



# Background information report

Media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe: The case of the UK

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## **Project profile**

MEDIADEM is a European research project which seeks to understand and explain the factors that promote or conversely prevent the development of policies supporting free and independent media. The project combines a country-based study in Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK with a comparative analysis across media sectors and various types of media services. It will investigate the configuration of media policies in the aforementioned countries and will examine the opportunities and challenges generated by new media services for media freedom and independence. Moreover, external pressures on the design and implementation of state media policies, stemming from the European Union and the Council of Europe, will be thoroughly discussed and analysed.

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## The case of the UK

*Rachael Craufurd Smith and Yolande Stolte*

### 1. Introduction

*The United Kingdom today*

The United Kingdom of Great Britain and Ireland (UK) is a constitutional monarchy and a unitary state consisting of four countries: England, Wales, Scotland and Northern Ireland. While the UK is governed by a parliamentary system with its seat of power in London, it has 3 devolved national administrations: Scotland, Wales and Northern Ireland, which all have a range of powers such as health, education and culture. The UK government retains power concerning all matters that have not been devolved.<sup>1</sup> With regard to the media, the UK parliament has reserved matters pertaining to broadcasting, telecommunications, data protection, video recording and cinema licensing/classification, UK Official Secrets legislation, competition (including newspaper mergers) and intellectual property. Reserved and devolved powers may overlap, as for example the Scottish Gaelic television channel can be argued to fall both under language & culture (devolved) and broadcasting (reserved).

The UK has no written constitution. Many rules relating to government take the form of unwritten conventions, though certain measures that can be considered to have constitutional status are enshrined in legislation, such as the Human Rights Act 1998 (hereafter, HRA). At the centre of the British constitution lies the doctrine of the sovereignty of parliament, which the constitutional theorist AV Dicey argued meant that parliament, as the ultimate source of law, can create such law as it determines and that no person or court can override statute law. The UK is, however, a member of the European Union and the courts in the United Kingdom have accepted the primacy of EU law.<sup>2</sup> Britain was one of the first states to sign the European Convention on Human Rights (hereafter, ECHR) in 1951 and has since adhered to it on an international level. With the coming into force of the Human Rights Act 1998 the ECHR has been afforded enhanced status within the domestic legal systems. The English legal system is founded on the common law, while Scots Law is based on civil law principles with common law elements.

There are currently 62 million people living in the UK, of which the greater majority live in urban areas.<sup>3</sup>

*History of the media in the UK: newspapers*

In Britain, licensing of the printed press ended in 1695 and was not renewed. However, in 1712, stamp duty was introduced, a tax levied on each (half) sheet of newspaper, coupled with a tax on news paper advertisements. The stamp duty assured that newspapers were too expensive for the general public and assisted in restricting ownership by raising the publishing costs.<sup>4</sup> Stamp duties rose significantly over the

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<sup>1</sup> Northern Ireland Act 1998, Scotland Act 1998, Government of Wales Act 1998.

<sup>2</sup> See, for example, *Factortame Ltd v. Secretary of State for Transport (no.2)* [1991] 1 AC 603. The internal effect of EU law (then EEC law) was provided for in the European Communities Act 1972.

<sup>3</sup> Office for National Statistics, "Population estimate", available at: <http://www.statistics.gov.uk/cci/nugget.asp?id=6> (last visited on 04/10/2010).

<sup>4</sup> R. Craufurd Smith, *Broadcasting Law and fundamental rights* (1997), at p. 16.

years to attain this objective. However, the “underground press”, which evaded stamp duty, flourished and the government responded with stronger coercive powers and reduced the stamp duty significantly to make tax evasion less attractive.<sup>5</sup> From the mid-eighteenth century to the early nineteenth century, a growth in advertising provided the press with the means to become more politically independent.<sup>6</sup> The radical press carried little advertising; it could initially survive on the proceeds of sales alone, allowing it to be relatively free from economic/commercial influences.<sup>7</sup> Stamp duty was abolished in 1855,<sup>8</sup> though the press was still controlled through generally applicable blasphemy, treason and sedition laws.<sup>9</sup>

Advertisers became a powerful force by the mid-nineteenth century when advertising sales became the main form of financing newspapers. A rise in advertising agencies and major national advertisers saw a decline in political prejudice in advertising selection and this practice was slowly abandoned.<sup>10</sup> In spite of this, left-wing newspapers had difficulty attracting advertising as their readership was less affluent. This led some of the radical press to temper their radicalism in order to attract a different, more upmarket, audience while others continued with a small audience, covering their losses by other means of income.<sup>11</sup> National newspapers overtook provincial newspaper sales in 1923 and, while newsprint was rationed for a time due to war,<sup>12</sup> sales continued to rise up until the mid-1950s when competition with other types of media, such as radio and television, started to show its effects.<sup>13</sup> Circulation numbers dropped and many national newspapers were running at a loss by the 1960s.

From the early twentieth century national newspapers were generally owned by “press barons” with varied reasons for owning newspapers, though common reasons were to further a political cause, party or their own political career.<sup>14</sup> Few papers had a wide spread of shareholders. Newspaper chains with national as well as local titles increased rapidly, though it was not till after the First World War, that press concentration became more pronounced with large scale consolidation of regional chains of newspapers.<sup>15</sup> While some papers became less hierarchical and took a more bi-partisan approach to political reporting after the Second World War (hereafter, WWII), this was not universally so and some of the papers became more partisan in the mid-1970s in response to the polarisation of British politics.<sup>16</sup> Concentration of media ownership became more pronounced in the following period as did cross-media ownership, both national and international. The press generally experienced a right wing shift<sup>17</sup> and cross-ownership linked press groups with major

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<sup>5</sup> J. Curran and J. Seaton, *Power without responsibility: the press and broadcasting in Britain* (1991), at p. 14.

<sup>6</sup> *Ibid.*, pp. 39-40.

<sup>7</sup> *Ibid.*, p. 18.

<sup>8</sup> Advertisement duty had been abolished in 1853 and paper duty was abolished in 1861.

<sup>9</sup> Craufurd Smith, *Broadcasting law and fundamental rights*, at p. 19.

<sup>10</sup> Curran and Seaton, *Power without responsibility*, at p. 40.

<sup>11</sup> *Ibid.*, p. 41.

<sup>12</sup> Newsprint restrictions lasted till 1955, due to import difficulties rising from the post-war dollar crisis and the Korean War, see C. Seymour-Ure, *The British press and broadcasting since 1945* (1996), at p. 16.

<sup>13</sup> *Ibid.*, pp. 16-17.

<sup>14</sup> *Ibid.*, p. 34.

<sup>15</sup> Curran and Seaton, *Power without responsibility*, pp. 50-51.

<sup>16</sup> *Ibid.*, pp. 86-87.

<sup>17</sup> *Ibid.*, p. 124.

interests outside the media, integrating them into core sectors of financial and industrial capital, such as furniture, gas and oil, banking and travel.<sup>18</sup> During the last 15 years, eight media owners have dominated the national press.<sup>19</sup> The local and regional media are even more consolidated with four publishers dominating 70% of the market share across the UK and all but one having significant cross media-interests.<sup>20</sup>

### *History of the media in the UK: radio and television*

Radio broadcasting started in the UK in 1922 when the British Broadcasting Company, established by the Post Office as a cooperative venture owned by the radio industry,<sup>21</sup> started daily transmissions as the sole licensed radio broadcaster. The company was restructured in 1927 into the British Broadcasting Corporation, the present day BBC.

