



Neutral Citation Number: [2018] EWHC 1973 (Admin)

Case No: CO/4497/2017

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 27 July 2018

**Before :**

**THE HONOURABLE MR JUSTICE SUPPERSTONE**

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**Between :**

<b>R (on the application of AVAAZ FOUNDATION)</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>THE OFFICE OF COMMUNICATIONS (Ofcom)</b>	<b><u>Defendant</u></b>
<b>- and -</b>	
<b>(1) SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT</b>	<b><u>Interested</u></b>
<b>(2) 21<sup>ST</sup> CENTURY FOX, INC</b>	<b><u>Parties</u></b>
<b>(3) SKY PLC</b>	

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**George Peretz QC and Azeem Suterwalla** (instructed by **Hausfeld & Co. LLP**) for the **Claimant**  
**Pushpinder Saini QC, Jessica Boyd and Flora Robertson** (instructed by **Ofcom**) for the **Defendant**  
**Julian Gregory** (instructed by **GLD**) for the **1st Interested Party**  
**Lord Pannick QC and James Segan** (instructed by **Allen & Overy LLP**) for the **2nd Interested Party**  
**Kieron Beal QC** (instructed by **Herbert Smith Freehills LLP**) for the **3rd Interested Party**

Hearing dates: 19 and 20 June 2018  
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**Approved Judgment**

## **Mr Justice Supperstone :**

### **Introduction**

1. The Claimant, the Avaaz Foundation, challenges the decision of the Office of Communications (“Ofcom”) dated 29 June 2017 (“the Decision”) by which Ofcom concluded that various allegations of impropriety made against Fox News, a subsidiary of 21<sup>st</sup> Century Fox Inc (“Fox”), and the evidence in support of those allegations, did not provide a sufficient basis for it to decide in advance of a proposed merger between Fox and Sky plc (“Sky”) that Sky, an existing holder of statutory broadcast licences, would not remain fit and proper to hold its licences.
2. The Claimant is a global citizens movement which has concerns about how the concentration of media ownership threatens the public interest.
3. Ofcom is a statutory body constituted under section 1 of the Office of Communications Act 2002. Its functions include the regulation of television and radio broadcasting in the United Kingdom, as principally provided for by the Communications Act 2003 (“the 2003 Act”).
4. The Secretary of State for Digital, Culture, Media and Sport (“the Secretary of State”) takes the final decision as to whether the proposed merger will operate against the specified public interests, which include “plurality of the media”, and what remedy should be imposed (see Article 12 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003) (“the 2003 Order”).
5. At the time of the Decision, Fox held 14 broadcast licences issued by Ofcom which cover services including Fox News.
6. At the time of the Decision, Sky held 54 television broadcast licences issued by Ofcom, which cover services including Sky News.
7. The Murdoch Family Trust owns 38.9% of Fox. Currently Fox owns 39.1% of Sky. After the proposed merger Fox would own 100% of Sky.
8. On 22 January 2018 Morris J granted permission to apply for judicial review.

### **Factual Background**

9. On 9 December 2016, Sky announced that it had received an approach from Fox to acquire the shares in Sky that it does not already own.
10. On 3 March 2017, Fox notified the European Commission (“the Commission”) of the proposed merger.
11. On the same day the Secretary of State published a “minded to” letter in which she gave notice that she intended to issue a European Intervention Notice (“EIN”) in respect of the Fox/Sky merger. She identified two public interest considerations, namely (1) media plurality; and (2) genuine commitment to the attainment of broadcasting standards.

12. On 16 March 2017 the Secretary of State issued an EIN stating that she would be intervening in respect of the Fox/Sky transaction on the two public interest grounds she had identified.
13. On the same day Ofcom issued a *Guidance Note for public interest test on the proposed acquisition of Sky plc by 21<sup>st</sup> Century Fox Inc*, and an *Invitation to comment*.
14. The Claimant made submissions to Ofcom on Fox's record and on the question of whether Sky would, after acquisition by Fox, be a fit and proper person to hold a broadcasting licence; and in addition the Claimant attended oral evidence sessions with senior officials from Ofcom on 12 April, 9 May and 17 May 2017.
15. On 29 June 2017 Ofcom published (1) its advice to the Secretary of State under the 2003 Order in respect of the two public interest considerations ("the Public Interest Report"); and (2) the Decision, namely the result of its review on whether, following the proposed merger, Sky would be a fit and proper person to hold a broadcasting licence.
16. In respect of the Public Interest Report, Ofcom concluded that the transaction raised a public interest concern, that media plurality would be adversely affected and that this concern may justify a reference by the Secretary of State to the Competition and Markets Authority ("CMA").
17. In the Decision Ofcom concluded (at para 10):

"In summary the behaviours alleged at Fox News amount to significant corporate failure, however the overall evidence available to date does not provide a reasonable basis to conclude that if Sky were 100% owned and controlled by Fox, it would not be fit and proper to hold broadcast licences."
18. At paragraph 70 of the Decision Ofcom stated:

"In 2012, we carefully considered the available evidence including in relation to the directors and managers that Sky shared with NGN (i.e. James Murdoch and Rupert Murdoch). We came to the view then that Sky remained fit and proper to hold a broadcast licence, while acknowledging that senior leadership fell short of the conduct to be expected. No new material evidence directly touching on those individuals has come to light since 2012. Disclosure is still ongoing in civil litigation against NGN and if this throws up new evidence, we will consider it as part of our ongoing duty to assess fitness and properness."

