

Department for Digital, Culture, Media and Sport's “Invitation for representations relating to the proposed merger between 21st Century Fox, Inc. and Sky plc”

Hacked Off response

Summary of submission

1. The Secretary of State is unable to act with due impartiality (either actual or perceived) as is required in the matter of the proposed merger, in respect of considering the public interest justification for referral on the grounds of Genuine Commitment to Broadcasting standards. This is because;
 - a. she holds the position that a Public Inquiry (The 2nd stage of the Leveson Inquiry), already established under the Inquiries Act 2005, which is due to investigate matters directly relating to the one of the grounds of possible referral (Broadcasting Standards) should be cancelled, and has in any event has prevented it from taking place.
 - b. The Government have failed to disclose the nature of private discussions that it has held with the Murdochs and other executives of 21st Century Fox in the run-up to the recent general election and the bid for Sky. Additionally this is in breach of recommendations 82, 83 and 84 of the Leveson Inquiry which the Government had claimed to accept.
2. Failure to refer the merger to the CMA for a second stage investigation is inappropriate and contrary to the public interest while the second half of the Leveson Inquiry remains suppressed by this Government.
3. Ofcom's Fit and Proper Decision is fundamentally flawed and as a consequence Ofcom's Public Interest “Commitment to Broadcasting Standards” recommendation, which relies on it, is flawed.
4. Ofcom's Public Interest “Commitment to Broadcasting Standards” recommendation was otherwise flawed by failure to properly consider evidence.
5. The integrity of the Parliamentary scrutiny process, which the Secretary of State has been obliged to follow, has been compromised.

Remedy

1. The Secretary of State should initiate the second part of the Leveson Inquiry immediately; and,
2. The Secretary of State should refer the Sky bid to the CMA on the grounds of Commitment to Broadcasting Standards in addition to Plurality.

- 1. The Secretary of State is unable to act with due impartiality (either actual or perceived) as is required in the matter of the proposed merger, in respect of considering the public interest justification for referral on the grounds of Genuine Commitment to Broadcasting Standards. This is because:**
 - a. she holds the position that a Public Inquiry (the second stage of the Leveson Inquiry), already established under the Inquiries Act 2005, which is due to investigate matters directly relating to the one of the grounds of possible referral (Broadcasting Standards) should be cancelled, and is in any event has prevented it from taking place.**
 - b. The Government have failed to disclose the nature of private discussions that it has held with Murdochs and other executives of 21st Century Fox in the run-up to the recent general election and to the bid for Sky. Additionally this is in breach of the recommendations 82-84 of the Leveson Inquiry, which the Government had claimed to accept.**

1.1 The integrity of the Government on all matters affecting the press has been compromised by previous and ongoing policy decisions undertaken by this Government; namely on the matter of the second half of the Leveson Inquiry.

1.2 The Leveson Inquiry was promised, in both parts, by former Prime Minister David Cameron on 29th November 2012¹. This promise was repeated in the House of Commons, and on other occasions, personally to the victims of press abuse and police corruption.

1.3 The Government's position on the matter more recently has been ambiguous. First, it began to equivocate; saying in January 2015 that part two was under consideration². Then, in November 2016, the Government announced a consultation³. This was challenged on grounds of lawfulness. But then in May 2017, before the consultation's outcome had been published, the Conservative Party manifesto pledged to cancel part two⁴. Throughout this period, all other political parties have remained supportive of the Inquiry proceeding as agreed.

1.4 No substantive developments have occurred which would render any of the outstanding Terms of Reference any less relevant or in need of investigation; indeed, the advent of the

¹ David Cameron, 29th November 2012, House of Commons: "When I set up the inquiry, I also said that there would be a second part to investigate wrongdoing in the press and the police... we remain committed to the inquiry as it was first established... It is right that it should go ahead, and that is fully our intention."

² Mike Penning, January 22nd 2015, House of Commons: The Government has been clear that a decision on whether to undertake Part 2 of the Leveson Inquiry will not take place until after all criminal investigations and trials related to Part 1 are concluded. As these are still ongoing it would be inappropriate to comment further.

