ... repeatedly fell short of the conduct to be expected of him as a chief executive officer and chairman'. Ofcom determined that the evidence available to date did not provide a reasonable basis to conclude that James Murdoch had deliberately engaged in any wrongdoing, or for it to reach any conclusion that Rupert Murdoch or News Corp had acted in a way that was inappropriate in relation to phone hacking, concealment, or corruption by employees of News Group Newspapers or News International.<sup>662</sup>
- 16.35 Overall Ofcom concluded: 'we do not consider, and having taken into account all the relevant factors, that on the evidence available to date Sky is no longer fit and proper to hold broadcast licences'.<sup>663,664</sup>

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<sup>656</sup> Fox indicated to us at the main party hearing that Gerson Zweifach was hired in relation to the corporate governance failures at News International.

<sup>657</sup> [News Corp Annual Report, August 2012.](#)

<sup>658</sup> [Ofcom press release 20 September 2012.](#)

<sup>659</sup> [Ofcom decision on fit and proper assessment of Sky, 20 September 2012, paragraph 11.](#)

<sup>660</sup> [BSkyB announces board changes, 3 April 2012.](#)

<sup>661</sup> [Ofcom decision on fit and proper assessment of Sky, 20 September 2012, paragraph 44.](#)

<sup>662</sup> [Ofcom decision on fit and proper assessment of Sky, 20 September 2012, paragraphs 14, 37 to 40.](#)

<sup>663</sup> [Ofcom decision on fit and proper assessment of Sky, 20 September 2012, paragraph 46.](#)

<sup>664</sup> We note that one of the grounds of Avaaz's judicial review of Ofcom's 2017 fit and proper decision regarding Sky if it were fully owned by Fox, is 'In an earlier Fit and Proper decision in 2012, Ofcom severely criticised James Murdoch's conduct at News Corporation and found Sky fit to retain a licence only after noting that he had stepped down as chair of Sky. In its 2017 report, Ofcom failed to explain why it was content with James

### *Our views on regulatory compliance at News Corp*

16.36 With regard to misconduct at News Corp in connection with phone hacking prior to the Leveson Inquiry in 2011, our view is that it is clear that there were serious failings in compliance with newspaper regulation and the law, as documented by the Leveson Inquiry and elsewhere. Voicemail interception, illegal payments to public officials and related misconduct are serious violations of the (then) Press Complaints Commission (PCC) Editors' Code of Practice<sup>665</sup> and the criminal law.

16.37 However, we note that the misconduct which gave rise to the phone hacking scandal, while serious, occurred some time ago. As a result, we looked at the record of News Corp in the UK after the Leveson Report.

### *News America Marketing*

16.38 As noted above, a small number of third parties made submissions to the issues statement and provisional findings in respect of claims of misconduct and alleged corporate governance failings at NAM, a marketing business owned by News Corp.<sup>666</sup> NAM has entered into a number of settlements in respect of allegations of anti-competitive activity. In 2016 a \$280 million settlement was reached following a class-action lawsuit in the US brought by several companies alleging anti-competitive conduct.<sup>667</sup> A number of other settlements have also been reached. We also note that in its letter to Ofcom on 7 August 2017, DCMS identified 'apparent new evidence' such as 'representations about the various litigation relating to corporate governance failings at another Murdoch-controlled company, News America Marketing (NAM) which may be relevant to issues of corporate governance concerns.'<sup>668</sup>

16.39 We considered the claims against NAM as potentially relevant evidence to our assessment, in that they are related to compliance with other, non-broadcasting, legal and regulatory obligations by an MFT controlled company. However, we consider that it is also of relevance that the conduct involved did not concern adherence to broadcasting standards in the UK or regulation in the UK, and related to misconduct claimed to have occurred some time ago.

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Murdoch's role as CEO of a merged Fox/Sky, including his assurances on corporate governance.' Source: Avaaz press release (29 September 2017) [Avaaz launches legal challenge of Ofcom's green light for Murdochs' Fox/Sky merger](#).

<sup>665</sup> The PCC was closed on 8 September 2014 and replaced by IPSO.

<sup>666</sup> For example, [Avaaz in its response to the issues statement and in its response to provisional findings](#).

<sup>667</sup> For example as reported on [News Corp's website](#), and by [Reuters](#). NAM and News Corp deny any wrongdoing in relation to the settlement.

<sup>668</sup> [DCMS, Letter to the Parties, 7 August 2017](#).

We also note the compliance and corporate governance arrangements put in place by News Corp, described further below.

### ***News Corp's compliance with press regulation in the UK***

16.40 As previously explained in chapter 5, IPSO regulates all News UK titles and is responsible for regulating their compliance with the Editors' Code of Practice. IMPRESS (while recognised by the Press Recognition Panel) does not regulate any News UK publications).<sup>669</sup> We considered News UK titles' approach to editorial compliance and complaints handling procedures and their compliance record against other broadly comparable publications.

16.41 We found that the complaints policies of The Sun<sup>670</sup> and The Times<sup>671</sup> when compared with The Mirror<sup>672</sup> and The Daily Mail<sup>673</sup> were similarly robust. In addition, with regard to complaints to The Sun, The Sun on Sunday and The Sun website, these are resolved by a person independent of editorial staff - the Ombudsman, a role established in 2012. The Ombudsman reports to and is appointed by the Managing Editor of The Sun on a rolling annual contract as a consultant. As well as dealing with IPSO complaints, the Ombudsman deals with complaints that come directly to the newspaper through an online form. While The Times and The Sunday Times do not have an ombudsman, each paper has appointed a Senior Editor to handle complaints and advise the Editor and journalists on IPSO related matters.

16.42 IPSO told us it is generally satisfied with the way News UK publications process and resolve complaints. IPSO explained that although it is difficult to compare across different titles, the number, nature and seriousness of complaints regarding News UK publications are comparable to similar publications.<sup>674</sup> Our review of IPSO statistics on News UK titles' compliance record and of complaints by publisher covering 2015, 2016 and 2017 supported this finding.<sup>675</sup> For example, upheld complaints in respect of The

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<sup>669</sup> We note comments by the Secretary of State in his address to the House of Commons on 1 March 2018, that IPSO 'now regulates 95% of national newspapers by circulation. It has taken significant steps to demonstrate its independence as a regulator, and in 2016 Sir Joseph Pilling concluded that IPSO had largely complied with Leveson's recommendations ... IMPRESS, has been recognised under the royal charter.' [House of Commons Hansard, 1 March 2018, Volume 636, Leveson Inquiry](#) for the full text.

<sup>670</sup> The Sun's Complaints Policy is set out on its website and in the [News UK IPSO Annual Report 2016](#).

<sup>671</sup> The Times and The Sunday Times Editorial Complaints Policy is set out on its website and in the [News UK IPSO Annual Report 2016](#).

<sup>672</sup> [The Mirror's complaints policy is set out on its website.](#)

<sup>673</sup> [The Daily Mail complaints procedure is set out on its website.](#)

<sup>674</sup> [Transcript of hearing with IMPRESS and IPSO.](#)

<sup>675</sup> While outside of the time period of our analysis, we note that on 5 April 2018, IPSO issued a decision upholding a complaint from Tower Hamlets borough council in respect of reporting by The Times on a story in August 2017. The complaint was received on 1 December 2017. The IPSO Committee ruled that the appropriate remedial action was publication of an adjudication on page six or earlier of The Times. The Times published its

Sun, The Sun website and The Sun on Sunday in 2016 and 2017 were broadly similar in number and character to those received by The Daily Mail, The Mail website and The Mail on Sunday.

16.43 We also considered the nature and gravity of complaints against News UK titles and comparable publications in qualitative terms. For almost all publications, most complaints raised and upheld related to accuracy matters. Although some News UK titles' breaches of the Editors' Code of Practice could be characterised as significant (for example, *Buckingham Palace v The Sun*),<sup>676</sup> we found that the nature of breaches by News UK publications was broadly consistent with comparable publications. This was, in turn, consistent with the evidence given to us by IPSO, which was that the number of complaints upheld against News UK publications was in line with what would be expected for such publications.

16.44 Next, we consider the compliance arrangements put in place at News Corp after 2011, mainly in response to the misconduct prior to the Leveson Inquiry in 2011 in connection with phone hacking.

### ***Establishing a global compliance programme at News Corp***

16.45 In April 2012 the News Corp board approved a group-wide global compliance programme. This included the establishment of a Compliance Steering Committee (CSC). We note statements made by Rupert Murdoch to News Corp staff and shareholders in support of the programme<sup>677</sup> such as in a memorandum to staff in August 2012:

... to continue to be worthy of the trust of our audiences around the world, we all have an affirmative obligation to adhere to the highest standards of ethical behaviour, consistent with our standards of business conduct. The enhancements to the compliance function that are already underway and that we are planning will help us to maintain those standards.<sup>678</sup>

16.46 Some key aspects of the global compliance programme included:

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adjudication on page one of its print edition. Further information is available on [IPSO's website](#), case 20480-17 Tower Hamlets Borough Council v The Times.

<sup>676</sup> This was in relation to an upheld complaint that The Sun breached clause one (accuracy) of the Editors' Code in an article headlined *Queen backs Brexit* published on 9 March 2016. Details available on the [IPSO website](#).

<sup>677</sup> For example, in News Corp's 2011 Annual Report; a statement published as an advertisement in UK national newspapers on 15 July 2011 and a statement to the UK parliamentary Committee on Culture, Media and Sport's 2012 report.

<sup>678</sup> Full text of the memorandum reproduced by [The Guardian: Rupert Murdoch's Memo to News Corp Staff – Full Text, 15 August 2012](#).

- greater board level oversight and new corporate governance structures:** the CSC Charter approved in February 2013 states that it is responsible for managing compliance programmes. The CSC includes key senior personnel (at least General Counsel and Chief Compliance Officer, Chief Operating Officer, Deputy Chief Financial Officer, Head of Corporate Audit, and Group Chief Compliance Officers (GCCOs))<sup>679</sup> and reports to the Audit Committee at least quarterly, to the independent directors at least twice a year and the board at least annually.<sup>680</sup> The Audit Committee, comprised of three or more independent directors, is responsible for overseeing the activities of the CSC as set out in its Charter<sup>681</sup> and for ongoing monitoring and review of the compliance programme. The NCGC, among other things, is responsible for developing, reviewing and recommending to the board a set of corporate governance principles including the company's Statement of Corporate Governance,<sup>682</sup>
- implementation of compliance procedures and corporate governance structures:** in October 2012, News Corp appointed five full time GCCOs to oversee compliance matters in specific business units with a reporting line to the board via the Group General Counsel and Chief Compliance Officer.<sup>683</sup> Post-split, three GCCOs remained with Fox and two with News Corp. Fox has since appointed a fourth GCCO. Annual training on the Standards and corporate compliance for the board was revised and enhanced in 2012;<sup>684</sup>
- communication and guidance to staff on compliance standards via policies:** in 2013 the CSC put in place 11 new policies and protocols, largely focused on payment and anti-corruption practices. Since 2013, employees are required to read the Standards and certify annually that they have done so (this policy continued at News Corp and Fox);
- strengthened reporting channels:** the board directed that all allegations, whether criminal or civil, that go to the integrity of the business be reported immediately to Group General Counsel or the CSC through the relevant GCCO. The CSC also receives all complaints entered into the Alertline system via an automatic email and determines responsibility for follow up, investigation and mitigation, as appropriate.

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<sup>679</sup> Information on these arrangements is provided by [News Corp on its website](#).

<sup>680</sup> Information on these arrangements is provided by [News Corp on its website](#).

<sup>681</sup> [Audit Committee Charter as of 2 August 2016](#).

<sup>682</sup> [NCGC Charter as of November 2016](#).

<sup>683</sup> Information on these arrangements is provided by [News Corp on its website](#).

<sup>684</sup> [Summary of hearing with Viet Dinh, Fox independent director](#).

16.47 Jacques Nasser, an independent director of Fox, explained that when the 2012 programme was introduced across the company, the main compliance focus was on 'FCPA [Foreign Corrupt Practices Act] issues – the corruption issues, the fraud issues, the potential mishandling of assets'. Mr Nasser explained that this was because this was the area that needed further work and that, as far as the board could tell at that point, there were not any major HR issues. In the main party hearing, Fox explained that the development of the 2012 global compliance programme, including the hiring of General Counsel and Chief Compliance Officer, Gerson Zweifach, were part of News Corporation's reaction to events in connection with phone hacking, as considered in the Leveson Inquiry. We note that while HR issues and other non-FCPA issues were covered by the global compliance programme, the HR, legal and finance functions were not centralised and continued to operate at business unit level, with limited requirements for these functions to report upward.<sup>685</sup>

16.48 The evidence shows that new and wide-ranging changes to compliance arrangements were put in place at News Corp following the phone hacking scandal. Next, we set out the further compliance policies, systems and procedures at News UK. We then assess what this more recent evidence tells us about the approach of MFT controlled companies to regulatory compliance.

### ***Compliance enhancements at News UK***

16.49 At News UK,<sup>686</sup> the role of Chief Compliance Officer (CCO) was created in September 2011 and reports to the News UK General Counsel and News Corp General Counsel and Chief Compliance Officer. The CCO's role is to ensure company-wide compliance with the law as well as with News Corp and News UK policies. The CCO is supported by a team of legal and compliance experts within News UK and has a dedicated annual ringfenced budget for staff resources and external legal fees.

16.50 News UK has adopted, reissued or implemented various policies since 2013 including an Engagement of Private Investigators and Search Agents Policy, and an Editorial Data Protection Policy. These are reviewed regularly and

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<sup>685</sup> Fox submitted that the compliance enhancements in 2012 at News Corp and post-split in 2013 at Fox, addressed HR related issues. In particular, Fox submitted that this was through: the Alertline anonymous complaints system; the requirements since 2013 for all Fox employees to certify annually that they have read, understood and complied with the Standards which cover a range of issues; and the requirement since April 2012 for upward reporting by business unit Legal functions on any allegations that go to the integrity of Fox or its business units.

<sup>686</sup> As set out earlier, News Corp's operations in the UK are largely conducted through the group of companies that has as its UK parent company News Corp UK and Ireland Ltd, and trades as News UK. News UK wholly owns five groups of companies that form the five main divisions of News UK: Times Newspapers Holdings Limited (TNHL); News Group Newspapers Limited ('NGN'); Newsprinters; Wireless Group; and Unruly Holdings Ltd.

updated accordingly. News UK explained that its policies are disseminated through the company by the Compliance, HR and Technology functions. Employees are provided with copies as part of their induction pack and can access them on the intranet. Casual workers are provided with copies of the policies following registration. Contributors are required to confirm they accept News UK compliance policies, without which payment is blocked.

16.51 News UK provides training on a number of its policies and as relevant to the nature of its operations. For example, since 2011 over 3,000 News UK staff have received training on the Editors' Code of Practice as well as anti-bribery, conflicts of interest, workplace conduct and whistleblowing policies. As regards News Group Newspapers, 600 reporters (both employees and casual workers) received training organised by the Managing Editor and the News UK CCO. It is also a contractual term of employment for journalists to comply with the Editors' Code of Practice.

16.52 As outlined earlier (see paragraph 16.18), some third parties submitted that the compliance enhancements put in place at News UK are evidence of the reactive rather than proactive approach of MFT controlled companies to compliance. We understand from Fox that the compliance enhancements at News Corp in 2012 were largely in response to allegations of misconduct prior to the Leveson Inquiry in 2011, rather than being put in place as proactive compliance measures. Fox submitted that the response was proactive in putting in place new compliance measures that went beyond the issues raised from the alleged misconduct. The evidence we saw shows that subsequent changes to the compliance arrangements at News UK have built and continue to build on the 2012 programme. We also note that our assessment of News UK's track record since 2013 found no evidence which is such as to call into doubt the general efficacy of these compliance arrangements.

### ***Conclusion on wider regulatory compliance at MFT controlled companies – News Corporation and News Corp***

16.53 With regard to misconduct at News Corporation in connection with phone hacking prior to the Leveson Inquiry in 2011, it is clear that there were serious failings in compliance with newspaper regulation and the law, as documented by the Leveson Inquiry and elsewhere. We regard these as serious matters and of concern. In our assessment, we placed some weight on this evidence in that it is related to compliance with other, non-broadcasting, legal and regulatory obligations in the UK.

16.54 However, also of relevance is the fact that the misconduct which gave rise to the phone hacking scandal, while serious, took place more than seven years ago. With regard to the handling of the evidence of misconduct by News Corp,

it has been alleged, including in ongoing civil proceedings before the High Court that key personnel at News Corp, including Rebekah Brooks and James Murdoch among others, were party to the wrongful concealment of misconduct by News International and that they have failed to remedy this position.<sup>687</sup> While we take these claims into account, they remain unproven allegations and, as such, we attach limited weight to them.

16.55 As well as considering evidence of misconduct prior to the Leveson Inquiry, we also looked at the record of News UK since the Leveson Report was published. We found that the policies, systems and procedures News UK put in place were a considered and detailed attempt to address the failings identified by the Leveson Inquiry and others in the aftermath of phone hacking. We took into account evidence from IPSO which stated that compliance by News UK publications was in line with other comparable publications. We also did not identify evidence that indicates more recent non-compliance by News UK (or News Corp more generally) with UK regulation in general or press regulation in particular.

16.56 Having considered the wider regulatory compliance of News Corporation and News Corp as MFT controlled companies and in which members of the Murdoch family hold senior positions, we now look at the compliance and corporate governance arrangements put in place at Fox following the split of News Corporation into Fox and News Corp in 2013. Having set this context, we go on to consider the main concerns raised by third parties regarding Fox, with a focus on more recent allegations at Fox News in the US.

## **Complaints and settlements at Fox and allegations of sexual harassment at Fox News in the US**

16.57 As the second main area of concern identified by third parties, we assessed Fox's wider regulatory compliance and corporate governance procedures in the context of complaints and settlements regarding corporate governance issues at Fox and more recent allegations of sexual harassment at Fox News in the US. Before assessing the complaints and settlements themselves, we

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<sup>687</sup> Details of these allegations are set out in the Amended generic particulars of concealment and destruction and the Re-amended defence to the amended generic particulars of concealment and destruction in the case *Voicemail Claimant v News Group Newspapers Limited*. These pleadings were prepared pursuant to an order of Mr Justice Mann, 10 March 2017. In addition, we note that in announcing no further action to be taken in respect of Operation Weeting, the CPS stated that it had 'examined the email deletion policy of NGN, which formed the basis of part of the evidence in the recent phone hacking trial. There are legitimate reasons for companies to have an email deletion policy. In this case, there is no evidence to suggest that email deletion was undertaken in order to pervert the course of justice'. See [CPS blog article](#).

set out a summary of the wider regulatory compliance and corporate governance arrangements put in place at Fox since 2013.

### ***Compliance enhancements at Fox***

16.58 Fox submitted that:

Fox has implemented substantial measures since 2012 to overhaul corporate governance across its entire organisation. These should leave no doubt that regulatory compliance is a matter of the highest importance for Fox.<sup>688</sup>

Fox is committed to complying with the law and the highest standards of corporate governance, and to providing an inclusive workplace that treats every employee with respect.<sup>689</sup>

16.59 Fox submitted that the wider regulatory compliance enhancements it has made since 2013 include:

- a successor CSC which reports directly to the Fox board through the Audit Committee.<sup>690</sup> As of June 2017 the CSC also includes the Chief Human Resources Officer and Deputy Chief Compliance Officer;
- as of May 2014, further to the News Corporation board instruction of 2012 (see paragraph 16.45), monthly written reports on all significant litigation or claims are to be sent to Deputy General Counsel;
- new policies in 2015 such as The Global Sanctions, Anti-Boycott and Import/Export Policy, and revisions to the Standards in 2016 to include information on Anti-Trust, Sanctions and Protection of Information, as well as being generally reviewed by the CSC;
- mandatory compliance training for all new and current employees across all majority owned Fox businesses. Since August 2016 the HR training programme has been reviewed to include live video training and a presentation by Lachlan and James Murdoch emphasising the importance of maintaining a civil and respectful workplace and the non-retaliatory reporting process and channels;

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<sup>688</sup> [Fox initial submission on broadcasting standards.](#)

<sup>689</sup> [Fox initial submission on broadcasting standards.](#)

<sup>690</sup> Information on these arrangements is provided by [News Corp on its website.](#)

- as of March 2017, creation of a Chief HR Officer role ‘as part of Fox’s broader focus on the people part of its business’.<sup>691</sup> In this new role, Thomas Gaissmaier led the development and roll out of a confidential employee survey across all Fox staff. The email invitation sent to employees in October 2017 was signed by Lachlan and James Murdoch. Fox intends the survey to be an annual process.

