

Fox News: broadcasting non-compliance

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AVAAZ

About AVAAZ

Avaaz has a simple democratic mission: organize citizens of all nations to close the gap between the world we have and the world most people everywhere want. Avaaz enables millions of people from all walks of life to take action on pressing global, regional and national issues, from corruption and poverty to conflict and climate change.

The Avaaz community campaigns in 16 languages, served by a core team on 6 continents and thousands of volunteers. We have 45 million members worldwide and 1.5 million in the United Kingdom.

Avaaz members across the UK are concerned about Rupert Murdoch's threat to our public debate and democracy, and played a major role in slowing and halting the Murdochs' bid for BSkyB in 2010-11. The Avaaz movement has been vocal and effective in calling for a full scrutiny of the bid for Sky in 2016-2017, including by submitting evidence, bringing witnesses from the USA, and encouraging inputs to consultations.

Contact: Alex Wilks or Alaphia Zoyab.

About this report

This report is intended to inform the Competition and Markets Authority in its scrutiny of the proposed takeover of Sky plc by 21st Century Fox.

It should be read in the context of other submissions made to the CMA at the same time:

1. 21st Century Fox and News Corporation: the Murdochs' common control
2. Defiance, not compliance: the culture and behaviour of Murdoch-owned companies.

And in the context of Avaaz's previous submissions and representations on the Fox/Sky takeover:

Submissions to the Secretary of State

- The Fox/Sky Takeover: Why A Phase Two Referral On Broadcasting Standards Is Needed To Protect The Public Interest, 14 July 2017
- Consolidating Control The Fox/Sky Merger And News Plurality In The UK, February 2017

Submissions to Ofcom

- Before The Murdoch Takeover: New Evidence Indicating The Need For A Further "Fit And Proper" Review, 8 March 2017
- Murdoch's Fox Effect: How full ownership of Sky risks undermining British broadcasting standards, 30 March 2017
- Report entitled "Rupert Murdoch and Donald Trump - The Conflicted Alliance", 8 May 2017;
- Report entitled "Racist content in the Murdoch Media" 11 May 2017;
- 21st Century Fox and News Corporation: the Murdochs' common control, 30 March 2017, amended on 13 April 2017
- Sexual harassment, denials and cover ups: evidence of a rotten corporate culture at Fox, 30 March 2017.

Executive Summary

Ofcom's scrutiny of Fox News during its Phase 1 assessment of the Sky takeover revealed that the channel had been on air in the UK for 16 years without any compliance policy or governance in place to ensure compliance with UK broadcast standards designed to protect the public interest. This meant that there was no agreed procedures, formal sign off, or line management systems in place during this time. Despite this, and a rising number of upheld complaints against Fox News on impartiality, accuracy and offensive content, Ofcom said its overall compliance record was good.

Fox News produced a new compliance policy during Ofcom's review, although its contents have not been made public. In response, Avaaz warned "the new policy arrangements and procedures ... cannot be relied upon to fix a persistent pattern of behaviour dating back two decades at Fox News, and longer at other Murdoch-controlled media outlets". Fox later withdrew Fox News from the UK just before the Secretary of State asked the CMA to assess whether Sky would retain "a genuine commitment to the standards for broadcasting".

In three earlier submissions to Ofcom and the Secretary of State, Avaaz has pointed to Fox News' long history of showing material in the UK that is partial, inaccurate and offensive, and argued that Ofcom's approach to assessing breaches by Fox was limited and incomplete, as it relied on complaints by a small, self-selecting audience.

This submission provides evidence as to the kind of compliance culture that 21st Century Fox (21C Fox) would be likely to introduce as the ultimate editorial controller of Sky, provides further evidence that Ofcom's analysis of Fox News breaches was incomplete, and suggests further lines of enquiry for the CMA's work. We also provide evidence as to the "Foxification" of a 21C Fox acquisition in Australia. We are concerned that, if Sky's legal and compliance teams are absorbed into 21C Fox management structures and business models, Sky would be subject to the culture revealed in this research.

In particular, we demonstrate:

1. 21C Fox's lack of accommodation to UK regulation and its assumption that the rules are not relevant to them, as US broadcasters, can be seen throughout their responses to complaints about Fox News in the UK. This reveals their underlying compliance understanding and processes that adhere to US business models that will be directly applied by 21C Fox to Sky if the merger is permitted.
2. How Fox News breached the UK Broadcasting Code by failing to distinguish between editorial and commercial content; how this is a revenue-generating model adopted from the US; and why the CMA needs to consider the potential implications of 21C Fox's commercialised news business model being applied to Sky after the takeover.
3. That 21C Fox's record of non compliance was greater than even the complaints against it suggest. There were a number of uninvestigated complaints in 2015 and 2016 that are of potential relevance and interest to the CMA enquiry. These were not considered at the time of Ofcom's Phase 1 report, nor were they covered by Ofcom's rationale as to the reasons for not investigating the additional complaints during 2017, when Fox News was under particular scrutiny. They should form part of the CMA's investigation into 21C Fox's approach to broadcast compliance.

Recommendations

Avaaz recommends that the CMA:

- seeks further information on Ofcom's internal discussions about whether and how to investigate and sanction Fox News, for example over Fox's decision to broadcast partial information while polling was taking place in the EU referendum;
- reviews Fox's justifications provided to Ofcom in response to inquiries about potential breaches;
- obtains the Fox News UK compliance policy provided to Ofcom this year, and notes of Ofcom's analysis of that policy;
- seeks detail on Fox's training of junior and mid level staff, and specifically about the compliance approval pathways, line management and promotion routes of mid level executives and production staff between Sky and Fox after the proposed acquisition;
- investigates the management lines of command in relation to commercial revenue streams and product placement decisions from editorial channels; and
- widens its investigation of the commitment to standards to explore how 21C Fox will behave in relation to the commercial goals it will set for Sky, and whether those commercial goals and business plans will include enhanced advertising and product placement revenue from its news channels.

Section 1: Ofcom investigations into bias, impartiality and accuracy

Background

Under UK law persons carrying on media enterprises, and for those with control of such enterprises, are required to have “a genuine commitment” to the attainment of broadcasting standards objectives as set out in section 319 of the Communications Act 2003.

These include:

- that news and current affairs included in television and radio services are presented with due impartiality
- that news included in television and radio services is reported with due accuracy;
- 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;
- that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
- 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.

Avaaz has made the case in previous submissions that Fox News’ broadcasting in the UK - and the broadcasting by channels owned by 21C Fox in other jurisdictions, including Sky Australia, and Fox US - repeatedly and regularly fail to attain these objectives.

While other countries’ media laws differ from the UK’s, the behaviour and standards demonstrated by 21C Fox-owned media in other jurisdictions is of relevance to the discussion in the UK, because they show the dominant approach taken by the parent company, and the attitude of its owners to news and current affairs reporting.