³ Consultation page: <https://www.gov.uk/government/consultations/consultation-on-the-leveson-inquiry-and-its-implementation>

⁴ Page 80: <https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf>

proposed merger, the developments in the Hillsborough families' campaign for justice, the jailing of Mazher Mahmood⁵, and the disclosure which has already occurred in The Sun voicemail interception litigation⁶ speak to the critical need for the Inquiry to complete its work. The fact that the Government have unilaterally blocked this inquiry from proceeding is evidence of a clear lack of impartiality on matters relating to the ownership of News UK and therefore the owners of 21CF.

1.5 Furthermore, on other matters, such as the commencement of section 40 of the Crime and Courts Act 2013, and more generally on the system of press regulation supported by Parliament and the public⁷, the Government have consistently acted with bias and utter disregard for promises made to the public and the will of Parliament⁸.

1.6 As such, it can only be concluded that the Government is fundamentally compromised over the issue of press regulation; and indeed, on all matters relating to the press and those who control it.

1.7 The Government could have defended itself against allegations of corrupt relationships with media proprietors by setting out, as Leveson recommended, the "general nature of any discussion of media policy issues at those meetings [with press representatives]" (recommendation 83)⁹. Instead this Government has failed to do so, and no records exist relating to policy discussions affecting the press between press representatives and Government Ministers. Only the fact of the meeting is published, and it is typically published up to nine months after the meeting itself has taken place.

1.8 Give the history of corruption between politicians and the press, we recommend that the Government should publish all minutes of meetings between press representatives and politicians over the last 12 months, to rebut the assumption which must otherwise be made, especially in light of this Government's political decisions relating to the press, that corrupt relationships exist between members of the Government and the press.

1.9 The public cannot have confidence in this process unless minutes of these meetings are published and the Secretary of State removes herself from intervening action to suppress an established public inquiry and interferences with other elements of the regulatory system agreed by Parliament.

⁵ Report here: <http://www.pressgazette.co.uk/sun-reporter-mazher-mahmood-jailed-for-15-months-as-judge-says-good-work-not-enough/>

⁶ Report here: <http://www.pressgazette.co.uk/news-uk-faces-first-claims-phone-hacking-took-place-sun-opening-possible-new-front-litigation/>

⁷ See the last two questions of this public opinion poll (YouGov): <http://hackinginquiry.org/wp-content/uploads/2017/01/App-5-Poll-results.xls>

⁸ Hacked Off submission on section 40 and Leveson Pt Two: <http://hackinginquiry.org/wp-content/uploads/2017/01/HO-Consultation-Submission-10.1.17.pdf>

⁹⁹ Leveson Report Executive Summary: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229039/0779.pdf

2. Failure to refer the merger to the CMA for a second stage investigation on the grounds of Genuine Commitment to Broadcasting Standards is inappropriate and contrary to the public interest while the second half of the Leveson Inquiry remains suppressed by this Government.

2.1 We submit that failing to refer the merger to the CMA for a second stage investigation on the grounds of Genuine Commitment to Broadcasting Standards is inappropriate and contrary to the public interest while the Government is unilaterally blocking the second half of the Leveson Inquiry.

2.2 This is because it has been established beyond any doubt that it was and remains necessary to determine the extent of criminal wrong-doing by News Corporation employees and executives and the extent of any mismanagement or failure of corporate governance at News International in relation to the criminal wrongdoing and unethical conduct that has been exposed. This is reflected in the terms of reference of the Leveson Inquiry's second stage¹⁰.

2.3 It is relevant to record that the attempted News Corporation takeover of BSkyB in 2011 was effectively ended last time when the criminal scandal at the News of the World emerged. It is six years later, and some time after the last relevant criminal trial, and the Public Inquiry into the cover-up at News International has still not been allowed to do its work. Its findings in relation to these matters that would clearly impact on whether the Murdochs can be relied upon to have adequate corporate governance arrangements which would satisfy the "broadcasting standards" public interest ground of referral.