### ***Complaints and out of court settlements at Fox***

16.60 We considered evidence on all complaints made to and tracked by Fox’s Corporate Audit, Compliance and Legal functions between 27 September 2012 and 27 September 2017 relating to corporate governance issues. These included financial irregularities, sexual harassment, sexual and racial discrimination. These excluded complaints at Fox’s business units that were not escalated further centrally. In addition, we considered details of out of court settlements which Fox as a company had made with employees between 1 January 2010 and 8 November 2017 in relation to sexual harassment and/or racial discrimination claims.<sup>692</sup>

#### *Complaints*

- 16.61 We received evidence that a total of [REDACTED] complaints were made between 27 September 2012 and 27 September 2017 relating to ‘corporate governance issues’ as defined in paragraph 16.60. Of these, [REDACTED] related to sexual harassment and [REDACTED] to racial discrimination. All [REDACTED] of these complaints [REDACTED] were raised at Fox News, largely between July 2016 and August 2017 ([REDACTED]). The remainder of the complaints related to other corporate governance issues such as financial irregularities.
- 16.62 Table 16.1 sets out a breakdown of complaints by Fox entity. The highest proportion of complaints were at [REDACTED], followed closely by [REDACTED], then [REDACTED], [REDACTED] and then [REDACTED] and [REDACTED]<sup>693</sup> which each accounted for the same proportion of complaints.

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<sup>691</sup> As reported publicly, for example on [Business Wire](#).

<sup>692</sup> For Fox Networks Group, Fox Television Stations and Fox Filmed Entertainment, information was provided from 1 January 2013 onwards.

<sup>693</sup> [REDACTED].

**Table 16.1: Breakdown of complaints by Fox entity**

	<i>Fox Film</i>	<i>FNG*</i>	<i>Fox News</i>	<i>Fox Television Stations</i>	<i>STAR</i>	<i>Other Fox entities†</i>
Number of complaints	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
% of total complaints	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: CMA analysis of Fox data.

\* The [REDACTED] complaints for FNG include both domestic (which had [REDACTED] complaints) and international (which had [REDACTED] complaints).

† The [REDACTED] complaints were made in the [REDACTED] other Fox entities. These were [REDACTED].

16.63 As shown in Table 16.2, most complaints were made in [REDACTED], followed by [REDACTED] (which had less than half as many as [REDACTED]), [REDACTED] [REDACTED], followed by [REDACTED], and [REDACTED]. [REDACTED] Fox entities accounted for the lowest proportion of complaints.

**Table 16.2: Breakdown of complaints to Fox by jurisdiction**

	<i>Latin America</i>	<i>Asia Pacific</i>	<i>Europe, Middle East and Africa (exc. UK)</i>	<i>UK</i>	<i>US</i>	<i>India</i>
Number of complaints	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
% of total complaints	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: CMA analysis of Fox data.

16.64 We also considered Fox’s procedures for responding to a selection of these complaints. One of the examples where we considered a complaint was handled in a timely manner related to alleged racially discriminatory remarks and hiring practices by a [REDACTED] of a business unit. The complaint was raised in [REDACTED]. Within a month it was investigated, a decision made and the subject of the complaint informed that they ‘must depart the company, effective end of [REDACTED]’. Following concerns raised about the handling of the matter by [REDACTED] employees, it was escalated upward to the relevant GCCO. The GCCO opened a second investigation that same day, which concluded seven days later. The initial investigation, though later found to be insufficient by Fox, was consistent with Fox’s compliance policies at that time and further action was taken following the second investigation. We note Fox’s timely response and the fact that existing compliance and corporate governance policies, systems and procedures were in place to enable it.

### *Out of court settlements*

16.65 We also considered out of court settlements made by Fox in response to some of the complaints made, covering 1 January 2010 to 8 November 2017. A number of third parties put to us the importance of reviewing this. Ed Miliband et al submitted that settlements made by former employee Bill O’Reilly were ‘a deeply concerning pattern’ and that the Fox board’s submission that it was unaware of the details of all of these is ‘wholly

inadequate'.<sup>694</sup> We held a hearing with Wigdor LLP, a US-based employment law firm representing a number of individuals in their claims against Fox for sexual harassment and racial discrimination. Douglas Wigdor stated in reference to settlements made by Mr O'Reilly that 'In turning a complete blind eye towards the conduct of its employees ... it is truly a complete failure of regulatory compliance in corporate governance.'<sup>695</sup>

- 16.66 The analysis presented here does not include personal settlements made by Fox employees. Fox submitted that it made [REDACTED] out of court settlements relating to sexual harassment and/or racial discrimination with employees between 1 January 2010 and 8 November 2017. The amount of one of these settlements is yet to be confirmed. In the [REDACTED] remaining settlements, Fox paid out in excess of \$[REDACTED].
- 16.67 [REDACTED] accounted for the highest proportion of settlements, followed by [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] which each accounted for the same proportion of settlements. [REDACTED] accounted for the lowest proportion of settlements relating to sexual harassment and/or racial discrimination with employees between 1 January 2010 and 8 November 2017.
- 16.68 [REDACTED] accounted for the highest proportion of settlements by value, followed by [REDACTED], [REDACTED], [REDACTED], [REDACTED]. [REDACTED] and [REDACTED] each accounted for the same proportion of settlements by value.
- 16.69 During the main party hearing Fox made reference to the litigious culture in the US and the associated costs and risks this could bring for a company. Fox explained that this was why it had chosen settlements over legal action in response to some complaints:

regrettably, at least in the United States, it is a fact of life and here is what happens...somebody brings a case against you, brings a case against someone in your company, makes extraordinary allegations against them, and you can spend - you know, pick a number - several million dollars for the thrill of winning, and you are not getting that back...I am not saying that everybody who came forwards was an opportunist. Far from it.

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<sup>694</sup> [Ed Miliband et al submission](#), page 87 and 88.

<sup>695</sup> [Transcript of hearing with Wigdor LLP](#), page 9 lines 10 to 12.

## ***Allegations of sexual harassment at Fox News in the US***

16.70 As reported, in 2016 and 2017 there was a spate of allegations of sexual harassment at Fox News in the US. These were made against senior staff such as Roger Ailes, Fox News CEO at the time and high-profile Fox News presenter, Bill O'Reilly, former presenter of 'The O'Reilly Factor'.<sup>696</sup> We note that the number and value of settlements paid by Fox had increased since May 2016. We understand this to be in relation to allegations at Fox News.

### *Allegations against Roger Ailes – a timeline*

16.71 We note that from July 2015 to July 2016, Roger Ailes, then CEO of Fox News, 'reported directly to Rupert Murdoch on a day to day basis, as well as formally reporting to James and Lachlan Murdoch.' Prior to July 2015, Mr Ailes reported to Rupert Murdoch and Chase Carey (now Vice Chair of Fox).

16.72 We set out a timeline regarding the allegations made against Mr Ailes in 2016:

#### **6 July 2016:**

- Gretchen Carlson filed a public lawsuit against Mr Ailes, claiming that Mr Ailes had made harassing statements in circa 2009, 2013 and September 2015. Ms Carlson also claimed that she was subject to retaliatory behaviour in 2009 and retaliatory demotion/transfer in 2013; and
- James Murdoch, CEO of Fox and Lachlan Murdoch, Executive Chairman of Fox, directed Fox to start an internal review.

#### **7 and 8 July 2016:**

- Mr Zweifach, General Counsel of Fox directed General Counsel of Fox News, Dianne Brandi, to assemble a list of female on-air talent who had contact with Mr Ailes and to schedule interviews with these individuals. Mr Zweifach instructed external counsel to assist in the internal investigation. Some members of the Fox board were informed.

#### **11 to 18 July 2016:**

- External counsel conducted interviews with multiple Fox News employees; and

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<sup>696</sup> Other employees named in individual complaints included Charles Payne, contributor to the Fox News channel and host of Fox's Making Money with Charles Payne and Eric Bolling, a political commentator who appeared on Fox News' opinion shows such as Hannity and Fox and Friends. For example, as reported by [The New York Times](#).

- with the authority of James, Rupert and Lachlan Murdoch, Mr Zweifach notified Mr Ailes' counsel that external counsel had substantiated several claims of harassment and advised that Mr Ailes must leave the company.

#### **20 July 2016:**

- Mr Zweifach notified Mr Ailes' counsel that Mr Ailes must sign a separation agreement or be fired for cause. Mr Ailes received a \$40 million severance payment due under his contract.<sup>697</sup>

#### **21 July 2016:**

- Rupert Murdoch informed Fox News' newsroom that Mr Ailes had left the company; and
- Fox board briefed by email (and in person at the August 2016 board meeting).

#### **July 2016 to November 2017:**

- Further allegations against employees at Fox News came to light.<sup>698</sup>

#### **August 2016 to May 2017:**

- Fox made changes to senior management positions at Fox News to effect change in the business including the role of CFO (resignation, August 2016) and COO (left by mutual agreement in May 2017).

### *Allegations against Bill O'Reilly – a timeline*

16.73 We set out a timeline of the allegations against Bill O'Reilly. Here we do consider personal settlements to the extent that they relate to these allegations.

#### **2002:**

- Personal settlement with Rachel Witlieb Bernstein for verbal abuse allegations.<sup>699</sup>

#### **2004:**

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<sup>697</sup> [Reuters article](#).

<sup>698</sup> Fox submitted to us that this was largely as a result of its 'proactive efforts to investigate' issues at Fox News, including inviting employees to interview as part of its internal investigation process.

<sup>699</sup> For example, as reported by [The New York Times](#).

- Personal settlement following a lawsuit from Andrea Mackris for sexual harassment allegations.<sup>700,701</sup>

#### **2011:**

- Personal settlement with Rebecca Gomez Diamond for sexual harassment allegations.<sup>702,703</sup>

#### **August 2016:**

- Allegations of sexual harassment made by former employees of Fox News – Laurie Dhue and Juliet Huddy – and settled by Fox.<sup>704</sup>

#### **January 2017:**

- Lis Wiehl raised a complaint of sexual harassment. Within 72 hours of the complaint being made, Fox’s counsel was advised that Ms Wiehl and Mr O’Reilly and their legal counsel had mediated the dispute, that they were committed to putting the matter behind them, and that they had agreed that all copies of Ms Wiehl’s allegations should be returned to her attorney. Fox submitted that there was no legal basis on which to terminate Mr O’Reilly’s contract at that time, as it was based on a disputed claim that Ms Wiehl had later withdrawn. Fox considered the matter to be personally settled by Mr O’Reilly and submitted that it was not aware of the details of the settlement amount.

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<sup>700</sup> This settlement was reportedly for \$9 million, for example as reported by [The New York Times](#).

<sup>701</sup> Fox submitted details of this settlement, namely that Andrea Mackris sent a letter to senior management at Fox News and News Corporation (as it then was) describing the nature of her allegations on 29 September 2004. Following a discussion between company lawyers and Ms Mackris, News Corp filed a suit against Ms Mackris on 12 October 2004 for attempted extortion. In response, Ms Mackris served the company and Bill O’Reilly with a harassment complaint the following day. On 28 October 2004, Mr O’Reilly settled with Ms Mackris, which he funded himself. The company did not agree to pay any amount. Separately, we note that the lawsuit was publicly reported on at the time - for example, as reported by CBS News. In the main party hearing, Fox stated that its board was not made aware of the settlements made by Mr O’Reilly in 2002 and 2004. Separately, Fox submitted that ‘Rupert Murdoch does not now recall when he learned of the 2004 matter, but he does recall that then Fox News CEO Mr Ailes advised him that Mr O’Reilly had been sued and had accepted responsibility for the matter, including by personally funding the settlement. Board minutes from 2004 do not suggest that there was a Board discussion on the matter.’

<sup>702</sup> For example, as reported by [The New York Times](#). Fox submitted that prior to Autumn 2016 its senior management was unaware of the fact or the amount of this settlement. In the main party hearing, Fox explained that when it became aware of the 2011 settlement with Rebecca Gomez Diamond in 2016, General Counsel and Chief Compliance Officer Gerson Zweifach contacted Bill O’Reilly’s lawyer to ask about the details, and was told that the matter was settled personally [REDACTED].

<sup>703</sup> In December 2017 Rachel Witlieb Bernstein, Andrea Mackris and Rebecca Gomez Diamond filed a defamation lawsuit against Bill O’Reilly regarding claims that they did not use internal reporting channels at Fox News at the time of raising their complaints. For example, as reported by [Variety](#).

<sup>704</sup> For example, as reported by [The New York Times](#).

### **February 2017:**

- Following ongoing employment agreement discussions, Fox News offers a new contract to Mr O'Reilly which is agreed and signed.<sup>705</sup>

### **April 2017:**

- Allegations of sexual harassment made by Wendy Walsh reported by The New York Times. Ms Walsh also filed an Alertline complaint on 5 April 2017;
- Fox appointed external counsel to investigate Ms Walsh's complaints and found that Mr O'Reilly had engaged in inappropriate conduct in 2013; and
- Fox terminated Mr O'Reilly's employment on 19 April 2017, with a reported severance payment in excess of \$20 million as per Mr O'Reilly's contract.

### **September 2017:**

- Mr O'Reilly makes an appearance on The Hannity Show on Fox News. This was not discussed with the board, Fox senior management or Fox News.

### **21 October 2017:**

- The New York Times reports that the settlement with Ms Wiehl was worth approximately \$32 million.<sup>706</sup>

16.74 Jacques Nasser told us that when the Fox board was informed of the harassment allegations against Bill O'Reilly, it was advised that the situation was different to the allegations involving Roger Ailes. This was in part related to there being an employment agreement with Mr O'Reilly which stated that he could not be dismissed on the basis of an allegation unless that allegation was proved in court. Mr Nasser further submitted that, at the time of the allegations being raised, the evidence was uncertain.<sup>707</sup>

16.75 In response to this, Douglas Wigdor submitted that:

it is important to know that in the United States there is no such thing as a contract that would preclude an employer from terminating its employee. In other words, you can have a contract

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<sup>705</sup> We note that the allegation by Lis Wiehl in January 2017 appears to have been sufficient to raise concerns with the Fox board and trigger Fox to renegotiate certain terms in a new contract with Bill O'Reilly, as part of ongoing employment agreement discussions.

<sup>706</sup> [The New York Times](#).

<sup>707</sup> [Summary of hearing with Jacques Nasser, independent director of Fox](#).

that has a provision in it that states that to fire somebody for cause you would have to prove something in court, but that does not preclude the employer from terminating the employee without cause and then providing that employee either with severance, as it would be determined in the contract, or paying out the remainder of the contract ... Fox would have been well within its rights to terminate Mr O'Reilly without cause and then pay him.<sup>708</sup>

16.76 We requested evidence regarding Bill O'Reilly's contract terms. Fox submitted that the 2017 contract terms agreed by Fox with Mr O'Reilly, differed from his 2012 contract with Fox News which itself was based on legacy contracts going back to 2007, and were agreed by Fox News, rather than by Fox.<sup>709</sup> Fox submitted that the pre-2017 contract terms were not reviewed but carried forward in subsequent contract renewals. In response to our questions, Fox said that it had offered a new contract to Mr O'Reilly in February 2017 as 'it substantially lowered the bar to his termination if more facts emerged that made clear that Mr O'Reilly had engaged in inappropriate behaviour'. Fox submitted that the 'reason for this approach was that it struck a balance in light of the Board's concerns about Mr O'Reilly and the lack of clarity in the record particularly in contrast to the record surrounding Roger Ailes'. For example, Fox submitted that the new contract no longer contained the clause which stated that Mr O'Reilly could not be dismissed on the basis of an allegation unless that allegation was proved in court. It also allowed Fox to terminate Mr O'Reilly's employment for 'anything he did that appeared to bring the company into disrepute'.

16.77 In the main party hearing, Fox acknowledged that 'the really large numbers [in terms of settlement amounts] are from cases that did have merit' in relation to the most recent settlements made for Fox News. Group General Counsel and Chief Compliance Officer, Gerson Zweifach went on to explain:

I met lots of women, spoke to lots of women, who were victimised, who deserved to be compensated, and we did. And that was the right thing to do. I am talking about, you know, they are relatively small change in the scheme of things for cases without merit. I am not going to pay the kind of money you are looking at for cases that had no merit. We paid money to people who were truly victimised.

16.78 We also reviewed how Fox dealt with the serious allegations relating to sexual harassment at Fox News. In the context of these allegations, and other

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<sup>708</sup> [Transcript of hearing with Wigdor LLP](#), page 6 lines 23 to 25, page 7 lines 1 to 7.

<sup>709</sup> Agreement between Household Inc (representative of Bill O'Reilly) and Fox News Network LLC.

complaints and settlements at Fox, we go on to consider the efficacy of Fox's previous and existing policies, systems and procedures and the timeliness and effectiveness of Fox's responses, before considering the relevance of this evidence for our assessment.

### ***Changes to wider regulatory compliance and corporate governance at Fox in response to allegations at Fox News***

16.79 We acknowledge Fox's response to the allegations of sexual harassment at Fox News in the US outlined earlier – such as the removal of Roger Ailes, Bill O'Reilly and accompanying senior management personnel and the appointment of external counsel to undertake internal investigations into the allegations, both known and unknown.

16.80 In their submission in response to the provisional findings, Ed Miliband et al wrote 'The real test of whether lessons have been learnt from the phone hacking ... is whether there was any repeat of a corporate scandal of a similar scale ... Events at Fox News suggest the reverse ... We believe this speaks directly to the compliance of the Murdoch-controlled companies with standards and regulation.'<sup>710</sup> As set out earlier (paragraphs 16.47 and 16.50 to 16.52) we considered the enhancements to compliance arrangements put in place at News Corp in 2012 following the allegations of misconduct, and subsequent revisions at Fox and News Corp from 2013 onwards, post-split. The evidence we saw shows that subsequent changes to the compliance arrangements at News UK have built and continue to build on the 2012 programme. We also note that our assessment of News UK's track record since 2013 found no evidence which was such as to call into doubt the general efficacy of these compliance arrangements.

16.81 In relation to Fox's compliance arrangements, as well as examining the written evidence received, we questioned Fox in detail at the main party hearing to understand its approach to wider regulatory compliance and corporate governance. Fox's Group General Counsel and Chief Compliance Officer set out Fox's view of compliance and corporate governance in the main party hearing, stating:

you are reactive, you are inevitably reactive, but we try to be proactive and look more broadly at the entire scale of issues that are raised and strengthen the compliance. But I will be honest with you. It is never over. You are never done ... You have to be reactive. So it is true that we react, but we do not react in a

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<sup>710</sup> [Ed Miliband et al submission to provisional findings.](#)

narrow way; we react in a broad way to address the issues to reflect, I think, a robust response.