In Australia, a 2016 full takeover by 21C Fox saw the editorial policy at Sky Australia change markedly in a process that has been referred to as “Foxification”. Although, we respect the integrity of Sky’s current legal and compliance teams, we believe once they are absorbed into the structures and business models of Fox, significant pressure will be applied to change their approach.

The persistent and repeated breach of broadcasting standards by Fox News UK calls into question the commitment of the owners of 21C Fox to the UK’s broadcasting standards, and is a cause for concern in the face of the potential takeover of Sky. The examples that follow further illustrate the tendencies and attitudes evidenced in earlier submissions.

The broader implication is that Fox would like UK audience expectations and laws to change to allow their style of broadcasting, an attitude implied by James Murdoch’s comment that the UK’s

media laws are an 'impingement on freedom of speech and on the right of people to choose what kind of news to watch.'¹

Below Avaaz explores a few clear examples of Fox News content in the two years preceding Ofcom's Phase 1 Public Interest assessment for the Sky bid. They show that Ofcom investigations and analysis as summarised in its Phase 1 report do not give a full picture of Fox's behaviour and intentions, and suggests specific ways the CMA should go further during its Phase 2 investigation.

All examples given below are taken from Ofcom's *Broadcast and On Demand Bulletins*.

BOX 1 - Timeline of Fox News in the UK

DATE	EVENT
September 2001	Fox News launched in UK
April 2017	Ofcom finds "Fox had not put in place adequate procedures to ensure the compliance of Fox News' content with the Broadcasting Code"
May 2017	Fox News creates new compliance policy
June 2017	Ofcom concludes "the improvements made by Fox to its compliance arrangements and procedures are sufficient to meet the requirements of its licence."
July 2017	Avaaz requests Ofcom and Fox News to share the compliance policy as other major broadcasters do publicly on their websites. Neither Ofcom, nor Fox make it known.
August 2017	21 C Fox withdraws Fox News from the UK, citing 'commercial' reasons.

1.1. "Why would any Brit wanna offshore its sovereignty to Brussels?"

Rule 6.4 of the Broadcast Code, which refers to broadcasting during elections, states: "Discussion and analysis of election and referendum issues must finish when the poll opens." This is designed to prevent broadcasters unduly influencing voters just as they prepare to cast their ballot.

In the UK, newspapers traditionally declare their support for one party (or candidate) or another in the run up to or on the day of the election. Murdoch-owned newspapers tend to be extremely vocal in support of their candidate or position. However such declarations are strictly prohibited for broadcasters, which are required to remain neutral.

¹ James Murdoch, MacTaggart Lecture, 28 August 2009
<http://image.guardian.co.uk/sys-files/Media/documents/2009/08/28/JamesMurdochMacTaggartLecture.pdf>

Your World with Neil Cavuto is one of Fox News' flagship discussion programmes. On 23 June 2016, while UK voters went to the polls in the EU Referendum, the show included a targeted and partial discussion of issues likely to sway UK voters, such as the cost of European Union membership, sovereignty and immigration.²

Here are some excerpts from the discussion, which demonstrate clear bias and inaccuracy:

- *This is the end of a very messy, very long campaign and at stake is everything – it's the UK's future in Europe – the Europeans' future in the world.*
- *At the heart of this is whether the UK should cut all ties with the European Union and go at it alone or if they should remain within as part of the super state, the European super state which makes many decisions on the behalf of the UK.*
- *I mean we are governed by a bunch of bureaucrats that don't speak English in a funny place called The Hague, which makes no sense at all, and it tells Britain what to do, it takes British money, it doesn't send much of it back – it's a very unfair one-way street when you begin to dig into it and the biggest thing of course is that all of this is all a disguise over the immigration issue.*
- *I don't know why any Brit, maybe I'm just too much of a Yank, why would any Brit wanna offshore its sovereignty to Brussels? That makes no sense to me but that's what we have today.*

Fox News describes the show as providing financial analysis aimed to coincide with the closing of the US stock market. Here are some examples of how it reported on the complex financial arguments for and against Britain's membership of the EU:

- *British banks are warning of potential chaos – the Bank of England is said to be on high alert tonight. Is that really something to be worried about or is it just plain old fear mongering?*
- *Now those who want to stay say it is simply madness to be cut off from our largest trading partners in the UK and economically it would lead to a massive recession.*

Given the timing of the programme, and its extensive discussion and subjective analysis of events broadcast while voters were still visiting the polls, it is not surprising that Ofcom found Fox News to be in clear breach of Rule 6.4.

The responses from Fox News' management betray their disrespect for UK law, their prejudice against what they consider the parochial nature of UK politics, and their strong disinclination to consider UK viewers' needs and perspectives.

Fox News breached a simple rule that no analysis of any kind may be conducted by broadcasters during polling time, and yet in their response to the Ofcom ruling they neither defend nor apologise for their airing of the programme at that time. They give no undertaking as to future compliance

² The material in this section is all drawn from Ofcom's Broadcast and On Demand Bulletin Issue No. 311 (22 August 2016), p 8:
https://www.ofcom.org.uk/data/assets/pdf_file/0028/88750/Issue_311_of_Ofcoms_Broadcast_and_On_Demand_Bulletin.pdf.

measures to avoid such breaches, and they fail to explain why the show went out when it did, except that it coincided with the closure of the US markets.

What the management does defend is an anticipated accusation of bias and impartiality, arguing that the show was unlikely to have influenced UK voters as it was not aimed at them but was “prepared with a view towards an American audience and the expectations of what an American audience would find interesting”.

They also assert that the content of the programme was clearly within the scope of legitimate news reporting and commentary and that “it is important that individuals are permitted to explore current affairs and their future impacts.”

These comments by Fox News’ management suggest that they were aware of the possibility that they were in breach of another part of Ofcom’s Broadcasting Code, namely rule 5.5, which states that “due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved.”

Ofcom took no position in relation to Fox’s arguments as to the programme’s content, reaching a limited conclusion that the programme was in breach of rule 6.4, without considering any aspect of bias or partiality. It stated:

“We also had regard to the fact that the prohibition in Rule 6.4 on discussion and analysis of referendum issues while the polls are open is not qualified in any way – for example by the possibility of a broadcaster justifying the material by the context.”