In 1934 the British government appointed a committee charged with assessing the viability of setting up a public television service. The committee recommended the BBC should be charged with bringing television broadcasting to the British public as a regular service. The BBC started regular “high definition” broadcasting in 1936, but the service was suspended in 1939 due to the outbreak of WWII, when the aerial was needed for different purposes.<sup>22</sup> The service resumed after the war and in 1954 the government decided that a second television channel was to be added, operated on commercial lines. The channel would, however, still be regulated by a public body responsible for imposing public service requirements: the newly inaugurated Independent Television Authority (hereafter, ITA). This new channel would be organised as a series of separately owned regional franchises, each provided with a monopoly of television advertising in its own geographical area.<sup>23</sup> ITV started broadcasting in London in 1955, gradually extending to cover other areas. The first few years were difficult for commercial television, with few advertisers willing to move from traditional forms of advertising to television advertising. However, by 1960 commercial television was making significant profits. By the end of the 1960s there were 16 million TV licences in the UK.<sup>24</sup> The 1970s brought Channel 4, a further form of a PSB set up as a non-profitable body, funded by advertising and statutory obliged to cater for tastes and interests not covered by the other two channels.

The election of the Conservative Government under the leadership of Margaret Thatcher in 1979 led to major changes in the state regulation of communications. The Thatcher government was strongly committed to deregulation and felt that the broadcasting sector should be led by the free market model. The new technological developments in the broadcasting sector, such as the arrival of cable and satellite, meant that the once limited spectrum was now capable of expansion and no

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<sup>18</sup> Ibid., p. 94.

<sup>19</sup> See House of Lords Select Committee on Communications, 1<sup>st</sup> report of session 2007-2008, “The ownership of the news”, 27 June 2008, HL Paper 122-1, at p. 41.

<sup>20</sup> Ibid., p. 46.

<sup>21</sup> P. Humphreys, *Mass media and media policy in Western Europe* (1996), at p. 112.

<sup>22</sup> Teletronic, “The history of the BBC: part 7”, available at <http://www.teletronic.co.uk/herestv7.htm> (last visited on 04/10/2010).

<sup>23</sup> House of Lords, Communication Committee, First report: “The British film and television industries”, 25 January, 2010, HL paper 37-I, at p. 140.

<sup>24</sup> Ibid., p. 143, a television licence is needed to own a television.

longer required the previous level of strict regulation. This led to a media policy aimed at deregulation in order to stimulate competition and provide incentives for innovation that would benefit customers.<sup>25</sup> Cable television in the UK was not faring well, mainly due to legal restrictions which prohibited it from generating its own programming.<sup>26</sup> These restrictions were lifted in 1980 and the Thatcher government started promoting privately owned cable systems, considering them the main route to more technologically advanced cable broadband systems.<sup>27</sup> However, growth of cable remained very slow, until, in 1991, a relaxation of the cable regulations allowed cable companies to carry telephone services next to television.

On 1 November the Broadcasting Act 1990, which aimed to significantly deregulate British television, received royal assent. Satellite television had been launched in 1989 in the UK by Rupert Murdoch's Sky Television, followed by British Satellite broadcasting in 1990. Neither was making a profit and in the final days of the Thatcher government they were allowed to merge, without any reference being made to the Independent Broadcasting Authority. The creation of British Sky Broadcasting (hereafter, BSkyB), marketed as Sky, essentially created a monopoly on the satellite pay TV market. The Broadcasting Act of 1990 precipitated a wave of consolidation within ITV reducing the original fifteen franchises to five. The Broadcasting Acts of 1996 and 1997 led to even further deregulation, and provided the groundwork for Digital Terrestrial Television (DTT), which was launched as a subscription service by ITV but failed. The final analogue television channel, Five, was launched in 1997 as a for-profit channel – but still nominally a public service channel. At this point all public service channels (BBC 1 and 2, ITV, Channels 4 and 5) were receiving public support, such as free or cheap access to the limited analogue spectrum, free access to digital capacity, in return for undertaking certain programming commitments, and, in the BBC's case access to the licence fee.

In 2002 a BBC-led consortium took over DTT and launched "freeview" digital television, a free-to-air broadcasting service. The 2003 Communications Act continued the previous trend of deregulation, resulting in further consolidation within ITV and relaxed content obligations on PSBs. Five separate sectoral regulators were combined to become the Office of Communications (Ofcom) in anticipation of further consolidation of communications technologies. Consolidation of media ownership also continued. In 2008 the switchover from analogue to digital television began, which will end in 2012. Catch-up television is increasingly available for all channels, as well as live streaming of television over the internet.

With the application of digital technology and growing communications convergence, the distinctions between the activities of broadcasting and print companies are beginning to erode, posing difficulties for regulation based on media type.

## **2. The media landscape in the UK**

The media landscape in the UK has developed into a large and diverse market, open to international participants. The following discussion provides a brief overview of

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<sup>25</sup> R. Wise and J. Steemers, *Multimedia: A critical introduction* (2000), at p. 97.

<sup>26</sup> *Ibid.*, p. 101.

<sup>27</sup> *Ibid.*, pp. 101-102.

the current media environment, discusses journalist's background and education and considers media literacy and public perceptions of the media in the UK.

## 2.1 The media market

### *The print media*

In the UK there are currently roughly 14 national newspapers,<sup>28</sup> 1200 local/regional newspapers and 600 niche or highly local newspapers<sup>29</sup>. The national press is predominantly based in London. Most of the national daily newspapers in the UK have special Sunday versions which are highly popular. Free weekly (local) newspapers are relatively common in the UK, which are heavily supported by advertising with little emphasis on editorial content. In Metropolitan areas free daily newspapers have come to the market, offering editorial content that approaches the quality of some of the paid-for daily newspapers, with *Metro* currently being the most successful.

In June 2010 none of the UK-wide national newspapers were showing a year-on-year rise in circulation<sup>30</sup> and the regional press is not faring much better.<sup>31</sup> Most national newspapers show serious decline in circulation, though part of this is explained by their decision to all but stop free giveaway copies.<sup>32</sup>

Of the print media the regional press receives the largest portion of total media advertising expenditure at 11.6%. The national press is the next largest at 10.5%, though all print media advertising expenditure is currently declining. Consolidation has become a recent trend with local media, with newspaper groups disposing of and acquiring titles. This trend has led to the five major regional newspaper groups accounting for over 70% of newspaper circulation.<sup>33</sup>

### *Radio*

As of July 2010, there are 288 individual analogue stations and 191 digital stations in the UK. This results in 334 unique radio stations in the UK, as some stations broadcast both analogue and digitally.<sup>34</sup> There are an additional 75 stations broadcasting on digital satellite, 24 stations available on freeview and 35 on cable; most of these are either analogously or digitally simulcast.<sup>35</sup> Of the total radio stations, 267 are local commercial stations, 10 are UK wide commercial stations and 57 are public, BBC run, stations.<sup>36</sup>

In 2008 90% of the UK population could receive a signal from at least one digital radio multiplex, most being able to receive three or more.<sup>37</sup> The number of radio stations that are available in an area vary between 23 (Northern Ireland) to 59

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<sup>28</sup> Audit Bureau of Circulations (ABC), available at [www.abc.org.uk](http://www.abc.org.uk) (last visited on 04/10/2010).

<sup>29</sup> See: The Newspaper Society, available at <http://www.newspapersoc.org.uk/> (last visited on 04/10/2010).

<sup>30</sup> "National press ABC's: Quality sales tumble", Press Gazette, 16/07/2010.

<sup>31</sup> "Regional ABCs: regional sales continue to slide", Press Gazette, 25/02/2010.