16.82 Fox made clear that certain types of behaviour including sexual misconduct have no place at Fox and that it would continue to work to enhance its culture and provide a safe, productive and inclusive workspace for everyone. Fox stated that it had taken action to investigate the allegations of sexual harassment seriously and to hold the perpetrators accountable at the highest levels of the business and had, it hoped, set a high bar for any institution grappling with similar wrongdoing.<sup>711</sup>

16.83 In 2017 Fox instigated and implemented further changes to its compliance programme and corporate governance procedures, which we set out here (see also paragraph 16.60). We understand these changes to be both in response to the recent allegations of sexual harassment at Fox News and an attempt to prevent such misconduct arising in future. The relatively recent implementation of these changes (coming into effect in 2017) means we are unable to assess or comment on their efficacy at the time of writing.

16.84 On 13 July 2017, Group Counsel and Chief Compliance Officer, Gerson Zweifach mandated the following additional reporting processes in a communication sent to staff:

- all claims or accusations of sexual harassment or discrimination, or other forms of illegal discrimination or retaliation, should be reported up immediately through the HR teams to Jill Ratner, Deputy General Counsel of Fox. Legal will then work with HR to ensure that they both have an opportunity to consider how to respond and can keep the Fox board apprised of those claims that require their attention;
- no claim of sexual harassment or other forms of discrimination should be settled without giving Julie Ratner or Gerson Zweifach notice of the claim and the proposed settlement, to ensure they are in a position to brief the board and senior management about the settlements that merit their attention; and
- the monthly written reports to Deputy General Counsel should include any such claims or accusations referred to previously.

16.85 Additional dotted reporting lines in relation to Fox News' HR, legal and finance functions were introduced, following the hiring of a Chief HR Officer and expansion of the HR team. Jacques Nasser told us that the Fox board's

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<sup>711</sup> [Summary of main party hearing with Fox.](#)

rationale for doing so was to ensure that the issues which had arisen at Fox News in 2016 and 2017 were not just isolated issues. It was felt that these changes would enable senior management and the board to pick up on potential issues earlier. Mr Nasser also acknowledged that not making these changes as part of the global compliance programme enhancements in 2012 was an oversight at the time.

16.86 We note that Fox submitted that the enhancements to the compliance programme in 2012 and 2013 included measures to increase the visibility of division-level HR issues to Fox centrally, as well as including HR related compliance, training and reporting requirements (see paragraph 16.46 for further detail). We note that the board authorised the formation of a special committee in relation to workplace issues at Fox News in April 2017. On 20 November 2017, Fox publicly announced the establishment of the Fox News Workplace Professionalism and Inclusion Council (the Council). Fox explained that the Council arose from its own initiative and is also part of an agreed shareholder settlement ‘reflecting Fox and Fox News’ affirmative commitment to a business practice and corporate value of zero tolerance for sexual harassment, race discrimination and all other forms of discrimination prohibited by law, and a corporate policy that creates a safe, productive and welcoming workplace for all employees’. The shareholder settlement also included a payment of \$90 million. The Council comprises experts in workplace and inclusion matters, and ‘will advise Fox News and its senior management in its ongoing efforts to ensure a proper workplace environment for all employees and guests, strengthen reporting practices for wrongdoing, enhance HR training on workplace behavior, and further recruitment and advancement of women and minorities’.<sup>712</sup>

### ***Conclusion on allegations of sexual harassment at Fox News in the US***

16.87 With regard to the allegations against Fox News employees in the US, we acknowledge that Fox moved quickly in dealing with the specific allegations against Roger Ailes once the Fox board was aware of these. The evidence suggests that there were factors relating to Bill O’Reilly’s contractual arrangements that may explain why he was not dismissed sooner (see paragraph 16.77), and why the Fox board was not aware of the full extent of the recent personal settlements he had entered into. We also acknowledge that Fox has subsequently supplemented existing and introduced new corporate governance arrangements to deal with workplace harassment. However, we have concerns that these issues were not identified sooner by

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<sup>712</sup> As reported by [Fox](#).

Fox and that there were deficiencies in certain of its previous corporate governance arrangements.

## **Conclusion on wider regulatory compliance and corporate governance**

- 16.88 As set out in chapter 13, we consider that evidence relating to wider regulatory compliance and corporate governance failures is potentially relevant to our assessment of the broadcasting standards consideration. For example, it may indicate that a media enterprise's policies, systems and procedures are nominal or ineffective in terms of supporting and promoting a culture of compliance with regulatory standards.
- 16.89 As outlined previously, our view is that where a media enterprise – such as Fox – is already involved in broadcasting in the UK, evidence that directly relates to an intention to promote and support the attainment of the broadcasting standards objectives in the UK, and its record of compliance with the Broadcasting Code, is of central relevance and should be accorded the greatest weight in our assessment. Nevertheless, we note the large number of submissions raising concerns in relation to wider regulatory compliance and corporate governance. We therefore looked at how Fox and News Corp (as companies controlled by the MFT and in which members of the Murdoch family hold senior positions) meet other, non-broadcasting, legal and regulatory obligations – including regulations relating to newspapers in the UK.
- 16.90 We looked at News Corp's approach to compliance in the context of newspaper regulation. We also examined Fox's corporate governance and the efficacy of its policies, systems and procedures that seek to ensure wider regulatory compliance. We then considered the relevance of this evidence for our assessment of the broadcasting standards consideration.
- 16.91 With regard to misconduct at News Corporation in connection with phone hacking prior to the Leveson Inquiry in 2011, it is clear that there were serious failings in compliance with newspaper regulation and the law, as documented by the Leveson Inquiry and elsewhere. However, the misconduct which gave rise to the phone hacking scandal, while serious, occurred some time ago.
- 16.92 As a result, we looked at the record of News Corporation and News Corp in the UK post Leveson. We found that the policies, systems and procedures News UK put in place were a considered and detailed attempt to address the failings identified by the Leveson Inquiry and others in the aftermath of phone hacking. News UK's record since shows its approach to complaints handling is on a par with comparable news publishers in the UK. We also did not

identify evidence that indicates more recent non-compliance by News UK (or News Corp more generally) with UK regulation in general or press regulation in particular.

- 16.93 With regard to the allegations against Fox News employees in the US, we acknowledge that Fox moved quickly in dealing with the specific allegations against Roger Ailes once the Fox board was aware of these. The evidence suggests that there were factors relating to Bill O'Reilly's contractual arrangements that may explain why he was not dismissed sooner, and why the Fox board was not aware of the full extent of the recent personal settlements he had entered into. We also acknowledge that Fox has subsequently supplemented existing and introduced new corporate governance arrangements to deal with workplace harassment. However, we have concerns that these issues were not identified sooner by Fox and that there were deficiencies in certain of its previous corporate governance arrangements.
- 16.94 Nevertheless, while the submissions raised by third parties and the failures of corporate governance in the US concern serious matters, we note that they relate to allegations of sexual harassment, racial discrimination and other issues that are not directly related to the attainment of broadcasting standards, whether in the UK or elsewhere. We therefore attach greater weight to the evidence relating to Fox's commitment to those standards (set out in chapter 14) in our assessment of the broadcasting standards consideration.
- 16.95 We also considered the concern raised by third parties, and noted by the then Secretary of State at the time of the reference, that MFT controlled companies prioritise commercial incentives or other interests over regulatory compliance and ethical standards, meaning that the MFT and Fox do not have a genuine commitment to the broadcasting standards objectives. We reviewed the corporate arrangements Fox has in place to address wider regulatory compliance and the response of Fox and the Fox board to the issues that arose. The evidence shows that there were deficiencies in certain policies, systems and procedures. For example, the fact that the HR, legal and finance functions remained decentralised and operated at business unit level, with limited requirements for these functions to report upward. This was the case until changes were made in 2017 in response to the allegations of sexual harassment at Fox News. However, we do not find, taking the evidence in the round, that the deficiencies in corporate governance that may have contributed to employee misconduct not being identified sooner were motivated by the prioritisation of commercial or other interests over regulatory compliance or ethical standards.

- 16.96 Our view is that the inadequate compliance arrangements for Fox News in the UK were a result of Fox's misinterpretation of the approach taken by Ofcom in applying the Broadcasting Code. Accordingly, we consider that the deficiencies in Fox News' approach to compliance in the UK were not a product of an attitude that sought to prioritise commercial or other interests over regulatory compliance. We therefore do not find evidence of such conduct in the context of Fox's broadcasting operations.
- 16.97 In our view, the evidence concerning failures of corporate governance in other areas of Fox's business does not displace our assessment of the evidence relating more directly to the commitment of Fox (and the MFT) to the attainment of the broadcasting standards objectives in the UK. Our assessment of that evidence, and of Fox's approach to broadcasting standards in other jurisdictions, supports our conclusion that Fox has (and MFT controlled companies have) a genuine commitment to the attainment of the broadcasting standards objectives in the UK.

## **17. Finding on the broadcasting standards consideration**

- 17.1 Assessing all of the evidence in the round, we consider that Fox, Sky and the MFT (taking into account the media enterprises that the MFT controls, including News Corp) have a genuine commitment to the attainment of the broadcasting standards objectives.
- 17.2 Accordingly, we find that, on the balance of probabilities, the Transaction may not be expected to operate against the public interest taking account of the need for persons carrying on media enterprises, and those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

## 18. Possible remedies to address the adverse effects identified and recommendation to the Secretary of State

### Introduction

- 18.1 As set out in chapter 12, we find that the Transaction may be expected to operate against the public interest taking account of the need, in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience (the media plurality consideration).
- 18.2 We also find that the Transaction may not be expected to operate against the public interest taking account of the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003 (the broadcasting standards consideration).
- 18.3 This chapter considers possible remedies to address the adverse effects identified and sets out our decision on remedies.
- 18.4 In reaching this decision we took into account the written submissions received from the Parties and third parties<sup>713</sup> in response to and following the notice of possible remedies published on 23 January 2018 (the Remedies Notice), the oral evidence and written submissions we received at and following response hearings held with Fox, Sky and one third party,<sup>714</sup> and information received following our discussions with another third party.<sup>715</sup>
- 18.5 This chapter is structured as follows:
- (a) paragraphs 18.6 to 18.16 outline the framework;
  - (b) paragraphs 18.17 to 18.58 give an overview of the remedies process, an outline of types of remedies and a summary of the context for a remedy in this particular case;
  - (c) paragraphs 18.171 to 18.170 assess the effectiveness of all the remedy options considered;

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<sup>713</sup> We received written responses to our Remedies Notice from the following third parties, as published on our [case page](#): 38 Degrees; Avaaz; CPBF, Ed Miliband et al; the NUJ; MRC; and members of the public.

<sup>714</sup> Response hearing with Ed Miliband et al. Transcript is published on the [case page](#).

<sup>715</sup> A staff level meeting was held with Disney on 5 April 2018 and subsequently followed up by a formal request for information on 13 April 2018.

- (d) paragraphs 18.171 to 18.195 summarise the effectiveness of the remedy options and proportionality assessment;
- (e) paragraph 18.196 sets out our decision on remedies; and
- (f) paragraphs 18.198 to 18.251 consider issues relating to implementation.

## Framework for the consideration of remedies

- 18.6 This section sets out the framework within which we assessed remedy options.
- 18.7 On 20 September 2017, the then Secretary of State, in exercise of her powers under Article 5 of the Order, referred the Transaction to the CMA for further investigation and report by a group of CMA panel members (the Inquiry Group).
- 18.8 In exercise of its duty under Article 6 of the Order, the Inquiry Group must decide on the balance of probabilities:
- (a) whether arrangements are in progress or in contemplation which, if carried into effect will result in the creation of a European relevant merger situation;<sup>716</sup> and if so
  - (b) whether, taking account only of the admissible media plurality and the broadcasting standards considerations, the creation of that situation may be expected to operate against the public interest;<sup>717</sup> and if so
  - (c) whether (and if so what) action should be taken by the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which may be expected to result from the creation of the European relevant merger situation concerned.<sup>718</sup>
- 18.9 While the Inquiry Group is required to decide these questions, the ultimate decision on the public interest considerations and remedies is for the Secretary of State.<sup>719</sup> In making this decision, including on remedies, the Secretary of State shall in particular have regard to the decision of the Inquiry Group provided in its final report pursuant to Article 8 of the Order.<sup>720</sup>

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<sup>716</sup> Article 6(2) of the Order.

<sup>717</sup> Article 6(3) of the Order.

<sup>718</sup> Article 6(4) of the Order.

<sup>719</sup> Article 12 of the Order. The Secretary of State shall accept the decision of the CMA's final report as to whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation (Article 12(5) of the Order).

<sup>720</sup> Article 12(8) of the Order.

- 18.10 Article 12(7) of the Order enables the Secretary of State to take such enforcement action as he considers reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest that may be expected to result from the creation of the European relevant merger situation concerned.
- 18.11 There is no specific guidance on remedies and very limited precedent about remedies to address media plurality rather than competition concerns. However, as set out in the Remedies Notice,<sup>721</sup> we consider that the CMA's Merger Remedies Guidelines<sup>722</sup> apply in this case, other than where there are good reasons to take a contrary view.<sup>723</sup>
- 18.12 Neither the Parties nor third parties raised objections to this approach. Fox in particular explicitly agreed that 'the Merger Remedies Guidelines and CMA precedent in applying them provides an appropriate framework as a starting point for considering possible remedies in this case'.<sup>724</sup>
- 18.13 When considering remedies to address an SLC, the Merger Remedies Guidelines state that the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy, mitigate or prevent any of the effects resulting from the SLC.
- 18.14 In line with the CMA's general approach to merger remedies, we consider that in this case, any remedy should achieve as comprehensive a solution as is reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest, which may be expected to result from the Transaction.
- 18.15 This is consistent with the submissions made by Fox and Sky in response to the Remedies Notice and Remedies Working Paper:
- (a) Fox submitted that '[t]he Merger Remedies Guidelines are clear that for remedies to be effective, they must be capable of comprehensively addressing the adverse effects identified';<sup>725</sup> and
  - (b) Sky submitted that the Firewall remedy proposed by Fox '...would be an effective and comprehensive solution to any potential concerns arising

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<sup>721</sup> Remedies Notice, paragraph 9.

<sup>722</sup> [CMA, Merger Remedies: Competition Commission Guidelines \(CC8\) \(Merger Remedies Guidelines\)](#).

<sup>723</sup> For instance, we note that the Order does not provide that the CMA and/or the Secretary of State in assessing remedies may have regard to the effect of any action on any relevant customer benefits.

<sup>724</sup> [Fox response to Remedies Notice](#), paragraph 2.1. See also [Sky response to Remedies Notice](#), paragraph 2.2.

<sup>725</sup> [Fox response to Remedies Notice](#), paragraph 2.6 and see also paragraph 1.5.

from the Transaction<sup>726</sup> and that the Ring-fencing and Divestiture remedies proposed by Fox would be ‘...effective to comprehensively address all of the CMA’s concerns regarding the Transaction’.

18.16 We therefore explored remedies that could be effective in addressing the effects adverse to the public interest which may be expected to result from the Transaction and then selected the least costly remedy that we consider to be effective.<sup>727</sup> We also ensured that the remedy is not disproportionate to the effects adverse to the public interest which may be expected to result from the Transaction.<sup>728</sup>

## **Overview of the remedies process, types of remedies and the context for a remedy in this case**

18.17 In this section we describe the remedies process that we undertook, provide an overview of different types of remedies and outline the context for the choice of remedy in this particular case.

### ***The remedies process***

18.18 Alongside our provisional findings, on 23 January 2018 we published a Remedies Notice seeking views on potential remedies to the concerns highlighted in our provisional findings.

18.19 In the Remedies Notice we consulted on various potential remedies including behavioural, structural and hybrid remedies.

18.20 In response to our Remedies Notice, Fox told us that the most appropriate form of remedies would be a firewall remedy in line with that offered to Ofcom.<sup>729</sup> The Firewall remedy initially proposed to the CMA by Fox (the Initial Firewall remedy) included a number of enhancements to the proposed undertakings in lieu (UILs).<sup>730</sup> Fox told us that the Initial Firewall remedy was designed to insulate Sky News from any increase in influence, or perceived influence, by the MFT or members of the Murdoch family over its editorial agenda.<sup>731</sup> Sky also submitted that the Initial Firewall remedy would comprehensively and effectively address the CMA’s provisional concerns.<sup>732</sup>

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<sup>726</sup> [Sky response to Remedies Notice](#), paragraph 1.1 and see also paragraphs 3.2, 3.3 and 3.7.

<sup>727</sup> [Merger Remedies Guidelines](#), paragraph 1.7.

<sup>728</sup> [Merger Remedies Guidelines](#), paragraph 1.9.

<sup>729</sup> [Fox response to Remedies Notice](#), paragraph 1.7.

<sup>730</sup> [Fox response to Remedies Notice](#), paragraph 1.9.

<sup>731</sup> [Fox response to Remedies Notice](#), paragraph 1.4.

<sup>732</sup> [Sky response to Remedies Notice](#), paragraph 3.7.

- 18.21 Fox told us that the Initial Firewall remedy offered built upon the resolution that was passed by the Fox board on 20 April 2017, the aim of which was to reduce the control that the Fox board could exert over Sky News' editorial content.<sup>733</sup>
- 18.22 The Initial Firewall remedy along with the other potential remedies outlined in the Remedies Notice, were discussed with Fox and Sky at response hearings.<sup>734</sup> Subsequent to these hearings, Fox submitted a revised proposal and relevant undertakings (the Revised Firewall remedy). The Revised Firewall remedy can be found in Appendix M.
- 18.23 Following this, we provided the Parties with a Remedies Working Paper setting out our analysis and provisional views on the various remedy options outlined in the Remedies Notice and on Fox's Revised Firewall remedy.
- 18.24 In response to the Remedies Working Paper, Fox submitted two further proposals (see Appendix N and Appendix O), along with relevant draft undertakings:
- (a) in the first proposal (the Ring-fencing remedy), Fox offered the legal separation of Sky News into a new legal entity (NewCo). The separation of Sky News was coupled with behavioural undertakings and also included interim safeguards and the appointment of a monitoring trustee. Pursuant to the proposal, NewCo would be established as a separate legal entity within the Fox group. Fox further offered for NewCo to be transferred to an independent trust company if equity ownership remained a concern for the CMA;
  - (b) the second proposal offered by Fox (Divestiture) was to divest NewCo to Disney.<sup>735,736</sup> Fox offered to enter into a binding divestiture agreement with Disney prior to and conditional mainly on the completion of the Transaction. The Divestiture proposal was also coupled with the provision of a set of undertakings (the Divestiture remedy), that included, among other things, interim safeguards and the appointment of a monitoring trustee.

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<sup>733</sup> [Fox initial submission](#), paragraph 2.25 ff.

<sup>734</sup> Summaries of the response hearings can be found on the [case page](#).

<sup>735</sup> The proposed undertakings that give effect to each of these three remedies, 'Firewall', 'Ring-fencing' and 'Divestiture' can also be found on the [case page](#).

<sup>736</sup> Alongside the Divestiture remedy which included as annexes the Articles of Association of NewCo, a divestiture agreement and a revised set of Sky News Editorial Guidelines, Fox provided an indicative timeline and steps of the divestiture on 29 March 2018 (see Appendix O); an expression of interest from Disney; and a Brand Licence Agreement.

18.25 Both of these two new proposals were discussed with Fox at a second response hearing and at staff level meetings with Sky and Disney.

### ***Types of remedies***

18.26 As set out in the Merger Remedies Guidelines, the CMA first assesses the effectiveness of remedies in addressing the adverse effects, before going on to consider the costs likely to be incurred by those remedies deemed to be effective in addressing the concerns.<sup>737</sup> In assessing the effectiveness of remedies, the CMA has regard to various dimensions (including the nature of the remedy proposal and the extent of any inherent risks in a remedy of that type):<sup>738</sup>

- (a) impact on the reduction of media plurality and resulting adverse effects;
- (b) appropriate duration and timing;
- (c) practicality;
- (d) acceptable risk profile.

