

DECISION UNDER SECTION 3(3) OF THE BROADCASTING ACT 1990 AND SECTION 3(3) OF THE BROADCASTING ACT 1996: LICENCES HELD BY BRITISH SKY BROADCASTING LIMITED

1. Introduction

1. On 3 March 2017 21st Century Fox, Inc (“Fox”) notified the European Commission of its intention to acquire the shares in Sky plc (“Sky”) it does not already own. Sky controls a number of broadcast licences, and Ofcom has an ongoing duty to remain satisfied that broadcast licensees are fit and proper to hold a broadcast licence.
2. On 16 March 2017 the Secretary of State for Culture, Media and Sport issued a European Intervention Notice requiring Ofcom to report on the effects of the proposed transaction on two public interest considerations: plurality and commitment to the attainment of broadcast standards. Having received our report, the Secretary of State will decide whether the merger should be referred to the Competition and Markets Authority for a more detailed review before taking a final decision on whether the merger should go ahead.
3. The issues we have been required to consider in the public interest assessment overlap with our own consideration of Sky’s fitness to hold broadcast licences in the event of the merger going ahead.
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.
5. In considering whether Sky would remain fit and proper to hold its broadcast licences, we have considered compliance with the broadcast regulatory regime. Our assessment is that both Sky and Fox have satisfactory compliance records.
6. We have also considered whether matters outside the broadcasting arena would mean that Sky would not remain fit and proper because those matters meant it would:
 - pose a significant risk of harm to audiences;
 - lack respect for - or ability to comply with - the regulatory regime such that that regime was undermined; or
 - damage public confidence in the regulated activity.

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.
8. Fox's and Sky's records of compliance are in line with other broadcasters. However, Fox News failed to put in place regulatory compliance procedures; that is a serious weakness, only recently rectified. Allegations of sexual and racial harassment at Fox News are extremely serious and disturbing. The veracity of the claims is being considered by the US courts. As the broadcast regulator it is not our role to investigate the accuracy of the claims. Nor do we believe it is necessary to the effective exercise of our fit and proper duty.
9. It seems clear that there were significant failings of the corporate culture at Fox News. Fox's response to the claims has been mixed. Some allegations were handled swiftly. But Fox was slower to deal with Bill O'Reilly, its star anchor. In order to have a concern about fitness and properness we would need to see evidence of misconduct in the parent company Fox. However, we have no clear evidence that senior executives at Fox were aware of misconduct before it was escalated to them. And senior executives put in place new corporate governance arrangements. In relation to News Corp we considered phone hacking and its implications for Sky's fitness and properness in 2012. So far only limited new evidence has emerged, with legal proceedings ongoing. No concerns have been raised about the corporate culture of Sky. We cannot conclude, therefore, that Sky would fail to tackle effectively issues of misconduct, if 100% owned by Fox. We find that Sky would remain fit and proper in the event of the merger. Fitness and properness is an ongoing duty and we can re-examine our position if new evidence comes to light.

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.

2. Ofcom's approach to our fit and proper duty

11. A provider of any “relevant regulated television service” must hold a licence under the Broadcasting Act 1990 (the “1990 Act”) or the Broadcasting Act 1996 (the “1996 Act”) ¹. Depending on the type of television service, a provider may be licensed under either the 1990 Act or the 1996 Act. Sky holds licences of various kinds under each of these Acts.
12. Under s.3(3) of each of the 1990 Act and the 1996 Act, Ofcom:
- a. shall not grant a licence to any person ² unless satisfied that the person 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.
13. This duty should be understood in the context of Ofcom's role as the broadcast regulator, and of the regulatory regime for broadcasting.
14. The main reason for broadcasting to be regulated is to protect audiences from harm. Broadcasters are required to comply with Ofcom's Broadcasting Code, which sets standards for the content that is broadcast. The Code covers a range of issues, including safeguards to secure the protection of children. It also contains rules to protect people who participate in programmes from unfair treatment or from unjustified breaches of privacy. ³
15. Broadcasters must also comply with specific rules that are set as a condition of holding a licence. These cover issues like retaining programme recordings after broadcast; having procedures in place to ensure compliance with the Broadcasting Code and other regulations; and obligations to inform Ofcom of new information that might affect eligibility to hold a broadcast licence, such as a change of ownership. The Broadcasting Code and licence conditions are there to ensure responsible broadcasting. Once a broadcaster is licensed, they are able freely to broadcast into people's homes, and audiences have a right to expect programmes they watch to meet high standards.

¹Section 13(1) of the 1990 Act. A “relevant regulated television service” is a service regulated by Ofcom under s.211 of the Communications Act 2003.

² A “person” may be any legal person, which would include an individual and a corporation. In this case, the licensee is the company British Sky Broadcasting Limited.