<sup>32</sup> "ABCs analysis: how bulk has disappeared since 2009", Press Gazette, 16/07/2010.

<sup>33</sup> Ofcom, "Media ownership rules review", 31/07/2009, at p. 34.

<sup>34</sup> Ofcom, "The communications market report", at p. 208.

<sup>35</sup> *Ibid.*, p. 208.

<sup>36</sup> *Ibid.*, p. 208.

<sup>37</sup> Ofcom, "The communications market report 2009", at p. 176.

(London).<sup>38</sup> Community radio, which is mainly financed by grants, is on the increase, with 17% of the UK population now able to receive community radio stations.<sup>39</sup>

While the average time spent listening to the radio is declining,<sup>40</sup> 90.6% of the adults in the UK listen to the radio on a weekly basis, which is up from the previous year by 0.3% (nearly half a million listeners).<sup>41</sup> The BBC's share of all radio listening hours is 54.6% and is currently holding stable year-on-year. National commercial radio accounts for 11% of all radio listening hours and local commercial radio accounts for 32.2%.<sup>42</sup> The average time spent listening to the radio increases with age, with children spending the least time listening to the radio.<sup>43</sup>

The total radio revenue for 2009 is estimated to be around £1.1 billion. The BBC accounts for £660 million and commercial radio for £432 million. Less than half of the latter (£202 million) is made up of national advertising sales, with commercial sales (31%) and sponsorship (22%) supplementing this amount.<sup>44</sup> Expenditure on radio advertising has been declining since 2007. Radio is currently receiving a 2.8% share of all advertising expenditure.<sup>45</sup>

The radio industry is experiencing ongoing consolidation, with the two largest commercial radio groups, Global (British) and Bauer (German) now owning 37.1% of all commercial radio licenses.<sup>46</sup> In terms of audience share, Global and Bauer account for 16.6% and 10.7% respectively of all radio listening hours, while the BBC accounts for 46.2%.<sup>47</sup>

### *Television*

In 2009 there were 490 television channels broadcasting in the UK.<sup>48</sup> Television can be received through different platforms in the UK with different geographical coverage. Analogue terrestrial television can be received by 99% of the population, 98% can receive digital satellite television and 81% can receive digital terrestrial television (DTT).<sup>49</sup> The availability of DTT is rising rapidly with the digital switchover from analogue to digital in the UK. By 2012 DTT coverage will match analogue coverage.<sup>50</sup> Further platforms to deliver television are cable and Internet Protocol Television (IPTV).

In the first quarter of 2010 the take up of multi-channel television had risen to 92.1% of UK households.<sup>51</sup> The five main PSBs in the UK attract 57.8% of all viewing hours in UK homes, with BBC1 being the most popular channel, followed by

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<sup>38</sup> Ibid., p. 178.

<sup>39</sup> Ibid., pp. 208-209.

<sup>40</sup> Ofcom, "The communications market report 2010", at p. 189.

<sup>41</sup> Data for the second quarter of 2010, Ibid., p. 214.

<sup>42</sup> 2.2% of the audience share is classified as 'other', Ibid., pp. 214-215.

<sup>43</sup> Ibid., p. 215.

<sup>44</sup> Ibid., p. 198.

<sup>45</sup> Ibid., pp. 198-199.

<sup>46</sup> Ibid., p. 203.

<sup>47</sup> Ibid., p. 204.

<sup>48</sup> Ibid., p. 99.

<sup>49</sup> Ibid., p. 157.

<sup>50</sup> Ofcom, "The communications market report 2009", at p. 119.

<sup>51</sup> Ofcom, "The communications market report 2010", at p. 158.

ITV1.<sup>52</sup> There is little movement in the top 10 most watched channels, though there is some movement in the top 20.<sup>53</sup>

Television industry revenue stood £11.1 billion in 2009,<sup>54</sup> of which 24% is generated by public funds, 28% by advertising and 41% by subscriptions.<sup>55</sup> 92% of UK households have taken up digital TV,<sup>56</sup> of which 53.1% subscribes to pay-tv. TV attracts 27.5% of the total advertising spending in the UK.<sup>57</sup> Of the total hours of television programming, 11% were first-run originations.<sup>58</sup> PSBs have to comply with original production quotas which pertain to programming made in the UK and commissioned from independent producers, or a broadcaster's own in-house production facilities. The quotas vary per broadcaster and apply separately for peak viewing times.<sup>59</sup> These quotas are generally between 50-90%<sup>60</sup> and are generally met and exceeded by all broadcasters.<sup>61</sup> There is a further 25% independent production quota for all PSBs to ensure that production companies that are not attached to any broadcaster have access to mainstream channels. This quota has been exceeded by all broadcasters during the last 5 years.<sup>62</sup>

### *Online media and social media online*

All national newspapers have an online version with the website of the Mail online having been the most visited national newspaper for the last 6 months.<sup>63</sup> Most major broadcasters operate websites which offer the option of watching programs that have recently been broadcast on demand for free.

In the UK Facebook is by far the most used social networking site, with a unique audience of 24.2 million.<sup>64</sup> Twitter is the next most popular social network with 3.7 million users.<sup>65</sup> UK users spend an average of 6 hours and 9 minutes on Facebook every month.<sup>66</sup> Currently 9% of the adult UK population maintains a website or a blog,<sup>67</sup> with those in higher socioeconomic groups being slightly more likely to maintain one.<sup>68</sup>

### *News agencies*

The UK has a wide range of news agencies, a number of which, such as Reuters, have attained an international reputation. These agencies can be distinguished according to

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<sup>52</sup> Ibid., p. 175.

<sup>53</sup> Ibid., p. 174.

<sup>54</sup> Ibid., p. 123.

<sup>55</sup> 6.4% is classified as "other". Ibid., p. 126.

<sup>56</sup> Data for first quarter of 2010, see: Ofcom, "The communications market report 2010", at p. 97.

<sup>57</sup> Ofcom, "The communications market report 2010", at p. 97.

<sup>58</sup> Ibid., p. 133.

<sup>59</sup> Ibid., p. 133.

<sup>60</sup> For a full overview of the quotas and compliance, see: Ofcom, "The communications market report 2010", at p. 142.

<sup>61</sup> Ofcom, "The communications market report 2009", at p. 103.

<sup>62</sup> Ofcom, "communications market report 2010", at p. 143.

<sup>63</sup> "Mail online stays top as it hits new traffic record in June", Press Gazette, 29/07/2010.

<sup>64</sup> "The ups and downs of social networks" BBC News, 22/07/2010.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Defined as those over the age of 16.

<sup>68</sup> Ofcom, "UK adults' media literacy" (2010), at p. 50.

their geographical coverage, subject focus and media orientation. The largest agencies, such as Reuters, the Press Association, News Team International and National News and Pictures have broad coverage and employ their own journalists. Reuters started life covering the financial sector but moved into general news reporting in the mid-nineteenth century and now operates 200 bureaus worldwide and is the world's largest international news agency.<sup>69</sup> In 2008 it became a subsidiary of the Canadian company, renamed Thomson Reuters. The company is of particular interest for the Mediadem project in that it is subject to the Reuters Trust designed to guarantee the independence of its reports.<sup>70</sup>

There are also news agencies operating at the devolved national and regional levels. In Scotland, for example, both Scottish News and Sport and Hard Edge Media provide varied coverage of Scottish news and events, while a similar role is performed in Wales by the Wales News and Picture Service. The Press Association covers developments in Ireland as well as the UK. At the regional level there are numerous smaller agencies such as the South West News Service, North News and Pictures, Mercury Press Agency (Liverpool) and the Cavendish Press (Manchester based).