18.27 Remedies are conventionally classified as structural or behavioural. Structural remedies, such as divestiture or prohibition are generally one-off measures that seek to restore or maintain the competitive structure of the market through a direct intervention in market structure. Behavioural remedies are measures that are designed to regulate or constrain the behaviour of merger parties with the aim of restoring the level of competition that would have been present absent the transaction. Some remedies may contain both structural and behavioural elements. We refer to these as ‘quasi-structural’ or ‘hybrid’ remedies.

18.28 As explained in the Merger Remedies Guidelines, in competition merger inquiries, the CMA will generally prefer structural remedies rather than behavioural remedies to address an SLC and its adverse effects:<sup>739</sup>

- (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source in restoring rivalry;
- (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and

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<sup>737</sup> [Merger Remedies Guidelines](#), paragraph 1.8.

<sup>738</sup> [Merger Remedies Guidelines](#), paragraph 1.8.

<sup>739</sup> [Merger Remedies Guidelines](#), paragraph 2.14.

(c) structural remedies do not normally require monitoring and enforcement once implemented (unlike behavioural remedies).

- 18.29 Structural remedies usually address the underlying adverse effects at source because they typically remove ownership links. The removal of ownership removes the control that such ownership conveys, thus removing any potential adverse effects that could arise as a result of that control.
- 18.30 Conversely, behavioural remedies do not generally remove ownership. Therefore, they do not remove the control that ownership brings. Instead, behavioural remedies seek to prevent certain forms of control that arise from ownership from being exercised or to limit its effects. Controlling outcomes in this way is challenging given the variety of decisions that any company needs to make in a dynamic commercial environment and the importance of the relationship between ownership and control within corporate governance. As a result, behavioural remedies are typically subject to a number of risks, which are identified in the Merger Remedies Guidelines and include: specification, circumvention, monitoring and enforcement and distortion risks.<sup>740</sup>
- 18.31 Consequently, behavioural remedies are generally inherently subject to higher risks than structural remedies and are less likely to be effective solutions.
- 18.32 The Merger Remedies Guidelines also state that only in unusual circumstances will the CMA select behavioural remedies as the primary source of remedial action to an SLC in a merger inquiry.<sup>741</sup> Therefore in practice the CMA has selected mainly structural remedies in the majority of merger inquiries under the Act, albeit that in some cases behavioural remedies have had a supporting role.<sup>742</sup>
- 18.33 A structural remedy in the specific framework and circumstances of the current case would be a one-off measure to restore or maintain the existing level of plurality of persons with control of media enterprises. In addition, consistent with the above, such a remedy would be likely to deal with any effects adverse to the public interest directly and comprehensively at source and would not require ongoing monitoring and enforcement once implemented.
- 18.34 A behavioural remedy in the specific framework and circumstances of the current case would be a measure designed to regulate or constrain the behaviour of the Parties with the aim of restoring the level of plurality of persons with control of media enterprises that would have been present

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<sup>740</sup> [Merger Remedies Guidelines](#), paragraph 4.2.

<sup>741</sup> [Merger Remedies Guidelines](#), paragraphs 2.16 and 4.1.

<sup>742</sup> [Merger Remedies Guidelines](#), paragraph 2.15.

absent the Transaction. Such a type of remedy would also be subject to the same types of risks and limitations as the ones identified in the Merger Remedies Guidelines in relation to behavioural remedies, as explained earlier.

18.35 Firewall remedies are classified as behavioural remedies in the Merger Remedies Guidelines.<sup>743</sup> Generally, the purpose of firewall measures in competition cases is to regulate the ongoing conduct of parties following a merger, by restricting the flow of information within a merged entity. In relation to the use of firewall remedies in competition cases, the Merger Remedies Guidelines state: 'Firewall measures prevent access to privileged information by effectively insulating the firm or division generating the information from other group companies' and that this is 'generally achieved by restricting information flows and use of shared services, physically separating premises and staff, and regulating transfers of management and any permitted interactions between relevant staff'.<sup>744</sup>

18.36 The Merger Remedies Guidelines note further that:

Firewall measures seek to prevent a vertically integrated company from accessing and using privileged information generated by competitors' use of the merged company's facilities or products<sup>745</sup> and

[t]o ensure effective compliance with firewall provisions, the relevant firm will normally need to commit significant resources to educating staff about the requirements of the measures and supporting the measures with disciplinary procedures and independent monitoring.<sup>746</sup>

18.37 The use of firewall remedies as a main remedy in UK merger control is very unusual. As outlined and in line with other leading competition authorities, the CMA generally opts for structural remedies, such as prohibition or divestiture.

18.38 The Ring-fencing remedy offered by Fox in this case is a quasi-structural remedy that seeks to ring-fence Sky News from the rest of the Sky business through the establishment of Sky News as a separate legal entity, which becomes a wholly owned subsidiary of Fox.

18.39 The CMA does not usually opt for a ring-fencing remedy to address competition concerns arising from a merger. Ring-fencing is more commonly

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<sup>743</sup> [Merger Remedies Guidelines](#), paragraphs 4.8 to 4.22.

<sup>744</sup> [Merger Remedies Guidelines](#), paragraph 4.21.

<sup>745</sup> [Merger Remedies Guidelines](#), paragraph 4.20.

<sup>746</sup> [Merger Remedies Guidelines](#), paragraph 4.22.

used as a transitional measure in conjunction with divestiture, with entities being ring-fenced prior to their disposal.

18.40 Fox's Divestiture remedy is structural in nature and envisages the separation of Sky News from Sky into a separate legal entity (NewCo) with a subsequent disposal to Disney. This would remove any control by Fox over Sky News as a result of its corporate ownership.

18.41 Finally, prohibition is typically deemed to be effective as a remedy for most anticipated mergers as it prevents any change in control from occurring.<sup>747</sup>

### ***The context for consideration of remedy options in this case***

18.42 While we had careful regard to our Merger Remedies Guidelines in considering remedy options, we were also mindful of the specific context of this case.

18.43 Our approach to remedies was shaped by the nature of the media plurality concerns raised by the Transaction, the material changes to the control of Sky and Sky News that would result from the Transaction, and the high degree of dependency of Sky News on its parent company.

### ***Focus on media plurality***

18.44 Our focus in developing remedies was to tackle concerns about the impact of the Transaction on plurality of media ownership.

18.45 The consideration of media plurality goes to the heart of our democratic process. Plurality of media ownership plays a fundamental role in supporting a healthy and informed democracy, and as such has been given special protection in legislation. It follows from this that UK parliament has attached considerable importance to the preservation of the plurality of persons with control of media enterprises. Insufficient plurality of persons with control of media enterprises, as we have identified, is therefore a serious concern, and the case for requiring a remedy to be demonstrably effective and comprehensive is a strong one.

18.46 The plurality concerns we identify as resulting from the Transaction are not time limited in any way. Any potential remedy therefore needs to be capable of being effective for an indefinite period of time, rather than as a transitional measure.

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<sup>747</sup> [Merger Remedies Guidelines](#), paragraph 2.3.

- 18.47 Our concerns about media plurality flow from the significantly increased level of control the MFT will be able to exercise over Sky and Sky News through its control of Fox combined with Fox's ownership of Sky post Transaction and reinforced by informal means including through relationships between certain directors of Fox and either the MFT or members of the Murdoch family, or both (for example, see paragraphs 7.54 to 7.112 and 8.46 to 8.49).
- 18.48 This gives 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.<sup>748</sup>
- 18.49 We also find that this increased ability of the MFT to exert influence over Sky News may not manifest itself in full control over or explicit involvement in editorial decision making, but that any exercise of such influence may take a number of different forms, direct or indirect in nature, and take place over time.<sup>749</sup>
- 18.50 In considering remedy options we were mindful that there is no bright line that distinguishes direct editorial influence and commercial or strategic decisions made by the business that influence editorial content and could have an impact on editorial decision making and editorial output at Sky News, for example the types of news items covered.
- 18.51 In such circumstances, any effective remedy would need to address the significantly increased level of control the MFT would be able to exercise over Sky post Transaction, enabling it to exert influence over Sky News, in ways that may be difficult to anticipate.
- 18.52 As explained in the previous section, of the four remedy options under consideration, two (divestiture and prohibition) are structural in nature. A divestiture of Sky News to a suitable purchaser independent of the MFT would remove the ownership links between Fox and Sky News and remove any control of the MFT over Sky News. Prohibition would prevent a change in ownership and control from taking place.
- 18.53 The remaining two remedy options (firewall and ring-fencing) envisage Sky News becoming wholly owned by Fox.<sup>750</sup> These remedies therefore seek to insulate Sky News from the significantly increased level of control that the MFT would otherwise be able to exercise over Sky News through a combination of governance arrangements and behavioural commitments.

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<sup>748</sup> See paragraphs 6.50 to 6.54, 7.90 to 7.101.

<sup>749</sup> See chapter 8.

<sup>750</sup> Fox also offered to transfer the ownership of the new subsidiary to a trust if equity ownership was a concern.

### *Dependency of Sky News on its parent company*

- 18.54 Following the Transaction – and absent remedies – Sky News will remain a division of Sky but Sky and Fox will cease to be separately distinct enterprises. Sky (including Sky News) will be a wholly owned subsidiary of Fox, ultimately accountable to the Fox board.
- 18.55 The relationship between a large corporation, such as Fox, and a small subsidiary, such as Sky News, would normally be expected to involve an element of dependency. It would also be expected to give rise to opportunities for interactions to take place, which could be difficult to monitor and assess. This is a particular issue given the way in which Sky News is currently physically embedded within the rest of the existing Sky business, and the need for legitimate interactions between employees at Sky News and other Sky employees.
- 18.56 Further, unlike Sky, the Sky News business is not currently profitable. Therefore, it will remain reliant on its parent for financial support as well as remaining reliant on Sky for certain support services (see Appendix P for Sky net investment in Sky News from 2011 to 2018). Relative to the overall Sky business, Sky News is also very small (and would be an even smaller part of the Fox business). It follows that Sky News would likely be in a weaker position compared to Sky pre Transaction in guarding against influence. In evaluating potential remedies, it was necessary to have regard to this.
- 18.57 Accordingly, in assessing the effectiveness of any remedy, we were mindful of the fact that, if the Transaction were to proceed:
- (a) Sky News would depend on Sky as a wholly owned subsidiary of Fox for the provision of shared services, such as facilities management, HR, finance, IT, advertising sales, marketing and communications;
  - (b) any potential remedy would need to apply to a business unit (Sky News) that is already integrated into a larger entity (Sky), rather than maintaining an existing separation;
  - (c) Sky News senior executives currently report to and are accountable to Sky, which would become a wholly owned subsidiary of Fox;
  - (d) Sky News would continue to share the same physical location as the rest of Sky on the Osterley campus, albeit that Sky News facilities are separately secured<sup>751</sup>; and

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<sup>751</sup> We also note that for non-Sky News employees to access these requires specific, pre-arranged access.

(e) Sky News would depend on Sky as a wholly owned subsidiary of Fox for ongoing financial support [✂].

18.58 Any remedy will therefore need to address these issues while enabling Sky News to operate effectively as a commercial news provider by having access to necessary financial and operational support and sufficient flexibility to be able to respond appropriately to changes in the market or technological environment.

## **Evaluation of remedy options**

18.59 In this section, we discuss the four remedy options which we either sought views on in the Remedies Notice or were subsequently proposed to us by Fox, as previously outlined. This section is structured as follows:

- (a) first, we consider the Firewall remedy;
- (b) second, we consider the Ring-fencing remedy;
- (c) third, we consider divestiture of Sky News to Disney or an alternative suitable purchaser; and
- (d) last, we consider prohibition of the Transaction.

18.60 In each case, the objective of the remedy option is to address the effects adverse to the public interest which may be expected to result from the Transaction,<sup>752</sup> as set out in this report. However, the remedy options differ in terms of the way in which they seek to achieve this objective. In this section we focus on the effectiveness of the aforementioned remedy options. We then consider proportionality in paragraphs 18.171 to 18.195.

### ***Firewall remedy***

18.61 As mentioned previously, the use of a firewall remedy in UK merger control is unusual, with the result that the level of confidence that the CMA can have that such a remedy would be effective in principle is reduced. To date, the CMA has not approved a firewall remedy in merger control since its formation in April 2014, although it has been invited to consider such remedies. For example, in relation to the completed acquisition by Intercontinental Exchange, Inc (ICE) of Trayport, Inc and GFI TP Ltd, the parties proposed a firewall element to remedy the SLC. In that case the CMA concluded as part of its decision that it was not possible to sufficiently specify information-

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<sup>752</sup> See paragraphs 18.13 to 18.16.

sharing arrangements, particularly in relation to soft information-sharing.<sup>753</sup> The CMA concluded that the specification risk would undermine any monitoring and enforcement and so the firewall remedy proposal was rejected.<sup>754</sup>

- 18.62 The CMA's predecessor bodies, the CC and the OFT, made only occasional use of firewall remedies, largely in the context of vertical mergers. In a handful of cases, firewall remedies have been required in support of other measures aimed at enabling third party access to key facilities and/or preventing discrimination against upstream or downstream competitors of the merged entity.
- 18.63 An example of using a firewall remedy under UK merger control was in 2002, when Centrica acquired a gas storage business, Rough, from Dynegy, a US energy company. In this case the CC considered that undertakings regarding Centrica's behaviour as owner of Rough (to regulate access to the Rough facility buttressed by a firewall remedy) could remedy the effects of the merger. The Rough undertakings were accompanied by extensive monitoring arrangements.<sup>755</sup>
- 18.64 The context in the current case is different from previous cases. Any remedy in this case would focus on preventing the exercise of influence rather than simply restricting the flow of information to prevent interference with issues such as transfer pricing. Further, in contrast to previous cases such as Centrica/Dynegy, Sky News is currently fully integrated into Sky (see paragraphs 18.54 to 18.58).

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<sup>753</sup> Soft information can come in many forms. It may include information that is hard to quantify or may not be verified, such as forecasts and unaudited information or information that is not formally captured, for example staff knowledge.

<sup>754</sup> [Intercontinental Exchange, Inc \(ICE\) of Trayport, Inc and GFI TP Ltd.](#)

<sup>755</sup> The Centrica remedy included a firewall to separate Centrica's storage business from the rest of the company. Centrica's compliance programme entailed the appointment of compliance officers on both sides of the firewall reporting to the company's Audit Committee. These compliance reports were audited quarterly by KPMG, Centrica's external auditors. At the end of each year, the Audit Committee presented an annual report on compliance to the main board, who in turn reported to the OFT and Ofgem. All Centrica employees who had to deal with Centrica Storage Ltd (the owner of Rough) had to confirm quarterly that they were complying with the code of conduct on compliance. Managers of shared service departments had to submit reports quarterly confirming that their staff were complying. In all, some 2,500 employees a year were required to confirm their compliance with the code and with the separation rules. In addition, staff were reminded periodically of their compliance obligations via emails and articles were posted on the company Intranet stressing the importance that Centrica attached to compliance. Centrica estimated that the compliance programme cost around £2 million to set up and between £250,000 and £350,000 a year to run.

## *Outline of Fox's Revised Firewall remedy*

18.65 Fox's proposed undertakings to give effect to its Revised Firewall remedy can be found in Appendix M and on the CMA's case page.<sup>756</sup> In summary, the Revised Firewall remedy includes:<sup>757</sup>

- (a) a commitment to maintain a Sky branded news services in the UK for at least ten years and maintain equivalent levels<sup>758</sup> of investment for the first five years, with a further five years of investment to be determined taking account of market conditions at the end of the first five years;
- (b) a commitment to establish a 'fully' independent 'expert' Sky News Board (SNB) to protect the editorial independence of Sky News. The SNB would initially comprise two existing Sky independent directors and a third member with senior editorial and/or journalistic experience nominated by the Sky independent directors, who would act as Chairman. Subsequently it would comprise members selected by the NCGC of the Fox board and approved by the Secretary of State as meeting the criteria of an Independent Expert Board.<sup>759</sup> The SNB would, on the basis of majority decision making:
  - (i) approve the appointment and dismissal of the Head of Sky News, who will have sole responsibility for setting editorial strategy and direction for Sky News' digital, TV and radio output, including the appointment and dismissal of senior Sky News employees (including presenters). The SNB will have the right, prior to any replacement of the Head of Sky News, to nominate a candidate for appointment to the role;
  - (ii) approve any material changes to the authority or reporting lines of the Head of Sky News;
  - (iii) approve decisions regarding the remuneration package of the Head of Sky News;
  - (iv) approve any changes to the Sky News Editorial Guidelines. These have been amended to provide further safeguards that the Head of Sky News will retain complete control over editorial matters and the instructions given to journalists and other editorial staff;

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<sup>756</sup> [Fox Revised Firewall remedy](#).

<sup>757</sup> [Fox Revised Firewall remedy](#).

<sup>758</sup> Equivalent to the current budget cycle.

<sup>759</sup> This term was defined in the draft undertakings (paragraph 8.4) as meaning, in effect that the individuals concerned would be unconnected with any MFT controlled companies.

- (c) the SNB would consider any representations made by the Head of Sky News as to Sky News' compliance with the Sky News Editorial Guidelines, keep a written record of such matters escalated by the Head of Sky News, and provide a copy of any such record to the Fox board and to the Secretary of State (certified as accurate by one Independent Expert Board member). Fox must also publish a summary of any such record in its annual report;
- (d) the SNB would on an annual basis, subject to no written records having been made in the preceding 12 months, prepare a statement confirming that no matters had been escalated to it by the Head of Sky News, and provide a copy of any such statement to the Fox board and the Secretary of State certified as accurate by one Independent Expert Board member;
- (e) a commitment that no employee or officer of Fox, or a member of the Fox board who is a trustee or beneficiary of the MFT, will influence or attempt to influence the editorial choices made by the Head of Sky News (including the selection or running of news stories or the political comment and opinion to be broadcast on Sky News services).

18.66 The Revised Firewall remedy provides that the Sky News Editorial Guidelines will not be further amended by Fox without approval from the Secretary of State (or other relevant body).

#### *Assessment of Fox's Revised Firewall remedy*

18.67 As stated, by their nature, firewall remedies seek to mitigate the increased influence arising from changes to ownership through behavioural commitments. This gives rise to risks with regard to their effectiveness.

18.68 Accordingly, we conducted a detailed assessment of the Revised Firewall remedy by reference to the risk factors associated with behavioural remedies.<sup>760</sup> The Merger Remedies Guidelines set out four forms of risk that the design of behavioural remedies should seek to avoid, enabling the measures to be as effective as possible. These are specification, circumvention, monitoring and enforcement, and distortion risks. Where material risks were identified, we considered whether these risks could be adequately addressed through the design of the offered undertakings that accompanied the Revised Firewall remedy proposed by Fox. This detailed assessment of the risks can be found in Appendix Q.

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<sup>760</sup> [Merger Remedies Guidelines](#), paragraphs 4.8 to 4.22.

*Specification risks (see paragraphs 8 to 35 in Appendix Q)*

- 18.69 Our assessment identified specification risks with the proposed SNB. The SNB is not equivalent to a company board, in that it has insufficient powers to protect against influence over subsequent appointments to the Head of Sky News and no powers to compel Fox to take action against Fox and Sky employees or those with links to the MFT if it identified any threats to editorial influence. We consider that the SNB could be given greater powers, although it is unclear what exact powers would be needed, given the difficulty of anticipating future events. It also remains unclear what sanctions the SNB could have over attempts of editorial influence.
- 18.70 We also identified issues with the SNB's limited remit. We consider that risks arising from the narrow and reactive specification of the SNB's remit could in principle be mitigated to a degree. Sky News could be better insulated from the MFT through its control of Fox by expanding the SNB's remit and giving the SNB a duty to carry out its obligations proactively. However, such expansion of the remit would make it more challenging for the SNB to carry out its functions effectively, thus creating further risks. We also consider that Sky News employees will face an ongoing conflict of incentives between commercial and career objectives and their duty in relation to the SNB.
- 18.71 We identified risks in relation to the composition of the SNB but consider that these risks could be mitigated, in particular by the inclusion of board members with a sufficiently broad range of skills and providing it with resources commensurate with the task it is set.

