Dr Sally Broughton Micova
s.broughton-micova@uea.ac.uk

8 March, 2017

Rt. Honourable Karen Bradley
Secretary of State for Culture, Media and Sport
DCMS
100 Parliament St.
London SW1A 2BQ

Dear Minister Bradley,

I write you in relation to the 21st Century Fox/Sky deal that you are considering for referral to Ofcom. I was very pleased to hear that you are minded to refer the deal, and to hear your statement in Parliament on Monday afternoon that you are not ruling out any areas as grounds if you decide to refer. Indeed, as the legal analysis by George Peretz, QC demonstrated, you do have the power to raise broader public interest than those of media plurality and adherence to broadcasting standards. I would therefore like to bring to your attention another interest that, while it has media plurality implications, also should be considered as a broader public interest matter.

Sky may be most recognised in the UK for Sky News and its premium subscription sports content, but according to Ofcom, as of 2016 the company also held 23% of the UK's home fixed broadband market. Last year Sky also launched Sky Mobile, a mobile service focused primarily on data plans offering high quality streaming and download through 4G networks. The company is therefore not only an important player in the production of news and provision of other content, but is also steadily growing as an internet service provider (ISP). Given that the ways people consume media content is increasingly reliant on their internet connection this puts Sky, and other ISPs, in the position of gatekeeper for many people's access to content.

This might not be a public interest issue, or risk to plurality, if we had absolute net neutrality – meaning that ISPs could in no way differentiate the content that is carried on their networks - but we don't. Traffic management by ISPs is allowed under EU rules if it is "reasonable". According to the Body of European Regulators for Electronic Communications (BEREC) there should be no blocking, slowing or degradation of services except when absolutely necessary and for a short time, but it is still allowed. EU rules also allow ISPs to enter into commercial agreements to give certain services optimised delivery on their networks or even zero-rating deals. Zero-rating is when a service is not counted in the customer's data usage, so using them does "cost" part of their data allowance, and when the customer hits his or her data cap those services continue to be used as normal while others are blocked or slowed. The use of zero-rating agreements must be assessed on a case-by-case basis. BEREC guidelines for regulators making those assessments include, among other criteria:

- the market positions of the ISPs and content or application providers involved;
- any effects on end-user rights of consumer and business end-users, e.g. reductions in the range of applications available, incentives for end-users to use certain applications, or whether there is a material reduction in end-user choice

These are clearly public interest concerns that go beyond media plurality and could form the basis for potential undertakings in relation to optimization agreement by Sky should the deal go ahead.

The challenge that "reasonable" traffic management and zero-rating agreements pose to media plurality and citizens' access to information are already being felt. In last year's European Commission consultation on media pluralism and democracy, the Swedish public broadcaster's response cited the zero-rating agreements that ISP Telia had with various platforms as having a detrimental effect on its access to audience and citizens' ability to view its content. Along with other content providers, it felt forced to either enter into an agreement to pay for similar optimisation, or risk losing audience as its content was effectively delivered at a higher price to consumers. Other content providers expressed similar concerns.

As a massive US-based rights holder, 21st Century Fox has a variety of interests that have consequences for a variety of online services and applications. It will hold particular positions on some of the grey areas of copyright enforcement that can have implications for freedom of expression. It may be able to use its position in negotiations to acquire content rights with services dependent on Sky's carriage to almost a quarter of UK households. This could not only impact diversity of content for audiences, but might also stifle innovation in UK online services. Large US-based companies like Netflix and Amazon will be able to pay for optimization or zero-rating, but what about British start-ups or existing broadcasters and publishers?

I therefore encourage you to refer this deal to Ofcom for not only a very serious review of the implications of this deal on media plurality and content standards, but also for consideration of the potential consequences for the broader public interest in relation to Sky's position as an ISP.

Sincerely,

Sally Broughton Micova
Lecturer in Communications Policy and Politics
Member of the Centre for Competition Policy
University of East Anglia