Not all news agencies employ journalists to carry out independent investigations. Some such as The Profile Group simply review existing reports and repackage them. Within the UK the news agencies are represented by the National Association of Press Agencies.

Increasing reliance on news agencies is a cause for concern in the UK, especially where international news is concerned.<sup>71</sup> The BBC is generally recognised as one of the few news organisations capable of foreign news gathering.<sup>72</sup>

## **2.2 Journalists' background and education**

### *Age, gender and social background*

The largest survey into journalism was conducted by the Journalism Training Forum in 2002.<sup>73</sup> This survey provides detailed information on journalists and is the most recent survey to provide specific data on journalists at work. It should be noted though that the survey on which the study was based achieved a low return rate (11.5%), which may have distorted some of the data,<sup>74</sup> though the sample was large enough to provide reliable information.<sup>75</sup>

While the data varies per sector, journalists in the UK are on average relatively young, with 35% aged between 22-39 and another 32% aged between 30 and 39.<sup>76</sup> The gender balance is 49% women and 51% men, thus providing a nearly equal split

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<sup>69</sup> See: Thomson Reuters, "Reuters news agency", available at: [http://thomsonreuters.com/content/media/pdf/news\\_agency\\_overview.pdf](http://thomsonreuters.com/content/media/pdf/news_agency_overview.pdf) (last visited on 04/10/2010).

<sup>70</sup> For more information on this, see: Thomson Reuters, "Founders share company limited", available at: [http://thomsonreuters.com/content/corporate/PDF/about\\_us/reuters\\_founders\\_share.pdf](http://thomsonreuters.com/content/corporate/PDF/about_us/reuters_founders_share.pdf) (last visited on 04/10/2010).

<sup>71</sup> House of Lords, "The Ownership of the news", at par. 53 and 80.

<sup>72</sup> *Ibid.*, par. 299.

<sup>73</sup> Journalism Training Forum, "Journalists at work" (2002).

<sup>74</sup> S. Frith and P. Meech "Becoming a journalist: Journalism education and journalism culture", 8 *Journalism* (2007), 137, at 139.

<sup>75</sup> Journalism Training Forum, "Journalists at work", at p. 12.

<sup>76</sup> *Ibid.*, p. 21.

between the sexes.<sup>77</sup> However, women earned on average £5000 less than men, though this can be partially explained by the average age of female journalists being lower and the fact that a high proportion of female journalists work in low paying sectors.<sup>78</sup> A very large proportion of journalists are white, over 96%, and only very small groups from ethnic minorities participate in the profession.<sup>79</sup>

In the last few decades there has been a noticeable increase in the social exclusivity of journalism. The typical journalist, born in 1970 comes from a family with an income of 42.4% above the average family income, where this was only 5.5% for those born in 1958.<sup>80</sup> The result is that the typical journalist will come from a family that is better of than 3 out of 4 families in the UK.<sup>81</sup> Top journalists are more likely to be independently schooled than not. Though only 7% of the UK population is independently schooled, nearly 55% of the top journalists are.<sup>82</sup>

### *Education and professional training*

The 2002 survey of the journalism profession showed that 98% of all entrants to the journalism profession have a degree, of which 43% has a postgraduate degree.<sup>83</sup> While these figures are likely to be distorted by the low return rate of the survey,<sup>84</sup> it does show a definite trend towards journalism becoming a graduate profession in the UK. There are still no formal academic entry requirements to journalism, though as the above data shows, the reality may be different. The National Union for Journalists (NUJ) estimates that currently 80% of all entrants to the profession have a degree.<sup>85</sup> It is further generally necessary to have some relevant work experience to access the profession,<sup>86</sup> which can form a barrier for entry due to the majority of work experience placements being unpaid.

At the time of the survey, 58% of those working in journalism hold a journalism qualification and a further 3% was working towards a qualification.<sup>87</sup> Most of these qualifications were accredited by the National Council for Journalists.<sup>88</sup> Newspaper journalists are most likely to hold a qualification, while those working in the magazine industry are least likely to.<sup>89</sup>

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<sup>77</sup> Ibid., p. 21.

<sup>78</sup> Journalism Training Forum, "Journalists at work", at p. 10 and 22.

<sup>79</sup> Ibid., p. 21.

<sup>80</sup> The Panel on Fair access to the Profession, "Unleashing aspiration: the final report on fair access to the profession", July 2009, at p. 20.

<sup>81</sup> Ibid., p. 21.

<sup>82</sup> Journalists working mid-2000s, Ibid., p. 19.

<sup>83</sup> Journalism Training Forum, "Journalists at work", at p. 24 and 26.

<sup>84</sup> Frith and Meech "Becoming a journalist", at 139.

<sup>85</sup> See: National Union of Journalists, "FAQs" available at: <http://www.nujtraining.org.uk/faqs.phtml#6> (last visited on 04/10/2010).

<sup>86</sup> The Panel on Fair access to the Profession, "Unleashing aspiration: the final report on fair access to the profession", at p. 101 and 103.

<sup>87</sup> Journalism Training Forum, "Journalists at work", at p. 34.

<sup>88</sup> Ibid., p. 35.

<sup>89</sup> Ibid., p. 35.

## *Salary*

A trainee broadcast journalist can expect to earn between £15,000 and £18,000 a year. An experienced broadcast journalist will generally earn between £25,000 and £40,000 a year, though top salaries can be £100,000 or more.<sup>90</sup> Newspaper journalist can expect to earn around £15,000 during training and may expect to earn between £15,000 and £40,000 a year. As in broadcast journalism, top salaries may rise above £100,000.<sup>91</sup> The median level of income in 2002 was £22,500.<sup>92</sup> Generally speaking salaries in broadcast journalism are higher than in print journalism, especially for those journalists who appear on screen.<sup>93</sup>

## **2.3 Media literacy**

### *Media consumption*

Since 2007 there has been a strong increase in the number of households that use digital television and internet. A 2009 survey shows that 89% of the households in the UK has digital television, 71% has internet access and 91% use mobile phones.<sup>94</sup> Currently 90% of the households with Internet have a broadband internet connection.<sup>95</sup> The households without internet cite “a lack of interest” and “cost” as the most common reason for not having internet access.<sup>96</sup> Those in the lowest socio-economic group and those aged 65 and above, have the lowest uptake of internet and digital television.<sup>97</sup> The main reasons for the use of television and radio, is for relaxation and to keep up to date with the news, whereas the main reason cited for using the Internet are “to find out and learn things” and to keep in touch with other people.<sup>98</sup> Three out of ten UK adults who use the internet either at home or elsewhere watch television and films over the internet.

### *Access to different types of media*

The Communications Act 2003 provides Ofcom with the duty to ensure the availability of a large range of electronic communication service, television and radio services.<sup>99</sup> 98.5% of the households in the UK are capable of receiving digital public service television.<sup>100</sup> The UK is currently switching from analogue to digital TV which should be completed by the end of 2012, though the switchover will not

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<sup>90</sup> Figures are a rough estimate, available at: <https://nextstep.direct.gov.uk/PlanningYourCareer/JobProfiles/JobProfile1351/Pages/Income.aspx> (last visited on 04/10/2010).

<sup>91</sup> Figures are a rough estimate, available at: <https://nextstep.direct.gov.uk/PlanningYourCareer/JobProfiles/JobProfile1459/Pages/Income.aspx> (last visited on 04/10/2010).