*Circumvention risks (see paragraphs 36 to 49 in Appendix Q)*

- 18.72 We also consider that there are circumvention risks because there are limits on the extent to which Sky News can be financially insulated from Fox; as [redacted] (see Appendix P), it cannot operate as a standalone entity outside of the proposed financial commitment from Fox. The need for Sky News to secure additional and future funding would both remain a point of leverage for Fox, and hence the MFT, over Sky News.
- 18.73 Further, circumvention risks arise due to the continued operational reliance Sky News will have on Fox. While we consider this to be less of a risk than the financial dependence, it provides another means through which the MFT, through Fox, could influence Sky News. At the very least this risk would require monitoring as Sky News would be a division of Fox and would not have its own robust and distinct management structure in place to protect Sky News effectively.

*Monitoring and enforcement (see paragraphs 50 to 68 in Appendix Q)*

18.74 In terms of monitoring and enforcement, we identified substantial ongoing monitoring and enforcement risks with regard to evaluating and detecting breaches and concerns over the adequacy of enforcement. We consider that the requirements necessary with the Revised Firewall remedy - including the need to monitor and evaluate the consequences of various personal interactions at different levels - would not be practical, and would be costly and difficult. We consider this to considerably undermine the effectiveness of the Revised Firewall remedy.

*Overall evaluation of effectiveness*

18.75 As outlined, we considered whether the Revised Firewall remedy could be modified in order to address these risks and identified some ways in which the remedy could be enhanced, particularly in relation to the powers and the remit of the proposed SNB.

18.76 However, even with further modifications, we consider that a firewall remedy would at best mitigate and not remedy effectively the effects adverse to the public interest that we identified. Important residual risks would remain taking into account the contextual considerations set out in paragraphs 18.42 to 18.58. These include the dependence of Sky News on its parent company, the difficulty in drawing a bright line between editorial and commercial or strategic matters, and the diverse ways in which the MFT would be able to exercise significantly increased control over Sky News through Fox post Transaction.

18.77 Firewall remedies are, by their nature, barriers. A barrier is either effective or ineffective. Having considered a variety of possible specifications, we reached the conclusion that the weaknesses inherent in such a remedy mean that it would not be possible to create a barrier that is sufficiently robust to be effective in preventing an increase in editorial control, while at the same time being sufficiently porous to allow the necessary commercial and managerial interactions between Fox (including members of the Murdoch family holding positions at Fox), Sky and Sky News. There is an inherent tension between these two requirements, such that attempts to make the Revised Firewall remedy more complete would introduce distortions and inflexibility into the operation of a fast-moving news gathering environment. Considerable reliance would also have to be placed on a commitment by a number of individuals in Sky, Fox and the MFT not to attempt to influence Sky News, which is not capable of effective monitoring or enforcement.

18.78 After careful consideration of the Revised Firewall remedy, we identified a number of material risks inherent in the proposal, relating to specification, circumvention, and monitoring and enforcement. Accordingly, we conclude that the Revised Firewall remedy would not be an effective remedy to address the adverse effects to the public interest we identified.

### ***Ring-fencing remedy***

18.79 We next assessed the Ring-fencing remedy, including the relevant Ring-fencing undertakings, given by Fox in response to the Remedies Working Paper.

18.80 In our Remedies Notice we sought views on a potential remedy, based on undertakings in lieu of reference that were offered by News Corp to the Secretary of State in 2011 when it bid for Sky.

18.81 At the heart of this remedy option was the suggestion that Sky News would be transferred into a new entity (NewCo), organisationally separate from the rest of Sky. In the Remedies Notice, we considered variations of that remedy involving external shareholders (as had been proposed in 2011) as well as entertaining the possibility that NewCo could be wholly owned by Fox, but in a separate corporate entity. The Parties did not engage to any significant degree with this remedy option in their response to the Remedies Notice.<sup>761</sup>

18.82 Following this, in response to the Remedies Working Paper, Fox put forward the Ring-fencing remedy. Fox's proposed undertakings to give effect to the Ring-fencing remedy can be found in Appendix N and on the case page.<sup>762</sup>

### ***Outline of the Ring-fencing remedy***

18.83 Fox's proposed Ring-fencing remedy sought to address concerns raised in the Remedies Working Paper in relation to the Revised Firewall remedy, in particular, the risks arising from the level of integration between and reliance of Sky News on the wider Sky business.

18.84 The Ring-fencing remedy would legally separate Sky News from the rest of Sky, by establishing Sky News as a distinct ring-fenced company (NewCo) within the Fox group, with its own independent board and under the independent management control of the Head of Sky News. Fox further offered to transfer the shares in NewCo to an independent trust company if

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<sup>761</sup> Sky's submission focused on the firewall proposal (in particular why the Parties thought it effectively addressed our concerns as set out in the provisional findings), which was the only remedy proposal that had been offered by Fox at the time.

<sup>762</sup> [Case page](#).

the independence of a ring-fenced Sky News may in some way be threatened by Fox's equity ownership.

- 18.85 Under this proposal, Fox said that Sky News would operate 'entirely independently within a guaranteed financial envelope' funded by Fox for 15 years, with facilities and support services provided by Sky on arm's length terms. These arrangements would be supported by corporate governance safeguards as well as personal undertakings given by Rupert, Lachlan and James Murdoch to the Secretary of State.
- 18.86 Fox would undertake that post completion of the Transaction, it will incorporate NewCo as a wholly owned subsidiary of Sky and cause the Sky News business to be transferred to NewCo as a going concern, including those assets required to conduct the Sky News business, all key Sky News editorial staff, and all or substantially all staff currently engaged principally in the Sky News business.
- 18.87 At the same time as the Sky News business is transferred to NewCo, Fox would ensure that Sky licensed the Sky News brand to NewCo.<sup>763</sup> Fox would further undertake that Sky will enter into a series of operational agreements with NewCo, under which Sky would provide facilities and support services to NewCo. These would include an advertising sales agreement, a lease of land and buildings, a site support services agreement, and agreements in relation to broadcast and technical services (including an Electronic Programme Guide services agreement) to ensure Sky News' continued prominence.
- 18.88 NewCo's draft articles of association submitted by Fox provided that its object will be to maintain a Sky branded news service received primarily in the UK, which will abide by the principle of editorial independence and integrity in news reporting, and will be managed by the Head of Sky News within an overall financial envelope.
- 18.89 According to Fox's proposal, the board of NewCo would comprise only independent directors and would be chaired by an independent director with senior editorial or journalistic experience. Fox would have no role in appointing the directors of NewCo. The board would comprise, initially, the existing Sky independent directors and members nominated by them, and subsequent appointments would be made by the board, subject to the approval of an 'appropriate authority' (the Secretary of State, Ofcom or the CMA).

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<sup>763</sup> It is proposed that the Secretary of State would have sight of the brand licensing agreement in principle prior to accepting undertakings with Fox.

- 18.90 In addition, a subcommittee of the NewCo board (the NewCo Editorial Committee) would be tasked with monitoring Fox's compliance with the Ring-fencing remedy and reporting any breaches to the Fox board and, if dissatisfied with their response, to the Secretary of State. The NewCo Editorial Committee, to be chaired by an independent director of NewCo with senior editorial and/or journalistic experience, would have exclusive authority over the selection, appointment and removal of the Head of Sky News, his or her remuneration package, any material changes to his or authority or reporting relationship and any future changes to the Sky News Editorial Guidelines.
- 18.91 Fox would commit to fund Sky News for a period of 15 years comprising ten years of operational net investment at a level not materially different from Sky's current levels (plus the incremental costs expected to be incurred in operating the Sky News business as a separate corporate entity; and adjustments for inflation), and then a further five years at a level not materially different to that in the preceding period.
- 18.92 Within 20 working days of acceptance of the undertakings by the Secretary of State, Fox would appoint a monitoring trustee to act on behalf of the Secretary of State to monitor compliance with the undertakings. The monitoring trustee shall remain in place until all the Sky News assets transfer to NewCo and all the operational agreements between Fox and NewCo become effective.
- 18.93 Fox would procure personal undertakings from Rupert, Lachlan and James Murdoch to the Secretary of State not to influence or attempt to influence the editorial choices made by the Head of Sky News or his or her delegates. Such undertakings would render each of them personally and directly liable to enforcement action by the Secretary of State, and according to Fox, as such would serve as a substantial deterrent against any conduct that could be perceived to amount to a breach.
- 18.94 The behavioural elements of the Ring-fencing remedy include the guarantee by Fox to provide a financial envelope, compliance with the procedures for making appointments and dealing with potential breaches and a personal commitment from Murdoch family members not to interfere with editorial decision making.

#### *Assessment of Fox's proposed Ring-fencing remedy*

- 18.95 The Ring-fencing remedy offered by Fox is a quasi-structural remedy that contains both structural and behavioural elements. It seeks to ring-fence Sky News from the rest of the Sky business through the establishment of Sky

News as a separate legal entity, which becomes a wholly owned subsidiary of Fox.

18.96 The Ring-fencing remedy represents an attempt by Fox to insulate Sky News from the various sources of influence that the MFT could exert post Transaction through Fox. We therefore conducted a detailed assessment of the Ring-fencing remedy focusing on the risks that we also identified in the context of our analysis of the Firewall remedy. Where material risks were identified, we considered whether these risks could be adequately addressed, for example, through the design of the offered Ring-fencing remedy. The detailed assessment can be found in Appendix R.

18.97 We consider that the Ring-fencing remedy has some advantages relative to the Revised Firewall remedy:

- (a) while the specific governance arrangements are relatively novel and untested, the establishment of a NewCo board provides for a more typical governance arrangement, which reduces some of the ambiguity over its roles and functions. For example, the Articles of Association to which the NewCo company directors would need to adhere would include the principle of maintaining the editorial independence of Sky News.<sup>764</sup> Further, Fox would retain no involvement in appointments to the preliminary or subsequent NewCo board, which is consistent with NewCo being a separate legal entity with its own management structure;
- (b) Fox would not retain any involvement in the hiring or removal of the Head of Sky News. This function would be reserved for the NewCo Editorial Committee, an independently chaired subcommittee of the NewCo board;<sup>765</sup>
- (c) the proposal provides for an enhanced financial envelope committing to 15 years of funding not materially different from the current level of operational net investment. Sky News' funding requirement for the last five years would be recommended to Fox by the NewCo board and if Fox did not accept the recommendation the matter would be referred to the London Court of International Arbitration;
- (d) the appointment of a monitoring trustee provides a means by which the Secretary of State could monitor and take action (if required) in relation to the negotiations between NewCo and Fox with regards to the drawing up

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<sup>764</sup> Directors would be limited to six-year terms to prevent independence from eroding over time.

<sup>765</sup> To be chaired by an independent expert director with senior editorial and/or journalistic experience, entitled to appoint as many members as it considers appropriate to discharge its functions, including by ensuring an appropriate balance of skills and expertise.

of the support service agreements (agreements between two separate legal entities), which constitute a key element of the separation of Sky News and the MFT.

18.98 We therefore consider that the Ring-fencing remedy provides greater protection in comparison with the Revised Firewall remedy.

18.99 However, we consider that it retains significant risks, in particular:

- (a) it does not adequately address the increased control that Fox would have over Sky News' finances outside of the financial envelope;
- (b) the operational dependence creates the opportunity for circumvention; and
- (c) there is no practical or effective way of monitoring and enforcing the behavioural commitments.

*Increased control outside the financial envelope (see paragraphs 4 to 10 of Appendix R*

18.100 Post Transaction, Fox will become the 100% owner of NewCo. All Sky employees effectively become employees of the Fox Group and Fox will have ongoing legal obligations to ensure effective stewardship and governance over NewCo and its assets.

18.101 As outlined earlier, we identified specific concerns in relation to the ongoing financial dependence of NewCo on Fox. This financial link between NewCo and Fox would give rise to Fox, as a result of the Transaction, having increased leverage/control over Sky News, giving Fox, and through it, the MFT, increased ability to influence the editorial output of Sky News.

18.102 We acknowledge that the financial envelope is a significant commitment and that it covers NewCo's costs in the ordinary course of business. However, in the event that NewCo required additional financial resources, for example because of changes in the market or technological developments, or if NewCo wished to pursue new commercial opportunities, it is Fox, NewCo's parent company post Transaction, that would decide whether or not to fund the request. This risk factor is a problem in this case because Fox would retain control over NewCo's finances, even with the remedy in place.

18.103 We gave careful consideration as to whether these risks could be mitigated in order to address the risks of the Ring-fencing remedy. We consider that it is not practical to further separate NewCo from Fox financially. Fox's offer to transfer the ownership of NewCo to an independent trust company would not

address the financial link between the Parties as NewCo would still remain reliant on Fox for any financing outside of the financial envelope. Therefore, the risks identified would remain even if the NewCo was under the ownership of an independent trust company.

*Circumvention risks (see paragraphs 11 to 15 of Appendix R)*

18.104 Further, circumvention risks arise due to the continued operational reliance Sky News will have on Fox. We consider this to be less of a risk than the financial dependence, however it provides a means through which the MFT, through Fox, could influence Sky News. At the very least this risk would require monitoring.

*Monitoring and enforcement (see paragraphs 16 to 23 of Appendix R)*

18.105 Beyond the financial and operational links, and in line with the Revised Firewall remedy, we remain concerned about the complexity of ongoing monitoring and enforcement. As with the Revised Firewall remedy, risks arise with regard to evaluating and detecting breaches, which include various personal interactions at different levels. We conclude that the Ring-fencing remedy would not be practical, and would be costly and difficult which ultimately undermines its effectiveness.

18.106 We further note that the monitoring trustee, who is appointed to act on behalf of the Secretary of State, has a time limited role. The monitoring trustee's mandate comes to an end once the Sky News assets have transferred to NewCo and the operational and commercial agreements are in place, and therefore provides no ongoing protection to the above risks.

18.107 We consider that it is difficult to see a practical way for the Secretary of State to verify whether the behavioural commitments were being observed in practice. For example, it would not be possible or desirable for the Secretary of State to monitor every direct or indirect interaction involving NewCo employees, Fox executives and members of the Murdoch family. Even in relation to those interactions it was possible to monitor, it would be difficult, if not impossible, to detect what might be implicit understandings that influence editorial decisions.

18.108 The impact of the Transaction on media plurality highlighted in this report is not time limited in any way. We therefore have intrinsic concerns about the resilience of the arrangements proposed by Fox and the appropriateness of accepting a remedy that is untested in merger control, which ultimately depends on the behaviour of individuals over an extended period of time.

### *Overall evaluation of effectiveness*

18.109 We conclude that the Ring-fencing remedy would at best mitigate some of the effects adverse to the public interest that we identify. However, important residual risks would remain, taking into account the contextual considerations set out in paragraphs 18.42 to 18.58. These include the risks as a result of the continuing financial links between Fox and NewCo, the ability for circumvention, combined with the inherent challenges of monitoring and enforcement. Reflecting the fundamental nature of the Ring-fencing remedy - namely that it does not address the ownership of Sky News - material risks of ongoing influence would still remain, as the MFT would control Fox, which would own all of Sky News. Accordingly, the Ring-fencing remedy is not an effective remedy to address the effects adverse to the public interest we identify.

### ***Divestiture***

18.110 The divestiture of Sky News to a third party was the third of the remedy options set out in our Remedies Notice.

18.111 An effective divestiture of Sky News to a suitable purchaser would address the effects adverse to the public interest at source by breaking the ownership link between the MFT and Sky News, and would not require ongoing monitoring and enforcement.

18.112 A particular challenge to the effectiveness of this remedy, which was also highlighted in our Remedies Notice, is that Sky News has never operated as a standalone business separate from Sky and relies, for example, on Sky centrally provided services for management accounting, IT and HR support. In addition, Sky News airtime is sold by the Sky advertising sales house, Sky Media. This potentially reduces its commercial resilience and ability to operate independently from the Parties, even if functionally separate. These factors, along with the fact that Sky News is loss-making, would necessitate the identification of a suitable, well-resourced and committed purchaser, if divestiture were to be an effective remedy.

18.113 While at the time of publication of the Remedies Notice, Fox had not received any serious approaches, it subsequently received an expression of interest in Sky News from Disney.<sup>766</sup> Disney is a US-based multimedia organisation,

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<sup>766</sup> Fox told us that, in addition to considering an offer from Disney, it would consider building on the Ring-fencing remedy by transferring ownership of NewCo to an independent trust company. It did not elaborate on this possibility. However, as previously explained, a trust company, however structured, would be more dependent upon Fox operationally than Disney, and would thus necessitate continuing links with Fox than Disney (like with the Revised Firewall remedy).

which owns and operates ABC News in the US. ABC News also has extensive news gathering operations around the world, which it has established through its network of partnerships with other news broadcasters such as Sky News in the UK. Although ABC News currently has no news broadcasting operations in the UK, it operates a news bureau in the UK as part of its extensive international operations. As discussed earlier, Disney has made a bid for Fox but its proposed acquisition of Sky News is separate to and independent of the wider Disney/Fox transaction. We therefore analyse the Divestiture remedy on its own terms and also consider the outcome if Disney successfully completed its acquisition of Fox.

18.114 Below, we assess the efficacy of Fox's Divestiture remedy in the context of Disney as the upfront buyer. We also examine whether the terms of Fox's Divestiture remedy make it viable for a purchaser other than Disney.

#### *Outline of Fox's Divestiture remedy*

18.115 In response to the Remedies Working Paper, Fox proposed to divest the Sky News business to Disney. It provided us with draft undertakings to give effect to the proposed divestiture (see Appendix O for the latest draft). In summary, the Divestiture remedy provides:

- (a) upfront buyer: Fox would enter into a binding agreement with Disney to acquire the Sky News business, which would be signed prior to the acceptance of the undertakings by the Secretary of State. The divestiture would take place once Fox completed the acquisition of Sky and would not be contingent on Disney's separate transaction with Fox;
- (b) transfer of Sky News business: the Sky News business would be transferred as a going concern, debt-free into a newly incorporated subsidiary of Sky (NewCo) as soon as practicably possible. Following the transfer and subject to any regulatory approvals,<sup>767</sup> Sky's shares in NewCo would be transferred to Disney [X];
- (c) brand licensing agreement: Fox would undertake to ensure that Sky enters into a brand licensing agreement with NewCo (prior to the sale of NewCo to Disney) permitting NewCo to use the Sky News brand in perpetuity, in a form to be approved by the Secretary of State prior to acceptance of the undertakings. This would be terminable by Sky only in the event of a material uncured breach, NewCo ceasing to provide output

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<sup>767</sup> See section 'Implementation considerations' for further discussion on the risks of Disney not obtaining regulatory approval.

which is branded 'Sky News' or NewCo ceasing to broadcast 'Sky News' in the UK;

(d) operational agreements: Fox would undertake to ensure that Sky enters into a number of operational agreements with NewCo covering facilities and support services, on arm's length commercial terms. Such agreements would last for a term of up to ten years, or such shorter times as required by NewCo, and would be terminable by NewCo on reasonable notice to Sky;

(e) funding commitments: the proposed undertakings provide financial covenants to ensure that:

(i) Disney would maintain the annual operating investment in Sky News at comparable levels to today for a period of ten years (taking into account cost inflation), ie Disney would agree to invest a minimum of £[X], which would increase in line with the consumer price index (CPI);

(i) Fox would guarantee to pay Disney a maximum of £[X] per annum, which again would increase with reference to CPI. The Fox financial envelope effectively underwrites the total costs of operating Sky News, including both the direct and indirect costs of operating Sky News. Fox's financial envelope would be constituted in the following way:

- NewCo would receive all advertising sales revenue and all other revenue generated by the Sky News business.<sup>768</sup> The actual amounts in any given year would be determined based on revenues received by NewCo from both Fox and third parties, subject to the guaranteed minimums under the Fox financial envelope;
- Fox would guarantee to make cash contributions (in annual instalments over a period of ten years, increased by reference to CPI each year), which would reflect the costs which are not currently expected to be covered by Sky News' revenue;<sup>769</sup>

(f) corporate governance of NewCo: the Articles of Association of NewCo would contain provisions that safeguard the editorial independence of Sky

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<sup>768</sup> The undertakings guarantee a minimum revenue of £[X], of which £[X] will be 'Advertising Revenue', and £[X] of 'Other Revenue'.

