Ofcom: Invitation to comment for public interest test on the proposed acquisition of Sky plc by Twenty-First Century Fox, Inc.

Consultation response from the

Centre for Competition Policy

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This consultation response has been drafted by the named academic members of the Centre, who retain responsibility for its content.

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CCP Response to Ofcom's invitation to comment on the public interest test in the Sky/21st Century Fox transaction

The authors welcome the opportunity to respond to Ofcom's invitation to comment on the application of the public interest test to the proposed Sky/21st Century Fox transaction. There already exists an abundance of evidence relating to Sky's news production and distribution, as well as the prominence of its news content and that of the other news companies run by its senior management, which raise media plurality concerns in relation to this deal.[1] We trust that Ofcom will be diligent and creative in assessing the risks to media plurality in terms of citizens' access to news and information, going well beyond consumption data and perhaps revising its "share of references" metric. However, the role of media in our society is not solely the provision of news and the representation of various groups and viewpoints within that news. It is also to provide a variety of content through which our norms, values, and identities are negotiated. Therefore our contribution will focus on two other issues that we believe are crucial to the media plurality public interest test and have broader implications: **(1)** Sky's position as an internet service provider (ISP), and **(2)** the relationship between this public interest test and the concurrent "fit and proper" test. The response affords separate consideration to **(3)** the scope of the 'commitment to broadcasting standards' public interest ground.

1. Media plurality implications of Sky's position as an ISP

1.1 As Ofcom's own data shows, as of 2016 Sky held 23% of the UK's home fixed broadband market.[2] Its takeover of the broadband provision arms of O2 and BE in 2013 allowed it to grow significantly in this area, supplying broadband as a standalone product or bundling services with subscription television and other services. Last year, Sky also launched Sky Mobile, a mobile service focusing primarily on data plans offering high quality streaming and download through 4G networks. The company is therefore growing rapidly as an Internet service provider (ISP) in fixed and mobile broadband.

1.2 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 these are still not entirely banned. EU rules also allow ISPs to enter into commercial agreements to give

[1] See e.g., Steven Barnett *et al*, 'Media plurality, the Fox-Sky bid, and the case for referral to Ofcom' (2017) Media Policy Brief 18 <http://blogs.lse.ac.uk/mediapolicyproject/files/2013/09/LSE-MPP-Policy-Brief-18-Media-Plurality.pdf> accessed 5 March 2017; Justin Schlosberg, 'Consolidating Control: The Fox/Sky merger and news plurality in the UK' (*Media* Reform, February 2017) <www.mediareform.org.uk/wp-content/uploads/2017/03/plurality-review-FINAL-4.pdf> accessed 4 March 2017.

[2] Ofcom, 'Fast Facts', <www.ofcom.org.uk/about-ofcom/latest/media/facts> accessed 3 March 2017.

certain services optimised delivery on their networks or even zero-rating deals. This allows the ISP to give preferential treatment to certain content providers and applications, which could have serious consequences for media plurality, especially when the ISP is also a major content provider and rights holder.

1.3 The challenge that "reasonable" traffic management and zero-rating agreements pose to media plurality and citizens' access to information is 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 certain platforms as having a detrimental effect on its access to audience and citizens' ability to view its content.[3] 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. More than 20 other Swedish content producers, mainly broadcasters and publishers, were campaigning for stricter net neutrality rules because of this problem. Content producers from other countries also responding to the consultation expressed similar concerns.

1.4 As a massive US-based rights holder and content producer, 21st Century Fox has interests that could 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 and access to diverse media. It may be able to use its position in negotiations over acquiring content rights with services that depend on Sky's carriage to almost a quarter of UK households, which could affect the diversity of content that British citizens can access and/or the ability of British content producers to reach audiences. The power that a company of this size might have over the terms and arrangements between content and application providers and ISPs could stifle innovation in UK online media services. Such consequences are not certain, but are possibilities, and there may be others that also deserve careful consideration.

1.5 Ofcom has extensive expertise on the exceptions to net neutrality and the potential of allowable traffic management. The current limitations on traffic management and preferential carriage agreements within the EU may not apply to the UK after 2019 and it is impossible to predict what ISPs in the UK may be allowed to do in the future. It is vital that Ofcom's expertise in this area could be brought into the public interest test process. Thorough consideration must be given to the implications of Sky's role as an ISP, both given the current conditions and given the possibility of even more allowances for ISPs to "manage" citizens' access to content and services in the future.

