

We use cookies to deliver our online, application and email services. Details on the cookies we use and instructions on how to disable them are set out in our [Cookies Policy](#). Either click agree to our use of these cookies, or, simply continue browsing.

Agree

Lexis<sup>®</sup>PSL IP

## Allegations against Fox insufficient for judicial review of merger decision (Avaaz Foundation v Ofcom)

30/08/2018

TMT analysis: Following the announcement of a merger between Sky News and 21st Century Fox, Avaaz Foundation, a global citizens' movement which has concerns over how the concentration of media ownership threatens the public interest, challenged Ofcom's decision to allow the merger to proceed, by way of judicial review. Professor Steven Barnett, of the University of Westminster, comments on what lessons can be learned from this case and considers the implications for press freedom or media plurality.

### Original news

*R (on the application of Avaaz Foundation) v Office of Communications (Ofcom)* [2018] EWHC 1973 (Admin), [2018] All ER (D) 170 (Jul)

### What are the key points to take from this judgment?

Perhaps because of the moot nature of the appeal and the brevity of the judgment, there appeared to be little sympathy for the Avaaz case and a great deal of faith placed in Ofcom's ability to interpret its own remit. Where there is a clear statutory framework, as in the framework for the public interest test and in UK's communications regulator Ofcom's duty to further the role of citizens and consumers, there is little incentive for the courts to second-guess an experienced regulator.

It is somewhat more surprising that the court should choose to defer to Ofcom's judgement where, as with the 'fit and proper test', there is no statutory guidance and little in the way of precedent. One might, for example, have expected more discussion around Ofcom's inclination to take at face value various promises and reassurances from an offending party, irrespective of their history of illegality and abuses of corporate governance.

The only clear available precedent was Ofcom's own 2012 decision which appeared to be contradicted in 2017. Ofcom's argument in concluding in 2012 that the Murdochs—Fox and News Corporation executive chairman Rupert Murdoch and his sons James and Lachlan—continued to be 'fit and proper' for the purposes of Broadcasting Act 1990 (BA 1990) was at least implicitly contingent on:

- James Murdoch having stepped down from running Sky, and
- the Murdochs having only a minority shareholding

That neither of these conditions would be obtained after the 2017 Fox–Sky merger seemed to leave Ofcom's position conflicted, and this contradiction surely deserved greater examination by the court.

In the event, it appears that this judgment will make no material difference. However, it does leave an underlying assumption that courts prefer to leave regulators as much discretion as possible to regulate as they see fit within the boundaries of their guiding statutes.

## What is the background to this dispute?

Under BA 1990, Ofcom has an ongoing duty to ensure that any broadcast licensee must be a 'fit and proper person' to hold an operating licence. In respect of the proposed acquisition by 21st Century Fox of the remaining 61% of shares it did not already own, the Secretary of State for Culture Media and Sport was sufficiently concerned to refer the bid to Ofcom on the following two public interest grounds, as she was entitled to do under the Enterprise Act 2002 and Communications Act 2003:

- media plurality, and
- a genuine commitment to broadcasting standards

She issued this notice on 16 March 2017.

Along with several other interested parties and stakeholders, Avaaz made submissions to Ofcom on the public interest issues. Avaaz also contested whether, given Fox's record on standards, Sky would continue to be a 'fit and proper' person to hold a licence after acquisition by Fox. While the public interest test can only be considered by Ofcom after referral by the Secretary of State (it having no jurisdiction to intervene unilaterally), the 'fit and proper' test is entirely at Ofcom's discretion and requires no political trigger. This means Ofcom's conclusions on the public interest tests are advisory only, while its conclusion on 'fit and proper' represent a substantive decision.

On 29 June 2017 Ofcom published both its advice to the Secretary of State on the two public interest considerations, and its decision on 'fit and proper'. It concluded that the transaction did indeed raise a public interest concern in respect of media plurality, such that it might justify a further reference by the Secretary of State to the Competition and Markets Authority (CMA). While it was clearly concerned about historic behaviour at Fox News (which it described as a 'significant corporate failure'), it concluded that the evidence did 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'.