<sup>769</sup> Based on anticipated financial results for the year ending 30 June 2018, the cash contribution payable to NewCo is £[X] (ie revenue of £[X] less total operating costs of £[X]).

News. Disney commits contractually to keep, and operate within these provisions.

18.116 Fox submitted that the divestiture of Sky News to Disney, effected in the manner set out in the Divestiture remedy, would be ‘an entirely clear-cut solution to the CMA’s concerns’. Below, we consider the efficacy of the Divestiture remedy, including the terms as summarised above, and the divestiture risks. We also assess the suitability of Disney as a purchaser of Sky News.

#### *Design of an effective divestiture remedy*

18.117 An effective divestiture remedy should involve the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process. To ensure that a divestiture remedy would achieve its intended effects, we considered the following three aspects of its design:

- (a) the scope of the divestiture package, ie its composition;
- (b) the availability of a suitable purchaser; and
- (c) the need to ensure an effective divestiture process.

18.118 We consider each of these elements in the context of Fox’s Divestiture remedy, below.

#### *Composition of divestiture package*

18.119 As previously stated, and as set out in the Remedies Notice, a particular challenge to the effectiveness of a divestiture remedy is that Sky News has never operated as a standalone business, separate from Sky. We were concerned that the operational and financial dependence on Sky would reduce the commercial resilience and ability of Sky News to operate independently of the Parties, even if functionally separate.

18.120 The scope, design and configuration of Fox’s Divestiture remedy seeks to mitigate these concerns.

18.121 The operational agreements and the brand licencing agreement proposed would enable the divested Sky News business to operate without disruption and without the need to adapt or transform its business to integrate with that of the purchaser, at least in the short term. The terms of the service agreements and the financial arrangements through which Fox effectively would underwrite the total operating costs of Sky News for a period of ten years would minimise any downside financial risks for the purchaser.

- 18.122 Sky told us that the assets of the Sky News business are distinguishable and easily separable from the rest of the Sky group. In response to our question on the practicalities and challenges of the transfer of Sky News, Sky told us that [REDACTED]. Although these preliminary steps would help ensure that the divestiture package is configured accordingly, Sky told us that the process of business transfer would still take approximately two months.
- 18.123 Fox indicated that Disney would be consulted on the transfer of the Sky News business. It would have sight of what assets would be transferred over to NewCo and the service and operational agreements between Sky News and the Parties. Moreover, as submitted by Sky, 'Clause 9 of the divestiture undertakings provides a pragmatic and buyer-friendly solution to any residual asset boundary questions, such that if any additional assets are identified as required post-divestiture, these would be transferred to Sky News/NewCo as soon as it is practicable'. This would give Disney the security that it will have the necessary assets and services to continue the operations of Sky News on an ongoing basis, independent of the Parties.
- 18.124 We consider that the composition of the Divestiture package offered by Fox, and agreed to by Disney, would enable Sky News to operate effectively under the ownership of Disney. As explained later (see paragraphs 18.125 to 18.132), we consider that any continuing links between Fox and Disney carry no residual risks of the MFT being able to influence the editorial policy of Sky News. Subject to the same design conditions, we consider that it would be possible to divest Sky News to another purchaser that meets our purchaser suitability criteria (another suitable upfront purchaser).

#### *Availability of a suitable purchaser*

- 18.125 In our Remedies Notice we identified 'purchaser risk'<sup>770</sup> as an additional factor to consider in assessing a divestiture remedy. At that time, we were concerned about the availability of a suitable purchaser for Sky News which would both remove the dependence of Sky News on Sky, whilst maintaining Sky News' ability to produce quality news programming.

#### *Our assessment of Disney as a suitable purchaser*

- 18.126 In any divestiture process in the context of a competition merger assessment, the CMA must satisfy itself that a prospective purchaser is independent of the merger parties, has the necessary capability to compete, is committed to

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<sup>770</sup> [Merger Remedies Guidelines](#), paragraph 3.1.

competing in the relevant market(s) and that divestiture to the purchaser will not create further competition concerns.<sup>771</sup>

18.127 The CMA must satisfy itself about each of these criteria before approving any potential purchaser. The relative importance that the CMA attributes to each of these criteria, and the factors that the CMA takes into account in applying these criteria, will depend on the circumstances of the inquiry.

18.128 We considered that these criteria are equally informative in the context of assessing a divestiture remedy for a public interest concern. In assessing the suitability of any purchaser of a divested Sky News business, we considered the following factors:

- (a) links to the MFT: given that our concerns relate to the control that the MFT would have over UK news outlets, a potential purchaser would need to demonstrate that they had no material links to the MFT. Consideration would need to also be given to links to MFT controlled companies;
- (b) commitment to the UK market: a prospective purchaser would have to demonstrate a genuine commitment to the provision of news services in the UK and provide evidence that the acquisition of Sky News complemented its strategy of entry or expansion in the UK;
- (c) expertise and capabilities: a prospective purchaser would be expected to have significant expertise and experience in news gathering and distribution and have the resources to maintain the quality and quantity of Sky News output;
- (d) absence of competitive or regulatory concerns: a prospective purchaser would need to not give rise to fresh competition or public interest, including media plurality, concerns.

18.129 In the following paragraphs, we set out our analysis of whether Disney meets our purchaser suitability criteria.

- *Links to the MFT*

18.130 We considered the independence of Disney from the MFT in the context of two possible scenarios:

- (a) first, Disney acquires only the Sky News business and does not complete its other transaction to acquire Fox;

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<sup>771</sup> [Merger Remedies Guidelines](#), paragraphs 3.15 to 3.19.

(b) second, Disney acquires Sky News and then completes the acquisition of Fox.

18.131 If Disney were to acquire just the Sky News business, it would have ongoing financial and operational agreements with Fox (as set out in the Divestiture remedy – see Appendix O). These agreements would be on arm’s length terms. Unlike the Ring-fencing remedy option where the agreements would be internal to the Fox group, under the divestiture option, Fox’s contractual obligations would be to another commercial entity. Given that Disney is a sophisticated, independent and well-resourced counterparty, we consider that any attempts by the MFT or others to undermine Disney’s commercial, operational or legal interests would be rebutted or defended vigorously, as Disney told us.

18.132 Should Disney acquire Fox in the separate transaction, we were told that the MFT will own under 5% of the new business. This shareholding would be lower than the MFT’s current equity holding in Fox and therefore would raise no concerns about the increased ability of the MFT to influence the editorial position of Sky News post Transaction. Furthermore, Disney told us that no member of the Murdoch family will be offered a position on the board or a senior management position of any Disney company if it was successful in completing its acquisition of Fox.

- *Commitment to the UK market*

18.133 We also considered Disney’s commitment to enter the UK market for news gathering and production. Disney told us that it has a strategic interest in owning and operating a news organisation in the UK. It said [redacted]. In support of this, we saw evidence of [redacted]. This lends further support to Disney’s commitment to complete the acquisition of Sky News independent from the wider Disney/Fox transaction.

18.134 We asked Disney what assurances it could provide that it would continue to invest in the Sky News business and maintain its high quality outputs if it was not successful in completing the Fox transaction. Given the financial viability of Sky News and [redacted], we were concerned that Disney would neglect or reduce its investment in the Sky News business if it was not able to realise the benefits of acquiring the wider Sky group.

18.135 In response to our question, Disney submitted that the terms of the Divestiture remedy provided financial safeguards, in which Fox effectively underwrites the total operating cost of Sky News and minimises any downside financial risks for Disney. Given these financial safeguards, Disney would be able to acquire a valuable strategic asset with a strong track record

and have access to the Sky News brand in perpetuity [X]. Fox's financial envelope 'provides the certainty and security needed to allow Disney to develop the business and explore the "option value" of owning the business, in anticipation of finding a relevant and profitable business model within the 10-year timeframe'.

- *Expertise and capability*

18.136 We also considered whether Disney has the expertise and capability to own and operate a news organisation in the UK. We note that Disney is a sophisticated and well-resourced multimedia organisation. Disney told us that it has significant expertise and experience in news gathering and distribution through its ownership of ABC News in the US, which cover the news on a 24-hour basis with scheduled (and, where called for, unscheduled) programming on the ABC television network and through other platforms and media. ABC News employs more than 1,200 employees and, in 2017, generated \$[X] in revenue. According to Disney, it is the number one news service in America, attracting approximately 116 million viewers to its television programming a month.

18.137 We also note that Disney (through ABC News) is already familiar with the UK news media landscape. Over the last 60 years, ABC News has had 'close working relationships with all three major news providers in the UK – first with ITN and then over 30 years with the BBC and now with Sky News'. It currently has a non-commercial agreement with Sky News to share news content, correspondent reports and editorial information<sup>772</sup> and this agreement has been in place since the summer of 2017. Although ABC News does not broadcast news programming in the UK, it operates a news bureau in London, which opened almost 60 years ago, the first of ABC News' international bureaus.

18.138 In response to our question about Disney's plan for Sky News, it told us that Sky News programming would still focus on the UK but the acquisition would create synergies and improve the quality of Sky News by providing Sky News 'an unprecedented ability to cover the United States from the White House and Congress to Silicon Valley and the American heartland'.

18.139 We also note that James Goldston, the Head of ABC News, has experience of working in a news and current affairs context in the UK. Mr Goldston

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<sup>772</sup> For example, a recent example of cooperation between Sky News and ABC News was the coverage of the allied response to the use of chemical weapons in Syria, which involved the sharing of journalists, reporters and remote technical operations in the region of the conflict, as well as reciprocal support in both London and Washington.

began his career in TV as a producer for several BBC News programmes, including Newsnight. Before joining ABC News, Mr Goldston was the executive producer of ITV's Tonight with Trevor McDonald. Although the regulatory framework in the UK is significantly different to that of the US, we take comfort from the fact that the Head of ABC News (Mr Goldston) has experience and knowledge of the UK news services sector and is familiar with the UK's broadcasting regulatory framework. We also note that Disney is familiar with the operations of Sky News through its news gathering and production partnership.

- *Absence of competitive or regulatory concerns*

18.140 We considered whether Disney's acquisition would lead to fresh competition or regulatory concerns. Disney may be subject to regulatory clearances, including:

- (a) competition clearance from the European Commission if the divestiture is considered by the European Commission to be part of Disney's acquisition of Fox; and the Irish competition authority (The Competition and Consumer Protection Commission);
- (b) media plurality assessment by the Irish Minister for Communications, Climate Action and Environment; and in Austria by the Austrian Communications Authority (KommAustria); and
- (c) a potential fit and proper assessment by Ofcom.<sup>773</sup>

18.141 Fox and Disney submitted that they do not envisage any problems with regard to any of these regulatory steps.

18.142 As with most divestitures, there is some uncertainty around regulatory clearances. We do not consider that Disney's acquisition of Sky News poses a significant risk in terms of regulatory clearances. We consider the regulatory steps involved in the Divestiture remedy in more detail when we discuss the implementation of this remedy option (see paragraphs 18.198 to 18.251).

### *Ensuring an effective divestiture process*

18.143 An effective divestiture process would require an assessment of:

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<sup>773</sup> See paragraph 18.228 for more detail.

- (a) the appropriate timeframe for divestiture to complete (the divestiture period); and
- (b) the sales process to ensure that Sky News is maintained and preserved during the process.

18.144 The Parties told us that the divestiture of Sky News would take approximately three months, subject to regulatory approval. On the basis of the Parties' submissions and given the risks associated with this Transaction, and the potential of Fox to influence the editorial policy of Sky News during the interim period when it has full control over Sky News, we consider that the divestiture period should be no longer than three months.<sup>774</sup>

18.145 In a divestiture remedy in the context of a competition merger, the CMA would also consider whether the divestiture could be subject to efforts by the selling party to deteriorate the assets before the completion of the divestiture. In the context of this assessment, we considered risks that the Parties would seek to deteriorate the assets of Sky News, for example by terminating the employment of key staff, and/or seek to influence the editorial position of Sky News during the period between the closing of the Transaction and the completion of the divestiture to a suitable purchaser.

18.146 Taking each in turn, we consider that there are limited incentives for the Parties to deteriorate the assets of Sky News (eg by terminating the employment of the Head of Sky News) because such actions would run counter to their commercial interests in the long run. Fox told us that it has an interest in the commercial success of Sky News because it has agreed with Sky for the business to use the Sky brand in perpetuity. In addition, as set out in the Divestiture remedy (see Appendix O), any reduction in advertising or other revenue would have to be met by Fox.

18.147 The risks of the Parties undermining and threatening the editorial independence of Sky News is low given that the period between the completion of the Transaction and completion of the divestiture is expected to be short and the Divestiture remedy provides for the appointment of a monitoring trustee to act on behalf of the Secretary of State. We consider further possible mitigations later, in the section on 'Implementation considerations' of the Divestiture.

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<sup>774</sup> See section 'Implementation considerations' for further detail.

## *Conclusions on divestiture*

- 18.148 Divestiture would address the effects adverse to the public interest identified in the report at source by severing the ownership link between Sky News and Fox, and in turn the MFT, and would not require ongoing monitoring and enforcement.
- 18.149 Divestiture would be a significantly more effective, lower risk and comprehensive solution relative to the Ring-fencing remedy as it removes all forms of direct control by the MFT through Fox by removing Sky News from Fox's ownership. Under the Ring-fencing remedy, we find that material risks of ongoing influence would still remain, given that the MFT would control Fox, who would own all of Sky News.
- 18.150 The main risks associated with divestiture flow from the dependence of Sky News on its parent company (see paragraphs 18.54 to 18.58) and the related risk that it would not be possible to identify a suitable purchaser. In our view, these risks can be managed effectively through the design of the divestiture and by careful oversight of the divestiture process, including the requirement on Fox to identify a suitable upfront buyer prior to completing the Transaction, and the appointment of a monitoring trustee.
- 18.151 Having examined the detail of Fox's proposed Divestiture remedy, we conclude that the scope, design and configuration of the Divestiture would mitigate any composition risks that Sky News could not operate independently of the Parties. The financial envelope effectively underwrites the total operating costs of Sky News in exchange for [X], such that a suitable purchaser would be able to access and make use of a strategic asset that it would seek to improve and increase in value. The financial safety net provided over a period of ten years would create a stable financial platform for the purchaser to invest in improvements to the Sky News service and/or find more efficient ways of providing the service.
- 18.152 We conclude that Disney would be a suitable purchaser of Sky News. Disney is, and after the proposed Disney/Fox transaction would continue to be, independent of the MFT. Disney has the ability, because of its expertise, experience and commitment to the UK market, to maintain the quality and quantity of Sky News output and its distribution across its existing platforms (satellite, cable, YouView and DTT).
- 18.153 Taking all of these factors into account, we conclude that the Divestiture, ie divestiture of Sky News to Disney, would be effective in addressing the adverse effects to the public interest identified in this report. Subject to the same design conditions and considerations, as analysed above, we conclude

that it would also be possible to divest Sky News to another suitable upfront purchaser.

### ***Prohibition of the Transaction***

18.154 In our Remedies Notice, prohibition of the Transaction was identified as a remedy that would address the reduction in media plurality, preserve the status quo and prevent the harm associated with the Transaction from arising. The Remedies Notice stated that prohibition of the Transaction would represent a comprehensive solution to all aspects of the adverse public interest findings, with relatively few risks, compared to the other remedial options, in terms of either implementation or effectiveness.

18.155 The Remedies Notice sought views on:

- (a) whether prohibition would be an effective remedy;
- (b) whether other, less intrusive remedies which are available to the Secretary of State would also be effective; and
- (c) whether there is a realistic prospect of Sky News being closed if the Transaction were prohibited and, if so, what steps could be taken to mitigate or remove the risk of this happening.

### ***Parties' views of prohibition***

18.156 All substantive third party responses to the Remedies Notice told us that we should recommend to the Secretary of State that he should prohibit the Transaction. The same responses highlighted that no other remedy option deals effectively with our provisional concerns, leaving prohibition as the only effective remedy.

18.157 In a letter to the Inquiry Group submitted subsequent to Fox's three proposed undertakings,<sup>775</sup> one respondent, Lord Grade of Yarmouth, did not agree and said that he considered that all three of Fox's proposals would remedy any concerns and noted that all Fox proposals, 'far and away exceed' that which was required in the 1981 Times Undertakings.<sup>776</sup>

18.158 Fox provided no responses to the specific questions asked in the Remedies Notice on prohibition. Sky told us that the proposed firewall remedy

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<sup>775</sup> The Revised Firewall, Ring-fencing and Divestiture remedies – see Appendix M, N and O respectively.

<sup>776</sup> [Letter from Lord Grade of Yarmouth](#).

represented the least intrusive effective remedy.<sup>777</sup> Sky also said that we should ensure that no remedy is disproportionate to the adverse effects arising from the Transaction.<sup>778</sup>

18.159 At the main party response hearing Fox told us that [REDACTED].

18.160 Sky told us [REDACTED].

### *Risks in relation to prohibition*

18.161 Generally, prohibition of an anticipated merger is an effective remedy in that it preserves the pre merger situation and prevents any change of control from occurring.<sup>779</sup> However, sometimes there may be risks identified with regard to prohibition. In the Remedies Notice we identified a potential risk that prohibition of the Transaction could lead to the closure of Sky News.

### *Potential closure of Sky News*

18.162 This risk could arise if the directors of Sky, as part of their fiduciary duties and possibly acting in response to the wishes of its shareholders, decided that it would be desirable to close Sky News, for example as a means of facilitating regulatory clearance for the Transaction or any potential new offer for Sky by Fox that would exclude Sky News.

18.163 Closure of Sky News would remove an alternative source of TV news to the BBC and ITN, which would harm plurality. This is therefore, a potential risk to consider in terms of the assessment of the prohibition remedy.

18.164 Sky raised the possibility of closure in response to the issues statement by arguing – in the context of the proposed counterfactual – that:

The CMA should not simply assume the “continued provision of Sky News” and its current contribution to plurality, “absent the Transaction”. Sky would likely be prompted to review the position in the event that the continued provision of Sky News in its current form unduly impeded merger and/or other corporate opportunities available in relation to Sky’s broader business, such as the Transaction – in particular having regard to any views

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<sup>777</sup> Sky response to Remedies Notice, paragraph 1.1.

<sup>778</sup> Sky response to Remedies Notice, paragraph 2.2.

<sup>779</sup> Typically, prohibition of a merger would be subject to a sunset clause (as is the case for prohibition on reacquisition following a divestiture) such that the prohibition ceases to have effect after ten years.

expressed by shareholders regarding the denial of such opportunities.<sup>780</sup>

18.165 Sky raised the point during the response hearing, [REDACTED]. [REDACTED]:

(a) [REDACTED];

(b) [REDACTED].