<sup>92</sup> Journalism Training Forum, “Journalists at work”, at p. 53.

<sup>93</sup> Frith and Meech, “Becoming a journalist”, at 139.

<sup>94</sup> Ofcom, “UK adults’ media literacy”, at p. 9.

<sup>95</sup> Office for National Statistics, Statistics Bulletin, “Internet access house holds and individuals” (2009), at p. 1, available at: <http://www.statistics.gov.uk/pdfdir/iahi0809.pdf> (last visited on 04/10/2010).

<sup>96</sup> Ofcom, “UK adults’ media literacy”, pp 19-20.

<sup>97</sup> *Ibid.*, p. 9.

<sup>98</sup> *Ibid.*, pp. 26-28.

<sup>99</sup> S. 3(2) Communications Act 2003.

<sup>100</sup> Ofcom, “Access and inclusion statement”, 15/10/2009, at p. 25.

significantly affect the number of households capable of receiving a television signal. It is estimated that after the switchover 98.6% of UK households will be capable of receiving public service digital television and 90% will be capable of receiving both public service digital television and all commercial multiplex channels, which is a significant increase from the 73% of households which could receive all analogue commercial channels before the switchover. Most households in the UK have access to broadband at basic speeds of up to 512Kbits/s. British Telecommunications (hereafter, BT) estimates this figure to be around 99.6% of all UK households.<sup>101</sup> Furthermore, 90% of all UK households currently have access to a 2MBit/s connection and the government has set itself the target of ensuring 2MBit/s connections for virtually all UK households by 2012.<sup>102</sup> Broadband access for rural communities such as the highlands and islands remains a concern and the government has recently created Broadband Delivery UK (BDUK) within the department of Business, Innovation and skills in order to achieve their Universal Service Commitment. 99% of the UK population is covered by 2G mobile network: the figure is somewhat lower for 3G coverage, at 92%, with rural and remote areas having the least coverage.<sup>103</sup>

### *Role and power of the media*

Although the extent and nature of media influence is hotly contested, the UK has introduced a number of measures designed to restrict the ability of any one individual or point of view to dominate the media.<sup>104</sup> These measures primarily relate to the audiovisual sector, which is considered particularly influential because of the combination of pictures and sound, and include the prohibition on political advertising, impartiality requirements, restrictions on election broadcasts and media ownership controls. Although political parties and many politicians now have their own websites, they do not directly control the main media sources in the UK. Political bodies are not allowed to own broadcasting licences and although press barons such as Beaverbrook and Rothermere, who dominated the print media in the early part of the twentieth century, sought to exert political influence, they did so independently of political power in parliament.<sup>105</sup> There remains, however, scope for indirect political influence, particularly in the audiovisual sector, through the government's power to appoint key personnel at the BBC and Ofcom, and during negotiations regarding the renewal of the BBC's Charter. It has also been suggested that the Hutton Inquiry, set up by the Labour government to investigate BBC journalist Andrew Gilligan's report on Iraqi weapons of mass destruction, led to subsequent BBC caution in the coverage of a number of controversial events.<sup>106</sup>

In terms of media influence on the public, television is by far the main source of news for the UK population. Figures from 2006 indicated that 65% of the population relied primarily on television, with only 14% looking to newspapers and

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<sup>101</sup> Ibid., p. 38.

<sup>102</sup> Ibid.

<sup>103</sup> These are coarse figures with a large error margin, for full details see: Ofcom, "Mostly mobile: Ofcom's mobile sector assessment, second consultation" (2009), at p. 112.

<sup>104</sup> For discussion of media effects see: G.G. Sparks, *Media effects research: A basic approach* (2009), especially chapter 9.

<sup>105</sup> Curran and Seaton, *Power without responsibility*, at pp. 45-48.

<sup>106</sup> H. Tumber and J. Palmer, *Media at war* (2004), at p.156.

11% to radio.<sup>107</sup> Five national television channels dominate the field, together attracting 97.5% of viewers: the BBC, Sky, Channels 3, 4 and 5.<sup>108</sup> The picture is in fact even more concentrated in that only three companies, the BBC, ITN and BSkyB, produce the news for these channels.

In general national broadcasters have been slow to adapt to social and political changes, which is sometimes blamed on the impartiality doctrine.<sup>109</sup> In 2010, however, the leader of the right wing British National Party (BNP) was controversially invited to take part in one of the BBC's flagship discussion programmes "Question Time", following the election of 2 BNP members to the European Parliament in 2009.<sup>110</sup> In addition, in the run up to the 2010 general election UK television broadcasters followed the US lead and organised for the first time three televised debates among the leaders of the Conservative, Labour and Liberal Democratic parties. The performance of the Liberal Democratic leader, Nick Clegg, at the first of these debates precipitated a sudden and unprecedented spike in support for the Liberal Democratic Party, suggesting that the broadcast media have considerable power to frame public perceptions of the political landscape and the viability of specific democratic options.<sup>111</sup> This spike was not ultimately reflected, however, in an increase in the number of elected Liberal Democrat Members of Parliament.

The printed press is not required to be impartial and British newspapers adopt a more or less explicit political bias. They can also take political advertising. Interestingly, a paper's bias is not necessarily in line with that of its subscribers: the Sun newspaper, for example, which supported the Conservative leader Margaret Thatcher during the 1980's, nevertheless retained a significant proportion of Labour readers throughout this period. Though this might be thought to confirm the weakness of the "hypodermic needle" theory of media impact, the Sun itself has claimed that it has had a tangible political influence, particularly in relation to the defeat of Labour in the 1992 election.<sup>112</sup> More recently, it has been argued that the selective use of opinion polls by the print media during the 2010 general election and negative reporting cut back the advantage that Nick Clegg obtained from the first televised debate.<sup>113</sup> Whether or not the print media are able to effect a major change in political allegiance, the growing sensitivity of politicians and their spin doctors to adverse

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<sup>107</sup> Ofcom, "Report for the Secretary of State Pursuant to Section 44A of the Enterprise Act 2002 of BSkyB plc's Acquisition of 17.9% Shareholding in ITV plc", 27/10/2007, figure 3.1.

<sup>108</sup> Ibid., figure 4.1.

<sup>109</sup> For a discussion, see D. Tambini and J. Cowling, (eds) *New news: impartial broadcasting in the digital age* (2002) and the work of the Glasgow Media Group, in particular J. Eldrige (ed.) *Glasgow media group reader volume 1: News content, language and visuals* (1995) and G. Philo (ed.) *Glasgow media group reader volume 2: Industry, economy, war and politics* (1995). For a recent reappraisal of the doctrine by the BBC see BBC, "From seesaw to wagon wheel: safeguarding impartiality in the 21<sup>st</sup> Century" (2007), available at: [http://www.bbc.co.uk/bbctrust/our\\_work/other/century21.shtml](http://www.bbc.co.uk/bbctrust/our_work/other/century21.shtml) (last visited on 04/10/2010) noting that 'impartiality is often about...bringing extra perspectives to bear, rather than limiting horizons or censoring opinion' (p. 6).

<sup>110</sup> J. Robinson and S. Brook, "Coup or crisis? Can the panel discuss...", *The Guardian*, 26/10/2009.

<sup>111</sup> C. Hope, "Nick Clegg's TV debate performance 'changed election dynamic' says Ashdown", *The Telegraph*, 16/04/2010.

<sup>112</sup> P. Chippindale and C. Horrie, *Stick it up your punter, The uncut story of the Sun newspaper* (2005).