We would like to draw to the CMA’s attention to this decision, and contrast it with other Ofcom findings that have taken a strict interpretation of the rules to ensure compliance during referenda. For example, London-based community radio channel Resonance FM, earned Ofcom’s censure for misguided banter about the Scottish referendum, despite the fact the radio station is aimed at the London’s artistic community with little or no reception in Scotland and no aspirations as to serious news or current affairs coverage.³

Ofcom’s failure to investigate the impartiality and bias aspects of the Your World broadcast leaves the CMA without a regulatory view as to whether Ofcom would have accepted Fox News’ arguments. We do have some guidance in the way they approached the dual questions in Hannity, just 6 months later (see section 1.3 of this document) but as there are so few investigations during Fox News’ tenure as a UK regulated broadcaster, the CMA should seek further information on what discussions Ofcom had at the time to guide the decision not to widen the investigation to include rule 5.5. Ofcom’s view on the show’s content, as documented in their finding in terms of partiality would be useful evidence.

³ Ofcom bulletin no 270 at https://www.ofcom.org.uk/_data/assets/pdf_file/0012/51132/obb270.pdf

To illustrate the tone and level of bias, we quote the DJ who says “People have been asking me, ‘Henry, how do you think it’s going to be if Scotland goes independent?’ And my reply is, ‘I think it will be perfect’”.

1.2. “Abortion is murder”

Rule 5.5 did come into play on another occasion. As stated above, Rule 5.5 in Ofcom’s Broadcast Code requires that: “Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole.”

On 7th April 2016 at 15:23, Fox News broadcast a segment featuring “Judge” Andrew Napolitano speaking on the topic of abortion. Andrew Napolitano is a frequent Fox News commentator with the title “Senior judicial analyst”.

Following a complaint, Ofcom found that the show was not balanced, neither internally nor through other clearly signalled companion programming designed to provide alternative viewpoints. Ofcom succinctly summarised the item as concluding that “abortion is murder” and ruled that the programme was in breach of Rule 5.5.⁴

Fox News threw a variety of defences into its representations to Ofcom when asked to respond to the complaint of apparent bias. They said that:

- they did not consider that abortion was a matter of current public controversy in the UK;
- this piece was targeted at the debate in the US;
- Fox Extra was not a factual programme but was presented as one of a series of short editorial opinion pieces and that “many in the audience of ‘personal view’ programmes are “comfortable with adjusting their expectations of due impartiality”;
- the audience would have known that Andrew Napolitano is an extreme commentator in the US, and that the audiences of Fox News and Fox Extra “know and expect that Fox News is a home of strident presenter opinions and that furthermore the programme’s the style and presentation, its “crafting”, would suggest that the opinions put forward will be strong and potentially disagreeable.

Again, a disrespect for UK law is demonstrated and the onus seems to be placed on the audience to distinguish between fact and opinion, to understand the context in which the remarks are being made, and for whose benefit.

The arguments put forward by Fox demonstrate that this was more than a lapse in editorial judgement. It indicates a US-based approach which ignores the journalistic principles of sound research, factual balance, and compliance that underpin trusted news and factual output in the UK.

In their first line of defence, Fox News’ management dismissed both the UK’s legislative position on abortion and the potential effect of their broadcast on their own viewers. It is apparent from their defence that Fox News had not checked the relevant UK legislation prior to broadcast. They gave

⁴ The material in this section is all drawn from Ofcom Broadcast and on Demand Bulletin no 311 (22 August 2016), p 12 ff, at www.ofcom.org.uk/__data/assets/pdf_file/0028/88750/Issue_311_of_Ofcoms_Broadcast_and_On_Demand_Bulletin.pdf

no apparent thought to the impact of the item on those UK viewers who might have been touched by the issue in their lives. As Ofcom stated:

“They (Fox News) criticised abortion in general terms using highly emotive language which would also resonate with viewers in the United Kingdom, where in Ofcom’s view abortion continues to be a controversial subject”.

Fox News’ reliance on the argument that the programme was aimed at addressing US issues was both factually wrong, and also shows a basic misunderstanding of compliance. As Ofcom stated:

“We ...considered Judge Napolitano’s comments would be controversial and as relevant to UK (and other international) audiences as they would be to US-based viewers, as a result, the requirement to preserve due impartiality was not materially reduced by the fact that the programme was focused on non-UK matters.”

This demonstrates that Fox News (UK) take their thought leadership and editorial business model from their US counterpart, and have not adjusted their editorial stance for UK viewers. They will in fact adhere as closely as possible to this business model expecting viewers to, in their own words, “adjust their expectations of due impartiality”. In the UK, while every channel is allowed to find its own creative expression, rules on impartiality and truth are not adaptable according to perceived audience demand.

Fox News then asserted that the programme was not factual, but opinion. This defence indicates that Fox News management considers Judge Andrew’s output to be entertainment. But they are not licensed to run an entertainment channel. Indeed, UK broadcast culture delineates a difference between fact and fun and imposes licence conditions accordingly. Ofcom quite rightly dismiss the claim stating:

“The programme was still a broadcast (albeit a brief one) dealing with a current affairs topic transmitted as part of the editorial schedule on a rolling news channel and audiences would have viewed it in this light. Again we see Fox News’ adherence to the structural model of the US counterpart, irrespective of local compliance requirements”.

This basic mismatch between Fox’s info-tainment approach to news and the expectations in the UK of unbiased, facts-based provision of information, lies at the heart of the Fox News management approach, and is a succinct illustration of the danger of 21C Fox taking over Sky.

1.3 “The queen of corruption”

A further investigation also concerned Ofcom’s Broadcasting Code requirements on due impartiality in both sections 5 - the general rules on matters of political or industrial controversy and section 6 - on election coverage. The effect of Rule 6.1 specifically is to ensure broadcasters preserve due impartiality in their coverage of elections and referendums and applies to the coverage of elections or referendums both inside and outside the UK.

In August 2016, at the height of the US presidential campaigns, “Hannity” on Fox News broadcast a series of reports on the 2nd, 5th, and 6th of August which Ofcom found to be in breach of UK

rules on bias and impartiality.⁵ "Hannity" is a live current affairs programme presented by Sean Hannity which discusses and analyses political news and stories. The broadcasts addressed the policy positions of, and personal integrity claims and counterclaims made by, the Trump and Clinton campaign camps.

Given the public commitment of its main presenter to both Donald Trump and right wing politics in general, it is unsurprising that he took a strong position for Donald Trump and against Hillary Clinton. What the programme did not do is provide commentators with strong counterbalancing views or give due air time to Clinton's policy positions. The Ofcom finding here is extensive, and quotes numerous occasions on which the Clinton's campaign or Hillary Clinton herself are subject to trenchant criticism. For example Hannity's broadcast advice to Trump damns Clinton and praises Trump:

SH: "...The only two people that he (Trump) really should mention with 95 days left are Obama's disastrous economic and foreign policy and Hilary's horrible record. And the other thing I think he should do is, you know, focus on the things that he said to me in interview after interview – I've put up on the screen – you know, the differences between these two campaigns: he's going to appoint originals to the Supreme Court, those that have fidelity to the Constitution, believe in separation of powers, co-equal branches of government; he's going to talk about protecting the homeland and securing the border for both of the economy and our safety; implementing a safe refugee programme; fixing America's broken economy; balancing budgets; creating jobs; energy independence; education and the states; his negotiating better trade deals....