³ The Code covers: (a) protection of under 18s; (b) incitement of crime etc; (c) impartiality; (d) accuracy of news; (e) responsibility in religious programmes; (f) adequate protection against offensive and harmful material; (g) political advertising; (h) misleading, harmful or offensive advertising; (i) international requirements on advertising; (j) sponsorship; (k) undue discrimination between advertisers; and (l) subliminal advertising. There are also standards for fairness and privacy and for cross-promotions.

16. In judging whether someone is fit and proper to hold a broadcast licence, the central consideration is whether they can be expected to be a responsible broadcaster. Key to this will be:
- a) **how well they have complied with regulatory standards and licence conditions.** Serious, repeated or ongoing breach of standards may suggest a lack of fitness and properness. A good record of compliance would suggest fitness and properness.
 - b) **how well they have conducted themselves beyond the broadcasting arena.** A broadcaster with a good compliance track record could be deemed unfit and improper for reasons outside the broadcasting arena that could affect their standing as a broadcaster. A broadcaster who committed a serious crime - for example, fraud or theft - could be deemed to pose a risk of substantial harm to an audience. Non-broadcast behaviour – like lying on oath - could be taken as an indication that the broadcaster lacks respect for, or the ability to comply with, the regulatory regime to the extent that retaining a licence to broadcast would undermine that very regime. Equally, non-broadcast conduct could weaken public confidence in the regulated activity. For example, four radio broadcast licences controlled by Owen Oyston were removed from him when he was convicted of rape.
17. As well as taking into account the broadcaster's own conduct, we can also consider the behaviour of people who exercise material influence or control over the broadcaster. These people might include directors, shareholders or any other person exercising control. The extent to which we do so will depend on their level of influence and on the circumstances such as the seriousness of the conduct.
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.

3. Our process

19. On 16 March 2017, Ofcom invited anyone who wished to do so to submit evidence relevant to our assessment of whether Sky would remain fit and proper to hold broadcast licences following the proposed change of control. We received 32,554 responses. Many of those who provided evidence for our separate public interest assessment of the change of control also raised concerns about fitness and properness.
20. We have considered carefully all of these responses. We met all of those who asked to meet us to explain their submissions. We have also carefully considered all the information provided to us by the parties to the proposed transaction, including in response to requests for information from us⁴ and at meetings.⁵
21. Ofcom sent a provisional decision to Fox for representations, which it provided on 16 June 2017. Ofcom has considered its representations and has taken them into account in reaching our final decision.

4. Issues considered

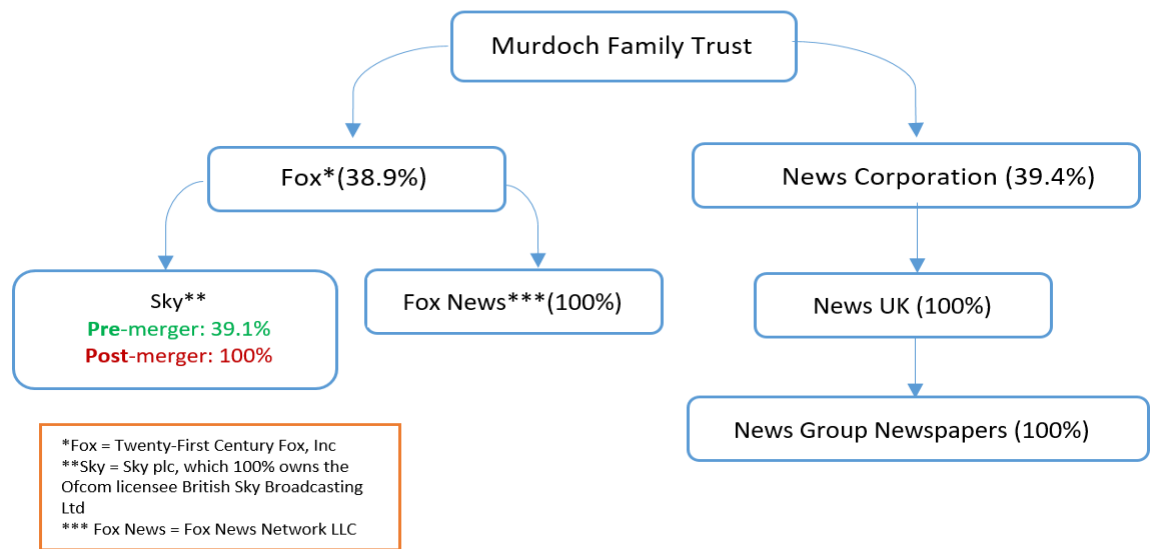
22. In judging whether Sky would remain fit and proper to hold its broadcast licences in the event of a takeover by Fox, it is important first to understand the nature of the corporate arrangements. Currently, Fox owns 39.1% of the shares in Sky.⁶ The transaction would mean it owned 100% of the shares in Sky.

⁴ Requests for information dated 20 March 2017, dated 4 April 2017; dated 5 April 2017, dated 6 April 2017 (to NGN) and dated 6 June 2017.