2.4 Meanwhile, the newspaper titles under the ownership of News UK (as it now is) have still not joined an independent recognised regulator in accordance with the recommendations of the first half of the Leveson Inquiry, designed to prevent the repetition of unethical conduct by the company and its employees.

2.5 Furthermore the newspapers owned by the Murdoch family have – under the direction of the Murdochs and their appointees – campaigned for the ending of the Inquiry into their misconduct¹¹, which demonstrates a disregard for basic norms of corporate governance.

2.6 Ofcom's Fit and Proper Decision which is relied on by Ofcom in respect of its Broadcasting Standards Public Interest report has a number of flaws (see below) but in addition is hindered by the suppression of information that would have come to light from part 2 of the Leveson Inquiry.

¹⁰ Leveson Pt Two terms of reference:

<http://webarchive.nationalarchives.gov.uk/20140122144942/http://www.levesoninquiry.org.uk/about/terms-of-reference/>

¹¹ <https://www.thesun.co.uk/news/3594528/theresa-may-ends-witch-hunt-against-media-by-ditching-punitive-law-which-quells-free-speech/>

The second half of the Leveson Inquiry

2.7 After widespread and persistent criminality was uncovered at News of the World in 2011, a Public Inquiry was ordered in two parts – the Leveson Inquiry.

2.8 The second part's Terms of Reference include:

3. To inquire into the extent of unlawful or improper conduct within News International, other newspaper organisations and, as appropriate, other organisations within the media, and by those responsible for holding personal data.

6. To inquire into the extent of corporate governance and management failures at News International and other newspaper organisations, and the role, if any, of politicians, public servants and others in relation to any failure to investigate wrongdoing at News International

2.9 The second part of the Leveson Inquiry was established to discover the facts of what happened at News International under the stewardship of James Murdoch – the same individual who would stand to significantly increase his ownership over the British media landscape with the success of this merger.

2.10 It has been almost a year since the Government stated in response to a Parliamentary Question¹² that the criminal trials which had made this part of the inquiry impossible to proceed without the risk of putting witnesses in Contempt of Court had concluded. But after a meeting (of which minutes or a summary have not been made available) between the Prime Minister and Rupert Murdoch in September 2016¹³, and further meetings (for which minutes or summaries have not been made available) between Government and press representatives in July, September, October and November 2016¹⁴, the Government announced it would consult on the question of whether to cancel the second part of the Inquiry. This was a unilateral action which was condemned by Parliamentarians across all major British Parties in both Houses of Parliament¹⁵.

2.11 In May 2017 the Conservative Party manifesto pre-empted the outcome of the consultation announced by the Conservative Government just months previously, and pledged to cancel the Inquiry entirely.

¹² Question 51962: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-11-07/51962/>

¹³ Report here: <https://www.theguardian.com/media/2016/sep/29/theresa-may-meeting-rupert-murdoch-times-sun>

¹⁴ (Limited) transparency data available here:

https://www.gov.uk/government/publications?keywords=&publication_filter_option=transparency-data&topics%5B%5D=all&departments%5B%5D=all&official_document_status=all&world_locations%5B%5D=all&from_date=&to_date=

¹⁵ Commons Hansard, November 1st 2016: <https://hansard.parliament.uk/commons/2016-11-01/debates/F317A5B6-3B88-4FB5-A02A-336426B79AE6/PressMatters;>

Lords Hansard, November 1st 2016: <https://hansard.parliament.uk/lords/2016-11-01/debates/33C17215-DFC6-423A-B359-2B9B96071246/PressMatters>

3. Ofcom’s Fit and Proper Decision is fundamentally flawed and as a consequence Ofcom’s Public Interest “Commitment to Broadcasting Standards” recommendation, which relies on it, is flawed.