...Put America first. That's his message"

By contrast, here is his view on Hillary Clinton's policy position:

SH: "...last week, about the DNC. I watched Hillary's speech. I know you had millions more watching when you compare Thursday to Thursday, but I kind of viewed it as a check-list, sort of clichés and platitudes and slogans, not a lot of specifics, you know."

As to their personal characteristics, he describes Clinton as dishonest and repeats and encourages rumours of corruption without evidence or any opportunity to respond, for example quoting Clint Eastwood:

SH: "... [Clint Eastwood] also said the following: 'I'd have to go for Trump, you know, because, you know, she's [i.e. Hillary Clinton] declared that she's gonna to follow in Obama's footsteps. There's just been too much funny business on both sides of aisle. She's made a lot of dough being a politician"

Interviewing Donald Trump he invites him to casually slander Hillary Clinton, without challenge:

⁵ The material in this section is all drawn from Ofcom's Broadcast and On Demand Bulletin Issue No. 317 (21 November 2016), p 23, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0023/94271/Issue-317.pdf

SH: "She [i.e. Hillary Clinton] lies a lot".

DT: "Yeah".

SH: "What's your reaction to that?"

DT: "Well, she lied about a lot of things. She's now lying about her job and she's lying that she's going to be the agent of change. She's not going to change, she's been there for 30 years..."

We have explained the purpose of due impartiality above. Although the impartiality due to a non-national matter may be less than for a UK referendum or election, broadcasters are expected to apply impartiality rules. Ofcom asked Fox for a response on this basis.

The licensee's response was, in essence, that it had provided a balanced form of presentation as they gave Clinton's position before knocking it down, explaining: "countering or challenging criticisms is but one way to achieve an appropriate range of views, however it is not the only way". Fox News relied strongly on the exemption of current affairs commentary shows from the news requirement of due accuracy arguing that "Given that the programmes are for commentary, when they mention the US presidential election or related topics they were done so to offer analysis and opinions" in a matter that complied with s 5.11.

Fox News also argued that they had offered the Clinton campaign sufficient right to reply, stating that "throughout the US Presidential campaign season, Fox News have made numerous and frequent invitations to Hillary Clinton for her (or any of her campaign staff) to appear on Hannity". In her absence Fox News felt it had balanced the program by using clips from other sources or prior interviews as a foundation for discussing her. Fox News felt its guests were not unduly partial, they conceded that "each person may have spoken to varying degrees on aspects of Mr Trump's campaign strategy ... but such statements even if positive or laudatory do not mean that a speaker supports Trump's campaign".

Ofcom concluded that the overwhelming balance of the programmes was against the Clinton campaign. They noted that she was variously described as "bogey woman"; "lying about lying"; "the queen of corruption"; "a monster"; "a weak person"; "not strong enough to be President"; "Hillary 'rotten' Clinton"; "reckless and crooked"; "putting her personal interests before our national security interest"; not being able to "win on issues based on honesty, integrity and truthfulness"; not being "honest or trustworthy"; and putting forward a "stale agenda".

They also dismissed the argument proposed by Fox News that including some clips of Hillary Clinton was sufficient to establish balance, noting that "In our view the few video clips of Hillary Clinton featured in the programmes were used only in a manner to criticise her and her candidacy."

Ofcom summarises the series of programmes overall as offering a high degree of unanimity in the viewpoints expressed with overwhelming support given to the candidacy of Donald Trump. This meant there was an overwhelmingly "one-sided view" on a matter of major political controversy.

Stepping back, and looking at the editorial management this finding exposes, we again see that Fox News exhibited a misunderstanding of the impartiality which should be the lifeblood of any news broadcaster committed to attaining standards of compliance. Fox News undertook special

pleading for its US-centred approach, offering no concessions as to any potential fault on the part of the broadcaster, nor proposals to avoid future breaches.

No sanctions were suggested or imposed by Ofcom. If such bias had been shown in relation to any UK election, one would expect Ofcom to have censured the programme and levied a fine.

Conclusion

We believe all of the cases outlined above are significant in predicting the likely path for the future of Sky news.

Fox withdrew Fox News from the UK in August 2017, just three months after it had introduced a policy claiming to make it compliant with the UK broadcasting code, and just two weeks before the Secretary of State referred the bid to the CMA. In a brief statement, 21C Fox claimed this withdrawal was for commercial reasons. However, company sources and other commentators said it was to avoid discussion of Fox News programming in the UK, an implicit admission that the compliance policy had failed to bring the channel into line with UK standards.⁶

While other countries' media laws differ from the UK's, the behaviour and standards demonstrated by 21C Fox-owned media in other jurisdictions is relevant to the discussion in the UK, because they show the dominant approach taken by the parent company, and the attitude of its owners to news and current affairs reporting.

This approach has been shown in the last year in Australia, as a full takeover by 21C Fox in December 2016 saw the editorial policy at Sky Australia change markedly. The prime time evening schedule has shifted from news programming as we would recognise it in the UK to panels of commentators, similar to much of Fox News' programming. Starting at 7pm Monday to Thursday, it now airs five hours of mostly politically biased talk. The line up starts with News Corp columnist Andrew Bolt and ends with another News Corp columnist Chris Kenny.

In May, one of Murdoch's former media writers, Mark Day, surveyed Sky News' line-up of opinionated presenters, and wondered whether there had been a "brand reset" since News Corp acquired it. "Will it be 'Foxified' – that is, turned into a Down Under version of America's most watched and controversial cable news channel, Fox News?" he asked. before saying that appeared "broadly" to be the case.⁷

Rupert Murdoch has said explicitly that he would like Sky in the UK to be more like Fox US.⁸ A House of Lords report states that Murdoch believed 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." He claimed

⁶ 21C Fox Pulls U.K. Fox News Feed From Sky, Variety, 29th August 2017:

<http://variety.com/2017/tv/news/21st-century-fox-pulls-fox-news-feed-sky-1202541510/>,

Ed Miliband, 'Britain doesn't need a Fox News. The regulators must block the Murdochs' bid', The Guardian, September 1, 2017 <https://www.theguardian.com/commentisfree/2017/sep/01/britain-fox-news-murdochs-uk-media>. Both accessed on 24th October 2017.

