

# ANTICIPATED ACQUISITION BY 21<sup>st</sup> CENTURY FOX, INC OF SKY PLC

## Issues statement

10 October 2017

### Introduction

1. Following a reference by the Secretary of State for Digital, Culture, Media and Sport (Secretary of State), the Competition and Markets Authority (CMA) is investigating the impact on media plurality and broadcasting standards of the proposed acquisition by 21<sup>st</sup> Century Fox, Inc (Fox) of the shares of Sky plc (Sky) that it does not already own (the Transaction).<sup>1</sup> Fox proposes to increase its share ownership from approximately 39% to 100%.
2. We are publishing this issues statement to help any parties submitting evidence to focus on the issues we expect will be relevant to our inquiry. We set out the main issues relating to plurality and broadcasting standards which we are likely to consider in reaching our decision, having had regard to the evidence available to us, including the evidence set out in the [Competition and Markets Authority's phase 1 report](#),<sup>2</sup> [the Ofcom report](#),<sup>3</sup> [the Secretary of State's letters to the Parties of 12 September and 20 September 2017](#), the Parties' submissions and responses to the Secretary of State, the Parties' initial submissions to the CMA, and third party submissions to Ofcom and DCMS.

### ***Assessment of impact on media plurality***

3. With respect to media plurality the CMA is assessing whether there will be a sufficient plurality of persons with control of the media enterprises serving audiences in the UK following the Transaction. We are therefore looking for

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<sup>1</sup> Throughout this document, where appropriate, we refer to Fox and Sky collectively as 'the Parties'.

<sup>2</sup> CMA, *A report to the Secretary of State for Culture, Media and Sport in response to the European intervention notice issued on 16 March 2017 in relation to the anticipated acquisition by 21<sup>st</sup> Century Fox, Inc of Sky plc* (20 June 2017).

<sup>3</sup> Ofcom, *Public interest test for the proposed acquisition of Sky plc by 21<sup>st</sup> Century Fox, Inc* (20 June 2017). We have also had regard to the advice provided by Ofcom to the Secretary of State on 25 August 2017 and 4 September following letters from the Secretary of State on 7 August 2017 and 31 August 2017.

views and evidence on the current level of media plurality in the UK, whether and the extent to which the Transaction reduces that level of media plurality, and whether the remaining level of plurality of persons with control of media enterprises would be sufficient. We will consider these issues in the context of Ofcom's definition of media plurality: ensuring diversity of viewpoints that are available and consumed; and preventing any one media owner or voice having too much influence over public opinion and the political agenda. We therefore particularly welcome views and evidence that address:

- whether and how the ability of the Murdoch Family Trust (MFT) to control or influence editorial and commercial decisions at Sky News will change as a result of Fox's share ownership of Sky increasing from approximately 39% to 100% and whether that change is material in nature;
- whether and how the range of viewpoints available from news and current affairs sources in the UK is evolving in general and would change in particular as a result of the Transaction;
- how people consume news and current affairs and the extent to which they rely on multiple sources and how this is likely to change in future;
- the impact and importance of different news and current affairs sources, including online and through social media, for media plurality and, in turn, the implications of the impact of online and social media on the use of traditional (ie broadcast and print) news and current affairs sources by consumers;
- whether and how the ability of the MFT to influence the political agenda will change as a result of the Transaction;
- the level of media plurality in the UK that should be considered sufficient;
- whether and how the Transaction would result in an insufficient level of media plurality in the UK, taking into account the increase in the level of control held by the MFT over Sky following the Transaction and its existing control over Fox and News Corporation (News Corp); and
- any existing factors which might help to prevent or reduce any potential negative effects of the Transaction on media plurality.

#### ***Assessment of impact on broadcasting standards***

4. With respect to broadcasting standards the CMA is looking for views and evidence on whether the merged entity post-Transaction will have a genuine commitment to broadcasting standards objectives. In assessing this, we will

consider the record of the Parties' compliance with broadcasting and other applicable regulations, and their broader attitude to compliance in general. We therefore in particular welcome views and evidence on:

- the current approach of Fox, Sky, the MFT and News Corp to compliance with broadcasting standards;
  - the approach of Fox, Sky, the MFT and News Corp to effective corporate governance and other applicable regulations, including regulations relating to the treatment of employees, in the UK and overseas;
  - the degree to which compliance with other applicable regulations, and effective corporate governance more generally should be considered in assessing a company's commitment to broadcasting standards, including whether and which particular regulations may be considered more relevant to this assessment;
  - what constitutes a genuine commitment to broadcasting standards and whether, and if so, how the Transaction might lead to the merged entity lacking a genuine commitment to broadcasting standards; and
  - any existing factors which might help to prevent or reduce potential negative effects of the Transaction on the merged entity's commitment to broadcasting standards.
5. We invite interested parties to notify us if there are any additional relevant issues which they believe we should consider in relation to the media plurality and broadcasting standards considerations. If any such further issues were to arise about which the Group would wish to hear evidence from the Parties, then both the Parties and the wider public will be informed and given an opportunity to comment.
6. Any party wishing to provide evidence in response to this statement of issues should do so in writing, by no later than 5pm on Tuesday 24 October 2017. Please email [FoxSky.Submissions@cma.gsi.gov.uk](mailto:FoxSky.Submissions@cma.gsi.gov.uk) or write to:

Project Manager  
Fox/Sky merger inquiry  
Competition and Markets Authority  
Victoria House  
Southampton Row  
London  
WC1B 4AD

## The reference

7. On 20 September 2017, the Secretary of State, in exercise of her powers under article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (the Order), referred the Transaction to the CMA for further investigation and report by a group of CMA panel members (the Inquiry Group).
8. In exercise of its duty under article 6 of the Order, the CMA must decide:
  - (a) whether arrangements are in progress or in contemplation which, if carried into effect will result in the creation of a European relevant merger situation;<sup>4</sup> and if so
  - (b) whether, taking account only of the admissible public interest consideration or considerations concerned, the creation of that situation may be expected to operate against the public interest;<sup>5</sup> and if so
  - (c) whether (and if so what) action should be taken by the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which may be expected to result from the creation of the European relevant merger situation concerned.<sup>6</sup>
9. The admissible public interest considerations referred to in paragraph 8(b) above are:
  - ‘the need in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience’ (the media plurality consideration) as set out in section 58(2C)(a) of the Enterprise Act 2002 (the Act); and
  - ‘the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003’ (the broadcasting standards consideration) as set out in section 58(2C)(c) of the Act.

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<sup>4</sup> Article 6(2) of the Order. ‘European relevant merger situation’ is defined in section 68 of the Act.

<sup>5</sup> Article 6(3) of the Order. As set out in Article 6(5) of the Order, ‘admissible public interest consideration’ means any such consideration ‘specified in the reference under article 5 and which the CMA is not under a duty to disregard’.

<sup>6</sup> Article 6(4) of the Order. The Group is also to consider whether it should recommend the taking of other action by the Secretary of State or action by persons other than itself and the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the European relevant merger situation concerned.

10. As the Transaction falls for consideration under the EU Merger Regulation,<sup>7</sup> the competition aspects of the Transaction were investigated by the European Commission, which [cleared the Transaction on 7 April 2017](#).<sup>8</sup> The CMA is therefore not looking at competition issues that may arise from the Transaction.
11. It is ultimately for the Secretary of State, under Article 12(2) of the Order, to decide the questions set out in the Terms of Reference following receipt of the CMA's report. However, in doing so, the Secretary of State must accept the CMA's decision on whether the Transaction amounts to a European relevant merger situation<sup>9</sup> and have regard to the CMA's report when making her decision about what action she may take to remedy any finding that the proposed Transaction may be expected to operate against the public interest.<sup>10</sup>

## Background

### *The Parties*

#### *Fox*

12. Fox is a Delaware corporation<sup>11</sup> whose shares are listed and traded on the NASDAQ Global Select Market. Fox was previously known as News Corporation, which owned 100% of News International and approximately 39% of Sky. On 28 June 2013, News Corporation was split into two independent publicly traded companies – Fox, focusing on broadcasting and film (including an approximate 39% ownership of Sky) and News Corp, focusing on newspapers and publishing.
13. Fox is a global media company providing cable network programming, TV and filmed entertainment. Fox owns a global portfolio of cable and broadcasting networks and properties including FOX, Fox Networks Group, National Geographic, STAR, Twentieth Century Fox Film, and Twentieth Century Fox Television. In the UK, Fox's principal activities involve the licensing and distribution of audio-visual works for theatrical exhibition, TV and home entertainment viewing, and the wholesale supply of TV channels.<sup>12</sup> Fox currently holds approximately a 39% stake in Sky.

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<sup>7</sup> Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 20 January 2004.

<sup>8</sup> DG Competition, Case M.8354 - FOX/SKY (7 April 2017).

<sup>9</sup> Article 12(5) of the Order.

<sup>10</sup> Article 12(8) of the Order.

<sup>11</sup> A Delaware corporation is a business entity created under the General Corporation Law of the Delaware state code.

<sup>12</sup> [Fox News ceased broadcasting in the UK on 29 August 2017](#).

## *Sky*

14. Sky is a public company whose shares are listed on the London Stock Exchange. Sky is an entertainment and communications company active in a number of territories through several subsidiaries. Sky retails subscription TV services on a linear and on-demand basis to residential and commercial premises in the UK, Ireland, Germany, Austria and Italy. Sky also produces a range of TV channels that it makes available to retail subscribers on its own and third party TV platforms and supplies on a wholesale basis to other retailers. Sky's other businesses include: the production, licensing and distribution of audio-visual content; the sale of advertising on its own and partner channels via its advertising house 'Sky Media'; and the sale of communications services (including broadband and mobile services) in the UK and Ireland.
15. Sky's portfolio of TV channels in the UK includes Sky News (a 24-hour international news channel), other retail pay-TV services and on free-to-air TV. As well as Sky News, Sky provides news content in the form of bulletins and articles on its website, and through social media. Sky also owns and operates Sky News Radio, which supplies news to the Independent Radio News (IRN) network of radio stations in the UK.