⁵ Meeting of 27 March 2017, attended by Fox's General Counsel & Chief Compliance Officer; its Deputy General Counsel & Deputy Chief Compliance Officer; and its Deputy General Counsel, Europe & Asia; together with representatives from Sky and external counsel. Meeting of 6 April 2017, attended by Fox's Deputy General Counsel & Deputy Chief Compliance Officer; and its Deputy General Counsel, Europe & Asia together with representatives from Sky and external counsel. Meeting of 18 April 2017, Fox's General Counsel & Chief Compliance Officer; its Deputy General Counsel & Deputy Chief Compliance Officer; and its Deputy General Counsel, Europe & Asia; together with external counsel. Meeting of 11 May 2017, attended by Fox's General Counsel & Chief Compliance Officer; its Deputy General Counsel & Deputy Chief Compliance Officer; and its Deputy General Counsel, Europe & Asia; together with representatives from Sky and external counsel. Meeting of 30 May 2017, attended by Fox's Chief Executive Officer, its Executive Chairman (Lachlan Murdoch); its General Counsel & Chief Compliance Officer; its Deputy General Counsel & Deputy Chief Compliance Officer and external counsel.

⁶ The voting rights of Fox in Sky are currently constrained by a shareholder's agreement to 37.1%.

Figure 1 The corporate structure⁷



23. Sky’s conduct, in particular its history of regulatory compliance, is clearly relevant because it is the licensee. It is already part owned by Fox, and since January 2016 has been chaired by Fox’s Chief Executive Officer, James Murdoch.

24. Fox’s conduct, in particular its history of regulatory compliance, is also relevant because it is the buyer. Fox’s 100% owned subsidiary Fox News Network LLC (“Fox News”) also holds a UK broadcast licence.

25. News Group Newspapers Limited (“NGN”) is the publisher of *The Sun* and *The Sun on Sunday*. It was formerly also the publisher of *The News of the World*. It is 100% owned by News UK (formerly News International), which itself is 100% owned by News Corporation. NGN is relevant because News Corporation is approximately 40% controlled by the Murdoch Family Trust. Both NGN and Sky are, therefore, under the partial control of the Murdoch Family Trust, and some directors are common to Fox and News Corporation.

26. In the sections that follow, we give our assessment of how conduct in relation to broadcasting regulation by Sky and Fox bears on whether Sky would remain fit and proper to hold its broadcast licences after the merger.

27. We then go on to set out how allegations put to us of various forms of misconduct outside the broadcasting arena – specifically sexual and racial harassment at Fox News and phone hacking at NGN - bear on our fit and proper assessment.

⁷ This is a simplified corporate structure chart showing only those entities which we consider helpful for understanding the reasoning in this decision. The percentages given relate to voting shares. Not all the shares held by the Murdoch Family Trust in Fox confer voting rights.

Broadcast-related behaviour

Sky

28. Sky holds 54 broadcast licences issued by Ofcom.⁸ These licences cover services including Sky News, Sky 1, Sky Atlantic, Sky Sports and Sky Cinema channels. They also include licences for +1 services, HD services and services which are licensed in the UK but are intended for an audience outside the-UK.
29. As set out in Figure 2 below, Ofcom has recorded 16 breaches against Sky services over the previous five years⁹, and has resolved a further ten cases. (“Resolved” cases are when a breach occurs, but the broadcaster takes immediate and appropriate steps to put it right.)
30. 11 of these resolved and unresolved cases involved the inappropriate use of the word “fuck”. One of the resolved cases related to a reporter picking up two items from a victim’s open suitcase during a report at a plane crash site. None of them related to phone hacking, computer hacking or similar issues. Nor did they involve offence caused by racism or sexism. Ofcom did not consider any of the cases sufficiently serious to impose a penalty.

⁸ Sky also holds a 50% stake in AETN UK, which holds a further 22 Ofcom broadcast licences. We understand that Sky does not exercise operational or editorial control over AETN UK so have not considered breaches recorded against AETN UK services as part of Sky’s compliance history.

⁹ We considered five years to be a reasonable timeframe to give an insight into a current commitment to broadcasting standards.

Figure 2 Breaches of the Broadcasting Code recorded against Sky since 2012

Nature of issue	Breached in last five years	Resolved in last five years
Protection of under 18s	2	1
Violence	2	
Competitions/voting		1
Harm (flashing images)	3	
Offensive language	5	6
Generally accepted standards		1
Sponsorship/ Promotion	4	1
Total	16	10

Note: Protection of under 18s – breaches relating to content that was potentially unsuitable for children and not appropriately scheduled; Competitions/voting – breaches relating to our rules regarding the requirement that broadcast competitions are conducted fairly; Harm (flashing images) – breaches relating to content that included flashing images that exceeded our technical guidance and was potentially harmful to viewers with photosensitive epilepsy; Offensive language – breaches relating to content that included offensive language that was not appropriately scheduled or otherwise justified by the context; Generally accepted standards – breaches relating to content that contained potentially offensive content that was not justified by the context; Sponsorship/Promotion – breaches relating to our rules regarding commercial references in television programmes.