3.1 There are a number of flaws in the Ofcom Fit and Proper Decision. While these are principally a matter for Ofcom, as the Government has no jurisdiction over Ofcom’s powers to carry out Fit and Proper ownership assessments, **the fact that Ofcom rely upon their Fit and Proper Decision findings in their recommendation on the “Commitment to Broadcasting Standards” Public Interest Test, means that flaws in the Fit and Proper Decision invalidate that recommendation.**

3.2 The various flaws in the Decision are described below.

a) Ofcom invent the threshold for “Fit and Proper”

3.3 Ofcom’s report on the public interest tests states, in respect of the threshold evidence must meet for a CMA referral:

1.2 ... The threshold for a reference is low. The Secretary of State would need to hold a reasonable belief that it may be the case that the transaction may operate or may be expected to operate against the public interest.

3.4 That threshold is set out in statute.

3.5 The threshold on the Fit and Proper Test, however, is not set out in statute.

3.6 Yet, Ofcom state this in their Decision:

4. The threshold for determining that a person is not fit and proper to hold its broadcast licences is a high one, because of the impact on audiences and on the broadcaster if the licences are revoked; and because freedom of expression is so important.

3.7 There is no citation for this threshold, and it is unclear on what basis Ofcom rely upon it. It appears to be an invention.

b) There is an unreasonable and/or irrational regard to “impact on audiences” in the Fit & Proper Decision

3.8 Of the apparent justifications given, the “impact on audiences” is a dubious factor in itself, but in any case, it works both ways. An unfit or improper media owner could be responsible for damage to their audiences.

3.9 The confiscation of broadcast licences may be to the immediate detriment of Sky subscribers, but could be to the benefit of subscribers to other services; and ultimately to former Sky subscribers if the effect is to ensure that broadcasters are fit and proper.

3.10 Furthermore the logic of the idea that audience impact of licence revocation is a significant factor is that the larger the broadcaster the higher threshold for a negative finding, when the public interest such large broadcasters to be subject to no greater preference in regulatory treatment. OfCom in fact recognise that the reason that it so lightly regulates Fox News for in respect of due impartiality is because of its small, niche audience.

3.11. To say “freedom of expression is so important” is not a justification in itself, and Ofcom do not explain (a) why Freedom of Expression trumps other rights and freedoms, and (b) how Freedom of Expression is enhanced by Sky’s ownership of broadcast licences.

3.12 The case for a lower threshold is more compelling. Companies which hold broadcast licences have extraordinary power. For such owners to have a record of good and ethical corporate governance, is the bare minimum the public ought to expect.

3.13 The fact that Ofcom have, of their own volition and without foundation, set an arbitrary and high threshold for this test invalidates the Decision.

(c) There is an unreasonable weighting towards “Freedom of Expression” in the Fit & Proper Decision

3.14 The right to freedom of expression, which is incorrectly and over relied upon in the the Fit and Proper Decision, as referred to above, is highlighted in four different paragraphs of the Decision:

4. The threshold for determining that a person is not fit and proper to hold its broadcast licences is a high one, because of the impact on audiences and on the broadcaster if the licences are revoked; and because freedom of expression is so important.

...

7. Finding a broadcaster unfit and improper would mean the immediate revocation of their broadcasting licence. This has consequences for freedom of expression – both for the broadcaster and its audiences. If Sky were found unfit and improper as a result of the merger with Fox, its subscribers would lose their Sky channels. There is therefore a high threshold to finding a broadcaster unfit and improper.

...

18.If a broadcaster is found to be not fit and proper to hold a particular licence, then by law Ofcom must revoke that licence. The broadcaster cannot broadcast again unless the reasons making it unfit have been fixed. This is a major interference with freedom of speech, as it prevents the broadcaster from broadcasting and restricts the number of voices being heard and the range of programming available to audiences.

...

66. In determining whether a broadcaster (Sky) is – or is not – fit and proper to hold a broadcast licence based on evidence that non-broadcasters under common control (News UK) have acted in a self-serving, retaliatory or vindictive way in what they publish, Ofcom must give great weight to the importance in a democratic society of freedom of expression, and the need for any interference with that right to be proportionate. Freedom of expression includes the right to speak with a range of motives.