### ***Developments post the Decision***

19. On the same day as the publication of the Decision, 29 June 2017, the Secretary of State announced that she was minded to refer the merger to the CMA for further investigation, on the ground of media plurality (but not in respect of the need for a

genuine commitment to broadcasting standards, in relation to which she requested comments).

20. On 8 August 2017, following further submissions from the Claimant and representations from others on her referral decision, the Secretary of State announced that she would be taking further advice from Ofcom.
21. On 21 August 2017 the Claimant's solicitors, Hausfeld, sent Ofcom a pre-action letter in which they stated that the Claimant intended to challenge the Decision.
22. On 12 September 2017 the Secretary of State wrote to Sky and Fox and informed them that, in addition to the media plurality ground, she was now minded to refer the merger to the CMA on the ground of commitment to broadcasting standards.
23. On 14 September 2017 Ofcom replied to the pre-action letter of 21 August 2017. It denied the proposed claim in its entirety, although on 11 September it issued a revised version of the Decision stating that new wording in two paragraphs better conveyed its originally intended reasoning.
24. On 20 September 2017 the Secretary of State referred the two public interest considerations to the CMA.
25. On 23 January 2018 the CMA published its provisional findings on the reference from the Secretary of State ("Provisional Findings"). The CMA provisionally found (1) that Fox, Sky and the Murdoch Family Trust had a genuine commitment to the attainment of the broadcasting standards set out in s.319 of the 2003 Act, and that the proposed merger could not be expected to operate against that public interest consideration; and (2) the proposed merger may be expected to result in insufficient media plurality and operate against that public interest consideration, and the CMA published a notice setting out possible remedies that could address these provisional concerns.
26. On 3 April 2018 the CMA published undertakings offered by Fox to ring-fence Sky News or to divest it to The Walt Disney Company ("Disney"), in each case containing detailed safeguards ensuring the ongoing editorial independence of Sky News.
27. On 1 May 2018 the Secretary of State received the final report submitted by the CMA on the public interest considerations raised by the proposed merger.
28. On 5 June 2018 the Secretary of State wrote to Fox and Sky issuing his public interest decisions in relation to the proposed merger. Shortly thereafter, he made a public statement to Parliament and published the CMA's final report. He decided that the merger may be expected to operate against the public interest on the plurality ground (the public interest consideration set out in s.58(2C)(a) of the Enterprise Act 2002), but not on grounds of the parties' commitment to broadcasting standards.
29. The Secretary of State was required to consider, in accordance with Articles 12(6) and (7) of the 2003 Order, what action would be reasonable and practicable to remedy, mitigate or prevent adverse public interest effects which may be expected to result from the proposed merger. Having considered the CMA's assessment of different remedy options, the Secretary of State found, in line with the CMA's conclusions, that

the divestiture of Sky News to Disney or to another suitable purchaser could potentially remedy the adverse public interest effects in an effective and proportionate manner.

30. On 19 June 2018 the Secretary of State published updated undertakings offered by Fox, along with new undertakings offered by Disney, for the divestment of Sky News to Disney. The Secretary of State considered that these undertakings provided significant protections for the long-term future and editorial independence of Sky News. In consequence of this, he stated that he now proposed to accept the Fox and Disney undertakings. However before doing so, and in accordance with the 2002 Act, he would commence a consultation period within which representations may be made in relation to the proposed undertakings. That consultation period lasted until 5pm on 4 July 2018.
31. By letter dated 21 June 2018 Allen & Overy, solicitors for Fox, wrote:

“During the second day of the hearing, Leading Counsel for the Claimant raised the possibility that 21CF might challenge the decision of the Secretary of State for Digital, Culture, Media and Sport dated 5 June 2018 pursuant to Article 12 of the Enterprise Act (Protection of Legitimate Interests) Order 2003 that 21CF’s proposed acquisition of the remaining shares in Sky plc may be expected to operate against the public interest, taking into account the media plurality public interest consideration specified in section 58(2C)(a) of the Enterprise Act 2002 (the Public Interest Decision). The effect of any such challenge, the Claimant submitted, would be uncertainty as to the potential outcome of the proposed transaction.

For completeness, we note that any such challenge would be [by] way of an application for review to the Competition Appeal Tribunal pursuant to section 120 of the Enterprise Act 2002 and must be brought by 3 July 2018, being four weeks from the date on which the Public Interest Decision was notified to 21CF and published (Competition Appeal Tribunal Rules 25(1)).

21CF’s Leading Counsel confirmed that we would update the Court and the parties upon obtaining instructions on any such challenge. We are now in a position to confirm that 21CF will not bring an application for review in respect of the Public Interest Decision.”

## **The Legislative Framework**

### ***The Broadcast Licensing Regime***

32. Section 13(1) of the Broadcasting Act 1990 (“the 1990 Act”) requires a provider of any “relevant regulated television service” to hold a licence under the 1990 Act, or the Broadcasting Act 1996 (the “1996 Act”). Ofcom is responsible for deciding whether

to grant a licence to a broadcaster, and for regulating its conduct while it holds its licence.

33. The relevant parts of s.3 of the 1990 Act state:

“(1) Any licence granted by Ofcom under this Part shall be in writing and (subject to the provisions of this Part) shall continue in force for such period as is provided, in relation to a licence of the kind in question, by the relevant provision of chapter 2 or 5 of this Part or section 235 of the Communications Act 2003.

(2) A licence may be so granted for the provision of such a service as is specified in the licence or for the provision of a service of such a description as is so specified.

(3) Ofcom—

(a) shall not grant a licence to any person unless they are satisfied that he is a fit and proper person to hold it; and

(b) shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence;

and nothing in this Part shall be construed as affecting the operation of this sub-section or of section 5(1) or (2)(b) or (c).”