## What did the court decide?

Avaaz challenged the Ofcom decision on four grounds:

- it was applying too high a threshold for finding a broadcaster not fit and proper to hold a broadcast licence
- its approach to Fox's conduct in relation to broadcasting regulation was irrational
- it did not properly assess Fox's corporate governance failures in relation to serious allegations of sexual and racial harassment at Fox News
- it behaved irrationally in failing to take into account its own earlier findings in respect of James Murdoch (in a 2012 report which examined whether News Corporation, as the Murdoch company was then known, was a fit and proper person following the fallout from the phone hacking scandal at the News of the World)

All four grounds were rejected.

### Ground 1—too high a threshold

Since there is no statutory guidance for the fit and proper threshold, the judge concluded that this was a matter for Ofcom's judgement 'subject to rationality review'. It was entitled to apply a high threshold and to do so prospectively, that is taking into account the potential impact of their decision on the continued transmission of Sky channels.

### Ground 2—irrationality

The judge could see no evidence of irrationality in Ofcom's approach and made it clear that 'the court will not lightly interfere with the exercise of Ofcom's regulatory judgment' given the regulator's expertise and experience. He concluded that Ofcom had taken proper cognisance of both Fox News'

and Sky News' performance and regulatory histories. Ofcom was entitled to place less weight on impartiality and accuracy breaches in broadcasting environments which were subject to different regulatory regimes, such as was the case in both the US and Australia where Fox operated news services. Moreover, it was entitled to take into account the pre-merger compliance record of Sky in determining whether there was likely to be a fundamental shift in approach post-merger.

### **Ground 3—harassment allegations**

The judge found Ofcom to be mindful of the very serious allegations about sexual and racial harassment that had been levelled against Fox News between 2012 and 2016. The judge was clear that Ofcom's duty was not to establish the veracity of such claims but to assess the extent of management knowledge and efficacy of subsequent remedial action. Ofcom's assessment that 'we cannot reasonably draw the conclusion that the alleged misconduct was known about at the time by the senior executives of Fox' was thus, he said, a reasonable basis on which to conclude that, post-merger, the owners of Sky would not cease to be a fit and proper person.

### **Ground 4—2012 report findings**

The judge concluded that Ofcom's reasoning in relation to its 2012 decision (that it had then found News Corporation to be fit and proper and that it found no subsequent evidence of malpractice sufficient to come to a different conclusion) was a reasonable approach to its ongoing commitment to assessing fitness and propriety. Ofcom 'had regard to the overall evidence available to date' in reaching its decision, including personal evidence given by James and Lachlan Murdoch, that corporate governance at Fox had been revised since the 2016 allegations came to light. Moreover, he said, there had been no suggestion from the claimant that fit and proper concerns had arisen since James Murdoch was re-appointed as chair of Sky in April 2016.

### **Are the issues in this judicial review challenge now academic, or is there a possibility that Fox might challenge the Secretary of State's decision?**

In its final adjudication on the public interest plurality test, the CMA decided that there were indeed plurality issues with the proposed merger which could operate against the public interest. The CMA said that absent any undertakings to mitigate those concerns, its advice to the Secretary of State was that the merger should be blocked.

Subsequently, following competition from Disney Corporation and Comcast to purchase Fox and/or its majority shareholding in Sky, Fox has agreed to divest Sky News to Disney (or another appropriate buyer) with specified long-term safeguards for independence and resourcing. These terms have been agreed by the Secretary of State, including the provision that, in the absence of such divestment, the merger will not be permitted to proceed.

Fox confirmed in June that they did not intend to appeal the CMA decision, and indeed the deadline for an appeal to the Competition Appeals Tribunal has now passed. It therefore appears that the issues raised by this case have become academic—a point made by the judge in introducing his assessment which, he said, he dealt with 'more shortly than I otherwise would have done'.

*Steven Barnett is professor of communications and a prominent writer and broadcaster who has been involved in policy analysis at the highest levels, both nationally and internationally, for the last 25 years. He has advised government ministers in the UK, has given evidence or served as an adviser on several parliamentary committees, has been called to give evidence to the European Parliament.*

*Interviewed by David Bowden.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*



- About LexisNexis
- Privacy Policy
- Cookies Policy
- Terms & Conditions

- Help
- Contact us
- Copyright ©2018 LexisNexis. All rights reserved.
-  RELX Group™