<sup>113</sup> A. Grice, "Sun' censored poll that showed support for Lib Dems", *The Independent*, 23/04/2010.

media coverage ensures that the views and interests of media owners such as Rupert Murdoch are, at the very least, taken seriously by political leaders.<sup>114</sup>

New media services are also beginning to show their capacity to supplement the established media, influencing the development and impact of news stories. For example, in 2009 Twitter was used to get around an injunction preventing the mainstream media from revealing the name of a chemical company involved in legal proceedings, while the Guardian newspaper experimented with “crowd sourcing” to help review the many documents detailing the, in some instances fraudulent, expense claims lodged by Members of Parliament.<sup>115</sup>

### *Citizen involvement in online content production*

Content creation by internet users is on the rise in the UK. The most common form of content creation is uploading photos onto a website, which is done by 49% of all adult internet users. Other popular activities in the UK are: making and uploading short videos (11%), maintaining a blog (12%) and setting up a website (15%).<sup>116</sup> In 2009, 44% of adult internet users had a social networking profile, which is nearly double the number of 2007, while commenting on blogs is also on the rise.<sup>117</sup> Setting up a social networking profile is mainly popular under those aged 34 and under, and females are more likely than males to have one. In the UK Facebook is the most popular social networking site.<sup>118</sup>

With regard to political participation online, 22% of all adult internet users have signed an online petition and 7% has contacted an MP or local councillor online.

### *Trust in the media*

Only 18% of the British population trusts the printed press, which is the lowest figure in the EU.<sup>119</sup> This is possibly attributable to the fact that it is well known in Britain that the written press is free to be partisan.

UK adults place the most trust in information found on TV and radio, as respectively 52% and 50% of the adult population find this type of information to be reliable and accurate. Information found on the internet and newspapers is considered less reliable.<sup>120</sup> A majority of users say that they tend to trust the news output from TV (54%), radio (66%) and news websites (58%).<sup>121</sup>

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<sup>114</sup> P. Toynbee, “Murdoch’s malign influence demeans British politics”, *The Guardian*, 11/07/2009. For discussion of Rupert Murdoch’s influence on the editorial slant of his newspapers see Curran and Seaton, *Power without responsibility*, chapter 7.

<sup>115</sup> R. Booth, “Trafigura: A few tweets and freedom of speech is restored”, *The Guardian*, 13/10/2009 and “Investigate your MP’s expenses”, *The Guardian*, available at: <http://mps-expenses.guardian.co.uk> (last visited on 04/10/2010).

<sup>116</sup> Ofcom, “UK adults’ media literacy”, at p. 51.

<sup>117</sup> *Ibid.*, p. 51.

<sup>118</sup> *Ibid.*, p. 53.

<sup>119</sup> European Commission, Directorate General Communication, Eurobarometer, autumn 2009, “national report UK”, at p. 12.

<sup>120</sup> Ofcom, “UK adults’ media literacy”, pp. 72-73.

<sup>121</sup> *Ibid.*, p. 73.

### 3. Media policy in the UK

In the following section we consider the legal status of freedom of expression and information in the UK, before turning to examine structural and content regulation in the communications sector. The regulatory framework for the media in the UK has developed into a complex system including elements of state, co and self regulation, with different types of media subject to different regulatory techniques.

#### 3.1 Freedom of expression and information

##### *Fundamental legal norms on freedom of expression*

The UK follows the common law legal tradition and does not have a written constitution as such. Many rules relating to government take the form of unwritten conventions, though certain measures that can be considered to have constitutional status are enshrined in legislation, such as the Human Rights Act 1998. At the centre of the British constitution lies the doctrine of the sovereignty of parliament, of which a more controversial aspect, particularly in the light of the UK's EU membership, is the principle that parliament cannot bind its successors.

Within the UK there has been a strong presumption that individuals remain free to do anything that the law does not proscribe. The emphasis on liberties rather than rights has meant that until recently human rights were not codified in the UK, and, though UK courts have recognised the importance of human rights under the common law, they could be overridden by legislation as indeed they can be by express legislation even today – the Human Rights Act having retained this aspect of Parliamentary sovereignty.

Britain was one of the first states to sign the European Convention on Human Rights (hereafter, ECHR) in 1951 and has since adhered to it on an international level. However, as the UK has a dualist approach to international law, the provisions of the Convention, though having some influence on the development of the common law, were not legally binding internally in the UK and could therefore not be directly enforced in the UK courts. In 1966 the UK accepted the right of their citizens to have recourse to the European Court of Human Rights (hereafter, ECtHR) in cases where they have exhausted domestic remedies.

The position of human rights in the UK changed radically with the adoption of the Human Rights Act 1998 (hereafter, HRA), which gave effect to key articles of the ECHR in the UK. The act requires courts to take into account any previous decision of the ECtHR, though it does not formally require them to follow these judgements.<sup>122</sup> Should there be a conflict between a ruling of the House of Lords and a ruling of the ECtHR, the English courts are required to follow the ruling of the House of Lords.<sup>123</sup> Of particular importance is section 3, which states that the UK courts have to interpret legislation, whenever possible, in accordance with human rights, though primary UK legislation cannot be invalidated on human rights grounds. Courts may only issue a declaration of incompatibility which does not affect the continuing validity of the statute in question.<sup>124</sup>

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<sup>122</sup> S. 2 HRA 1998.

<sup>123</sup> *Price v Leeds City Council* [2005] EWCA Civ 289, Confirmed by the House of Lords in *Leeds City Council v Price* [2006] UKHL 10.

<sup>124</sup> S. 4 HRA 1998.

Section 6 of the HRA states that it is unlawful for a public authority to act incompatibly with convention rights. All bodies that have functions of a public nature are covered by this provision, which can lead to the HRA imposing obligations on private bodies as well as the state, for example with regards to privacy. Especially relevant for the media is section 12, which requires courts to have particular regard to the importance of freedom of expression when deciding whether to grant any relief, and in particular when granting an injunction prior to publication. It requires courts to take into consideration the public interest in the availability of the contested information.

The HRA has both vertical and horizontal effect. Although the HRA itself only covers public bodies, it is applicable to the courts, which have consequently given effect to rights under the ECHR in private law actions between individuals and private companies. It should be noted though that a violation of rights which stems from private law, will not give rise to a cause of action under the HRA. However, where there is cause of action in private law the court must interpret this action in line with the HRA. Certain sections of the media have been extremely critical about the operation of the HRA, especially its influence on the development of the law of privacy. The Conservative Party, now in coalition government, has indicated that it would like to abolish the HRA and instate a new bill of rights for the UK.

#### *Freedom of information and the media*

The right to freedom of information contained in art 10 of the ECHR is protected in the UK through the HRA, but there is also specific legislation aimed at insuring freedom of information. The Freedom of Information Act 2000 (hereafter, FOI Act) contains a general right of access to information held by public authorities in England, Wales, and Northern Ireland. The Freedom of Information (Scotland) Act 2002, which came into force at the same time as the FOI Act, contains similar public-disclosure obligations as those contained in the FOI Act. The predecessor of the FOI Act, the Code of Practice on Access to Government Information, which had a much wider margin of discretion when responding to access requests,<sup>125</sup> was replaced by the FOI Act when it came into force on 1 January, 2005. The Act contains 23 exemptions to the general right of access,<sup>126</sup> divided into two types: “absolute” and “qualified” exemptions. Where an absolute exemption is applicable, no public authority may disclose the requested information, not even where disclosure would be in the public interest. Where there is a qualified exemption, information may only be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exception.