34. Ofcom is required to act in accordance with general duties in carrying out its functions, as set out in section 3 of the Communications Act 2003 (“the 2003 Act”). Section 3 provides, so far as is relevant:

“(1) It shall be the principal duty of Ofcom, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

(2) The things which, by virtue of sub-section (1), Ofcom are required to secure in the carrying out of their functions include, in particular, each of the following—

...

(c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;

(d) the maintenance of a sufficient plurality of providers of different television and radio services;

(e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services; and

(f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both—

(i) unfair treatment in programmes included in such services; and

(ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

...

(4) Ofcom must also have regard in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

...

(g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression.”

35. Section 319 of the 2003 Act, “**Ofcom’s standards code**” provides:

“(1) It shall be the duty of Ofcom to set, and from time to time review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.

(2) The standards objectives are—

...

(c) that news included in television and radio services is presented with due impartiality and that the impartiality requirements of s.320 are complied with;

(d) that news included in television and radio services is reported with due accuracy;

...

(3) The standards set by Ofcom under this section must be contained in one or more codes.

(4) In setting or revising any standards under this section, Ofcom must have regard, in particular and to such extent as appears to them to be relevant to the securing of the standards objectives, to each of the following matters—

...

(f) the desirability of maintaining the independence of editorial control over programme content.”

36. Ofcom has specific duties relating to due impartiality under s.320 of the 2003 Act. S.320 provides, so far as is relevant:

“(1) The requirements of this section are—

(a) the exclusion, in the case of television and radio services (other than a restricted service within the meaning of s.245), from programmes included in any of those services of all expressions of the views or opinions of the person providing the service on any of the matters mentioned in sub-section (2);

(b) the preservation, in the case of every television programme service, teletext service, national radio service and national digital sound programme service, of due impartiality, on the part of the person providing the service, as respects all of those matters;

(c) the prevention, in the case of every local radio service, local digital sound programme service or radio licensable content service, of the giving of undue prominence in the programmes included in the service to the views and opinions of particular persons or bodies on any of those matters.

(2) Those matters are—

(a) matters of political or industrial controversy; and

(b) matters relating to current public policy.

...

(4) For the purposes of this section—

(a) the requirement specified in sub-section (1)(b) is one that (subject to any rules under sub-section (5)) may be satisfied by being satisfied in relation to a series of programmes taken as a whole;



(b) the requirement specified in sub-section (1)(c) is one that needs to be satisfied only in relation to all the programmes included in the service in question, taken as a whole.”

37. Ofcom’s Broadcasting Code (“the Code”) provides at Section 5:

**“Principles**

To ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality.

To ensure that the special impartiality requirements of the Act are complied with.

**Rules**

Meaning of ‘due impartiality’:

‘Due’ is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. ‘Due’ means adequate or appropriate to the subject and nature of the programme. So ‘due impartiality’ does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context, as defined in Section Two: Harm and Offence of the Code, is important.

**Due impartiality and due accuracy in news**

5.1 News, in whatever form, must be reported with due accuracy and presented with due impartiality.

5.2 Significant mistakes in news should normally be acknowledged and corrected on air quickly (or, in the case of BBC ODPS, corrected quickly). Corrections should be appropriately scheduled (or, in the case of BBC ODPS, appropriately signalled to viewers).

**Special impartiality requirements: news and other programmes**

5.9 Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of ‘personal view’ or ‘authored’ programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a

series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality. Presenter phone-ins must encourage and must not exclude alternative views.

5.12 In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented.”

### **Article 10 ECHR**

38. Article 10 provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

### **Grounds of Challenge**

39. Mr George Peretz QC, for the Claimants, advances four grounds of challenge:

- i) Ofcom erred in applying a high threshold to finding a broadcaster not fit and proper to hold a broadcast licence (**Ground 1**);
- ii) Ofcom adopted an irrational approach to Fox’s conduct in relation to broadcasting regulation (**Ground 2**);
- iii) Ofcom’s assessment of Fox’s failures of corporate governance in relation to serious allegations of sexual and racial harassment at Fox News was inadequate (**Ground 3**); and
- iv) Ofcom’s failure to take account of earlier findings made in 2012 in respect of James Murdoch was irrational (**Ground 4**).

## **The parties' submissions and discussion**

### ***Whether the Claim has become academic***

40. The Claimant acknowledged, when instituting these proceedings, that “there is a significant chance that this claim may become academic, because the CMA, and then the Secretary of State, may decide on “merger related” grounds, that the proposed transaction between Fox and Sky should be blocked. If that happens then there will be no need for this claim to proceed, as the Decision will become moot” (Claimant’s statement of facts and grounds for judicial review, para 145).
41. At the outset of the hearing Mr Julian Gregory, for the Secretary of State, outlined the Secretary of State’s position as set out at paragraphs 28-30 above.
42. Lord Pannick QC, who appears for Fox, and Mr Kieron Beal QC, for Sky, submit that, in the light of these recent events, the claim has become moot. The proposed merger will only proceed if Sky News is divested to Disney, as proposed by Fox, or to an alternative suitable buyer. If acceptable terms cannot be settled in respect of such divestment, then the merger will be prohibited.
43. Mr Peretz, whilst accepting that is likely to be the position, did not agree that the claim had as yet become academic as there was still the possibility that Fox might challenge the Secretary of State’s decision of 5 June 2018.
44. By their solicitor’s letter dated 21 June 2018 Fox has now confirmed that it will not bring an application for review in respect of the Public Interest Decision (see para 31 above).
45. That being so, I consider that the issues in this judicial review challenge have now become academic.
46. In these circumstances I will deal with the grounds of challenge more shortly than I otherwise would have done.