Fox

31. Through a number of subsidiaries, Fox currently holds broadcast licences issued by Ofcom for 14 services¹⁰. As set out in Figure 3 below, in the last five years we have recorded breaches of the Code in 13 instances, and we have resolved one case. Almost half the breaches related to commercial arrangements, such as promotions within programming. None of the breaches involved infringement of privacy. One of the cases involved interviews with ‘experts’ on Islam and terrorism who asserted that Birmingham and areas of Paris contained “no-go zones”. The resolved case involved limited verbal and visual references to sex and to sexual violence (in a trailer on National Geographic Channel). Ofcom did not consider any of the cases sufficiently serious to impose a penalty.¹¹

¹⁰ FOX; FOX + 1; FOX HD; Fox News Channel; National Geographic Channel; National Geographic Channel HD; Star Gold; Star Plus; Star Utsav; Star Life OK; Wild; Wild HD; Your TV; and Your TV+1. Fox also holds a 50.1% stake in Baby TV.

¹¹ 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’. We consider that the Broadcasting Code provides for us to

Figure 3 Breaches of the Broadcasting Code recorded against Fox since 2012

Nature of issue	Breached in last five years	Resolved in last five years
Protection of under 18s	1	1
Harm (flashing images)	1	
Offensive language		
Generally accepted standards	1	
Material Misleadingness	1	
Due impartiality/elections	3	
Sponsorship/ Promotion	6	
Total	13	1

Note: Protection of under 18s – breaches relating to content that was potentially unsuitable for children and not appropriately scheduled; Harm (flashing images) – breaches relating to content that included flashing images that exceeded our technical guidance and was potentially harmful to viewers with photosensitive epilepsy; Offensive language – breaches relating to content that included offensive language that was not appropriately scheduled or otherwise justified by the context; Generally accepted standards – breaches relating to content that contained potentially offensive content that was not justified by the context; Material misleadingness – breaches relating to content that materially misled the audience so as to cause harm or offence; Due impartiality/elections – breaches relating to our rules regarding the requirement for discussions of matters of political controversy or current public policy to be duly impartial or the specific election rules contained in Section 6 of the Broadcasting Code; Sponsorship/Promotion – breaches relating to our rules regarding commercial references in television programmes.

Compliance of comparable broadcasters

32. We have compared Fox’s and Sky’s track record of compliance with similar sized broadcasters that also hold multiple Ofcom licences in order to assess if they are out of line in any way.
33. Viacom is an international media group, broadcasting channels such as MTV, Nickelodeon, Comedy Central, Paramount and VH1 in the UK. It has owned Channel 5 since 2014. Viacom holds 54 Ofcom broadcast licences. Viacom services have breached the Broadcasting Code 12 times in the last five years; four further cases have been resolved. The great majority of the breaches and resolved cases related to the use of offensive language, while two breaches related to the protection of children (sexual content). Ofcom did not consider any case sufficiently serious to warrant a penalty.

take action against this type of content where appropriate and that, more generally, the risk of unacceptable content being broadcast would need to be very high before it could be said to affect a person’s fitness to hold a broadcast licence.

34. Discovery is another international media group with broadcast interests in the UK. Its portfolio includes a range of channels including Discovery Channel, Animal Planet, TLC and Eurosport. Discovery holds 101 Ofcom broadcast licences (many of which are for its channels broadcasting outside the UK). Discovery services have breached the Broadcasting Code 13 times over the past five years. Ofcom has imposed a penalty once, for a case involving the broadcast of strong violence including scenes of torture, mutilation and murder.¹² Four related to offensive language or the protection of children and the rest involved failures to adhere to rules on sponsorship or advertising. One further case – relating to the limits on advertising - was resolved.

Fox News' compliance procedures

35. Under the terms of its licence for Fox News, Fox must have in place procedures to ensure compliance with broadcasting standards, and must make sure that those procedures are adhered to. (Fox News is principally aimed at a US audience and has a UK viewership of about 2,000 people.) A lack of compliance procedures does not mean that a channel will necessarily breach broadcasting standards. But it may foretell a risk of future breaches (which is why the licence condition is there in the first place).

36. During the course of our investigation of the proposed transaction, we found that Fox had not put in place adequate procedures to ensure the compliance of Fox News with the Broadcasting Code. We wrote to Fox to express our concerns. Fox has now supplied us with details of new compliance arrangements introduced on 15 May 2017. We consider that the improvements made by Fox to its compliance arrangements and procedures are sufficient to meet the requirements of its licence.