⁷ Mike Secombe, 'Murdoch's failure to launch Fox here', The Saturday Paper, October 7, 2017

<https://www.thesaturdaypaper.com.au/news/politics/2017/10/07/murdochs-failure-launch-fox-here/15072948005316>

⁸ Owen Gibson, 'Murdoch wants Sky News to be more like rightwing Fox' (The Guardian, 24 November, 2007)

<<https://www.theguardian.com/media/2007/nov/24/bskyb.television>>accessed on 12 July 2017.

one of the reasons that it was not yet a proper alternative was because no one knew any better and that Sky could become more like Fox even without a change to the impartiality rules in the UK. He stated Sky had not yet made the presentational progress that Fox had made and that the only reason that Sky News was not more like Fox News yet was because “nobody at Sky listens to me.”⁹

We believe that no evidence has been supplied to date to indicate that this model of Foxification will not be applied to Sky if Sky is absorbed into the management structures and business models of 21C Fox.

Despite separation of management in channels acquired in Australia, the US station’s editorial approach rapidly affected Sky Australia’s news output and culture, with the choice of presenter and programme structure leading to a subjective, narrative-driven, and entertainment-focused news output. Small programme inserts, like the one that featured Judge Napolitano, are the kind of infotainment fodder junior producers are typically tasked with at Fox. They are the training ground for future programme editors and presenters. It seems inevitable that this culture will come to affect Sky’s programming too.

To address this, the CMA should request detail as to the training of junior and mid-level staff, including the compliance approval pathways, line management and promotion routes of mid-level executives and production staff between Sky and Fox under the proposed joined companies.

⁹ Murdoch: Sky News could be more popular if it emulated Fox News
<http://www.adweek.com/tvnewser/murdoch-sky-news-could-be-more-popular-if-it-emulated-fox-news/18096>
Accessed 20 October 2017

Section 2: Ofcom investigations into commercial influence

The Broadcasting Code has a number of explicit rules designed to protect news and current affairs provision from commercial influence. These range from the strict prohibition of disguised paid for content within programmes (surreptitious advertising) to more subtle distinctions preventing undue prominence of a particular product within a program - even if no money has exchanged hands.

There are also clear rules on how to separate advertising from editorial content, with clear “break bumpers” required between the end of a part of a show and the advert break.

We have argued in previous submissions that Fox News has breached these rules in the UK in the past, and in this section we provide further evidence of this tendency, and the concomitant risk to Sky News’ standards.

In the US, where 21C Fox is headquartered, and where the culture of the company has been established, product placement and promotion in news and current affairs programmes is common. Indeed many flagship US drama and current affairs productions are funded by product placement and advertiser funding¹⁰ and they are an important part of 21C Fox’s business model.¹¹ The commercialisation of broadcast and cable programming has been seen by US Congress and the FCC as largely the business of the networks in the US. Thus this issue does not fall under great scrutiny in the States - and the few recommendations which do exist are generally restricted to soft recommendations as to how a distinction between advertising and editorial content is achieved, rather than scrutiny of the content itself.

The track record established by Fox News in its 16 years of broadcasting in the UK, suggests that the strictures placed on advertising in this country are ones the company is reluctant to comply with and is familiar with in the US. This raises concerns about how a Sky News that was 100%-owned and controlled by 21C Fox would fare under these regulations.

¹⁰ Mallory Russell, *Here Are Some Of TV's Most Successful Product Placements* (Business Insider, March 14, 2012) <http://www.businessinsider.com/here-are-some-of-tvs-best-product-placements-2012-3>

¹¹ Brian Steinberg, *Pepsi Taps Fox's 'Empire' To Build A TV Commercial For The Future* (Variety, November 19, 2015) <http://variety.com/2015/tv/news/pepsi-empire-fox-tv-advertising-1201644340/>

2.1 “Shop till you drop”¹²

Section 9.2 of Ofcom’s Broadcasting Code states clearly that, “Broadcasters must ensure that editorial content is distinct from advertising.” Indeed, the distinction between paid for content and editorial content, is a mainstay of UK broadcast compliance. The rules, which derive both from the UK’s broadcast law and European Union Directives, are designed to both strictly limit the amount of advertising per clock hour and keep it distinct from programmes - so no extra advertising content can be inserted.

On June 28, Fox News programme “Fox and Friends” contained an editorial segment - called It’s Your Money, which breached this rules and the guidelines around it.

Ofcom’s report describes a sequence of discussions between the programme’s two presenters and a representative of the website Mega Morning Deals. Each discussion focused on a particular product offered exclusively to Fox & Friends viewers at a discounted price. Viewers were directed to the programme’s website to take advantage of the special offers.

Here’s a typical conversation about a golf product, which was accompanied by helpful on-screen graphic directing views to the website where purchases could be made:

Representative: *“Ok, the Golf Buddy; this is for the golf fanatic. This is basically a wristband, you get on the course and it has this special green view technology. It tells you exactly the distance from any angle or approach to the greens, so you know which to choose; 38,000 courses programmed into this baby. It’s got GPS; it’s typically pretty pricey \$300 – but today: \$119. So –”*

First Presenter: *“Wow”*

Second Presenter: *“That’s awesome”.*

Representative: *“just click on the Mega Morning Deals icon on the Fox & Friends website”*

First Presenter: *“Yeah, Foxandfriends.com”*

Representative: *“Shop till you drop”*

And another exchange, promoting a new exercise tool:

“This internationally acclaimed personal trainer came up with the system – it comes with a DVD, it’s great for sculpting and toning and it’s the new thing”,

“[pointing at portable charging sticks] they’ve got these really cool designs, there’s one for fourth of July, there’s a rainbow one, love that they’re fashionable”,

[in reaction to an on-screen banner, reading]: “Stellar Savings: Amazing deals on the season’s best products. Wow, what a saving; today it doesn’t cost \$44, it costs £18”;

¹² The material in this section is all drawn from Ofcom Bulletin 319 at https://www.ofcom.org.uk/_data/assets/pdf_file/0018/96012/Issue-319-of-Ofcoms-Broadcast-and-On-Demand-Bulletin.-to-be-published-on-19-December-2016.pdf

Fox and Friends was found in breach rule 9.2 on the grounds that the It's Your Money section contained advertising that was not sufficiently distinct from the editorial content, raising the risk that viewers could be confused as to whether they were watching a recommendation that was genuine and impartial, or one made because the channel had been paid to make it.

This also raises issues of trust. Under the guise of helping the viewer to find discounts, Fox's presenters were actually selling products. This is a form of partial reporting motivated by commercial interests that directly calls into question Fox's commitment to broadcast standards. Yet again, it places too much of an onus on viewers to distinguish between types of content.

In its representations to Ofcom, Fox News made much of the "important principle of the expression rights should be restricted only when necessary and proportionate to do so". They argued it was programme content, not advertising, designed to let viewers know about the discounts available to them, rather than the products to which the discount applied.

They also said that It's Your Money was "clearly distinguished as a featured segment distinct from advertising by the absence of the use of lead-in and lead-out bumps and teases that broadcasters use to alert viewers when a commercial interstitial is appearing".