[3] The full response can be found on the official consultation page; European Commission, *Public Consultation – 2016 Annual Colloquium on Fundamental Rights on 'Media Pluralism and Democracy'* (2016) <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=31690> accessed 3 March 2017.

2. Media plurality implications of the outcome of a "fit and proper" test

2.1 The authors recognise the ongoing nature of Ofcom's duty to ensure that persons in possession of a TV broadcast licence are "fit and proper" for the purposes of the Broadcasting Act 1990. Equally, we understand the legal basis that requires Ofcom's assessment of the referred public interest grounds to be undertaken separate to any "fit and proper" test. Ofcom's announcement that it will undertake a preliminary "fit and proper" investigation in parallel to the public interest assessment is to be praised,[4] but it is important to note that an adverse finding in any "fit and proper" test undertaken post-merger has the potential to impact media plurality itself.

2.2 The problem here lies in the hypothetical scenario where: (i) Ofcom concludes that the merger is unlikely to affect media plurality or 'commitment to broadcasting standards', but (ii) Ofcom publishes a provisional view that the management of the merged entity would be likely to fail the "fit and proper" test. Under the current provisions of the Enterprise Act 2002, the Secretary of State will base her decision – be it after Phase I or Phase II – on the advice she receives with regard to competition and the public interest grounds that have been referred (in principle, her decision should not be influenced by the outcome of the "fit and proper" test). Assuming the Secretary of State clears the merger,[5] and the transaction is finalised, media plurality concerns may nevertheless arise if Ofcom withdraws Sky's TV broadcast licences on "fit and proper" grounds – given that, in theory, it could prompt Sky's exit from the market. Although this outcome may seem far-fetched in practice,[6] it highlights the risk that comes with not considering the media plurality and "fit and proper" assessments holistically. Moreover, given the significant concerns raised by Ofcom in relation to James Murdoch when BSkyB was subjected to the "fit and proper" test in 2012,[7] it would not be too surprising if these were found to be even more problematic with the powerful role he would have should 21st Century Fox, of which he is CEO, take full control of Sky.

2.3 Ofcom's provisional view on the "fit and proper" status of the merged entity will provide a useful counterfactual of how the entity is likely to be treated with respect to its existing licences. If the provisional view is that the change in management is likely to result in Sky losing its licences, it may be appropriate for Ofcom to advise the Secretary of State of this possible eventuality and to include an additional counterfactual account of the effect that this would have in its assessment of the media plurality implications of the deal.

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[4] And, indeed, has been praised by the Secretary of State; HC Deb 16 March 2017, vol 623, col 557.

[5] Having found no basis to block the merger or seek undertakings on competition or public interest grounds.

[6] It is conceded that the merged entity would, in all likelihood, make changes to the membership of its decision-making board in an attempt to avoid having its licences withdrawn.

[7] Ofcom, *Decision under section 3(3) of the Broadcasting Act 1990 and section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited* (2012) <www.ofcom.org.uk/__data/assets/pdf_file/0022/32485/bskyb-final.pdf> accessed 4 March 2017.

3. The scope of the 'commitment to broadcasting standards' ground

3.1 Regarding the second public interest ground referred by the Secretary of State – the 'commitment to broadcasting standards' ground specified in s.58(2C)(c) of the Enterprise Act 2002 – some confusion has been voiced over the scope for 'corporate governance' issues to be considered under this ground; both as part of the Secretary of State's decision-making and in Ofcom's advisory report. Those who suggest that 'corporate governance' may not fall within the scope of the existing law and, as such, might require its own public interest ground include: Lord Puttman (who tabled an amendment to the Digital Economy Bill on this very basis),[8] Ed Miliband MP,[9] Tom Watson MP[10] and George Peretz QC (in his advice presented to Avaaz).[11] On the other hand, those who suggest that s.58(2C)(c) is sufficiently broad in scope to encompass consideration of 'corporate governance issues' include: Baroness Buscombe,[12] and the Secretary of State herself.[13] Indeed, the Secretary of State indicated that she would '*expect*' Ofcom to look at corporate governance issues, also noting that the regulator '*is open to look at whatever evidence it feels is appropriate to enable it to make its decision*'.[14]

3.2 The issue at hand is whether Ofcom – having been referred the s.58(2C)(c) ground by the Secretary of State – is required to assess 'corporate governance' issues as part of its advice. If the Secretary of State had concluded that 'corporate governance' considerations fell outside the scope of s.58(2C)(c), but warranted consideration in the Phase I assessment, she had an obligation to specify this as a new public interest ground before issuing an intervention notice,[15] or 'as soon as is practicable' after issuing an intervention notice.[16] Since the Secretary of State decided against proposing a new public interest ground and has been clear in expressing her belief that 'corporate governance' considerations fall within s.58(2C)(c), it seems evident that Ofcom would be acting within its statutory ambit by addressing 'corporate governance' issues within its advisory report.