3.15 The Decision relies on an extremely heavy weighting towards freedom of expression, yet Ofcom do not cite any statute or related guidance which calls for the Freedom of Expression to be given such an unnaturally significant weighting. The Fit and Proper Test is ultimately about protecting the public interest, and yet that appears to be given an inferior weighting to the proprietor's interests in this report.

d) Ofcom's findings on Fox News sex scandal are inadequate

3.16 Paragraph 62 says:

62. The alleged conduct is deeply disturbing. And it appears to us likely that bad publicity and the associated fall-off of advertising was a major factor behind the company's response to the allegations against Mr O'Reilly. With the information we have, we cannot reasonably draw the conclusion that the alleged misconduct was known about at the time by the senior executives of Fox. James and Lachlan Murdoch have since been responsible for a revision to Fox's corporate governance arrangements. On this basis, we therefore cannot reasonably conclude that were Sky to be wholly-owned by Fox, Sky would not in future properly investigate and resolve misconduct, and take measures to prevent it from recurring. This in turn means that we cannot - on today's evidence - cease to be satisfied that were Sky to be 100% owned by Fox, it would be fit and proper to hold its broadcast licences.

3.17 This is an evidentially inadequate finding.

3.18 Even if 21CF's claims that Senior Executives did not know about this misconduct can be stood up, and given the record of cover-up at News International, and what we know so far about the depth of the scandal at 21CF, we submit that the onus of proving their lack of awareness of this conduct ought to be on them in this case. The substantive point is that if they didn't know then they ought to have known.

3.19 Good corporate governance, which is ultimately the responsibility of senior executives in corporations, is not simply reacting to misconduct when it arises. It requires robust processes in place throughout the organisation to prevent misconduct from occurring, to encourage complainants to come forward, and to have in place mechanisms of accountability to ensure failures and transgressions are picked up early.

3.20 The very fact that a sexual harassment scandal, perpetrated over such an extended period, existed under the ownership of 21CF is damning proof of corporate governance failure in itself. The fact that senior executives didn't know about it adds a degree of

incompetence to the lengthy charge-sheet for 21CF's ownership, but this doesn't diminish the fundamental point that they have evidentially failed to ensure 21CF was well-governed.

3.21 The ownership of 21CF could not maintain basic corporate governance standards. The claim that they were also incompetent instead of being corrupt does not alter the basic point that under their ownership, the corporate governance of the organisation allowed a years-long culture of sexual harassment to persist.

e) Ofcom's claim that freedom of expression justifies threats to politicians is flawed

3.22 Paragraphs 64 – 66 of Ofcom's Fit and Proper Decision report state:

64. It has been put to us that News UK newspapers are used to engage in a pattern of reprisal against individuals to secure political ends and to punish those who do not act in the interests of News Corporation or the Murdoch family. Submissions have been made to us by individuals who say they are aware of senior politicians and public servants who are so cowed that they would not give evidence to Ofcom for the purposes of our fit and proper assessment or public interest test, for fear of retaliation. We have reviewed again the evidence published by the Leveson Inquiry and the conclusions of that Inquiry in light of new – albeit limited - evidence provided to us.

65. On the evidence we have seen, Ofcom can reach no view on whether the second hand reports of what other individuals rightly or wrongly are said to have believed are true. It may or may not be the case that, as alleged, senior politicians and officials fear reprisal by NGN newspapers if they do not do what is wished.

66. In determining whether a broadcaster (Sky) is – or is not - fit and proper to hold a broadcast licence based on evidence that non-broadcasters under common control (News UK) have acted in a self-serving, retaliatory or vindictive way in what they publish, Ofcom must give great weight to the importance in a democratic society of freedom of expression, and the need for any interference with that right to be proportionate. Freedom of expression includes the right to speak with a range of motives.

3.23 The closing line of this passage appears to be a justification for the prospect of News International newspapers using the media under their control to “target” politicians who may expose them. The trite statement that “*Freedom of expression includes the right to speak with a range of motives*” is different from saying that “speaking” with any and all motives (for example; intimidation, blackmail, or incitement to hatred) is valid.