37. However, we are concerned 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 we expressed our concerns. It is for licensees to ensure that they comply with the conditions of licences issued by Ofcom and it should not have been necessary for Ofcom to remind Fox of its obligations in this regard. We would expect Fox and other licensees to ensure that they are fully aware of the obligations which the licence places upon them and act accordingly.

38. Fox has an ongoing obligation to comply with its licence conditions and the Code and if any further compliance concerns were to arise following the proposed transaction, we would compel Fox to take steps to address such concerns through enforcement action.

¹² *Deadly Women*, Broadcast and On Demand Bulletin 246 20/1/2014.

Overseas broadcasts

39. We also looked at compliance of overseas channels controlled by Fox and Sky respectively. Each has breached broadcasting regulation applicable in the host country a number of times.
40. Sky services have been found in breach of broadcasting standards in Germany twice and in Italy eleven times in the last five years. These breaches related to protection of minors (twice), commercial references in programming (once), limits on advertising (seven times), advertising of alcohol (twice) and impartiality during elections (once). In each case a fine was levied by the relevant regulator.
41. Fox has breached standards in Argentina, Brazil, Bulgaria, India, Indonesia, Italy, Netherlands, South Korea, Taiwan and Turkey. In considering these we placed most weight on breaches recorded within the EU, where the approach to broadcast standards is most consistent with the UK. Fox services have breached broadcasting standards in Italy on four occasions within the last five years. Each breach related to rules limiting advertising and, on each occasion, a fine was levied. Fox services breached broadcasting standards in the Netherlands on one occasion in the last five years.
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.

Assessment

43. A comparison of Fox's and Sky's compliance records shows that Fox has recorded a similar number of breaches of the Code to Sky, despite the fact that it broadcasts significantly fewer licensed services. The data also show that Fox's record is largely comparable to those of other large broadcasters. Moreover, there appears to be no distinct pattern of non-compliance with broadcasting regulatory requirements by their overseas operations.

Non-broadcast related behaviour

44. We have received a number of submissions asserting that conduct at Fox News would render Sky unfit to hold a broadcast licence in the event of a merger. In particular, people have raised concerns about Fox's corporate response to allegations of sexual and racial harassment at Fox News. In addition, people have raised concerns about News Corporation's corporate response to phone hacking amongst other issues¹³ at NGN.

¹³ E.g. alleged corruption, breaches of privacy, receipt of stolen goods (a mobile phone).

Concerns raised about Fox News

45. Fox News is a wholly-owned subsidiary of Fox. Until recently, it operated with substantially its own management.¹⁴ It is a sister company of Sky and Sky licensees. At the time of the alleged misconduct Fox News did not share any management with Sky, although both were wholly or partially controlled by Fox.
46. The allegations that have been put to us about sexual harassment at Fox News are of an extremely serious and disturbing nature. They include allegations of women being told that their professional advancement was dependent on entering into a sexual relationship with senior executives, and of women being asked to display themselves to senior executives.¹⁵
47. Allegations put to us of racial harassment by a particular manager at Fox News (who has been fired) are just as disturbing. They range from mockery of individuals' language and accents and of the Black Lives Matter movement to the perpetuation of offensive racist stereotypes about black, Islamic, Chinese, Asian and Panamanian people. Court documents allege, for example, that the manager asked a black employee "Why are all Black men women-beaters?"; that the same manager regularly mocked the way in which black people pronounce words; and that she referred to her daily commuter train as the "Bombay Express".¹⁶
48. There are also allegations, based on press reports¹⁷, that financial misconduct may have resulted from the way in which settlements with complainants were structured: it is alleged that settlement payments were made via payroll in order to disguise them, which may have resulted in shareholders being misled. We have also received submissions suggesting reprisals against complainants ranging from the loss of work opportunities to alleged email hacking¹⁸ and the use of private detectives to find negative information about them.

¹⁴ Rupert Murdoch is currently its acting Chief Executive Officer.

¹⁵ See e.g. Complaint of Lidija Ujkic v Twenty-first Century Fox et al, United States District Court, Southern District of New York, Civil action No: 16-CV-09608 (AJN), at paragraph 2.

¹⁶ Amended complaint of Tichaona Brown, Tabrese Wright and Monica Douglas v Twenty-First Century Fox et al, New York State Supreme Court, Bronx County 22446/2017E, 4/4/2017 at paragraphs 52, 73 and 89 to 92.

¹⁷ See e.g. <http://www.chicagotribune.com/news/nationworld/>; <https://www.ft.com/content/26ce771c-1916-11e7-9c35-0dd2cb31823a?mhq5j=e1>; <http://money.cnn.com/2017/04/27/media/fox-news-federal-investigation/index.html>.

¹⁸ In its letter of 16 June 2017, Fox told us it was unaware of this allegation.