The UK Information Commissioner is charged with the responsibility of ensuring public authorities’ compliance with the statute. Where a public authority refuses to disclose information, the internal complaint procedure of the authority must be followed and where this does not lead to a satisfactory result, independent review may be sought from the Commissioner. An appeal lies from the Commissioner’s

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<sup>125</sup> D. Cooper “UK Freedom of Information Act 2000: Boon or bane?” 26 *Company Lawyer* (2005) 217, at p. 217.

<sup>126</sup> Ss. 21 to 44 FOI Act.

decision to the First-tier Tribunal (Information Rights)<sup>127</sup> and then, as a last resort, to the High Court.

### *Ranking of media freedom in the country under study*

The UK has ranked between 20 and 28 in the Press Freedom Index of the Reporters Without Borders, since the start of the publication of the index. The UK is currently ranked at the highest rank it has achieved so far: 20th place. The media in the UK is deemed free to report on all aspects of British life.<sup>128</sup>

Due to its constitutional framework there is no entrenched guarantee of press freedom, though the HRA, as noted previously, emphasises the importance of the Convention right to freedom of expression. Nevertheless, freedom of the press has historically been an important part of Britain's unwritten constitution and legal tradition.<sup>129</sup> Licensing of the (written) press was abolished in 1684 and ever since there has been a general right to publish written material without prior state authorisation, though sedition laws and stamp duties were used to curb the radical press well into the nineteenth century.<sup>130</sup> The broadcast sector was, from its inception in the early twentieth century, subject to government regulation and even today there remain laws that limit the freedom of both the print and audiovisual media. *Freedomhouse* currently ranks the UK 27th in their 2009 world ranking of freedom of the press. The factors they cite as limiting media freedom in the UK are libel laws favourable to the plaintiff, the Prevention of Terrorism Act, and the intimidation of journalist in Northern Ireland.<sup>131</sup>

### *Relevant international treaties signed by the UK*

The UK is a signatory state to the International Covenant on Civil and Political Rights and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005. It is also a signatory to the Council of Europe European Convention on Human Rights and the Convention on Cybercrime, though has yet to ratify the latter convention.

## **3.2 Structural regulation**

### *Licensing rules*

In the UK the media regulator "Ofcom" is responsible for licensing all commercial radio and television channels transmitted by satellite or terrestrial networks and by cable. Under the Broadcasting Act 1990, as amended by the Broadcasting Act 1996 and the Communications Act 2003, there are several groups of people who are disqualified from holding a licence. The main groups of people that are disqualified

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<sup>127</sup> Previously called the Information Tribunal, originally the Data Protection Tribunal specifically set up to hear appeals under the Data Protection Act and later the FOI Act 2000, the Privacy and Electronic Communications Regulations 2003 and the Environmental Information Regulation 2004.

<sup>128</sup> See: CPU Media Trust, "United Kingdom", available at: <http://www.cpu.org.uk/page-view.php?pagename=UnitedKingdom> (last visited on 04/10/2010).

<sup>129</sup> Humphreys, *Mass media and media Policy*, at p. 199.

<sup>130</sup> Curran and Seaton, *Power without responsibility*, at pp. 40 chapters 2 & 3.

<sup>131</sup> See: Freedom House, Freedom of the press 2009, Press freedom rankings by region, available at: <http://www.freedomhouse.org/template.cfm?page=251&year=2009> (last visited on 04/10/2010).

from holding a broadcasting licence<sup>132</sup> are: political organisations, advertising agencies, local authorities and those people who, in the opinion of Ofcom, are subject to undue influence by a disqualified person such as to act against the public interest.<sup>133</sup> Religious bodies may only hold licences with Ofcom's prior approval and there are restrictions on the type of licence they can hold.<sup>134</sup> Publicly funded bodies cannot hold radio service licences.<sup>135</sup> Prior rules restricting foreign ownership of broadcasting licences were removed by the Communications Act 2003. It is a criminal offence to provide broadcasting services without a licence.<sup>136</sup>

The EU Authorisation directive has been implemented in the UK by the Communications Act 2003, thus moving the previous regime of telecommunications licensing on an individual base with conditions based on market power, to a general authorisation regime. New online media will, however, generally fall into the category of "content service" for the purpose of the Communications Act 2003 and will therefore not fall under the general regulation applicable to "electronic communication services" as regulated by the EU Authorisation and Framework directive.<sup>137</sup> New online media in the UK are currently not subject to licence conditions, though under the amendments of the Communication Act 2003 to implement the Audiovisual Media Service (hereafter, AVMS) Directive, anyone who wishes to provide an on demand programme service must notify the relevant regulatory authority, Ofcom, in advance if its intention.<sup>138</sup>

The print media in the UK are less regulated than the broadcast media and are not subject to a licensing system. Anyone with the funds to start a newspaper is free to do so. There are, however, rules on cross-ownership and competition regulations that pertain to newspapers, discussed further below.

### *Ownership rules*

In the last decade there has been significant deregulation of media ownership rules in the UK, with increasing emphasis on the role of competition law to check undue concentrations. Ownership was previously heavily regulated in order to promote plurality of content, thereby enabling access to different viewpoints and facilitating citizens' democratic participation. With increasing diversity and choice of content, the result of new digital services transmitted over the Internet or satellite and terrestrial networks, this underlying rationale for ownership regulation has decreased in importance.

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<sup>132</sup> A licence granted under the 1990/1996 Broadcasting act for independent television services, independent radio service, digital terrestrial television broadcasting and digital terrestrial sound broadcasting.

<sup>133</sup> For a full list see: Schedule 2 of the Broadcasting Act 1990, Schedule 2 of the Broadcasting Act 1996 and ss. 348-350 & Schedule 14 of the Communications act 2003.

<sup>134</sup> They cannot hold a channel 3 or 5 licence, a national sound broadcasting licence, a public teletext licence, an additional television service licence and a television or radio multiplex licence.

<sup>135</sup> Schedule 2, part 2, s. 3 Broadcasting Act 1990.

<sup>136</sup> S. 13 & 97 Broadcasting Act 1990.

<sup>137</sup> S. 32(2) Communications Act 2003.

<sup>138</sup> S. 368BA Communications Act 2003, as amended by the Audiovisual Media Services Regulations 2010.

Ownership rules are primarily of two types. The first, discussed in the previous section, prevents certain bodies from owning licences. The second restricts the number of licences any one individual or group can own and are set out below.

In relation to television, all accumulation rules at both national and local levels were removed by the Communications Act 2003. Consolidation among the various Channel 3 (ITV) licencees was thus made possible, subject to competition law oversight. Cross-media restrictions have, however, been retained in relation to certain combinations of print and broadcast interests. Companies with a 20% share of the national newspaper market are prohibited from holding, or acquiring, 20% or more of the shares in the holder of a Channel 3 television licence. In addition, a company in which a major newspaper proprietor has more than a 20% stake cannot own more than a 20% stake in a company with a Channel 3 licence.<sup>139</sup> Local television ownership is also affected by cross media ownership rules with limits on ownership of certain combinations of local radio stations, local newspapers and a regional channel 3 licence where market shares are high and coverage overlaps.<sup>140</sup> The rules considering local licences are currently under review.<sup>141</sup>

In relation to radio, current restrictions on ownership of multiple licences are fairly complicated. The main rules are that no single person may hold a licence for more than one national multiplex service for radio, nor can someone hold two local multiplex licences with overlapping territory. There are no restrictions on the number of national analogue radio licences a person can hold. The number of local licences a single person can hold can generally not exceed two in the same locality and calculations take place on a complicated point system based on coverage and potential audience shares.<sup>142</sup>

There are currently no media ownership rules pertaining to newspaper ownership, other than those concerned with mergers of large newspapers, discussed in the next section, and rules concerning cross media ownership, as discussed above. There are further specific rules preventing cross media ownership at the local level, concerning local analogue licences, local newspapers and regional channel 3 licences where audience and market shares overlap and cross a certain threshold. There are however strong indications that the rules concerning cross media ownership of local media will be relaxed in the near future, in part to ease the position of local newspapers, which have been affected by Internet and free media services.<sup>143</sup>

### *Competition rules*

Aside from specific media ownership regulations, competition rules also apply to the media. The position is complex in that not only have the general competition rules been modified to take into account media pluralism concerns, but Ofcom also has concurrent competition powers in relation to those media services it regulates.