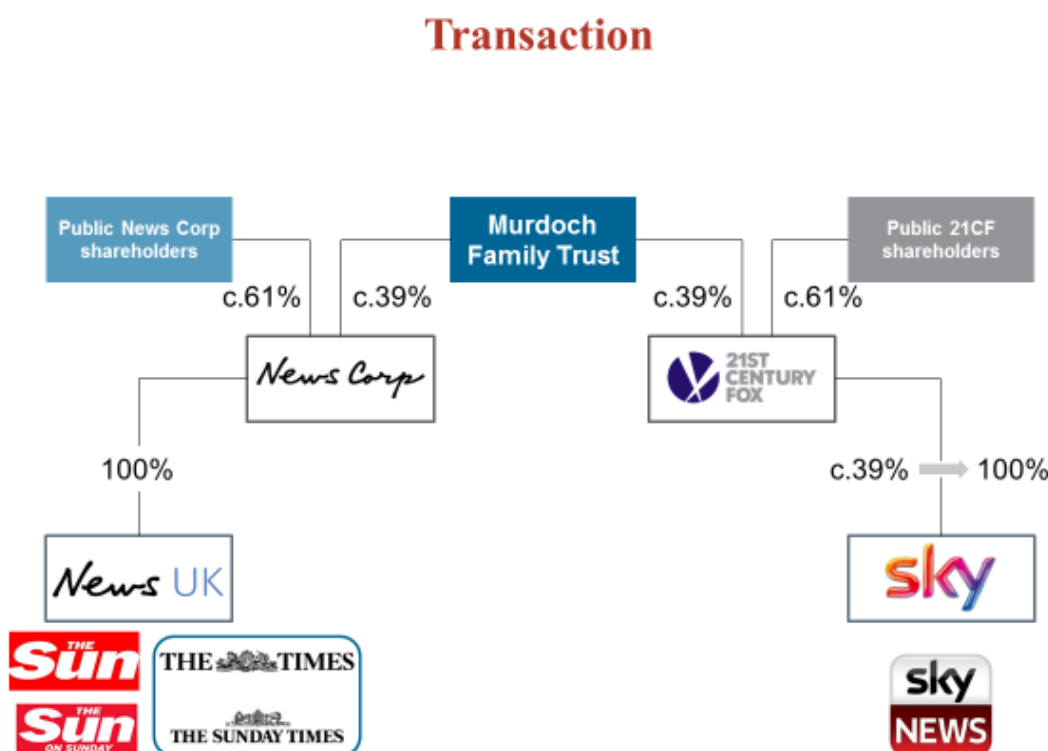
## *Related parties*

16. News Corp is a global media company with a range of businesses including news and information services, book publishing, digital real estate services, cable network programming in Australia and pay-TV distribution in Australia. News Corp owns 100% of News UK and Ireland Limited (News UK, previously known as News International), which publishes *The Times*, *The Sunday Times*, *The Sun* and *The Sun on Sunday* (along with their respective websites) and owns a number of UK radio networks (including TalkSport and Virgin Radio UK).
17. The MFT is the largest shareholder of Fox and News Corp, holding approximately 39% of shares in each. The MFT exercises its voting rights through its sole trustee, Cruden Financial Services LLC. Cruden Financial Services is managed by its Managing Directors, who are appointed by Mr K Rupert Murdoch (also Executive Chairman of News Corp and Executive Chairman of Fox), Prudence MacLeod, Elisabeth Murdoch, Lachlan Murdoch (also Co-Chairman of News Corp and Executive Chairman of Fox) and James Murdoch (also Chief Executive Officer of Fox, Chairman of Sky and a Board member of News Corp).

## The Transaction

18. On 9 December 2016, Fox announced its intention to acquire the fully diluted share capital of Sky not already owned by Fox and its affiliates, increasing its existing shareholding from approximately 39%. The recommended offer is for a consideration of £10.75 a share (£11.7 billion)<sup>13</sup> and puts the value of Sky at £18.5 billion.<sup>14</sup> The Transaction is subject to the Takeover Code.

Figure 1: The Transaction



Source: The Parties.

## Assessment of the effects of the Transaction on media plurality

### Framework for our analysis for assessing the Transaction's impact on plurality

19. In approaching our assessment of media plurality, we will follow the findings of the Court of Appeal in relation to plurality set out in its judgment following the report of the Competition Commission (CC) on the acquisition by British Sky Broadcasting Group plc of 17.9% of the shares in ITV plc (BSkyB/ITV).<sup>15</sup> In that regard, we note that the statutory framework permits us, if we find it to

<sup>13</sup> Share price as of 8 December 2016, set out by Fox in its [Investor Presentation on 15 December 2016](#).

<sup>14</sup> [Value as of 20 June 2017](#).

<sup>15</sup> *British Sky Broadcasting Group plc v The Competition Commission* [2010] EWCA Civ 2, judgment of 21 January 2010 (the Court of Appeal judgment).

be the case that the MFT has ‘control’ over Fox and News Corp for the purposes of section 26 of the Act (including by way of ‘material influence’), to assess the Transaction by taking into account the activities of the Parties and those of News Corp as if they are media enterprises under common ownership or control of only one person, namely the MFT.<sup>16</sup>