49. A number of submissions have suggested a failure of corporate governance that went beyond Fox News to encompass Fox more generally. These have argued that before July 2016 (when the first sexual harassment case was escalated by Fox News' internal lawyer for the attention of Fox's General Counsel and from there to James Murdoch and Lachlan Murdoch), the resolution of cases through confidential settlements by Fox News points to a corporate tendency to cover up misconduct. Furthermore, litigants and campaigners assert that the corporate response from July 2016 onwards has been reluctant, with action taken only when expedient. It is these allegations that affect Fox, which is the entity acquiring increased control over Sky.
50. There are a number of ongoing court cases in the US concerning the veracity of some of the allegations made. These could take some years to conclude. As the UK broadcast regulator, it is not our role to investigate the accuracy of the claims. Nor do we believe it is necessary for the effective exercise of our fit and proper duty.
51. Fox fired Roger Ailes, the former Chief Executive Officer of Fox News (now deceased) in July 2016. It issued a public apology to one woman and accepted that Mr Ailes engaged in misconduct in relation to at least six to eight other women. Fox also fired its star anchor, Bill O'Reilly, on 19 April 2017. Fox told us it had reason to be troubled by Mr O'Reilly's conduct. Fox has also fired Fox News' Chief Financial Operator, its Comptroller and a number of other employees in light of the allegations. 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, would be dealt with effectively?

What management knew

52. In answer to an information request (which by law must be answered truthfully, subject to financial penalty or imprisonment) Fox has said that no executive director was aware of any allegations of sexual and racial harassment at Fox News prior to July 2016.¹⁹ Fox also told us that Rupert Murdoch recalled being briefed by Roger Ailes about a case alleging misconduct relating to “star” anchor Bill O’Reilly that took place in 2004 but he did not recall when he was briefed.²⁰
53. Absent any awareness on Rupert Murdoch’s part that Mr Ailes was himself engaged in sexual misconduct, we believe that it was reasonable of him as Chairman and CEO of the parent company²¹ to expect that the Chairman and CEO of Fox News would ensure that allegations relating to Mr O’Reilly were dealt with appropriately. It is also reasonable to believe that Mr Murdoch would have expected Mr Ailes to assess the evidence against Mr O’Reilly with care and would take steps to ensure any conduct of this nature did not happen – regardless of the facts of the case.
54. We have no other evidence - and no submissions have been made to us - that any executive director at Fox knew about the alleged misconduct prior to July 2016. On that basis, their failure to act cannot be held against them.
55. Almost all the alleged misconduct and settlements relate to the period before 2012. This is important, because Fox changed its corporate governance arrangements in 2012 in response to the phone hacking scandal at News Corporation. The detail of the new arrangements as set out by Fox is in the Annex. We cannot, therefore, draw conclusions about Fox’s corporate conduct after 2012 from conduct which took place before 2012.
56. The first sexual harassment case that was escalated to Fox’s General Counsel, Gerson Zweifach, related to Mr Ailes and was filed in July 2016. The General Counsel told us that Fox investigated Mr Ailes immediately and fired him shortly thereafter with a public apology from Fox and a settlement made to the woman who had complained.²² Submissions were made to us that the amount of the settlement with Mr Ailes would not have sent a clear message

¹⁹ Fox response to Ofcom’s information request dated 6 June 2017.

²⁰ This admission is (broadly) consistent with allegations made in a biography of Ailes published in 2014, that Rupert Murdoch was aware of the case and its settlement, which was reportedly for a very large sum (the books says \$10 million; two other sources told us \$9 million) - *The Loudest Voice in the Room*, Gabriel Sherman, Pages 297 to 303 of the 2017 edition.

²¹ At the time, Fox and News Corporation were one entity. They split into two in 2013. <http://newscorp.com/leader/rupert-murdoch/>.

²² Note of Fox meeting with Ofcom, 18 April 2017; note of Fox meeting with Ofcom, 11 May 2017.

that the conduct was unacceptable.²³ The General Counsel has given us a detailed description of the steps taken to ensure that there is no recurrence of the conduct. These include senior personnel changes, governance reform, new training and changes to staff handbooks on workplace conduct.²⁴ For more detail, see the Annex.

57. Fox responded more slowly to allegations against Bill O'Reilly. We are troubled by some of the reasoning Fox applied in relation to his case. It was already aware of multiple cases that had led to settlements when it renewed its contract with him in February 2017: while we accept that Fox considered the evidence in these cases to be equivocal, the number of them is concerning.
58. We were concerned by Fox's suggestion in its meeting with us on 18 April 2017 that it was seen by some Board members as being to Mr O'Reilly's credit that he settled cases personally. Fox wrote to us on 16 June 2017 to clarify what it considered to be certain misunderstandings by us as to its explanation of events at Fox News. It said it certainly would not have intended to imply that some Board members considered Mr O'Reilly's behaviour acceptable, or that it gave Mr O'Reilly credit for not alerting his employer to his misconduct. Board members "merely took into account that, in paying past settlements, Mr O'Reilly had at least appeared to take some measure of personal responsibility for his behaviour". In the light of this clarification, we remain concerned that Board members regarded Mr O'Reilly's settling cases personally as somehow a point in his favour.
59. In addition, we found the language used by Fox to describe some of its employees' misconduct to us tended to downplay the harm caused²⁵ and diminish the victims.²⁶ In relation to the latter, in its letter of 16 June 2017, Fox said that in making the statements to us about the victims, it was seeking to explain why Fox had questioned the credibility of certain claims. Whilst we accept that its comments may have been relevant to an explanation of the