18.166 If the Transaction were to be prohibited and in response Sky decided to close Sky News, it would not be straightforward in regulatory terms for Fox to proceed immediately with a new attempt to acquire the 61% of shares it does not own. Furthermore, despite it being a small part of the overall business, Sky told us that Sky News currently delivers significant value to the Sky brand, which would be lost by closing it down.<sup>781</sup>

18.167 In response to the Remedies Working Paper, Sky said that it is inconsistent for us to use a 'likely' threshold for placing weight on the potential closure of Sky News and not to apply a 'likely' threshold in relation to the risks that arise in respect to Fox's proposed undertakings. As previously set out (see paragraphs 6.30 and 6.31 for example) we are not required to assess the likelihood of the MFT exercising its influence post Transaction; the ability to exercise this power is a concern in and of itself. However, as is the case with any prohibition remedy, we accept that there is no guarantee that following a prohibition, Sky News would not be closed.

18.168 In light of the limited evidence and uncertainties identified, we conclude that absent the Transaction we do not consider the closure of Sky News to be a high risk. However, we acknowledge that the risk cannot be completely excluded. This risk factor is relevant when considering the relative merits of the effective remedies that we identified.

18.169 Accordingly, prohibition would be an effective remedy, given that it would preserve the pre merger situation and would address the effects adverse to the public interest concerns identified in this case. However, we note that the Divestiture remedy proposed by Fox has additional benefits compared with prohibition:

(a) first, the Divestiture remedy provides a greater guarantee for the continued prominence of Sky News through, among others, a ten-year

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<sup>780</sup> [Sky response to issues statement](#), paragraph 4.3.

<sup>781</sup> [Sky initial submission](#), page 7, paragraph 3.22.

funding commitment along with a commitment for Sky News to continue to be carried across all current platforms;

- (b) second, the risk factor in relation to the closure of Sky News in the event of prohibition falls away in the case of divestiture.

18.170 We therefore consider that prohibition would be effective in addressing the adverse effects to the public interest concerns identified in this report, but that the Divestiture remedy has some additional benefits that make it a more attractive proposal than prohibition.

## **Summary of effectiveness and assessment of proportionality of remedies**

18.171 In this section we summarise our decisions about the effectiveness of the remedy options we considered and assess the proportionality of the effective remedy options.

18.172 As set out in our Merger Remedies Guidelines, the CMA first assesses the effectiveness of the remedies in addressing the adverse effects identified in the report before turning to the issue of proportionality.<sup>782</sup> In reaching our decision about the effectiveness of remedy options we had regard to the various dimensions of effectiveness identified in our Merger Remedies Guidelines, namely:<sup>783</sup>

- (a) impact on the reduction of media plurality and resulting adverse effects;
- (b) appropriate duration and timing;
- (c) practicality; and
- (d) acceptable risk profile.

18.173 We carefully considered the Revised Firewall and Ring-fencing remedies put forward by Fox. These remedies seek to mitigate the increased influence arising from changes to ownership, but do not effectively address the effects adverse to the public interest.

18.174 Our analysis shows that both the Revised Firewall and the Ring-fencing remedies suffer from material risks taking into account the ongoing relationships between Fox and Sky News, Sky News' lack of financial independence and substantial concerns about monitoring and enforcement.

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<sup>782</sup> [Merger Remedies Guidelines](#), paragraph 1.8.

<sup>783</sup> [Merger Remedies Guidelines](#), paragraph 1.8.

Even with further modifications, we consider that both remedies will at best mitigate only some of the effects adverse to the findings of our report, meaning that material residual risks would remain. As a consequence, we conclude that both of these remedies would not be effective.

18.175 We then considered the two structural remedies, prohibition and divestiture. We conclude that divestiture of Sky News to Disney (or divestiture to another suitable upfront purchaser) would be an effective remedy that would address the adverse effects to our public interest findings in a timely manner and with an acceptable risk profile. Likewise, prohibition of the Transaction would prevent the effects adverse to the public interest from arising, by preventing the change of ownership and control. By focusing on the ownership of Sky News, both measures would address the effects adverse to the public interest identified in the report at their source and would not require ongoing intervention on behalf of the Secretary of State, or the CMA in order to safeguard this outcome.

18.176 While both a divestiture of Sky News to Disney and prohibition would be effective solutions to address the effects adverse to the public interest identified in the report, albeit in different ways, we identified additional benefits in terms of media plurality of a divestiture to Disney when compared to prohibition. In particular, we conclude that a divestiture to Disney would provide greater certainty than prohibition over the continuation and availability of Sky News.

18.177 Accordingly, we conclude that either a divestiture of Sky News to Disney (or to another suitable upfront purchaser) or prohibition would be effective solutions that would comprehensively address the adverse effects identified in our report, but that divestiture would represent the better outcome in terms of media plurality. Subject to our assessment of proportionality below, divestiture of Sky News to Disney is our preferred recommendation.

### ***Proportionality***

18.178 Our Merger Remedies Guidelines state that having considered the effectiveness of remedy options, in order to be reasonable and proportionate the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective.<sup>784</sup> The Merger Remedies Guidelines also state that the CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>785</sup>

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<sup>784</sup> [Merger Remedies Guidelines](#), paragraph 1.9.

<sup>785</sup> [Merger Remedies Guidelines](#), paragraphs 1.9 and 1.12.

18.179 In considering proportionality of remedies in line with our Merger Remedies Guidelines, we also followed the established criteria set out by the EU and UK courts, which have been explicitly endorsed by the CAT in the context of the assessment of merger remedies. These are that the remedy selected:

- (a) must be effective to achieve the legitimate aim in question (appropriate);
- (b) must be no more onerous than is required to achieve that aim (necessary);
- (c) must be the least onerous, if there is a choice of equally effective measures; and
- (d) in any event must not produce adverse effects which are disproportionate to the aim pursued.<sup>786</sup>

18.180 Having established that divestiture of Sky News to Disney (or to another suitable upfront purchaser) is our preferred remedy, we assessed this option against each of the above criteria.

*Effectiveness of achieving the legitimate aim in question*

18.181 The consideration of media plurality goes to the heart of our democratic process. Plurality of media ownership plays a fundamental role in supporting a healthy and informed democracy, and as such has been given special protection in legislation. Insufficient plurality of persons with control of media enterprises is therefore a serious concern. Given this, we considered it would not be in the public interest to accept a remedy that was not effective and comprehensive in addressing the adverse effects identified in the report, but which might mitigate some of the effects adverse to the public interest that we identified and that would allow the Transaction to proceed.

18.182 Our concerns about media plurality flow from the significantly increased level of control the MFT will be able to exercise over Sky and Sky News through its control of Fox, combined with Fox's ownership of Sky post Transaction, and reinforced by informal means including through relationships between certain directors of Fox and either the MFT or members of the Murdoch family, or both. We conclude that a divestiture of Sky News to Disney would be effective in addressing the adverse effects we identify in this report. In particular, it addresses our concerns by removing the corporate ownership and therefore the significantly increased level of control that the MFT would

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<sup>786</sup> See *Tesco plc v Competition Commission* [2009] CAT 6 at [137], drawing on the formulation by the European Court of Justice in *Case C-331/88 R v Ministry of Agriculture, Fisheries and Food, exp. Fedesa*, ECLI:EU:C:1990:391, paragraph 13.

have over Sky and Sky News through its control of Fox as a result of the Transaction.

18.183 The divestiture of Sky News to Disney is effective in addressing the effects adverse to the public interest resulting from the Transaction because ownership of Sky News transfers to Disney, which is a suitable purchaser, who would take on responsibility for the effective stewardship and control of Sky News and its assets. This would equally apply to another suitable upfront purchaser.

18.184 Prohibition would prevent the effects adverse to the public interest from arising, by preventing the change of ownership and control and, therefore, would also be an effective remedy. Absent the Transaction we do not consider the risk of closure of Sky News to be a sufficiently material risk that we should exclude prohibition as a potential remedy.

*No more onerous than is required to achieve that aim*

18.185 We consider that the specification of the Divestiture remedy is no more onerous than is necessary to address the adverse effects identified in the report. Sky News is the smallest part of the Sky business that could be divested to address those effects, provided that the business divested was viable. In order to ensure such viability, we consider that the various safeguards in terms of the financing of Sky News and the implementation of the divestiture are necessary in order to achieve an effective remedy, given Sky News' financial performance and dependence on its parent company.

18.186 Although prohibition would prevent the effects adverse to the public interest from arising, it would also preclude the acquisition by Fox of the rest of the Sky business. As a result, if there are alternative effective remedies that would enable the rest of the Transaction to proceed, then these should be preferred. We took this factor into account in assessing the relative intrusiveness of the effective remedies.

*The least onerous, if there is a choice of equally effective measures*

18.187 Where there is a choice between effective remedies, the CMA must also select the remedy that imposes the least cost or that is least restrictive.

18.188 The divestiture of Sky News to a suitable purchaser is less onerous than prohibition.<sup>787</sup> This is because there are aspects of the Transaction that represent the great majority of the commercial value of Sky which we do not

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<sup>787</sup> As Fox proposed this undertaking to us, it is clear that Fox agrees with this assessment.

find to raise public interest concerns. In addition, as already outlined, the divestiture has additional benefits in terms of media plurality over and above prohibition of the Transaction.

18.189 We therefore conclude that provided this can be implemented successfully, a divestiture of Sky News to Disney is the least onerous effective remedy.

18.190 If it does not prove possible to secure a divestiture to Disney, (or an alternative suitable purchaser) then prohibition would at that point be the only, and therefore the least intrusive, effective remedy.

*The remedy will not produce adverse effects which are disproportionate to the aim pursued*

18.191 We considered whether a divestiture to Disney would give rise to any adverse effects which are disproportionate to the aim pursued by the proposed remedy, particularly insofar as these would adversely affect media plurality or the interests of customers or media audiences generally.

18.192 We considered whether a divestiture of Sky News to Disney would risk a deterioration of the quality or impact of Sky News, which could adversely affect media plurality. Based on our assessment of Disney as a potential purchaser, we consider this unlikely, given the strategic rationale for the acquisition as well as the funding commitments that Disney is prepared to offer underwritten by the terms of the divestiture with Fox (18.115(e)).<sup>788</sup>

18.193 Consequently, we conclude that a divestiture to Disney would not give rise to adverse effects that are disproportionate to the aim of remedying the adverse effects on the public interest that we identified.

18.194 As noted in paragraphs 18.159 and 18.160, it has been put to us that a potential consequence of prohibition of the Transaction would be the closure of Sky News. We do not have sufficient evidence to conclude that this is a sufficient risk that it would outweigh the clear impact on the public interest resulting from the Transaction. As noted in paragraph 18.45, we consider that the public interest in plurality of ownership of media enterprises is of vital importance to the democratic process. As a result, while divestiture to a suitable upfront purchaser would be a preferable option, prohibition would also be proportionate in the absence of such a divestiture.

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<sup>788</sup> This would need to be reassessed in the event that an alternative suitable upfront purchaser is proposed.

### *Conclusion on proportionality*

18.195 We conclude that divestiture of Sky News to Disney (or to another suitable upfront purchaser) would be a proportionate solution to the effects adverse to the public interest that we identified. It is the least onerous remedy that we find to be effective, is no more onerous than it needs to be and does not produce adverse effects that are disproportionate to its aims. If it does not prove possible to secure a divestiture to Disney, (or an alternative suitable purchaser) then prohibition would at that point be the only effective and proportionate remedy.

### **Decision on remedies**

18.196 Based on the analysis set out in this chapter, we conclude that an effective and the most proportionate remedy is the divestiture of Sky News to Disney (or to another suitable upfront purchaser). It represents as comprehensive a solution as is reasonable and practicable to remedy, mitigate or prevent the effects adverse to the public interest that may be expected to result from the Transaction, taking account of the media plurality consideration. We therefore recommend this remedy to the Secretary of State.

18.197 Below we set out the implementation considerations relevant for a divestiture.

### **Implementation considerations**

18.198 Having concluded that the divestiture of Sky News to Disney (or to another suitable upfront purchaser) is the most effective and proportionate remedy to address the effects adverse to the public interest resulting from the Transaction, this section sets out how this divestiture remedy should be implemented by the Secretary of State.

18.199 Divestiture requires the cooperation of multiple stakeholders, not only the main parties and the purchaser of the divested business but others such as national and international regulators and governmental agencies (in this case, potentially Ofcom and other regulators). This creates uncertainty over timing, the configuration of the divestiture package and the ability of the upfront purchaser to complete the divestiture.

18.200 To address these implementation uncertainties and to ensure that the divestiture process is implemented effectively, we considered several relevant factors. These are also set out in the Merger Remedies Guidelines. In summary, these considerations are:

(a) protecting the divestiture package;

- (b) use of monitoring trustees;
- (c) the divestiture period;
- (d) regulatory obstacles preventing the sale of Sky News to Disney;
- (e) use of divestiture trustees;
- (f) review of divestiture commitments; and
- (g) the fall-back remedy.<sup>789</sup>

We also set out these considerations and a timeline for the Secretary of State in Figure 18.1.

18.201 As set out in Fox's Divestiture remedy, the divestiture process will begin formally only after the Transaction completes. Thereafter, the divestiture process has two separate steps:

- (a) transfer of the Sky News business into NewCo and the setup of the related governance structures; and
- (b) the sale of shares in NewCo to Disney.

18.202 Fox envisages that the divestiture process will take up to three months from completion of the Transaction, involving a number of steps, including but not limited to the transfer of the relevant assets and employees to NewCo and Disney obtaining the appropriate regulatory approvals. An indicative timeline and outline of these steps, submitted by Fox, is provided in Appendix O.

18.203 Fox submitted that the risks of the divestiture not completing are purely theoretical, given the upfront nature of the divestiture agreement with Disney and the extremely low risk attached to the required conditions. We, however, consider that the Secretary of State, in implementing this Divestiture remedy should have regard to the following issues:

- (a) alterations to the scope and configuration of the Divestiture remedy proposed by the Parties during the divestiture process, for example, by failing to transfer all of the relevant assets into NewCo, thereby limiting the ability of Sky News to operate effectively or as efficiently after the completion of divestment;
- (b) the divestiture period being extended beyond a reasonable time, during which time Sky News would operate under the full ownership of Fox with

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<sup>789</sup> See [Merger Remedies Guidelines](#) for further details.

the associated risks that its editorial independence could be undermined;  
and

- (c) Disney encountering regulatory obstacles that prevent it from acquiring Sky News. This would require Fox to find another suitable purchaser.

### ***Protecting the divestiture package***

18.204 Disney will be contractually obliged to complete the acquisition of Sky News after the completion of the Transaction. In order to give effect to Disney's contractual commitments, we advise the Secretary of State to seek undertakings from Disney that contain the same commitments as currently envisaged under clauses 8.1 and 8.3 of the draft Sale and Purchase Agreement (SPA). Disney told us that it would be willing to offer such undertakings to the Secretary of State. In summary, these provisions commit Disney to:

- (a) maintain the operating investment in Sky News at a level not materially different (taking into account cost inflation) for ten years;
- (b) maintain the corporate governance structure of NewCo as set out in the first sentence of section 3.1 (i) of the Divestiture remedy (see Appendix O); and
- (c) ensure that the Articles of Association of NewCo provide that NewCo would not be able to make any subsequent amendments to the Sky News Editorial Guidelines without prior approval of the Secretary of State/Ofcom/CMA.

18.205 We therefore believe that both Fox and Disney are committed to completing the divestiture of Sky News to Disney.

18.206 Where the main parties have an incentive to run down or neglect the business or assets of a divestment package, the CMA will generally seek undertakings from the parties which impose a general duty to maintain the divestiture package in good order and not to undermine the operational efficacy of the divested business.

18.207 While the Parties have limited incentives to deteriorate the assets of Sky News during the divestiture process, we consider that measures should be taken to ensure that all of the relevant assets and licences are transferred into NewCo such that it would enable the effective operation of Sky News

post divestment to Disney.<sup>790</sup> Linked to this, we also consider that measures should also be taken to guard against key personnel leaving Sky News, either through the wilful termination of employment by the Parties or through employees choosing to leave before the completion of the divestiture. Either scenario would leave the divested business in a worse position than before the divestiture.

18.208 We therefore agree with the Parties that it would be appropriate to use an independent monitoring trustee to oversee the implementation of the Divestiture remedy. We now go on to set out further details on the use of monitoring trustees.

### ***The use of monitoring trustees***

18.209 Where divestiture undertakings are in place, the CMA would normally require the appointment of an independent monitoring trustee to oversee the parties' compliance with the undertakings. To ensure that the remedy is implemented in accordance with the undertakings, we note that the Parties proposed the use of a monitoring trustee to monitor the Parties' operations during the divestiture process and report to the Secretary of State on the progress of the divestment.

18.210 The scope of the monitoring trustee's responsibilities could cover the following areas:

- (a) review the scope, and oversee the implementation of the business transfer to ensure that all of the relevant assets, staff and licences of Sky News are transferred to NewCo so that it is able to operate independently of the Parties, post divestiture to Disney;
- (b) review the terms of the operational and financial agreements such that it would be possible for a suitable purchaser to operate Sky News independently of the Parties, post divestiture to Disney;
- (c) ensure that the Parties and Disney (as the suitable upfront buyer of Sky News) are taking adequate steps to complete the divestiture within the agreed timescales and report any risks of delay to the Secretary of State;
- (d) ensure that the Parties have taken steps to maintain and support the ongoing operations of Sky News, including providing the financial and operational incentives to keep key personnel.

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<sup>790</sup> We note that the draft SPA contains provisions for the identification and allocation of assets to NewCo.

### ***The divestiture period***

- 18.211 The CMA would normally set a time limit by which the Parties would have to effectively dispose of the divestiture package. Fox indicated conservatively that the divestiture to Disney will be completed within three months from completion of the Transaction.
- 18.212 Given the risks associated with this Transaction, and the potential for Fox to influence the editorial policy of Sky News during the interim period when it has full control over Sky News, we consider that the divestiture period should be as short as possible. We consider that the impact of a temporary loss in media plurality would not cause longstanding and permanent damage. We also consider that setting a definitive long-stop date would create the right incentives for the Parties to complete the divestiture process as quickly as possible; and offer staff at Sky News informal protection against influence, ie empower staff to reject attempts of influence in the knowledge that the ownership of Sky News will be transferred out of Fox's control at the end of a fixed period to effect the Divestiture, which has been identified by the Parties as three months.
- 18.213 However, we note that there may be legitimate reasons for a divestiture process to take longer than initially anticipated. Where reasonable requests are made, we consider that it would be appropriate for the Secretary of State to consider extending the divestiture period beyond three months, particularly if it allows the Parties to execute the sale of Sky News to a suitable buyer shortly thereafter. Provisions for such extensions are typically included in divestiture undertakings and the CMA can advise the Secretary of State on the operation of such provisions.
- 18.214 If the divestiture to Disney is not completed within the divestiture period, we consider that the Secretary of State should appoint a divestiture trustee to oversee the sale of Sky News to another suitable purchaser. We consider these steps in more detail in paragraphs 18.249 and 18.250.

### ***Regulatory obstacles preventing the sale of Sky News to Disney***

- 18.215 The Parties told us that regulatory licences would need to be transferred to NewCo in order for it to operate independently of the Sky group. These licences are:
- (a) TLCS Licence 264 relating to Sky News' HD and SD channels;
  - (b) TLCS Licence 100036 relating to Sky News' (ROI feed) HD and SD channels; and

(c) TLCS Licence 402 relating to Sky News International.

18.216 Under the terms of the licences set out in 18.215(a) to (c), it would be possible for Sky to transfer these licences to NewCo, subject to approval from Ofcom. The transfer process would involve an application being made to Ofcom together with a letter of consent from Sky UK Limited. As set out in Ofcom's procedures and guidance, Ofcom would consider each request for transfer on a case by case basis at the time of the application. According to the Parties, Ofcom aims to transfer a licence within 25 working days, subject to resource and adequate provision of information, and requests for further information. Fox has allowed a period of three months for the transfer of licences and Sky told us that this was reasonable.