20. However, in undertaking this assessment, we recognise that in assessing the plurality of persons with control of media enterprises and the sufficiency of that plurality we are required to ‘take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control’.<sup>17</sup> Accordingly, our assessment of media plurality will factor in the level of actual control or influence that the MFT may have over Sky, Fox and News Corp pre- and post-Transaction, including a consideration of the range of views that are provided within Sky, Fox and News Corp (referred to as ‘internal plurality’), and will not start from a presumption that the MFT exercises full control over Fox and News Corp (in other words, our assessment will not start by assuming that the MFT, Fox and News Corp are to be treated as a single entity).
21. In that context, we plan to focus our analysis on:
- the current level of plurality within the UK as a whole and in relation to different audiences;
  - whether and the extent to which the Transaction reduces the plurality of those with control of media enterprises in the UK; and
  - whether the level of plurality which would remain after the Transaction would be sufficient, taking into account the impact of the Transaction on the existing level of plurality.
22. We intend to consider carefully how we should approach our assessment of media plurality.<sup>18</sup> In particular, we will have regard to the guidance of the (then) Department of Trade and Industry (DTI) on public interest intervention in media mergers ([the DTI guidance](#)),<sup>19</sup> the approach of the CC in relation to its assessment of *BSkyB/ITV*, the Court of Appeal judgment following the judicial review of the CC’s decision (in particular, that any consideration of

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<sup>16</sup> Section 58A(5) of the Act.

<sup>17</sup> Court of Appeal judgment, paragraph 121.

<sup>18</sup> The Act does not provide a definition or measure of sufficient plurality and there is limited existing guidance and no clear benchmark against which to make an assessment.

<sup>19</sup> DTI, Enterprise Act 2002: Public interest intervention in media mergers – Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004.



media plurality must do more than just count the number of media enterprise controllers and should involve a qualitative assessment<sup>20</sup>), and the consideration given to the question of media plurality by, among others, the Leveson Inquiry into the culture, practices and ethics of the press ([the Leveson Inquiry](#)<sup>21</sup>), the House of Lords Select Committee on Communications, and Ofcom.

23. We therefore plan to take as our starting point Ofcom's advice to the Secretary of State on the measurement framework for media plurality ([the Ofcom measurement framework](#)). Ofcom identifies two strands to the meaning of plurality in this context:
- ensuring that there is diversity in the viewpoints that are available and consumed, across and within media enterprises; and
  - preventing any one media owner, or voice, having too much influence over public opinion and the political agenda.<sup>22</sup>
24. We intend to focus our analysis on the provision of news and current affairs. We consider that, following Ofcom's consultation on its measurement framework and based on the views expressed in the [Leveson Inquiry report](#), the [House of Lords Communications Committee report](#), and [DCMS's response to that report](#), there is a broad consensus that this is appropriate and practicable. Similarly, for reasons of practicability, we intend to focus our assessment on plurality of news and current affairs on a UK-wide level – that is, we do not intend to specifically consider regional or local level news and current affairs sources or sources solely available outside of the UK. However, we note the argument of the Parties that this analysis should include certain regional and even local titles (such as the *Evening Standard*) and we would be interested in views and evidence on whether the use and impact of such news and current affairs sources means that some or all such sources should be taken into account.
25. In light of the above, we plan to base our assessment of the media plurality consideration on the analytical framework set out in the Ofcom measurement

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<sup>20</sup> The Court of Appeal stated: (i) that the media plurality consideration 'requires an assessment of the sufficiency of the plurality of media controllers. Even if plurality means no more than "number" in this context, there has to be an assessment of whether the remaining number is sufficient'; and (ii) that '[t]he [CMA's] task is not just to count the number of media enterprise controllers, but also to make a qualitative assessment of the position following from the [merger]. One would expect that assessment to be made by reference to the real position as regards extent and level of control.' (the Court of Appeal judgment, paragraphs 88 and 118).

<sup>21</sup> The Leveson Inquiry: Culture, Practice and Ethics of the Press.

<sup>22</sup> Ofcom (2015), [Measurement framework for media plurality](#), paragraph 1.2. We note that the Ofcom measurement framework was prepared by Ofcom at the request of the Secretary of State (at that time) in September 2014, based on the scope and objectives set out by the Secretary of State, and was developed following a call for inputs and further consultation with industry (see paragraphs 1.13–1.16 of the Ofcom measurement framework).

framework. In summary, this sets out three quantitative metrics and several qualitative 'contextual' factors by which to measure media plurality.

26. The quantitative metrics cover:

- availability – the number of different news and current affairs sources available on each media platform and across all media;
- consumption – quantifying the consumption of news and current affairs sources and measuring the use of different sources across all media platforms, including cross-media consumption; and
- impact – using proxies to measure the impact and influence of news and current affairs sources on consumers.

27. The qualitative contextual factors include:

- the range of regulatory regimes across media platforms – we will be particularly interested in views and evidence regarding the effectiveness of [the Ofcom Broadcasting Code](#) in protecting plurality and limiting editorial influence;
- the editorial control and influence exercised by key individuals within organisations;
- the effect of differing governance models within organisations; and
- the existence (or lack) of internal plurality, ie the degree to which differing editorial viewpoints exist within a single media organisation.

28. However, we would welcome views on the extent to which using this analytical framework is appropriate and whether there is other analysis that we should consider carrying out in relation to the assessment of media plurality.

29. We also welcome views on whether there are any significant differences between audiences (for example, whether audiences could be defined along socio-demographic criteria taking into account differences in using multiple news and current affairs sources and the use of online media) such that a specific audience group might be particularly affected by the Transaction even if other audiences are not.