### **Ground 1: Ofcom erred in the application of a “high threshold”**

47. Ofcom set out in the Decision the “threshold” which it had applied to determine whether Sky would remain fit and proper to hold its broadcast licences in the event of the merger going ahead. It stated:

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

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

broadcaster must either have had a consistently poor record of complying with broadcasting regulations or committed such egregious misconduct outside the broadcasting arena to raise fundamental questions about their integrity as a broadcaster.

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

48. Mr Peretz contends that Ofcom placed no weight on the implications for freedom of speech if a broadcaster, not committed to impartiality or accuracy, was permitted to take over Sky. Further, it did not place any weight on the desirability recognised by Parliament when it created the requirements of impartiality and accuracy that “the playing field of debate should be so far as practicable level” (*R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312, per Lord Bingham at para 28).
49. Ofcom, Mr Peretz submits, failed to take account of the fact that the need to protect freedom of expression cuts both ways when the concern is, as it is here, about the willingness of the entity at issue to comply with its obligations of impartiality and accuracy. The high threshold test, he suggests, ignores the rights of those with different views to express those views on broadcast media, and the corresponding public interest in receiving accurate and impartial information on those media. Accordingly, Mr Peretz contends, Ofcom failed to take account of the countervailing Article 10 rights of those from all parts of the political spectrum, seeking a fair opportunity to express their views on broadcasting media (and in particular on an important Sky channel), and the profound public interest, protected by Article 10, in imparting and receiving accurate and impartial information and a range of viewpoints, fairly presented.
50. Mr Peretz submits that in formulating the relevant test Ofcom should have taken into account the requirement to guarantee effective pluralism (see *Animal Defenders International v UK* [2013] 57 EHRR 21 at paras 100-105).
51. Mr Peretz makes two further criticisms of Ofcom’s “high threshold” approach. First, he submits that the approach allowed for examination only of past breaches of broadcasting regulations and non-broadcasting conduct (see Decision, para 7 at para 47 above), and left no room for examining (and led Ofcom to ignore) “the tendency to bias and inaccuracy of a broadcaster [and those who control it] that has deliberately chosen to operate a grossly biased and inaccurate news channel in legal regimes [in the US and Australia] that provide no, or no effective control, on bias or inaccuracy” (Claimant’s skeleton argument, para 38).

52. Second, Mr Peretz submits that Ofcom erred in placing weight on the point that a negative finding would cause subscribers to lose their Sky channels. The decision would not have had an immediate impact on subscribers of Sky, rather its effect would have been on the proposed merger. Further, Mr Peretz contends that Ofcom was wrong to suggest that it would necessarily follow from a finding that Fox was not fit to hold a licence in the present case that existing licences held by Fox subsidiaries such as “National Geographic” channels would have to be revoked.
53. I do not accept the contention that Ofcom erred in applying a high threshold to the question whether there was a sufficient basis to conclude that Sky, after the proposed merger, would cease to be fit and proper to hold its broadcast licences.
54. There is no guidance in the statute as to the height of the threshold to be applied in assessing whether a broadcaster is fit and proper. Accordingly this is a matter for Ofcom’s judgment, subject to rationality review.
55. Far from being irrational, it seems to me, as Mr Pushpinder Saini QC, who appears for Ofcom, contends, Ofcom had to be satisfied that any decision that a broadcaster is not fit and proper is necessary and proportionate to the interference with Article 10 ECHR rights that is entailed by licence revocation; and Ofcom was therefore required to apply a high threshold.
56. I do not consider it to be irrational to set a high threshold in determining whether or not a broadcaster with a very large number of viewers should have its broadcasting licences, on which its business depends, revoked. Any adverse decision would be likely to have had a very significant effect on the businesses of Sky and Fox.
57. I reject the contention that Ofcom placed no weight on issues concerning freedom of speech in relation to the ability of persons with differing views to express those views through broadcast media. Paragraphs 7 and 18 of the Decision (see para 47 above) make clear that Ofcom did have regard to these issues. However Ofcom recognised that there were countervailing considerations arising for freedom of speech if it were to take a decision to revoke broadcasting licences, and not just licences relating to news channels, held by broadcasters such as Sky and Fox.
58. Paragraphs 66 and 67 of the Decision again make clear that Ofcom took into account the impact of its decision on freedom of speech:

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

67. Broadcast content, and in particular news, is regulated to ensure fairness and privacy for people who take part in programmes, and impartiality and accuracy in news, and to

guard against harm and offence across the board. No-one has suggested that Sky, while under Fox's partial control, has been used for reprisal. We cannot reasonably conclude that Sky would be used to that end if the transaction were to proceed."