3.24 Ofcom's report remarks that no politicians had come forward with first-hand experience of this practice. Of course, the very point is that politicians fear retribution from News UK newspapers for making representations against them, so Ofcom cannot draw any conclusions from the fact that no politicians have come forward. The only evidence which can exist, and which was provided to them by the Hacked Off Campaign, is that after a politician (or indeed other public figure) has made an intervention which News International have objected to, they have faced unjustified attack in News International newspapers.

3.25 But it is Ofcom's further argument that such practices are acceptable on the grounds of Freedom of Expression which is even more compromising to the Report's Decision.

3.26 The effect of silencing one's critics through the threat of media attacks is a chilling of free speech and public debate. If it is true that News UK-owned titles are targeting politicians who may expose them, criticise them, or even support a position at odds with News UK's political agenda, that would be highly detrimental to Freedom of Expression.

3.27 Ofcom ought to have investigated this in detail. If true, it would be one of the greatest transgressions of free expression which arises in the matters discussed in this Report, and yet despite Ofcom's apparent belief in the supremacy of the right to Free Expression, it is barely addressed.

3.28 Instead, Ofcom's report appears to argue that the fact no politician had come forward to give their own account of being threatened rendered the point unprovable, and the right for Freedom of Expression would have made such practice permissible anyway (as it is permitted under a "range of motives").

3.29 Regarding the former, no first-hand evidence will ever exist of such a practice. Regarding the latter, the Right to Free Expression would be disastrously compromised by such activities.

f) Consideration of critical evidence was absent from Ofcom's Decision

3.30 A number of points of critically important evidence were absent from Ofcom's Decision report.

3.31 Firstly, there was no mention of the finding of the Privileges Parliamentary Committee that the Culture, Media and Sport Select Committee had been misled by at least two News International Executives¹⁶. This ought to have been given significant weighting and consideration by Ofcom. It speaks to the corporate governance at News International, the culture of cover-up, the absence of accountability, and directly, the question of commitment to Broadcasting Standards. If individuals working with James Murdoch could not be trusted to abide by the rules of giving evidence to Parliament, how can his organisations be trusted to abide to Ofcom's standards code?

3.32 Secondly, paragraph 69 of the Report states,

"[campaigners argue that] we should draw adverse inferences from the reemployment of Rebekah Brooks as Chief Executive Officer of News UK following her acquittal on various charges related to the scandal."

3.33 But on apparent examination of this point, Ofcom claim that the new mechanisms in place make her appointment reasonable. We would dispute those new mechanisms as having any significant bearing on the basis that those oversight processes only work if the business unit does not successfully conceal wrongdoing from the supervisory structures – the very thing that was claimed (in terms) by the Murdochs and News Corporation to have happened in the hacking scandal.

¹⁶ Report here: <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmprivi/662/662.pdf>

3.34 Yet even if that is true, it misses the point.

3.35 The point is that Ms Brooks successfully defended herself in court by arguing that her incompetence was such that she was unaware of the wrongdoing which was occurring all around her. This would require an extraordinary level of incompetence – and yet she was reappointed to a senior position at News UK. Ofcom’s claim that the new governance procedures in place ought to prevent a second scandal of industrial scale criminality to develop under Ms Brooks’ nose is beside the point. The point is that it is manifestly poor corporate governance to appoint, to an extremely senior position, an individual who has effectively proven in a court of law that she is incapable of the most basic elements of corporate management.

g) Ofcom assume that a finding that the Murdochs were not Fit and Proper if Fox owned Sky outright would mean the revocation of licences which would be against the interests of the audience.

3.36 We dispute this assumption of audience impact (see point (a) above) but even if that was not accepted, Ofcom appear to have forgotten that they are conducting a prospective fit and proper test and that if their finding was that the merger would result in licence revocation, the bid would clearly not proceed, and Sky would retain the licence as now. This is a fundamental misdirection on the part of Ofcom which renders their Decision invalid.

h) As a result of all the above flaws in the Fit and Proper Decision, the Public Interest Test recommendation on “Commitment to Broadcasting Standards” is invalid.