30. We now set out how we intend to use and build on Ofcom's framework to answer the questions set out in paragraph 21.

***Whether the Transaction reduces the plurality of those with control of media enterprises?***

31. We will examine the relationships between the Murdoch family, Cruden Financial Services LLC, the MFT, Fox and Sky, including the appointment and role of executive and independent directors to assess Fox's and the MFT's current level of control or influence over Sky News, and whether the Transaction will materially increase their ability to control or influence Sky News. This ability could range from controlling or influencing:
- the overall positioning and editorial outlook of the whole of Sky News's output; to
  - editorial choices and selection of stories related to particular themes over a period of time; to
  - editorial choices and selection of stories linked to a specific event (eg elections).
32. Further, as well as control or influence made with respect to the editorial decisions relating to news and current affairs as set out above, this ability could also manifest itself as control or influence over the overall programming strategy of Sky and Sky News, such as the introduction and scheduling of discussion and other types of shows, or the positioning of channels on Sky's electronic programme guide.
33. We will also consider the extent to which the Transaction will materially increase the control or influence that Fox and the MFT have over Sky News's commercial policy (for example, decisions over investment, advertising, recruitment of key staff, and relocation of key management personnel to the USA).
34. It is important to note that we are concerned with the impact of the Transaction and therefore whether there is evidence that the Transaction will, in addition to the change in control of Fox over Sky (from approximately 39% to sole control), also lead to a material increase from the current level of control or influence exercised by the MFT over Sky, and in particular Sky News, through the MFT's approximately 39% share of Fox. Evidence that Fox and the MFT already – ie prior to the Transaction – control Sky News would not be sufficient to form a view on whether the Transaction is likely to reduce the plurality of persons with control of media enterprises in the UK; we are therefore seeking to identify whether there is evidence about what could be done post-Transaction by Fox and the MFT that each of them cannot already

do. We will also seek to identify any factors which could constrain the MFT's control or influence over Fox, Sky and, in particular, Sky News.

35. In carrying out our assessment, we will conduct a similar analysis for News Corp in order to understand the current level of control or influence by the MFT over News Corp, in particular, News UK, and the current level of interaction with Sky and Sky News. We consider that such analysis will assist in providing insights into the extent of internal plurality and the extent to which we can consider that the MFT has control or material influence over each of Fox, Sky, News Corp, and News UK post-Transaction, and whether there will be a material change in the way News Corp interacts with Sky News.

***Whether the degree of plurality which would remain after the Transaction would be sufficient, taking into account the impact of the Transaction on the existing level of plurality***

36. The previous section set out how we propose to assess whether the Transaction will result in a material reduction in the plurality of those with control of media enterprises. This section sets out how we propose to assess whether the level of media plurality would remain sufficient following the Transaction, taking into account the impact of the Transaction on the existing level of plurality. As noted above, there is limited guidance regarding the level of plurality that may be considered sufficient and, accordingly, we set out below an explanation of how we think the Transaction might have an adverse effect on plurality such that it may operate against the public interest (known as 'theories of harm').<sup>23</sup>
37. To answer this question, we intend to assess a broad range of qualitative and quantitative evidence to come to a view on:
- the existing level of media plurality, including recent changes and likely trends;
  - the impact of the Transaction, if any, on the existing level of media plurality; and
  - whether the remaining level is sufficient in light of any reduction in plurality resulting from the proposed Transaction.

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<sup>23</sup> For example, the Court of Appeal judgment noted in relation to the BSkyB/ITV merger that 'the criterion of sufficiency, for this purpose, seems to be the need to avoid the over-concentration of the market' (paragraph 88). The [DTI guidance](#) states that the media plurality consideration 'is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality' (paragraph 7.7).

38. The Parties have argued that analysis of whether the level of plurality remaining post-Transaction is sufficient should be based by reference to a historic benchmark when plurality may be deemed to have been sufficient, such as the level seen in 2003 (when the Communications Act 2003 was passed), or by reference to the position in 2007 (when the CC reviewed BSkyB's acquisition of a stake in ITV plc and found no adverse effect in terms of the media plurality consideration). We invite views on whether these or any other benchmarks would be an appropriate basis for assessing the sufficiency of the level of plurality that remains following the Transaction.

### *Theories of harm*

39. In order to help focus our analysis of the possible effects of the Transaction, we have considered the ways that the Transaction might adversely affect the level of media plurality such that it was no longer sufficient. These are termed 'theories of harm'. As noted above, we have used Ofcom's measurement framework as a starting point for our analysis and therefore we have based the theories of harm on the two strands to media plurality identified by Ofcom: diversity and influence (this does not preclude any other theory of harm relating to plurality being identified during our inquiry).