²³ Fox gave us at our meeting of 18 April 2017 two reasons for the settlement being made. We did not accept that it did not wish to have to rely on the evidence of women who "wanted nothing more to do with the company" in Court. In a letter of 20 June 2017 Fox told us that it did not intend to suggest this, but wanted to protect the women in question from being called to testify about their traumatic experiences. At our meeting of 18 April 2017 Fox also gave a plausible commercial reason for the settlement.

²⁴ Letter dated 5 May 2015, note of Fox meeting with Ofcom 11 May 2017.

²⁵ Fox acknowledged [redacted] a continuum from physical assaults and demands for sexual favours to salacious talk. In setting this out for us at our meeting of 11 May 2017, Fox described the continuum as going from "appalling sexual harassment" to "regular dirty old man talk." It subsequently told us that this phrase was not intended to diminish the seriousness of any [redacted] conduct.

²⁶ In response to our information request of 4 April 2017 and at the meeting on 18 April 2017, Fox explained why it did not initially consider credible some of the cases of which we know it was aware when it renewed Mr O'Reilly's contract. In so doing, it placed weight on factual and evidential matters but also made statements about the cases noting their alleged [redacted] respectively.

credibility of the claims, we consider that some of the comments were superfluous and unnecessarily pejorative for this purpose.

60. In a separate meeting, James and Lachlan Murdoch personally put to us that no individual working for Fox News could now be under the impression that sexual harassment is acceptable, having seen the sacking of Mr Ailes, Mr O'Reilly and a number of other employees including very senior managers.²⁷
61. The racial harassment allegations involving Fox News appear to have been dealt with in a timely fashion by Fox once it had become aware of them. Fox fired the individuals alleged to have been involved and has trained its staff in acceptable workplace behaviour.²⁸ As above, it has been put to us by James and Lachlan Murdoch that no employee of Fox News could now be under the impression that the conduct alleged was acceptable.²⁹

Implications for future governance

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.³⁰ 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.

²⁷ Note of Fox meeting with Ofcom, 30 May 2017.

²⁸ We understand that despite firing the individuals concerned, Fox is defending the cases.

²⁹ Note of Fox meeting with Ofcom, 30 May 2017.

³⁰ We do not accept Fox's assertion in our meeting of 11 May 2017 that there was no commercial pressure because advertising was moving to other Fox programmes.

Concerns raised about News Group Newspapers

64. It has been put to us that News UK newspapers are used to engage in a pattern of reprisal against individuals to secure political ends and to punish those who do not act in the interests of News Corporation or the Murdoch family. Submissions have been made to us by individuals who say they are aware of senior politicians and public servants who are so cowed that they would not give evidence to Ofcom³¹ for the purposes of our fit and proper assessment or public interest test, for fear of retaliation.³² We have reviewed again the evidence published by the Leveson Inquiry and the conclusions of that Inquiry in light of new – albeit limited - evidence provided to us.
65. On the evidence we have seen, Ofcom can reach no view on whether the second hand reports of what other individuals rightly or wrongly are said to have believed are true. It may or may not be the case that, as alleged, senior politicians and officials fear reprisal by NGN newspapers if they do not do what is wished.
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.

³¹ Or to other public authorities.

³² Submission from a senior politician [redacted] dated 12th April 2017; submission from Tim Lord dated 30th March 2017.

68. In addition, a number of submissions have argued that we should take account of the fact that the scandal within Fox News followed the phone hacking scandal at News Corporation. Years of phone hacking took place within News of the World, with the knowledge of its editor Andy Coulson. A Sun journalist has been convicted of receiving stolen goods and another of conspiracy to pervert the course of justice.³³ Computer hacking and corruption of public officials have been alleged. Litigation is ongoing in which it is being alleged that phone hacking was also taking place at the Sun.
69. Campaigners against phone hacking argue that the corporate response to misconduct was to cover it up. They invite us to draw inferences about the attitude and expectations of senior executives towards misconduct. In particular, they say we should draw adverse inferences from the re-employment of Rebekah Brooks as Chief Executive Officer of News UK following her acquittal on various charges related to the scandal. During her trial, Brooks admitted that as CEO of News International between September 2009 and December 2010 she did nothing to investigate phone hacking except where forced to by external pressure.³⁴
70. 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 2012.³⁵ 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.
71. Specifically, on the question of Ms Brooks' reappointment, we note that she currently has no role in the management of Sky. The principal business of News UK is newspapers and digital services. News UK has recently acquired 100% control over Wireless Group, which controls a number of radio broadcast licensees. Ms Brooks is not a director of News Corporation. She is an employee, subject to the supervision of the Board of News Corporation, which includes its independent directors. Ms Brooks was re-employed after new corporate governance arrangements were established in light of phone hacking, specifically to prevent heads of business units, like her, from dealing unsupervised with matters involving possible systematic illegality. Under the new arrangements, were wrongdoing to occur, it would be required to be

³³ Nick Parker and Mazher Mahmood, respectively.