Ofcom rightly rejected Fox's arguments and identified the material as serving the function of advertising i.e. the promotion of the supply of products in return for payment by viewers. They also pointed out that the regulations explicitly require promotional material to be separated from editorial content by teasers and that the lack of them compounds the risk that viewers will be confused as to what they are watching.

In its final comments, Ofcom attempted to give Fox a basic lesson in the difference between advertising and programming, and make clear that the absence of bumpers does not negate the need to ensure that editorial content does not function as advertising.

At this point, Fox News had been broadcasting in the UK for 15 years. The need to distinguish between commercial and editorial content, particularly in current affairs and news programmes, should have been an established principle. The fact that the UK regulator had to go out of its way to explain the basic rules to the It's Your Money production team suggests a wilful desire by the producers to misunderstand or test the rules.

Indeed, this is upheld by the fact that this was not the first time Fox had been in trouble for blurring commercial and editorial boundaries. In 2013, in a Fox News Extra item, a veterinarian praised a particular brand of pet food for its qualities in supporting senior pets. Ofcom found the segment to have given undue prominence to the pet food, even though Fox News claimed they had received no money for the item's inclusion.¹³

All of this provides grounds for concern as to the business model Sky's new owners would expect it to follow under the combined corporate entity. At 21C Fox, interpolation of commercial content into editorial is key to revenue models. If Sky's business advisors and legal compliance officers,

¹³ Ofcom Broadcast Bulletin (April 8, 2013) Page 61
https://www.ofcom.org.uk/data/assets/pdf_file/0030/46992/obb227.pdf

became part of an institution whose goal is to maximize the revenue of all of its television operations, we fear they may be pressured to pursue more forms of commercial revenue.

Indeed, in the Annual Report to shareholders of 2017, Rupert Murdoch's son Lachlan, a director of 21C Fox, makes clear that they want to streamline and increase Sky's revenue generating capabilities: "our proposed acquisition of the shares of Sky that we do not own will deliver more balanced revenue streams and geographic spread and is expected to be significantly accretive to our earnings and free cash flow."¹⁴

In our view, the CMA should therefore widen its investigation of the commitment to standards beyond those concerning due accuracy, impartiality and bias, and investigate whether 21C Fox is likely to set commercial goals for Sky that include enhanced advertising and product placement revenue from its news channels.

This aspect was not covered by Ofcom's report, so the CMA will need to review product placement and advertiser revenue policies both in relation to Fox News, and to the business plan for Sky should it be acquired by Fox.

Any corporate governance and undertakings imposed on Fox in relation to editorial interference should be mirrored by undertakings to avoid commercial influence over programme content. The CMA should also investigate how decisions about commercial revenue streams and product placement on editorial channels would get made.

¹⁴ "A message from the chairmen" 21 CF Annual Report 2017 at https://www.21CFox.com/sites/default/files/uploaded/investors/annual-reports/21C_Fox_full_final_ar_2017.pdf

Section 3: Complaints not investigated

The previous two sections detail the results of Ofcom's completed investigations into complaints against Fox News. Noting Ofcom's decision not to look into the question of impartiality in Fox News' coverage of the EU referendum, Avaaz decided to look back at other complaints that were recorded but not investigated.

One of the factors that Ofcom uses to decide whether to pursue an investigation is the level of harm caused by the potential breach. We understand that the Fox News audience was so small (around 2000 simultaneous viewers at any one time, of around 70,000 regular viewers) that the potential harm caused by breaches was relatively minimal. However, our contention is that these breaches acquire more relevance in the light of the CMA enquiry, and the potential takeover of Sky, which reached 14.5 million viewers in the first quarter of 2017.¹⁵

It is on these grounds that we sought to identify potentially relevant cases that should be further examined in the context of the proposed acquisition. We used Ofcom's records at the back of each bulletin from 2015 and 2016, on the grounds that as Ofcom is most likely to still hold records and original complaints material for these more recent years.

3.1. Background to the complaints process

Ofcom's "Procedures for investigating breaches of content standards for television and radio" explain that the regulator is free to investigate, on the basis of its own monitoring and any other evidence presented before it, any issue which is a potential breach of the Broadcasting Code.¹⁶ It does not only have to investigate issues that are complained about, nor does it have to investigate all issues about which it receives complaints.

The official procedures state that Ofcom will first consider whether, on its face, a complaint raises potentially substantive issues under the Broadcasting Code (or other Code to which these Procedures apply). It will also consider the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm, harm to minors and/or financial harm.

Ofcom may ask the broadcaster for a copy of the relevant programme at this stage, which must be provided within five working days. They may also request any other relevant background material or evidence, such as the audience data for the day, or any compliance arrangements that had been made to avoid problems in a less controlled broadcast environment such as a live broadcast. They will not normally request written representations from the broadcaster at this stage.

A group of Ofcom standards executives then review the content supplied and undertake an initial assessment. The triage group may decide there is no case to answer, or that there is a possible

¹⁵ Statista, Quarterly reach of the Sky News channel in the United Kingdom (UK) from 1st quarter 2012 to 2nd quarter 2017 <https://www.statista.com/statistics/290872/sky-news-viewers-reached-quarterly-united-kingdom>

¹⁶ Ofcom, Procedures for investigating breaches of content standards for television and radio https://www.ofcom.org.uk/_data/assets/pdf_file/0020/55109/breaches-content-standards.pdf

breach but that it does not pass the potentially substantive issues test. They may also refer the matter up to the Director of Standards. If the event that Ofcom decides not to investigate the matter further it publishes its decision in its Broadcast and On-demand Bulletin.

3.2 Pro-Trump fake news

In May 2017, just after Fox News issued its new UK compliance policy, Fox News broke a story that murdered Democratic National Committee staffer Seth Rich provided DNC emails to WikiLeaks ahead of the 2016 presidential election.

Fox News host Sean Hannity, one of Fox News' biggest stars, devoted several editions of his TV shows to pushing this demonstrably false claim.¹⁷ His commentary contrasted with the intelligence community's determination that the emails were hacked and distributed by Russian intelligence services,¹⁸ and relied on evidence from Rod Wheeler, a private investigator hired by Fox who rapidly challenged Fox's story and has since filed a court case arguing that Fox fabricated quotes in his name and pressured him to produce a false narrative. Lawyers acting for Wheeler further allege that the Fox story was produced in collusion with the White House, aiming to distract from the president's sacking of FBI chief Comey, who was investigating Trump/Russia links. Evidence presented in the case includes a text to Wheeler from senior Trump campaign donor, Ed Butowsky: "the president just read the article. He wants the article out immediately. It's now all up to you."