3.3 The question of whether 'corporate governance' considerations fall within the scope of s.58(2C)(c) is a question for the courts to determine, in the event that the ruling of the Secretary of State is subjected to judicial review. The wording of the relevant statutory provisions (s.58(2C)(c) Enterprise Act 2002 and s.319 of

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8 HL Deb 8 February 2017, vol 778, cols 1811-1814.
9 HC Deb 6 March 2017, vol 622, col 586.
10 HC Deb 16 March 2017, vol 623, col 558.
11 George Peretz QC, 'Re: Anticipated acquisition by Twenty-First Century Fox, Inc ("21CF") of the entire issued and to be issued share capital of Sky plc ("Sky"): Proposed European intervention notice' (Advisory document, 6 March 2017) <https://inforrm.files.wordpress.com/2017/02/avaaz-sky-advice-6-3-17-1.pdf> accessed 28 March 2017.
12 HL Deb 8 February 2017, vol 778, col 1819.
13 HC Deb 6 March 2017, vol 622, col 581-582. The Minister cited previous 'corporate governance failures' by News Corp as a possible reason for referring the merger for a s.58(2C(c) assessment.
14 HC Deb 16 March 2017, vol 623, col 559.
15 The requirement for the Minister to intervene on specific public interest grounds is conferred by s.42(2) of the 2002 Act, with s.58(3) affording the Minister a residual power to propose new public interest grounds, which must be 'finalised' by Parliamentary approval (s.42(8)(b)).
16 Enterprise Act 2002, s.42(7).

the Communications Act 2003) is sufficiently broad to at least present the reasonable possibility that 'corporate governance' may be considered; but there is little to point to this being Parliament's intended meaning during Hansard debate of the Communications Bill. Parliament's intended meaning may be of great importance here given that, in the event of judicial review where the interpretation of s.58(2C)(c) is a live issue, the court may adopt the *Pepper v Hart* approach to determine whether ambiguities in s.58(2C)(c) can be explained by reference to Ministerial statements made in Parliament during debates on the Communications Bill.[17] In any event, judicial review would likely see greater scrutiny directed at the Secretary of State's decision to draw emphasis to 'corporate governance' without proposing a new public interest ground, than of any evidence on 'corporate governance' issues that Ofcom submits as a result of this.

3.4 The proposed merger is very likely to amount to having an EU dimension, as is evident from 21st Century Fox's decision to formally notify the deal to the European Commission.[18] Assuming this is the case – and the Commission concludes that the merger does not raise competition concerns[19] – the UK Government may seek jurisdiction over the assessment process on 'legitimate national interest' grounds under Article 21(4) of the EU Merger Regulation. If, after a Phase II assessment, the Secretary of State concludes that the merger raises media plurality concerns – under s.58(2C)(a) of the 2002 Act – the UK Government may proceed to take steps to remedy these concerns, given that media plurality is a named legitimate interest under Article 21(4). However, 'commitment to broadcasting standards' – under s.58(2C)(c) – is not mentioned under Article 21(4) and, as such, will require the UK Government to seek approval from the European Commission before it can take steps to protect this interest.[20] As the 'commitment to broadcasting standards' ground is broadly compatible with EU law objectives, it is likely that the Commission will afford it 'legitimate' status; provided the UK measures are deemed 'appropriate, proportional and non-discriminatory'.[21] This highlights the importance of the advice and evidence that Ofcom provides on the 'commitment to broadcasting standards' ground, as it may be relied upon in the design of potential remedies.

[17] *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3, [1993] AC 593.
[18] *Fox/Sky* (Case M.8354) Prior notification of a concentration to the Commission [2017] OJ C73/24.
[19] In accordance with Article 2(3) of Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EU Merger Regulation) [2004] OJ L24/1.
[20] ibid, art 21(4) para 3.
[21] *Lyonnaise des Eaux/Northumbrian Water* (Case IV/M.567) [1996] OJ C11/3, para 8.