³⁴ Transcript of summing up, 2014.06.10 page 84 lines 23-25.

³⁵ We have considered all the evidence put to us in this regard, including the transcript of a recording said to have been made of Rupert Murdoch addressing Sun journalists in 2013.

escalated to the General Counsel of News Corporation, who sits above Ms Brooks. James Murdoch and Lachlan Murdoch have put themselves personally behind the new arrangements.³⁶ We therefore do not consider that Ms Brooks' reappointment of itself suggests that those exercising control over Fox have an irresponsible attitude to wrongdoing or to how it is handled.

72. If evidence were to emerge in future that the new arrangements are defective, we would take it into account in our ongoing fit and proper duty.

³⁶ Note of Fox meeting with Ofcom, 30 May 2017.

Annex: Fox's corporate governance arrangements

1. In the context of the current transaction, Fox has described to us the revisions to corporate governance it made in the wake of the phone hacking scandal.³⁷ Its General Counsel, Gerson Zweifach, said that he was brought into what was then News Corporation in 2012 and was “asked to make sure this didn’t happen again”. He had no prior relationship with the company.
2. He reviewed its arrangements and found it non-bureaucratic and de-centralised which created legal risks. He made recommendations to the Board in April 2012 that the arrangements were too de-centralised and that the approach taken to legal risk in the past by individual business units had been too defensive.
3. He recommended an approach to compliance that was implemented and enforced by staff independent of the business unit concerned. People were hired for that purpose and report to him; Mr Zweifach himself reports to the Fox audit committee and to the Board.
4. Mr Zweifach told us he speaks to group Chief Compliance Officers every two weeks or so and meets them every month. He reports to the audit committee five times a year. He reports to the Board at every meeting but separately to the independent directors on compliance twice a year.
5. The policy instituted in 2012 was that any claim that goes to the integrity of the business must be escalated to him within 24 hours. Mr Zweifach reminds his team formally of this every six months. Legal issues now lead to bonus and stock implications for business unit managers.
6. This policy was instituted when Fox and News Corporation were one and is identical in both companies.
7. The provisions of the corporate governance regime are contained in a document filed with the court in settling litigation.

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8. Fox has, since the events described, implemented further corporate governance changes and rolled out a programme of training on acceptable workplace conduct for Fox News.
9. Fox told us more about the changes in a letter from Mr Zweifach dated 5 May 2017.

³⁷ Note of Fox meeting with Ofcom, 27 March 2017. See also Slide 8 of presentation given to that meeting.

- (a) It said that had “recently” established a Special Committee of the Board, consisting of independent directors James Breyer and Robert Silberman, which will retain its own outside counsel to focus on Fox News related workplace matters including governance issues at both the business unit and parent company level. It noted that Fox had enhanced its Human Resources team and training practices at both the business unit and parent company level. It said it had installed a new global Chief Human Resources Officer at Fox, Thomas Gaissmaier – this appointment appears to have taken place on 10 February 2017³⁸. It also said it had installed a new head of Human Resources at Fox News, Kevin Lord; this appears to have taken place on 14 December 2016³⁹.
- (b) It said that Fox “has communicated extensively with all heads of Human Resources and all General Counsels throughout the company to reinforce that all serious claims -- systemic or involving senior talent or executives -- are to be reported to the company’s new global Chief Human Resources Officer and to me, so that I can keep our Audit Committee and entire Board apprised of these matters and how we are addressing them.”
- (c) It said it has broadened its messaging to tell employees that they may raise issues not only using the anonymous hotline, but also through Fox’s Chief Human Resources Officer, heads of Human Resources at each division, and to Mr Zweifach himself as Group General Counsel.
- (d) It said that since August 2016 it has reviewed its training practices and that since September 2016, nearly 7,000 employees have received training.
- (e) It also said that Fox has reviewed and ensured that all of its policies with respect to equal employment opportunity, fair work environment, discrimination and harassment, and business conduct are robust and presented clearly in the company’s Standards of Business Conduct.

³⁸ <http://www.businesswire.com/news/home/20170210005531/en/Thomas-Gaissmaier-Named-Executive-Vice-President-Chief>.

³⁹ <http://deadline.com/2016/12/fox-news-names-kevin-lord-new-hr-chief-1201870518/>.