Rich's family joined Wheeler to demand retractions of Fox's reporting, and Fox News removed its online report after ten days, claiming that it was launching an internal investigation.¹⁹ However Hannity frequently referred back to this false story in subsequent weeks, and neither he nor the other journalists, editors, producers or others at Fox, have faced any consequences from their employer, as far as is publicly known.

Ofcom advised the Secretary of State that:

"We previously received a complaint about this programme's coverage of Seth Rich's murder. We did not consider that this raised issues that warranted investigation under the Code. Hannity is not a news programme so there was no due accuracy requirement. We also did not consider it to be materially misleading. The segment about Seth Rich was presented as a "murder mystery". Hannity did not state that this was the definitive account of what happened and made it clear that the official version of events, according to police,

¹⁷ David Weigel, 'The Seth Rich conspiracy shows how fake news still works,' (*The Washington Post*, 20 May 2017)

<https://www.washingtonpost.com/news/the-fix/wp/2017/05/20/the-seth-rich-conspiracy-shows-how-fake-news-still-works/?utm_term=.b5bcff89b31b> accessed 12 July 2017; Sean Hannity: 'I'm not backing off' the Seth Rich conspiracy,' (*Media Matters for America*, 19 May 2017); 'Sean Hannity Continues Smear Campaign Against Slain DNC Staffer,' (*Media Matters for America*, 18 May 2017) <<https://www.mediamatters.org/video/2017/05/18/sean-hannity-continues-smear-campaign-against-slain-dnc-staffer/216554>> accessed 13 July 2017.

¹⁸ Scott Shane, 'What Intelligence Agencies Concluded About the Russian Attack on the U.S. Election,' (*The New York Times*, 6 January 2017) www.nytimes.com/2017/01/06/us/politics/russian-hack-report.html?_r=0.

¹⁹ 'Statement on coverage of Seth Rich murder investigation,' (*Fox News*, 23 May 2017)

<http://www.foxnews.com/politics/2017/05/23/statement-on-coverage-seth-rich-murder-investigation.html>.

was that Seth Rich was killed during a robbery gone wrong. He set out information that might undermine the official account of what happened.”²⁰

We recommend that the CMA:

- examine the Wheeler complaint²¹
- obtain additional court documents from Wheeler’s attorney Douglas Wigdor
- obtain the Fox internal inquiry into the Seth Rich story and its retraction, and:
- obtain internal Ofcom documentation on its review of this story.

3.3 Detail of other complaints not investigated

The Broadcast and On-demand Bulletins from 2015 and 2016 detail numerous complaints about due accuracy and due impartiality recorded against Fox News, which were not investigated.

In 2015:

Bulletin No 272 records “various” complaints regarding due accuracy against Fox News but does not record how many and on which occasions.

- Bulletin No 275 records a complaint against Sean Hannity, for a programme on 10/01/2015 as being for “crime”, which we take to be incitement to crime.
- Bulletin 288 records a complaint against “The O’Reilly Factor” on due impartiality and bias.

In 2016, there were six other complaints recorded but not investigated:

- Ofcom Bulletin 301, lists a complaint concerning due accuracy in Fox News programming on 2nd March 2016.
- Bulletin 303, a complaint that the “The O’Reilly Factor” on Fox News, broadcast on 17 March 2016, was materially misleading.
- Bulletin 310, a complaint that “Outnumbered” on Fox News, 16th June 2016, failed to observe due accuracy.
- Bulletin 312, a complaint that the “Hannity” show on Fox News failed to achieve due impartiality.
- Bulletin 313, a complaint that “The O’Reilly Factor” on Fox News on the 11th of August 2016 failed to demonstrate due accuracy.

The nature and frequency of the complaints recorded suggests there could be additional material of use to the CMA in determining the question of Fox News’ commitment to UK broadcast standards, and how Ofcom approaches its duty to protect the public interest.

The litany of uninvestigated complaints should also cause the CMA to re-examine the assessment provided by Ofcom of Fox News compliance record, as none of these complaints were mentioned in its public interest test report:

Ofcom stated in its public interest report submitted to the Secretary of State that:

²⁰ Ofcom letter to Secretary of State, 25th August 2017.

²¹ Wheeler complaint, available at: https://regmedia.co.uk/2017/08/01/wheeler_complaint.pdf.

“We have not found Fox News to have breached the accuracy and impartiality provisions of the Broadcasting Code in respect of its news programming. We have, however, recorded breaches against Fox News in respect of non-news content under rules concerning materially misleading content on one occasion and the rules of due impartiality and elections on three occasions.³ We did not, however, consider any of those breaches sufficiently serious to warrant the imposition of a sanction. On this basis, we have recorded relatively few breaches of the accuracy and impartiality rules against Fox News and the report concludes that these few breaches do not indicate a lack of genuine commitment to the attainment of broadcasting standards”.²²

Given that each of the complaints not investigated in the name of administrative efficiency could have been a breach of compliance standards, was Ofcom safe to come to this conclusion? We note Ofcom took pains to explain to the Secretary of State its rationale in not taking up any of the 2017 complaints brought to it by parties interested in the takeover. The CMA should now ask Ofcom to provide its reasoning for not investigating these other complaints in the same way. We believe they are particularly illustrative of the kind of compliance we might expect when it is business as usual at 21C Fox.

We believe any assessment by the CMA must take these uninvestigated complaints into account and would suggest it call upon Ofcom to deliver any additional information and relevant material it still holds. We also think they are relevant to its consideration of the market impact that 21C Fox's acquisition of Sky may have on UK regulation. The CMA must satisfy itself that when the number of complaints about a small channel such as Fox News are magnified by the reach and audience numbers of Sky news, any commitment given to standards can be adequately monitored and regulated.

The most frequent reason cited by Ofcom for not looking further into the issues raised in the various programmes considered by the regulator is that the requirement for due accuracy only does not apply to current affairs discussion programmes.

Designating prime time programmes as discussion style programmes rather than news programmes is a pattern that 21C Fox have applied to both its domestic, and non US news channel holdings. Ofcom has accepted that due accuracy does not apply to these shows, even though some of the programmes complained of in the Annex seem to coast perilously close to the provision of news. They feature comment and discussion on issues or items of news which had happened that day - in the same way as we would see in mainstream news coverage. For example on Tucker Carlson Tonight - 22nd March, Katie Hopkins described British citizens as being “cowed”, “afraid” and “not united” over a terrorist attack that had happened only hours earlier. Ofcom accepted that many would believe this to be inaccurate, but said that even though the Tucker Carlson format covers and reports on news events, it does so in a panel presentation format and so is not news and so not subject to the remit of that section of the Code.

²² See p 90 Ofcom's report to the Secretary of State Public interest test for the proposed acquisition of Sky plc by 21C Fox, Inc published 20 June 2017
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/623244/Public_Interest_Test_report_-_on_confidential_-_For_publication.pdf .