59. Contrary to the Claimant's contention, I agree with Mr Beal that individuals do not have any right to gain access to broadcast media to express their views. The domestic rules concern due impartiality and accuracy and a need to maintain plurality, but do not give access to broadcaster's "platform" as of right. A "level playing field" is secured by domestic rules concerning due impartiality and accuracy and the statutory requirement to maintain plurality. Ofcom did consider that there was a risk that plurality might be endangered by the merger. It was on this basis that Ofcom advised the Secretary of State that the merger ought to be referred to the CMA. However, it did not consider that there was significant risk a Fox-owned Sky would depart from UK broadcasting standards, including those relating to impartiality and accuracy. In the light of this conclusion, concerns that Sky after the merger would not respect the rules about impartiality and accuracy did not have to be weighed in the balance in an Article 10 context.
60. As for the criticism that Ofcom's approach by focussing on past breaches of broadcasting regulations and non-broadcasting misconduct ignored evidence of bias and inaccuracy, that does not go to the question of whether Ofcom was right to apply a high threshold. I agree with Mr Saini that the question as to whether the threshold should be treated as a high one is different from the question of what aspects of conduct are relevant to fitness and propriety.
61. Finally, I do not accept the contention that Ofcom was not justified in applying a high threshold to a fit and proper decision made prospectively. Having concluded that there is a high threshold to finding a broadcaster not fit and proper because of the consequences that such a finding will have in general, Ofcom was correct to proceed on the basis that the threshold for the prospective assessment of Sky's fitness and propriety after the merger was similarly high. Further I accept Mr Saini's submission that a finding that Fox's control of Sky would render Sky no longer fit and proper to hold its licence would, logically, require Ofcom to revoke Fox's existing broadcast licences, whether or not the merger goes ahead. Were Ofcom to conclude that Fox would not be fit and proper to hold a broadcast licence because it could not be trusted to comply with the Broadcasting Code, such concerns would apply equally to all licences held by that broadcaster. The decision was in relation to Sky's licences generally.

## **Ground 2: Irrational approach to Fox's conduct in relation to broadcasting regulation**

62. Mr Peretz criticises Ofcom's conclusion that Fox and Sky had acceptable records of compliance with broadcasting regulation under three heads of challenge. First, that Ofcom wrongly focussed on past compliance when it should have considered whether Fox had a "genuine commitment" to broadcasting standards. Second, it failed to take account of key relevant considerations, or placed inadequate weight on those considerations, which failures were irrational; and third, it failed to appreciate the impact of Fox's corporate governance failures on the integrity of its news broadcasts.

63. As for the first, Mr Peretz submits that Ofcom wrongly took the approach of considering Fox's past compliance with broadcasting standards; an approach that was also irrational when considered as the only indicator of the merged entity's future fitness. Ofcom should, he contends, have considered the issue of Fox's gross bias and inaccuracy when asking itself whether Sky post-merger could be expected to be a responsible broadcaster. The only part of the decision that Ofcom is able to refer in order to show that it considered Fox News's bias and inaccuracy is footnote 11 to paragraph 31 which states:

“We received a number of submissions that the transaction should not be permitted because of the general nature of the content broadcast by Fox News: concerns were raised about, for example, sexism, Islamophobia and ‘fake news’...”

64. Mr Peretz suggests that the reference to “fake news” is not to bias; and this generalised reference fails to deal with the specific point that Fox News's US content raised serious questions about the broadcaster's likely compliance with the requirements of impartiality and accuracy post-merger. Mr Alexander Wilks, employed by the Claimant as a Campaign Director, states in his witness statement:

“32. There is clear evidence that the way Fox-owned channels around the world operate runs counter to UK broadcasting standards and shows what kind of standards the Murdochs are committed to when they have a free choice...”

33. In addition, Rupert Murdoch has clearly stated that he wants to make Sky News in the UK more like Fox News. There is a recent example that shows he means what he says. Murdoch's News Corp. Australia took 100% ownership of Sky Australia on 30<sup>th</sup> November 2016. We submitted evidence showing how Sky News in Australia has already overhauled its evening news schedule, modelled on Fox News, to feature panellists with extreme and abusive views...”

Mr Peretz points to section 58(2C)(c) of the Enterprise Act 2002 as indicating the importance Parliament attached to the existence of a genuine commitment to broadcasting standards as a public interest consideration sufficient to justify the prohibition of a merger in the media sector.

65. The court will not lightly interfere with the exercise of Ofcom's regulatory judgment. Ofcom has considerable expertise and experience of issues that arise as to whether a broadcaster is fit and proper to hold a broadcast licence. Cranston J observed in *R (EE Ltd) v Ofcom* [2016] EWHC 2134 (Admin) at para 109: “Ofcom enjoys a margin of appreciation on issues which entail the exercise of its judgment”. I agree with Lord Pannick that in the context of a decision involving such a substantial element of predictive judgment, the court will be especially slow to intervene.
66. I am not persuaded that there was any error in Ofcom's approach to Fox's conduct. Ofcom considered the broadcast-related behaviour of Sky (Decision, paras 28-30), and of Fox (Decision, para 31), and compared Fox's and Sky's track record of compliance with that of comparable broadcasters (Decision, paras 32-34). In addition

it considered the parties' records of broadcast regulation compliance overseas (Decision, paras 39-42). I agree with Mr Saini that the suggestion that footnote 11 to paragraph 31 of the Decision only addresses fake news, but not bias, is based on an artificially narrow reading of the footnote. Ofcom received and considered representations from the Claimant and others suggesting that Fox had a history of biased and inaccurate reporting (Decision, paras 19-20). The weight to be attached to that evidence was a matter for Ofcom. Ofcom concluded in the Decision at para 42:

“We did not consider that the number or nature of the breaches gave rise to concerns in the light of the different approach to regulation taken by the jurisdictions.”