#### *Theory of harm 1: The Transaction reduces the range of viewpoints available to and consumed by members of the public*

40. This relates to the first strand identified by Ofcom of ensuring that there is diversity in the viewpoints that are available and consumed, across and within media enterprises.
41. Under this theory of harm, the Transaction would raise plurality concerns if it materially reduced the range of viewpoints available and consumed in UK news and current affairs content, such that plurality was no longer sufficient. The specific concern in this case is the degree to which the Transaction might reduce the independence of Sky's news and current affairs content from the rest of Fox and News Corp, and the degree to which this could lead to a reduction in diversity of viewpoints across the news and current affairs offerings controlled by the Parties and News Corp, including Sky News, *The Sun*, *The Sun on Sunday*, *The Times*, and *The Sunday Times*.
42. Concerns about a reduction in diversity might arise, in particular, if the increased control that Fox (and indirectly the MFT) will have over Sky following the Transaction means that the news and current affairs offerings controlled by the Parties and News Corp:

- could pursue similar editorial positions and story selection following the Transaction – for example, if the editorial position of Sky News could be aligned with that of *The Times*, *The Sunday Times*, *The Sun* or *The Sun on Sunday* newspapers, reducing the existing differences in viewpoints available to consumers; or
  - could take a similar approach on specific topics or issues following the Transaction, even if the overall editorial position did not change.
43. Consistent with [Ofcom’s measurement framework](#), we consider that it is relevant to consider the consumption of alternative news sources with different viewpoints pre- and post-Transaction, as well as their availability. The Transaction is more likely to raise plurality concerns if both Sky News and one or more of News Corp’s news and current affairs offerings have a significant share of current consumption, such that any reduction in diversity as a consequence of the increased level of control by the MFT over Sky would be expected to affect a significant number of consumers. Similarly, we might also be more concerned about a loss of diversity where the audiences of Sky News and the news and current affairs offerings owned by News Corp overlap to a significant extent (for example, if a significant number of *The Sun* readers watch Sky News) and do not consume news from many other sources.
44. Finally, we might have a greater concern about a loss of diversity if Sky News or one or more of New Corp’s news and current affairs offerings has a strong reputation for integrity and trustworthiness, such that any reduction in diversity could have a more significant impact on news consumption.

*Theory of harm 2: The Transaction increases the influence of the MFT and, by proxy, the Murdoch family on public opinion and on the political agenda*

45. This relates to the second strand identified by Ofcom of preventing any one media owner, or voice, having too much influence over public opinion and the political agenda. We will consider whether the changes that arise as a result of the Transaction will provide the MFT and, by proxy, the Murdoch family, with increased influence over public opinion or the political agenda, taking into account the level of plurality that remains following the Transaction.
46. We note that even if that influence over public opinion is not exercised in practice, a perceived ability to exercise such influence could be sufficient to give some leverage over the political agenda. This also means that even if editorial outlooks are not aligned, the ability of the MFT to potentially exercise its influence in relation to selected issues may still affect media plurality under this theory of harm.

47. Again, we note that this theory of harm depends on there being a reasonable belief that there has been a material increase in the ability or perceived ability of the Murdoch family to influence public opinion or the political agenda as a result of the Transaction. Evidence of current influence (actual or potential) is therefore not sufficient to establish this theory of harm. As such, while we will be interested in evidence of the current degree of influence to help establish the position pre-Transaction (such as by seeking evidence of actual political decisions that have been already been influenced by the Murdoch family), we will be seeking to understand whether there is evidence that this existing influence will increase and change as a result of the Transaction.<sup>24</sup>

### *Analysis*

48. To assess the theories of harm outlined above, we will consider a number of factors relevant to assessing the availability of a range of viewpoints to UK consumers and to determining the influence of the various media outlets operating in the UK, including:
- the extent to which editorial alignment is possible and likely following the Transaction, by building on our analysis of whether the Transaction increases the influence of the MFT over Sky News and looking at the current level of influence and control that the MFT has over the newspapers owned by News Corp and considering the extent to which this could be replicated with Sky News;<sup>25</sup>
  - evidence on the consumption and use of different news and current affairs sources across all media platforms, including cross-media consumption and the extent of multi-sourcing (ie the use of a variety of news and current affairs sources, regardless of whether those sources are accessed through one or more intermediaries, such as social media platforms);<sup>26</sup>
  - the reach and shares of reference (or frequency of use) of different news and current affairs sources;

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<sup>24</sup> Including whether access to the consumer data held by Sky makes a material difference in the ability to target content to influence political opinion.

<sup>25</sup> As well as control or influence over Sky News, we will also consider whether the Transaction materially increases Fox's and the MFT's ability to control or influence Sky's overall programming and the impact that might have on the level of media plurality and on the ability of the Murdoch family to influence the political agenda.

<sup>26</sup> This will include content broadcast on TV (news-dedicated channels as well as news and current affairs programming) and radio (such as news bulletins), print (newspapers and magazines), and content published and shared online – whether directly by publishers (including online-only publishers such as BuzzFeed or the Huffington Post) or indirectly via online intermediaries such as Facebook, Twitter and Google.

- the importance of a news and current affairs source for its audience relative to other sources, including the extent to which particular sources are considered impartial and are trusted;<sup>27</sup>
- the degree to which online news, including when sourced through social media and other intermediaries, has changed and is changing the impact of traditional media outlets and whether this differs between different demographics and audiences;
- the impact of social media on editorial choices and editorial freedom, and hence the ability of those controlling news and current affairs sources to influence public opinion; and
- evidence on the extent to which politicians take account of and act on the views of media owners.

### *Mitigating factors*

49. We will consider whether there are any factors, including regulatory constraints or internal plurality considerations, that might mitigate any potential adverse effects on media plurality. These include, but are not limited to, the role that regulatory requirements such as [the Ofcom Broadcasting Code](#) play as a constraint on editorial control.