3.37 In the Public Interest Tests report, the “Commitment to Broadcasting Standards” test is barely addressed at all in the context of corporate governance. Instead the report refers to the Decision in the Fit and Proper report; arguing that the finding in that report makes a recommendation for CMA referral unnecessary.

(i) The Fit and Proper Decision is so fundamentally flawed that it cannot be relied upon for Ofcom’s referral recommendation

3.38 For the multiple reasons listed (a) to (f) above in (3), Ofcom’s Fit and Proper Decision is substantially flawed and it would be unsafe for the Secretary of State to rely upon it in any referral decision.

3.39 But Paragraph 10.51 of Ofcom’s Public Interest Tests report states, in respect of the Commitment to Broadcasting Standards test:

10.51 As set out in our separate assessment of the fitness and properness of Sky to hold broadcasting licences, and in light of our conclusion on this, we do not consider that this evidence demonstrates that the merged entity would lack a genuine commitment to the attainment of broadcasting standards.

3.40 The fact that Ofcom rely, almost exclusively, on the flawed Fit and Proper Decision for its recommendation on the “Commitment Broadcasting Standards” referral ground, means that the Secretary of State must dismiss this recommendation out of hand and proceed with the Broadcasting Standards referral.

(ii) Ofcom’s mixed thresholds invalidate findings on Genuine Commitment to Broadcasting Standards

3.41 Ofcom ought to have re-appraised the matter of corporate governance in considering the Commitment to Broadcasting Standards test. Instead, they simply deferred to the Fit and Proper Decision on the matter. This is the wrong approach anyway, but what invalidates their recommendation on the referral further is the differing threshold relied upon for the Fit and Proper Decision.

3.42 Ofcom’s report on the public interest tests states, in respect of the threshold evidence must meet for a CMA referral:

1.2 ... The threshold for a reference is low. The Secretary of State would need to hold a reasonable belief that it may be the case that the transaction may operate or may be expected to operate against the public interest.

3.43 Ofcom’s Fit and Proper Decision sets a different threshold, which is far higher for enforcement action:

4. The threshold for determining that a person is not fit and proper to hold its broadcast licences is a high one, because of the impact on audiences and on the broadcaster if the licences are revoked; and because freedom of expression is so important.

3.44 It is conceivable that conduct which fails to meet a high threshold under the Fit and Proper test, may yet still meet the lower threshold of a CMA referral. The record of corporate governance of the 21 Century Fox ownership (the same ownership as News International) could be poor enough to satisfy a CMA referral, but not poor enough to require a negative Fit and Proper Decision.

3.45 Yet as cited under the previous heading, paragraph 10.51 of the Public Interest Tests report states:

10.51 As set out in our separate assessment of the fitness and properness of Sky to hold broadcasting licences, and in light of our conclusion on this, we do not consider that this evidence demonstrates that the merged entity would lack a genuine commitment to the attainment of broadcasting standards.

3.46 But as described above, the Fit and Proper Decision has a much higher threshold for a negative Decision. So its conclusion cannot be relied upon to justify non-referral in the public interest test.

3.47 The report is further fatally flawed in this respect and a referral must be made so that the CMA can investigate the matter properly.

4. Ofcom’s Public Interest “Commitment to Broadcasting Standards” recommendation was otherwise flawed by failure to properly consider evidence.