67. The second head of this ground of challenge is that Ofcom failed to take into account a number of key factors. First it is said that Ofcom relied on limited evidence, to the exclusion of other highly material evidence. In particular it relied on a low number of complaints against Fox News as an indicator of fitness, without taking into account the small and self-selecting nature of the channel's audience in the UK; and it undertook selective monitoring of Fox News coverage limited to the seven weeks of the UK 2017 election campaign, rather than conducting a qualitative analysis of Fox News coverage as a whole.
68. Second, Ofcom failed to address adequately or at all the concerns raised by the Claimant and others about the intentions of the Murdochs in seeking to merge Fox and Sky when Rupert Murdoch is on the record as having said that he wants Sky News in the UK to become more like his politically partisan cable network Fox.
69. Third, Ofcom's approach to Fox News's failure to have any system in place for compliance with UK broadcasting standards between 14 September 2001 and 15 May 2017 was irrational. In addition, for a company such as Fox News not to have any policy for compliance with its UK regulatory obligations, 14 years after it began broadcasting in the UK, and to introduce one only once a regulatory process was already underway, is a factor to which any rational regulator would give significant weight in assessing fitness.
70. Fourth, consideration of Sky's compliance record pre-merger was essentially irrelevant, given that the question was whether a Fox-controlled Sky would be fit and proper.
71. I do not accept that Ofcom failed to take into account any of these factors. Essentially the Claimant's criticisms are directed at the weight that Ofcom placed on the individual factors. First, it is clear from paragraph 31 of the Decision that Ofcom considered Fox's record of breaching of the Code across all of the 14 services, taking account of the number and seriousness of the breaches. Ofcom's monitoring of Fox News during the 2017 election period constituted relevant evidence which Ofcom properly took into account.
72. Second, Ofcom was entitled to take the view that in all the circumstances (having regard to the fact the statement was made over ten years ago, and the compliance records of Fox and Sky of UK broadcasting over the subsequent period) that Rupert Murdoch's 2007 statement was not material to its assessment of whether Sky would remain fit and proper, in respect of its broadcasting activities, after a Fox takeover.



Ofcom considered the 2007 Statement by Rupert Murdoch in the context of its Public Interest Report to the Secretary of State for the proposed acquisition of Sky by Fox (20 June 2017). At para 10.46 Ofcom stated:

“Respondents [i.e. the Claimants and others] referred to a statement by Rupert Murdoch which indicated his view that Sky News would be more popular if it was more like Fox News, and that it would be possible to do this within the confines of the impartiality rules of the Broadcasting Code. We note in respect of this statement that there is explicit reference to compliance with the Broadcasting Code. In our view this does not show that Rupert Murdoch would, if granted full control of Sky, seek to breach the provisions of the Broadcasting Code.”

73. Section 3 of the 1990 Act does not say that a broadcasting licence can be revoked unless a broadcaster demonstrates “a genuine future commitment to broadcasting standards”. What has to be considered is whether Sky would remain a fit and proper person to hold a broadcasting licence. I agree with Mr Saini and Mr Beal that there is no evidence that Sky News would fail to comply with the due impartiality and accuracy requirements in the Broadcasting Code post-merger. As to the first point: the allegedly biased broadcasts were aired under different regulatory regimes in other jurisdictions to which different broadcasting standards are applied; in circumstances where those broadcasts complied with the applicable regulatory regime. Both Sky News Australia and the broadcasts in the United States are subject to different regulatory frameworks. It is common ground that Australia, like the US, do not impose UK-style regulation of impartiality on current affairs programming (though there are standards in relation to news). Ofcom, in its letter to the Secretary of State dated 25 August 2017 wrote:

“... we do not consider that Fox News’s broadcasts in the US or Australia are a guide to its commitment to broadcasting compliance to the UK because the broadcast conduct complained of in several representations does not breach broadcasting regulation in those jurisdictions.”

74. Third, at paragraph 37 of the Decision Ofcom did express its concern that Fox did not have adequate compliance procedures in place for the broadcast of Fox News in the UK and only took action to improve its approach to compliance after it expressed its concern. However I agree with Mr Saini that Ofcom was entitled to conclude that, overall, the absence of an adequate compliance procedure at Fox News did not support a finding that Sky, post-merger, would cease to comply with broadcasting regulation. Lord Pannick and Mr Beal both point to the relevant findings and conclusions of the CMA in their final report of 1 May 2018 on the anticipated acquisition by Fox of Sky on “Genuine commitment to the attainment of broadcasting standards”. At paragraph 138, in relation to Sky, the CMA concluded:

“Having reviewed Sky’s record of compliance with the Broadcasting Code and evidence of the other ways in which Sky has acted to promote and support the attainment of the broadcasting standards objectives within its business, we

concluded that Sky is genuinely committed to the attainment of the broadcasting standards objectives in the UK.”

At paragraph 146, in relation to Fox, the CMA concluded:

“... that the evidence from overseas jurisdictions on Fox’s record of and approach to compliance outside the UK does not raise concerns about Fox’s commitment to the broadcasting standards objectives in the UK.”

In their findings in relation to allegations of misreporting by Fox in the US the CMA noted at paragraph 15.44:

“that broadcasting standards and rules in the US are very different from those in the UK. In particular they do not impose requirements regarding due accuracy and due impartiality. We therefore attach greater weight to the evidence relating to Fox’s approach to broadcasting standards in the UK... in our assessment of the broadcasting standards consideration.”

The CMA’s conclusions on this issue of genuine commitment to the attainment of broadcasting standards chime, as Mr Beal observes, with the assessment of Ofcom in the Decision at paragraphs 37 and 62.

75. If in the future Sky is in breach of the Broadcasting Code Ofcom will be able to exercise its regulatory enforcement powers to rectify the situation.
76. Fourth, Ofcom was entitled to take the view that Sky’s compliance record pre-merger is relevant when considering whether post-merger there is likely to be a fundamental shift in Sky’s approach to broadcast compliance. Ofcom took into account evidence of past compliance with its own regulatory regime in order to assess the extent to which ongoing compliance with broadcasting standards could be expected with that very same regime in the future (Decision, paras 23 and 24). Sky and Fox had already shown themselves sufficiently fit and proper to hold licences for many years. Ofcom was entitled to take the view that any risk of serious breaches could be addressed through its enforcement powers.
77. The third head of this ground of challenge is that Ofcom failed to consider, or irrationally gave no weight to, Fox’s corporate governance failures as an indicator of its past and likely future broadcast conduct, limiting its assessment of broadcasting conduct to past breaches. This criticism now appears to form part of Ground 3 of the challenge which I will address below.