## **Assessment of whether the merged entity will have a genuine commitment to broadcasting standards objectives**

### *Framework for our analysis*

50. The second public interest consideration that we are required to investigate is the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.<sup>28</sup> These objectives are:

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<sup>27</sup> As noted above, we intend to focus our assessment on plurality of news and current affairs on a UK-wide level. However, we would be interested in views and evidence on the issues set out in paragraphs 48 in relation to regional and local news and current affairs sources, and whether some or all such sources are material enough to warrant inclusion in our analysis.

<sup>28</sup> We note here that there are overlaps between this test and the 'fit and proper' test carried out by Ofcom. Ofcom has an ongoing duty, set out in section 3(3) of the Broadcasting Act 1990 and section 3(3) of the Broadcasting Act 1996, to be satisfied that broadcast licensees are fit and proper. It does so by considering two questions: how well the licensee has complied with regulatory standards and licence conditions; and how well they have conducted themselves beyond the broadcasting arena. Ofcom carried out [an assessment of Sky's fitness and propriety](#) at the same time as carrying out its phase 1 assessment. Only Ofcom can carry out a fit and proper assessment and, while similar, the 'fit and proper' test and the test for assessing whether following



- that persons under the age of 18 are protected;
- that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services;
- that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with;<sup>29</sup>
- that news included in television and radio services is reported with due accuracy;
- that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;
- 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 product placement requirements referred to in section 321(3A) are met in relation to programmes included in a television programme service (other than advertisements);
- that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services;
- that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
- that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with;
- that the unsuitable sponsorship of programmes included in television and radio services is prevented;
- that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and

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the Transaction the merged entity would have a genuine commitment to broadcasting standards (which the CMA is considering) are separate.

<sup>29</sup> Section 320 provides for special impartiality requirements applicable to matters of political or industrial controversy and matters relating to current public policy. In relation to these matters, the person providing the broadcasting service is excluded from all expressions of their view or opinion and are required to preserve due impartiality.

- 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.
51. In carrying out our assessment of a genuine commitment to broadcasting standards, we will take into consideration the DTI Guidance, Ofcom's approach in its phase 1 report and the comments by the Secretary of State in her letter of 12 September 2017. We note in particular that [the DTI Guidance states](#):
- 'in considering how such a merger may impact on the range and quality, or the standards, of UK broadcasting, [...] it is reasonable to have regard to any relevant information as to the track record both of the enterprise seeking to acquire a broadcaster and of those who control it';<sup>30</sup> and
  - 'the intention behind [the broadcasting standards] consideration is to assess whether persons controlling or carrying on media enterprises post-merger are likely to comply with the spirit as well as the letter of the broadcasting standards'.<sup>31</sup>
52. The [DTI Guidance](#) also sets out a range of factors that can be taken into account in assessing a genuine commitment to broadcasting standards. These include:
- a qualitative assessment of past compliance with broadcasting standards in the UK of any other broadcasting enterprises controlled by the media owner (as opposed to just focusing on the number of infringements);
  - the due impartiality and accuracy of news offered by the media owner's other broadcasting enterprises and evidence of any breaches;
  - compliance of any other broadcasting enterprises controlled by the media owner with broadcasting standards in other jurisdictions;
  - the record of any non-broadcasting media enterprise's compliance with applicable standards; and
  - all other material factors, including comments, statements, and other plans made by the acquiring media owner which give an indication as to its commitment to UK broadcasting standards post-Transaction.<sup>32</sup>

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<sup>30</sup> Paragraph 7.2.

<sup>31</sup> Paragraph 7.22.

<sup>32</sup> Paragraphs 7.24 and 7.25.

53. We interpret these statements to mean that our analysis should not simply be confined to the compliance record of the Parties as regards broadcasting standards in the UK. Rather, it should cover, both in the UK and other jurisdictions in which they operate:
- the overall regulatory compliance record of the Parties; and
  - the overall regulatory compliance record of those controlling the Parties, specifically the MFT, along with all other businesses they materially influence or control (including News Corp).
54. Further, we consider that in order to address the issue of whether the merged entity will have a genuine commitment to broadcasting standards, our analysis, while taking into account the relevant organisations' record of compliance and non-compliance with broadcasting standards regulation (including the number and severity of infringements recorded), should also consider the broader attitude within the relevant organisations towards regulatory compliance and to infringements that have taken place. This will include looking at the extent of efforts made to ensure compliance, such as the strategies in place, investment in training, the seniority of staff responsible for compliance and the extent of Board involvement, and looking at actions taken following the remedying of any breaches, all of which may have a bearing on how seriously such concerns are taken.
55. We note that in considering the implications of broader compliance shortcomings, we will need to assess the extent to which the record of compliance in one field of regulation can read across into another (including the applicability of compliance or otherwise with broadcasting standards in different political and cultural contexts). This will include considering the weight we place on compliance with different regulations and therefore the degree to which compliance with a particular regulation, and effective corporate governance more generally, are relevant to assessing a commitment to broadcasting standards.
56. We believe that this represents an appropriate point from which to start our analysis, but welcome views and evidence on any other factors which may be necessary to consider.