18.217 In addition, NewCo would also need to:

- (a) submit a new application for a Digital Television Programme Service Licence for digital terrestrial television (DTT) transmission of the Sky News channel. This again would require an application to be made to Ofcom. The timings are the same as for a TLCS licence, ie 25 working days; and
- (b) make a notification to Ofcom for the relevant Sky News on-demand content available across various on-demand services, including Sky News app. This would be a notification rather than an application and would not require approval from Ofcom. The notification should be made at least ten working days prior to launch of the service.

18.218 NewCo would be able to use Sky and Sky Sports News' existing spectrum licences as part of its access to shared services post completion. NewCo therefore would not need to apply for a new licence for the use of wireless equipment in and out of the studio.

18.219 The Parties submitted that they do not envisage any problems in obtaining the relevant licences for NewCo to broadcast Sky News on all of the platforms on which it is currently shown.

18.220 On acquiring the shares of NewCo, Disney would be able to use the licences obtained by NewCo.

18.221 However, the purchase of NewCo by Disney may be subject to other regulatory reviews, including:

- (a) competition clearance from the European Commission (if the divestiture is considered by the European Commission to be part of Disney's

acquisition of Fox) and the Irish competition authority (the Competition and Consumer Protection Commission);

(b) media plurality assessment by the Irish Minister for Communications, Climate Action and Environment, and in Austria by the Austrian Communications Authority (KommAustria);<sup>791</sup> and

(c) a potential fit and proper assessment by Ofcom.

18.222 Fox submitted that it does not envisage any problems with regard to any of these regulatory steps. While we are not able to opine on the outcomes of any of the aforesaid regulatory processes, we note that these considerations may delay or prevent the completion of the divestiture process to Disney.

18.223 Disney submitted that its proposed acquisition of Sky News does not meet the turnover thresholds under the EU Merger Regulation in its own right, nor does it raise any substantive competition concerns that might require scrutiny. It has no news broadcasting operations in the UK or in any other EU countries, and so there is no overlap between the parties' business activities. For these reasons, Disney does not believe that the European Commission will have concerns that could affect its ability to complete the purchase of Sky News.

18.224 A risk factor is that the European Commission may consider that the divestiture forms part of the Disney acquisition of Fox and that giving effect to the divestiture would breach the suspensory obligation in the EU Merger Regulation.<sup>792</sup> The European Commission would normally require the parties to wait until the completion of its assessment of the transaction before permitting any type of integration to take place between the two businesses that are the subject of a notification under the EU Merger Regulation. We note that, at this stage, the timeframe for completion of the European Commission's assessment of the Disney/Fox transaction is uncertain.

18.225 Fox and Disney submitted that any such concerns would necessarily be predicated on Disney's proposed acquisition of Fox and the divestiture being treated as a single concentration for the purpose of the EU Merger Regulation. Both Fox and Disney informed us that the acquisition of Sky News is not conditional on the Disney/Fox transaction as a matter of law or de facto, and that the Disney/Fox transaction is not conditional on the acquisition of Sky News. Disney submitted that:

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<sup>791</sup> [Overview of Irish merger control: key statistics 2016](#).

<sup>792</sup> Disney and Fox have started to integrate the two businesses before obtaining the requisite competition clearances.

- (a) the acquisition of Sky News could, and would, proceed regardless of whether Disney's bid for Fox is successful;
- (b) similarly, if Disney cannot acquire Sky News (for whatever reason), its bid for Fox could, and would, continue.

18.226 If this risk were to crystallise, a derogation from the European Commission may be sought to enable the divestiture of Sky News to Disney. This would allow Disney to acquire Sky News prior to the European Commission's final decision on the Disney/Fox transaction. We recommend that any undertakings given to the Secretary of State by Disney should include an undertaking to take all steps as reasonably necessary, including without limitation, to seek a derogation should it prove to be necessary, to enable the acquisition by Disney of Sky News to proceed as swiftly as possible. As noted at paragraphs 18.211 to 18.214, including a provision to allow the Secretary of State to extend the divestiture period where appropriate would enable Disney to request an extension of the divestiture period from the Secretary of State to obtain regulatory clearance from the European Commission in these circumstances.

18.227 In addition to clearance from the Competition and Consumer Protection Commission, divestiture of Sky News to Disney will also require media plurality clearance from the Irish Minister for Communication, Climate and Environment. Disney expects to receive the Minister's approval in phase 1 (30 working days). The Parties told us that there is no overlap and they would not envisage any problems in obtaining the relevant approvals.

18.228 Ofcom told us that it has an ongoing duty to be satisfied that its licence holders continue to be fit and proper. Ofcom could carry out a fit and proper assessment when Disney acquires Sky News, if it considered it appropriate to do so in the event of a change of control over Sky News. The outcome of this assessment and timeframe for completing such an assessment is unknown.

### ***Finalising divestiture commitments***

18.229 Implementing the Divestiture remedy requires the finalising of, and agreement on, a number of key documents prior to and following the completion of the Transaction. The Parties submitted draft versions of Fox's Divestiture Undertakings, an SPA for the sale of Sky News to Disney and a Brand Licence Agreement as well as proposed Articles of Association for NewCo. Below, we set out necessary steps that the Secretary of State should take in relation to the divestiture.

*Interim arrangements prior to accepting any final undertakings (or making a final order) and other preparatory steps*

18.230 Prior to the Secretary of State accepting any final undertakings from Fox and Disney, either party could decide to pull out of the divestiture. At this stage neither party would have offered binding undertakings to the Secretary of State to complete the divestiture, nor would they be contractually obliged to undertake the divestiture in the absence of any final signed agreement between the Parties and Disney, as approved by the Secretary of State.

18.231 As discussed below (see paragraph 18.241 onwards), the Secretary of State would have the option to prohibit the Transaction before accepting any final undertakings or making any final order in this case.

18.232 Once the Secretary of State is satisfied with the proposed final undertakings and prior to acceptance of the undertakings, the Secretary of State is required to consult publicly on the text of the undertakings he proposes to accept. The relevant consultation period would need to be factored into the remedies implementation period.<sup>793</sup> Prior to this consultation, certain key documents will need to have been approved by the Secretary of State and be either signed as binding agreements (in the case of the SPA) or in an agreed form subject only to execution by the relevant parties following completion of the Transaction. This includes:

- (a) the SPA between Fox and Disney in relation to the sale of Sky News;
- (b) the Articles of Association of NewCo, (ie the Sky News business will be transferred into NewCo) and the corporate governance structure of NewCo;
- (c) the Brand Licence Agreement; and
- (d) the Sky News Editorial Guidelines.

18.233 Fox and Disney told us that they have agreed the Articles of Association for NewCo and the overall corporate governance structure of NewCo, the SPA, and the Brand Licence Agreement. In addition, the Sky News Editorial

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<sup>793</sup> By virtue of paragraph 2(3) of schedule 3 to the Order and paragraph 2 of schedule 10 to the Act, before accepting a final undertaking, or making a final order, the Secretary of State must give notice of the proposed undertaking (or order) and allow a period of no less than 15 days in the case of a final undertaking or 30 days in the case of a final order for consultation. If any amendments are made to that final undertaking or final order following such consultation, a further period of consultation of not less than seven days is required, unless the amendments are not material in any respect

Guidelines have been modified and attached as a relevant annex to the Divestiture remedy (see Appendix O).

18.234 Although other relevant documents, such as the operational agreements referred to in clause 8.1 of Fox's Divestiture remedy have not yet been agreed, Disney said [X]. Disney is aiming to have the forms of these agreements finalised by the time the final undertakings are accepted. Finalising these agreements is unlikely to cause undue delay to the divestiture process. Therefore, the Secretary of State should be able to also approve those agreements before accepting any final undertakings. However, as these agreements would be entered into by NewCo, it would not be possible for them to be executed prior to completion of the Transaction.

18.235 We consider it appropriate for the Secretary of State to use the interim measures powers in the Order.<sup>794</sup> This would enable the Secretary of State to enforce various commitments offered by the Parties and Disney, including the provision of the Secretary of State's approval of these commitments prior to acceptance of the final divestiture undertakings mentioned previously at paragraph 18.232. It would also enable the Secretary of State to retain the possibility of prohibiting the Transaction prior to the acceptance of final undertakings. This would enable the Secretary of State to prohibit completion of the Transaction until the following conditions have been satisfied:

- (a) all relevant agreements have been agreed as between the relevant parties and the terms of these agreements have been approved by the Secretary of State (this should include at a minimum the agreements listed at paragraph 18.232 but insofar as is possible should include the operational agreements referred to in paragraph 8.1 of the draft undertakings<sup>795</sup>);
- (b) the SPA has been signed in binding terms by the relevant parties and evidence of this provided to the Secretary of State;
- (c) completion of the Transaction is conditional on the acceptance by the Secretary of State of final undertakings from both Fox and Disney.

18.236 We consider the sort of undertakings that it may be appropriate for the Secretary of State to seek in more detail below.

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<sup>794</sup> It would also be possible for the Secretary of State to direct the appointment of a monitoring trustee at this stage should he consider it necessary.

<sup>795</sup> We note that as it is proposed that a monitoring trustee would oversee the negotiation of the operational agreements necessary to transfer the Sky News business to Disney, and that we expect that Disney will be well placed to negotiate suitable agreements on an arm's length basis, the need for these operational agreements to be in agreed form prior to the undertakings being accepted by the Secretary of State is reduced.

### *Undertakings from Disney*

18.237 The process set out in Fox's Divestiture remedy envisages that prior to the acceptance of such undertakings, Fox will have entered into the SPA with Disney, which will contractually commit Disney to acquire Sky News on completion of the Transaction. However, there is currently no commitment by Disney to the Secretary of State to give effect to the acquisition of Sky News in the manner envisaged in that agreement. Disney have since told us that they would be willing to enter into relevant undertakings with the Secretary of State.

18.238 To that end, we advise that the Secretary of State should seek relevant final undertakings from Disney, in which Disney undertakes to:

- (a) mirror the contractual agreements and arrangements set out in Fox's Divestiture remedy, the SPA and the other relevant agreements to give effect to the Divestiture remedy;
- (b) take all steps as reasonably necessary to obtain regulatory clearances, including without limitation, to seek a derogation from the European Commission.

### *Undertakings from Fox*

18.239 Fox's Divestiture remedy sets out to divest Sky News to Disney and only Disney. The Divestiture remedy does not stipulate that the Sky News business would be sold to another purchaser if Disney is not able to complete the Divestiture.

18.240 Prior to accepting any final undertakings, Fox's Divestiture remedy should be amended to include provisions in which Fox will undertake to find another suitable buyer if Disney is unable able to acquire Sky News. This would need to be done within a timescale agreed by the Secretary of State and under the auspices of a divestiture trustee as is usual in cases involving a divestiture remedy. Further advice on the use of a divestiture trustee is set out in paragraph 18.249 onwards.

### ***Fall-back remedy***

18.241 We consider that the Parties and Disney are committed to the Divestiture remedy. We note in particular Disney's willingness to offer undertakings to the Secretary of State that would effectively codify its contractual commitment to acquire Sky News on completion of the Transaction. This further supports

our view that it is in Disney's commercial interests to complete the acquisition of Sky News.

18.242 The implementation considerations identified above highlight some potential issues that could delay the process. However, most of these considerations are inherent to any divestiture process and did not identify any issues that are exceptional to this divestiture. As outlined earlier, there are tools and measures available to the CMA that mitigate these issues, such as the use of monitoring trustees.

18.243 However, there are certain circumstances which would require Fox to identify another suitable purchaser of Sky News. For example, in the event that:

- (a) Disney pulls out of the transaction to acquire Sky News before the Transaction closes; or
- (b) Disney is prevented from acquiring Sky News during the divestiture process, for example because of a failure to obtain any necessary regulatory clearances.

18.244 We consider that the risk of Disney pulling out of the transaction before the closure of the Fox/Sky Transaction is low. Interim measures, of the type described above, would further mitigate that risk. For the reasons set out earlier (see paragraph 18.215 onwards), we also consider that there is only a very small risk of Disney not being able to obtain the relevant regulatory clearances. That said, we consider below other possible outcomes should either scenario take place.

18.245 As set out in paragraphs 18.148 to 18.153, we consider that the divestiture package proposed by Fox would enable Sky News to operate effectively under the ownership of a well-resourced media operator with an interest in news gathering and production. Our expectation is that Fox would have to offer the same or enhanced financial and operational commitments to its current Divestiture remedy to ensure that Sky News remains independent of the Parties post divestment. It should therefore be possible to sell Sky News to another suitable upfront purchaser that satisfies the CMA's suitable purchaser criteria.

18.246 Therefore, in the event that Disney does not complete the acquisition of Sky News within the divestiture period,<sup>796</sup> we recommend that Fox should undertake to sell Sky News to another suitable purchaser. As explained

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<sup>796</sup> As noted above, we recommend that divestiture undertakings provide that such period may be extended at the discretion of the Secretary of State.

earlier, we consider provisions should be included in Fox's final divestiture undertakings to require such a fall-back divestiture.

18.247 In the unlikely event that either of the scenarios in paragraph 18.243 come to fruition, we recommend that the Secretary of State should appoint a divestiture trustee to oversee the sale of Sky News to an alternative suitable purchaser.

18.248 We note that the draft Divestiture remedy provided by Fox includes the implementation of the Ring-fencing remedy as a fall-back to the divestiture to Disney. As we consider that the Ring-fencing remedy is not effective, we consider it therefore should not form part of any fall-back remedy.

#### *Use of a divestiture trustee*

18.249 If there is a risk that the divestiture process is likely to be delayed or fail to complete within the agreed timescales, the CMA would normally employ the use of independent divestiture trustees who would be mandated to dispose of the divestiture package. The CMA may require that a divestiture trustee is appointed before the end of the initial divestiture period,<sup>797</sup> and would only in exceptional circumstances require a divestiture trustee to be appointed at the outset of the process.

18.250 Given that Fox has already identified an upfront suitable buyer, and Disney has agreed to provide undertakings to the Secretary of State to purchase Sky News, we do not consider it necessary for the Secretary of State to direct the appointment of a divestiture trustee to oversee implementation from the outset. However, if at any time during the implementation period, the monitoring trustee reports that there is a material risk that the divestiture process is likely to be delayed or fail to complete within the agreed timescales, we recommend that the Secretary of State should direct the appointment of a divestiture trustee. This requirement to appoint a divestiture trustee under these circumstances when directed to do so by the Secretary of State should be incorporated into any divestiture order or undertaking.

#### *Prohibition as the final fall back*

18.251 In the event that the Secretary of State is unable to secure undertakings from Fox (or Disney) to sell Sky News, or similar undertakings from Fox and an alternative suitable purchaser, we consider that the only option to address the adverse effects to the media plurality concerns identified in our report would

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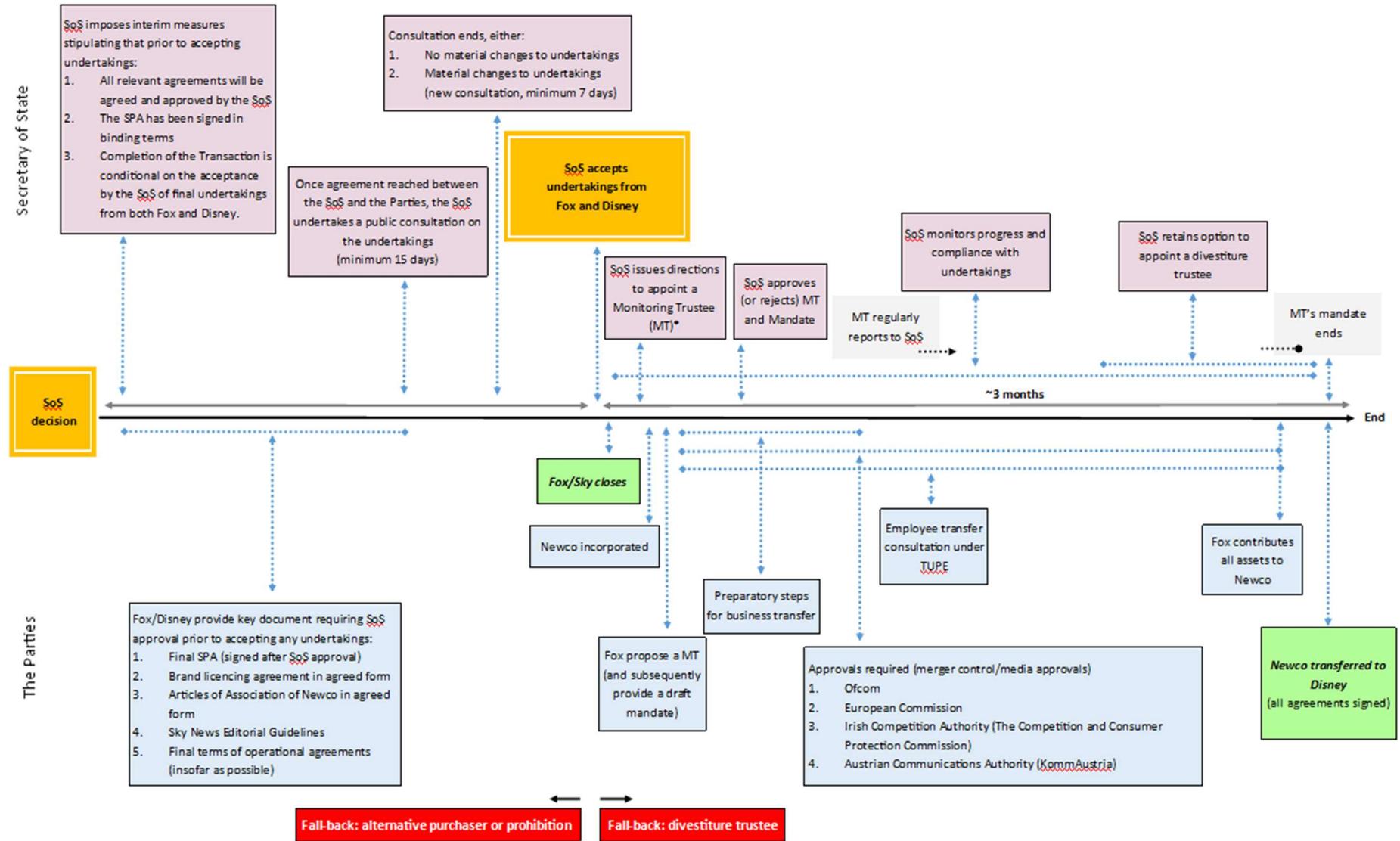
<sup>797</sup> This would typically be the case if the CMA were unsatisfied with the progress being made towards implementing a divestiture.

be to prohibit the Transaction in its entirety. If this were to be necessary, the interim measures referred to at paragraph 18.235 would be replaced by a final undertaking, or final order, prohibiting the Parties from giving effect to the Transaction. A prohibition remedy would typically prohibit the transaction and also prevent the acquisition of an interest in the target entity (or of any material assets of the target entity), without the prior consent of the relevant authority (in this case the Secretary of State) for a period of ten years. Given the nature of this case, prohibition would prevent completion of the Transaction and of the acquisition by Fox of an interest in Sky or Sky News in excess of the current level of control that it has over Sky (without the prior consent of the Secretary of State) for a period of ten years.

### ***Steps and timeline for the implementation of the divestiture of Sky News***

18.252 Below we set out the key steps and considerations for the implementation of the divestiture of Sky News, for the Secretary of State's consideration.

**Figure 18.1: Steps and timeline for the implementation of the divestiture of Sky News**



\* The Secretary of State could appoint a monitoring trustee after the imposition of interim measures or after the acceptance of undertakings (as outlined above).