### **Ground 3: Ofcom’s inadequate assessment of Fox’s failures of corporate governance**

78. Mr Peretz submits that Ofcom’s approach to Fox’s history of misconduct was irrational, either because it failed to have regard to that history, or because it irrationally afforded it no weight.

79. Ofcom's decision contained what the Claimant describes as "an egregious error of fact" (Statement of Facts and Grounds, para 123) in that it asserted that almost all of the alleged sexual misconduct and settlements at Fox related to the period before 2012 and that this was significant because Fox had changed its corporate governance arrangements in that year, in response to the phone hacking scandal. Only after that error was pointed out in the Claimant's letter before action did Ofcom amend the Decision. Ofcom now accepted that a substantial number of misconduct allegations had been made in relation to the post-2012 period, but that no adverse conclusions could be drawn against Fox because those allegations or settlements had not been made until July 2016.
80. Ms Frances Weitzman, Ofcom's General Counsel, explains the reason for the change in wording in the Decision:

"5. ... I accept that paragraphs 55 and 61 of the Decision as [originally] drafted did not fully express Ofcom's reasoning underlying the Decision. However, Ofcom was not in error on the point of fact in question and I confirm that Ofcom was well aware of and took into account the allegations and complaints raised about conduct taking place after 2012 and before July 2016 that were drawn to its attention. I can also confirm that any such purported error did not infect or underpin Ofcom's conclusions that: (1) knowledge of (or an attitude of toleration towards) misconduct at Fox News could not be imputed to the executive directors of Fox on the basis of the facts known; (2) the corporate governance procedures put in place in 2012, and Fox's explanation of those procedures, together with James and Lachlan Murdoch's personal representations on the subject, meant that Fox's pre-2012 failures of corporate governance did not have necessary implications for the future; or more generally, and most importantly, (3) the allegations of wrongdoing at Fox News (pre- and post-2012) did not provide a reasonable basis for a conclusion that a takeover of Sky by Fox News's parent company would cause Sky to become not-fit-and-proper to retain its broadcast licences. None of these conclusions was premised on a false assumption or understanding that no complaints, allegations or settlements relating to misconduct at Fox News after 2012 were raised.

6. I first noticed the drafting of paragraphs 55 and 61 was unclear following Avaaz's letter before claim. Ofcom therefore added explanatory wording to those paragraphs of the Decision on 11 September 2017 in order to identify more clearly the matters relied upon in arriving at our Decision."

81. Mr Peretz accepts the credibility of this evidence but submits that this explanation provides no answer to the critical question, in the context of Fox's alleged compliance programme, as to why the serious allegations made since 2012 that came to light only after July 2016 were not picked up earlier. A key aspect of good corporate governance is that serious matters requiring the attention of the leadership are escalated upwards to the leadership. Mr Peretz says there is no trace in the Decision

that Ofcom looked at or reached any conclusion as to why Fox did not know about the post-2012 misconduct.

82. Ofcom considered the allegations that had been put to them about sexual harassment at Fox News to be of an extremely serious and disturbing nature (Decision, para 46), and the allegations of racial harassment by a particular manager at Fox News (who has been fired) to be just as disturbing (Decision, para 47). Fox dismissed Roger Ailes, former Chief Executive Officer at Fox News in July 2016; Bill O'Reilly, a former star anchor on Fox News in April 2017; a Fox News Chief Financial Operator; a Fox News Comptroller; and a number of other employees, in the light of allegations of misconduct (Decision, para 51). The Decision noted (at para 51):

“It seems clear that things went seriously wrong at Fox News. This was a grave failure of corporate governance, which gives rise to two questions.

- First, did the management of Fox know about the misconduct and fail to act?
- Second, if they did not know, can the public have confidence that any future corporate governance failings, which might touch on broadcasting, will be dealt with effectively?”

83. Ofcom considered “*What management knew*” (Decision, paras 52-54) and concluded that there was no evidence that any executive director at Fox knew about the alleged misconduct prior to July 2016, and on that basis, their failure to act cannot be held against them (Decision, para 54).
84. It was not Ofcom’s role to investigate the accuracy of the claims (Decision, para 50), but what Ofcom rightly did consider under the headings “*Allegations of sexual misconduct*” (Decision, paras 55-60) and “*Allegations of racial misconduct*” (Decision, para 61) was Fox’s response to the allegations.
85. Under the heading “*Implications of future governance*” (at paras 62-63 of the Decision) Ofcom set out its conclusions on this issue:

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

were Sky to be 100% owned by Fox, it would be fit and proper to hold its broadcast licences.

63. Our duty to be satisfied that broadcast licensees remain fit and proper is ongoing, and we would review this position if further evidence were to become available.”