4.1 We refer to the evidence we submitted in the previous call for evidence, the summary of which is appended.

5. The integrity of the scrutiny process has been compromised

5.1 Parliament may have been misled by the Government over the powers and responsibilities of Ofcom

5.2 Tom Watson MP, arguing that Ofcom ought to be given instructions to investigate corporate governance as a public interest referral ground, asked the Secretary of State in the House on March 6th 2016 (emphasis added):

The Secretary of State rightly referred to failures of corporate governance during the phone hacking scandal, but it is unclear whether those failings strictly fall under the heading of broadcasting standards, even though they are central to whether the merger should be approved.... Will Ofcom's assessment of 21st Century Fox's commitment to broadcasting standards include in its scope the following facts? [details relating to illegality and wrongdoing at NGN followed].¹⁷

5.3 Ms Bradley responded (emphasis added);

As I have said, Ofcom has sufficient powers and can investigate anything it thinks appropriate. I thank the hon. Gentleman for raising his points, which I am sure will be considered by Ofcom. Ofcom has a fit and proper person test for broadcasting licences. That test is different from the one that will be considered for the merger, but the same evidence may be relevant to both.

Finally, my letter sets out a number of matters that I consider relevant and as warranting further investigation, which includes facts that led to the Leveson inquiry, such as on corporate governance at News of the World. It will be open to Ofcom to look at all relevant areas, and I will not rule out any areas if I decide to intervene.

5.4 The meaning of Mr Watson's question is whether corporate governance will be directly addressed as a factor in respect of whether this merger would be in the public interest. He explicitly raises the fact that Broadcasting Standards alone are likely to be insufficient grounds for Ofcom to give corporate governance failures due attention. The point is that corporate governance should not be examined in the context of their impact on Broadcasting Standards; but rather on their impact on the public interest question generally.

5.5 The implication of Ms Bradley's comments is that Ofcom "has sufficient powers" to address Mr Watson's concerns, and may investigate whatever it chooses; that a separate referral ground for corporate governance standards is unnecessary because Ofcom can address the matter themselves.

¹⁷ Hansard: <https://hansard.parliament.uk/Commons/2017-03-06/debates/045187F9-4209-47B1-B7B9-BA1AD6473DCE/Sky21StCenturyFoxProposedMerger>

5.6 She refers to her letter. But it is unclear what status, if any, the letters have. Ultimately Ofcom rely upon the EIN¹⁸, which does not make reference to corporate governance.

5.7 S44a(3a) of the Enterprise Act 2002 (as amended), which sets out what Ofcom can look at in their report, states:

(3)The report shall contain—

(a)advice and recommendations on any media public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State’s decision as to whether to make a reference under section 45; and...

5.8 That report’s findings are based ultimately on the grounds set out by the Secretary of State in the EIN, and the fact that she went on to refer on Broadcasting Standards and Plurality alone meant that Ofcom were unable to investigate the substantive issues raised by Mr Watson in Parliament without risking legal challenge for going beyond their instructions.

5.9 Indeed, Ofcom’s final report opens by stating that it is giving a view in respect of those two tests specifically¹⁹. Ofcom refer to corporate governance later in their report, but not in the detail which Mr Watson was calling for. The critical distinction is that Mr Watson argued for Ofcom to measure 21CF’s ownership’s corporate governance record against the public interest (the implication of it being a grounds for referral), whereas the Secretary of State, deliberately or otherwise, effectively limited Ofcom to only measuring 21CF’s corporate governance record against the specific question of commitment to Broadcasting Standards.

5.10 In summary, the Secretary of State committed Ofcom to investigating these matters substantively in Parliament, but it is unclear whether or not Ofcom had the instruction to do so.

5.11 The fact that this problem was drawn to the Secretary of State’s attention by cross-party amendments in the Lords²⁰, responses to the March consultation, and by her opposite number in Parliament, means that she cannot claim that she intended Ofcom to fully investigate corporate governance but wasn’t clear enough: Mr Watson put the point to her. Either Ofcom did not act in accordance with their obligations, or Parliament was misled.

¹⁸ EIN:

[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/600344/European Intervention Notice Sky Fox 16 March 2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/600344/European_Intervention_Notice_Sky_Fox_16_March_2017.pdf)

¹⁹ Page one of the Report; “About this document”.

²⁰ Hansard: <https://hansard.parliament.uk/lords/2017-03-29/debates/399F6682-6341-42BF-B095-7C6A36E3F01E/DigitalEconomyBill>