*Theory of harm 3: As a result of the Transaction, there will not be a genuine commitment to broadcasting standards at the merged entity*

57. As with our assessment of media plurality, we have sought to identify an overarching theory of harm to help focus our analysis of the possible effects of the Transaction. We believe the most appropriate theory of harm is that, as a

result of the Transaction, there will not be a genuine commitment to broadcasting standards at Sky once it is fully owned by Fox.<sup>33</sup>

58. We again note that we are concerned with the change resulting from the Transaction. In other words, our analysis will focus on whether and how any concerns in relation to Fox and News Corp will mean it is more likely than not that there will not be a genuine commitment to broadcasting standards at Sky (and in particular, Sky News) following the Transaction.
59. We propose to consider the following issues in order to address this theory of harm, building on the framework set out above (in particular the factors set out in [the DTI Guidance](#)).
60. We intend to examine the extent to which the Parties, both in the UK and in other jurisdictions in which they operate, have complied with the relevant rules on broadcasting standards and on applicable regulatory and corporate governance requirements more broadly. This will not only be a matter of assessing the number and severity of breaches, or complaints received by relevant regulators. This analysis will also take into account evidence on the extent to which the Parties have in place:
- effective structures, processes and strategies for ensuring compliance; and
  - effective structures, processes and strategies for identifying and addressing problems in advance rather than reacting to concerns raised by a regulator.

Such structures and processes might include, for example, the level of training provided to staff, the seniority of those involved in overseeing compliance, and the level of Board involvement).<sup>34</sup>

61. We will undertake similar analysis for the MFT, and the news and current affairs enterprises owned and materially influenced by the MFT, including News Corp. In particular, in addition to the above, we will consider evidence of commitment to:
- effective corporate governance and compliance in other areas, including standards of integrity and accuracy in the newspapers controlled by the

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<sup>33</sup> For the avoidance of doubt, references to Sky's commitment to broadcasting standards in this context means in relation to all the broadcasting licences held by Sky and, in particular, in relation to the commitment to broadcasting standards at Sky News.

<sup>34</sup> Of particular interest here is Ofcom's finding that Fox did not have in place appropriate measures to ensure Fox News's compliance with the Broadcasting Code in the UK before May 2017; we will examine how this situation occurred and the implications that this has for a genuine commitment to broadcasting standards going forward.

MFT in the UK (including *The Times*, *The Sunday Times*, *The Sun* and *The Sun on Sunday*);<sup>35</sup> and

- compliance with regulations applying to employers in general.

Again, as well as assessing the number and severity of any breaches that might have occurred, we will also look at the policies and processes in place to prevent, identify and address problems in advance of any regulatory involvement.

62. In considering these issues, we will consider the weight to place on the evidence we obtain and consider whether and how any wider failings of regulatory compliance and corporate governance at Fox are capable of affecting the merged entity's commitment to broadcasting standards.
63. Finally, to assess the impact of the Transaction (ie the change that has occurred as a result), we will consider the ways in which Fox could change or affect the commitment to broadcasting standards at Sky following the Transaction (including by introducing a less impartial, more partisan approach to an extent which may conflict with the duty of due impartiality).<sup>36</sup> Among other things, we intend to consider stated plans by Fox and members of the MFT for Sky (and in particular Sky News) following the Transaction, including the planned governance arrangements for Sky News.

## Counterfactual

64. We intend to consider the theories of harm set out above in the context of any change relative to the current level of plurality (ie absent the Transaction, we assume that the level of plurality likely to prevail would be as it is prior to the Transaction, including the continued provision of Sky News) and commitment to broadcasting standards (ie absent the Transaction, we assume that the commitment to broadcasting standards at Sky will remain as it is now), but welcome views on whether another counterfactual would be more appropriate.

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<sup>35</sup> We will be particularly interested in the effectiveness of corporate governance measures introduced at News Corp following the exposure of the practices which gave rise to the Leveson Inquiry.

<sup>36</sup> This overlaps with the assessment on media plurality, and will depend on the extent to which we find such editorial alignment is possible.

## **Public interest**

65. We will consider whether, taking account of the admissible public interest consideration, the creation of the relevant merger situation operates or may be expected to operate against the public interest.

## **Possible remedies**

66. Should the Group conclude that the relevant merger situation operates against the public interest, we will need to decide what remedial action to recommend should be taken by the Secretary of State or by persons other than the Secretary of State, and, in either case, what is to be remedied, mitigated or prevented.

## **Responses to the issues statement**

67. Please note that the CMA can only look at the issues which have been referred to us by the Secretary of State as set out in the Terms of Reference and we cannot widen the scope of this inquiry. We are therefore unable to consider submissions on matters such as (but not limited to) the impact of the Transaction on competition.
68. Any party wishing to provide evidence in response to this statement of issues should do so in writing, by no later than 5pm on Tuesday 24 October 2017. Please email [FoxSky.Submissions@cma.gsi.gov.uk](mailto:FoxSky.Submissions@cma.gsi.gov.uk) or write to:

Project Manager  
Fox/Sky merger inquiry  
Competition and Markets Authority  
Victoria House  
Southampton Row  
London  
WC1B 4AD

69. While we intend to meet with third parties, we unfortunately cannot undertake to meet with everyone that wishes to do so. We will consider meeting with parties who explicitly request this but only if we believe we will be able to obtain additional information and evidence to that included in their submission.