86. Mr Peretz takes a further point under this ground of challenge. He contends that Ofcom’s conclusion in relation to Fox’s non-broadcast conduct was also irrational because Ofcom failed to consider whether public confidence in broadcasting would be undermined by the large number of allegations of sexual and racial misconduct made against Fox, and the way in which Fox responded to those allegations.
87. Ofcom had well in mind that non-broadcast conduct could weaken public confidence in the regulated activity, and that is a relevant consideration in judging whether someone is fit and proper to hold a broadcast licence (Decision, para 16(b)). However Ofcom did not consider that the overall evidence provided a reasonable basis to conclude that post-merger Sky, would not be fit and proper to hold broadcast licences (Decision, para 10). Ofcom gave careful consideration to Fox’s responses to the allegations and took into account the statements of James and Lachlan Murdoch that no employee of Fox News could now be under the impression that sexual or racial misconduct is acceptable (Decision, paras 60 and 61).
88. Ofcom says it is unaware of any alleged perpetrator of racial harassment who still occupies a senior position within Fox (Defendant’s detailed grounds of resistance, para 107). The Claimant suggests this is contradicted by the statement given in a letter from Lisa Bloom of The Bloomfirm to Ofcom on 4 May 2017 concerning Dianne Brandi, who is the in-house lawyer who acted for Fox News in relation to some of the racial harassment claims, and who remains in post at Fox News. Ms Bloom refers to claims made in US proceedings that Ms Brandi had mishandled the cases. However Mr Saini makes two points. First, Ofcom is not aware that it is alleged that Ms Brandi herself engaged in any racial harassment. Second, the fact that racial misconduct cases are ongoing against Fox is not inconsistent with the statement by the Murdochs that such conduct is no longer tolerated.
89. I reject the contention that Ofcom’s assessment of Fox’s failures of corporate governance was inadequate or that Ofcom’s approach to Fox’s history of misconduct was irrational.

**Ground 4: Irrational failure to take account of earlier findings made in 2012 in respect of James Murdoch**

90. At paragraph 70 of the Decision Ofcom state:

“In 2012, we carefully considered the available evidence including in relation to the directors and managers that Sky shared with NGN [News Group Newspapers] (i.e. James Murdoch and Rupert Murdoch). We came to the view then that Sky remained fit and proper to hold a broadcast licence, while acknowledging that senior leadership fell short of the conduct to be expected. No new material evidence directly touching on

those individuals has come to light since 2012. Disclosure is still ongoing in civil litigation against NGN and if this throws up new evidence, we will consider it as part of our ongoing duty to assess fitness and properness.”

91. Mr Peretz submits that that reasoning irrationally failed to take account of (1) Ofcom’s serious concerns, identified in 2012, about James Murdoch’s role and actions while chairman of Sky; (2) Ofcom’s reliance, in 2012, on James Murdoch’s limited future role within Sky as a material factor in its decision that Sky remained fit and proper; and (3) the fact that James Murdoch would be CEO of the merged Sky/Fox entity. In addition Mr Peretz suggests that it is not correct to say there was no new material evidence (see Mr Wilks’ witness statement at para 64).
92. Mr Peretz submits that paragraph 70 of the Decision contains no explanation as to how Ofcom reconciled its reliance in 2012, on the fact that James Murdoch would no longer be in charge of running Sky as a condition of finding Sky to be fit, with its 2017 conclusion that a merged Sky/Fox would be fit with James Murdoch as its CEO.
93. I think a fair reading of paragraph 70 is that in reaching the decision Ofcom did take into account its 2012 concerns about James Murdoch. It noted that in 2012, while acknowledging that senior leadership fell short of the conduct to be expected, it had concluded that Sky remained fit and proper to hold a broadcast licence. As part of its ongoing duty to assess fitness and properness Ofcom stated that in the future it will consider any new material evidence concerning James Murdoch that comes to light.
94. At paragraphs 41-47 of its 2012 Decision Ofcom set out its “Conclusion”. Paragraph 46 states:

“In the circumstances, and notwithstanding our views in relation to James Murdoch’s conduct, we do not consider, having taken into account all the relevant factors, that on the evidence available to date Sky is no longer fit and proper to hold broadcast licences. Whilst we consider that James Murdoch’s conduct in various instances fell short of the standard to be expected of the chief executive officer and chairman, we do not find that James Murdoch’s retention as a non-executive director of Sky means that Sky is not fit and proper to hold broadcast licences. We recognise that whether it is appropriate for James Murdoch to be a director in light of the events is a matter for the Board and shareholders of Sky.”
95. Mr Peretz appears to accept in describing Ofcom’s reliance, in 2012, on James Murdoch’s “limited future role within Sky as a material factor in its decision” that it was not “the key factor” as the Claimant had originally asserted (Claimant’s statement of facts and grounds for judicial review, para 138). It was one of the relevant factors to which Ofcom had regard.
96. In 2017 Ofcom assessed Sky’s fitness and propriety to retain its licences in the event of a merger with Fox. In so doing it had regard to the overall evidence available to date. This included what was said by James and Lachlan Murdoch personally to Ofcom at a meeting (Decision, paras 60 and 61), and that James and Lachlan

Murdoch have, since they have known about the alleged misconduct, been responsible for revision to Fox's corporate governance arrangements (Decision, para 62). James Murdoch was re-appointed as Chairman of Sky in April 2016. The Claimant does not suggest that Sky's conduct under his chairmanship has to date given rise to concerns about fitness and propriety, but the Claimant fears that the position will be different if the merger goes ahead when Fox will no longer be a minority shareholder and James Murdoch will be in a stronger position to shape the corporate culture of Sky (see Mr Wilks' witness statement at para 68).

97. I accept Mr Saini's submission that what Ofcom was required to do was to conduct a fair assessment in the light of all the relevant evidence as at 2017 when it made its decision, and that is what it did. I do not accept that there was a failure by Ofcom to take account of earlier findings made in 2012 in respect of James Murdoch, and certainly not any irrational failure as the Claimant alleges.

### **Conclusion**

98. For the reasons I have given, none of the grounds of challenge are made out. Accordingly this claim is dismissed.