We believe this is something the CMA, whose remit is to examine market impact, will need to address in its enquiry, looking beyond compliance with the technical letter of the Broadcast Code to the potential impact of the acquisition on the market for news provision. It would be of the greatest concern to the level playing field expected in the UK news provision market if Sky moved to a Fox style rolling current affairs discussion schedule, exempt from the regulations other news channels observe.

We think that the CMA must consider anew those complaints about due accuracy which have been raised and not investigated fully by Ofcom on the basis that they are not news, in order to understand the kind of approach and impact Fox's ownership of one of the largest trusted UK news providers could have. We believe it indicates the direction of travel that Sky News editors will be asked to take.

Section 4: Fox News' compliance arrangements

It emerged during Ofcom's preparation of its report to the Secretary of State that Fox News has never introduced adequate UK compliance arrangements for its news content. This astonishing admission that a basic licence condition had not been fulfilled, should be assessed in the context of serious breaches from failed compliance processes dating back to at least 2012. At that time, inadequate compliance provisions allowed the live suicide of a man to be broadcast at UK tea time - to the shock and consternation of presenter and viewers alike.²³

In its finding against Fox News in 2012, Ofcom reminds Fox of the importance of such procedures, concluding in its final lines:

“Licensees are reminded that when broadcasting live, if there is a reasonably foreseeable chance that something might be broadcast that would raise issues under the Code, they should be able to demonstrate that they have taken all reasonable measures both before and during the broadcast to ensure compliance with the Code.”²⁴

Its therefore all the more surprising that Ofcom had to stress the point again to Fox some five years later to make it produce compliance procedures, stating in its 2017 Public Interest Test report:

“We remain concerned that Fox did not initially have adequate compliance procedures in place for the broadcast of Fox News in the United Kingdom and only took action to improve its approach to compliance after we expressed our concerns.”²⁵

Ofcom points out in that same report that a lack of compliance procedures does not mean that a channel will necessarily breach broadcasting standards, but may foretell a risk of future breaches. We believe this is a telling comment on the culture that could hold sway after any acquisition. It is highly indicative of the lack of commitment to compliance by the main news channel owned by an organisation now seeking to take on a major UK news provider.

Ofcom has said that Fox did eventually supply details of the new compliance arrangements, together with a set of compliance procedures. It considered that:

“the improvements made by Fox to the Fox News compliance arrangements and procedures are sufficient to meet the requirements of its licence.”²⁶

Ofcom did not give any detail of the arrangements in its report and Fox, unlike other major news providers in the UK such as the BBC, ITN, Channel 4 and 5, never made its compliance processes public. This lack of transparency is a concern, if it is a model for future compliance arrangements in

²³ Fox News - Fox News 28 September 2012 see Bulletin 222 at https://www.ofcom.org.uk/_data/assets/pdf_file/0029/47963/obb216.pdf

²⁴ Fox News - Fox News 28 September 2012 see Bulletin 222 at https://www.ofcom.org.uk/_data/assets/pdf_file/0029/47963/obb216.pdf

²⁵ Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc, Ofcom, June 2017, p.98, available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf

²⁶ Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc, Ofcom, June 2017, p.90, available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf

the new combined entity. The compliance procedures of a broadcast channel, and their public, accountable, backing by senior management, should underpin its staff's understanding of the ethos of the channel.

The CMA should be given sight of these processes in order to understand 21C Fox's approach to news compliance. The CMA should compare the processes with published procedures of other UK news providers, looking specifically at their preservation of editorial integrity, and the value they place on truth, accuracy, and adherence to broadcast compliance.

It is key to understand the likely paths of compliance approval expected under the new organisation. There is little value, for example, in a Head of News role being protected if he/she has to defer on all compliance risks to the new organisation's legal counsel in corporate headquarters in the US.

Conclusion

We have raised a series of concerns and suggested additional lines of enquiry we believe the CMA must undertake to be properly placed to consider whether the commitment to broadcast and compliance values can be preserved in the light of Fox News' record.

We have drawn some conclusions from reviewing several Ofcom investigations. We believe the CMA should seek evidence from both regulators and those within the compliance pathway within 21C Fox that were responsible for Fox News whether they would still defend the choices that were made by production teams operating without compliance procedures.

The CMA needs to gain a true picture of the kind of news that we can expect from a 21C Fox-owned news supplier, and determine whether this will be in the partial reporting style permitted in the US, but completely at odds with UK broadcast news culture.

The CMA must seek details about the training of junior and mid level staff, and the compliance approval pathways that their line management will provide. The staff exchange and promotion routes of mid-level executives and production staff between Sky and Fox under the proposed joined companies must also be examined, as they carry one organisation's culture through to the other.

The CMA should widen its investigation of the commitment to standards beyond those concerning due accuracy, impartiality and bias and explore how 21C Fox will behave in relation to the commercial goals it will set for Sky, and whether they will include enhanced advertising and product placement revenue from its news channels. We advise that the CMA investigate the management lines of command in relation to commercial revenue streams and product placement decisions from editorial channels.

We have raised questions over the volume of uninvestigated complaints. We believe the CMA should request Ofcom to provide all the evidence about complaints received, but never investigated, over the past 5 years. Even if Fox News was considered to be a minority interest channel aimed at US viewers in Ofcom's consideration of specific complaints at the time, it is not so now, as it represent the compliance model understood and accepted by the organisation seeking to acquire a large and trusted UK news brand. We also think they are relevant to its consideration of the market impact that 21C Fox's acquisition of Sky may have on UK regulation. The CMA must satisfy itself that, if the compliance culture illustrated above does begin to influence a broadcaster with the reach and audience numbers of Sky news, any commitment given to standards can be adequately monitored and regulated.

We have described the insight that the Fox News procedures may have provided to Ofcom about the reality of compliance in the new organisation. We believe the CMA should carefully review the evidence in the unpublished compliance procedures provided to Ofcom by Fox, and compare them to the processes of other major news providers. Only once the full compliance picture is established can the CMA properly consider its recommendations to the Secretary of State.

The CMA will note we have focussed our inquiry on the past record of Fox and not Sky. This is because we join Ofcom in judging Sky news to be a good, well-run and compliant broadcaster and it is precisely the diminution in this trust, accountability and reliability of Sky News that we fear will result from the proposed merger with 21C Fox. Compliance in the final analysis is more than a set of procedures. It is an ethos that rests on the training, experience and commitment of every link in the production chain: a commitment to the idea that news output must be trusted, and that it is trusted if it is impartial, fair and accurate.

Fox's statement in its response to Ofcom in the programme Fox Extra that they and their intended audience should be "comfortable with adjusting their expectations of due impartiality", coupled with the knowledge that at the time they were defending a news channel that had no adequate compliance processes in place, must create concern over the impact that the proposed acquisition could have on the trusted brand of Sky News.