Media mergers are subject to the general merger rules contained in sections 22 and 23 of the Enterprise Act 2002, which enable the Office of Fair Trading to make a

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<sup>139</sup> Part 1, Schedule 14 Communications Act 2003.

<sup>140</sup> For full regulations see Communications Act 2003, schedule 14.

<sup>141</sup> House of Commons, Culture, Media and Sports Committee: 4<sup>th</sup> report, "Future of local and regional media", 24 March 2010, HC Paper 43-I, chapter 4.

<sup>142</sup> S. 9, Schedule 2, part III, Broadcasting Act 1990.

<sup>143</sup> See: House of Commons, "Future of local and regional media" and Ofcom reports.

reference to the Competition Commission where a merger is likely to result in a significant lessening of competition in the relevant market. Where a merger is thought to raise specific media plurality concerns the Secretary of State is empowered, though not required, to trigger an investigation and can block a merger on media pluralism grounds.<sup>144</sup> The public interest factors that can be taken into consideration in this way are: the accurate presentation of news and freedom of expression in newspapers; the plurality of views in the newspaper market; the plurality of the media in general and the need for a wide range of high quality broadcasting appealing to different tastes and interests; and, finally, the need for a genuine commitment on the part of the media owners concerned to the objectives of section 319 of the Communications Act, which include due impartiality, taste and decency.<sup>145</sup> Where the Secretary of State has given a merger intervention notice that mentions a media public interest consideration, Ofcom will provide an advisory report to the Secretary of State concerning the likely effect of the merger on the specified media pluralism concern.<sup>146</sup>

Under sections 316-318 of the Communications Act 2003, Ofcom also enjoys broad powers to regulate competition in relation to licensed broadcasters. Ofcom can include in the terms of its licences such conditions as it sees fit to ensure fair and effective competition.<sup>147</sup> Where Ofcom considers that action by a licensee threatens competition it can give directions to the broadcaster concerned and if no action is taken the broadcaster can ultimately be fined or even lose its licence. Ofcom has recently exercised this power by fixing the wholesale prices at which the satellite broadcaster BSkyB sells on its premium sports channels to competing media providers.<sup>148</sup>

### 3.3 Content regulation

#### *General structure of content regulation in UK*

In the UK the written press is largely self-regulated by the Press Complaints Commission (hereafter, PCC) Editors' Code of Practice (hereafter, PCC code of conduct) which is applicable to both printed and online versions of printed publications, though not all publications subscribe to the code.<sup>149</sup> The editors are responsible for the conduct of the journalist working for their publication and are therefore responsible for ensuring the code is followed. It has become common practice for compliance with the PCC code of conduct to be written into editors' contracts.<sup>150</sup> The PCC cannot impose fines to enforce compliance with the code, but it can force an editor to print an adjudication against their newspaper or magazine. The lack of power of the PCC to impose financial penalties has led to wide criticism that the PCC is an ineffectual body, incapable of keeping the press in check, though this is contested by the PCC itself. It should be noted that section 12 of the HRA requires courts to take into account "any privacy code" when considering whether to grant an

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<sup>144</sup> Ss. 42, 59 and 67 Enterprise Act 2002.

<sup>145</sup> Ss. 58(2A-2C) Enterprise Act 2002.

<sup>146</sup> S. 377 Communications Act 2003.

<sup>147</sup> S. 316 Communications Act 2003.

<sup>148</sup> For more details, see Ofcom, "News", available at: [www.ofcom.org.uk/media/news/2010/03/nr-20100331](http://www.ofcom.org.uk/media/news/2010/03/nr-20100331) (last visited on 04/10/2010).

<sup>149</sup> House of Commons, Culture, Media and Sport Committee, "Press standards, privacy and libel: second report", 9 February 2010, HC paper HC362-I, at para. 553.

<sup>150</sup> Press Complaints Commission, "code of conduct", Introduction.

injunction preventing publication and this has led to some consideration of the privacy provisions of the code in the courts.

The broadcast media, both public and commercial, are subject to content regulation by Ofcom under the Communications Act 2003. This requires Ofcom to establish certain standards for the content of programmes transmitted as part of television or radio services.<sup>151</sup> These standards are set out in Ofcom's broadcasting code, which is accompanied by guidance notes. The notes are non-binding but give an indication of how the code will be applied in certain situations. It should be noted that Ofcom has a certain "bias against intervention"<sup>152</sup> and in practice a form of co-regulation takes place, with industry regulation backed-up by statutory enforcement by Ofcom.<sup>153</sup>

The broadcasting code is enforced by Ofcom's Sanctions Committee, which has a variety of duties, the most relevant here being the consideration of content-based cases.<sup>154</sup> Where a service provider breaches the content provisions, the Committee may direct the service provider to issue a correction, they may impose a fine and in the most severe cases, they can revoke the broadcasting licence.<sup>155</sup> It should be noted that the code covers all licensed services and to some extent also the BBC, though as noted below the BBC alone oversees compliance with impartiality and accuracy standards.

The BBC is largely self-regulated with its own code, the BBC's editorial guidelines, which, in many aspects, parallels the Ofcom Broadcasting Code. The BBC's editorial guidelines are broader than the Ofcom Broadcasting Code as they apply to all BBC content, whether this be for radio, television, online content, mobile devices, interactive services or the printed word.<sup>156</sup> Compliance with the guidelines is monitored by the Executive Board, who is responsible for ensuring compliance with the code and guidelines.<sup>157</sup> The Executive Board is overseen by the BBC Trust, the BBC's specific regulatory body. The BBC Trust has the power to investigate areas of concern and hear appeals on complaints made to the executive board on editorial matters. They can apply internal controls such as reprimands, or even dismissal to enforce the editorial guidelines. In particular, the Trust is ultimately, and solely, responsible for compliance with impartiality and accuracy standards.<sup>158</sup>

Video on Demand (hereafter VoD) content is partly regulated by the Association for Television on Demand (hereafter, ATVOD), with Ofcom as a co-regulator, through a regulatory framework that implements several provisions of the AVMS Directive. It sets minimum content standards for those VoD services that are under its editorial control, namely those services that offer content comparable in

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<sup>151</sup> S. 319 Communications Act 2003.

<sup>152</sup> S. Carter, "The Communications Act: myths and realities" (2003), Speech delivered to Media and legal Practitioners, available at: <http://media.ofcom.org.uk/2003/10/09/the-communications-act-myths-and-realities-thursday-9-october-2003/> (last visited on 04/10/2010).

<sup>153</sup> L. Hitchens, *Broadcasting pluralism and diversity: a comparative study of policy and regulation* (2006) at p. 14.

<sup>154</sup> The full terms of reference for the Ofcom Content Sanctions Committee are available at: [http://www.ofcom.org.uk/about/csg/ocsc\\_index/ocsc\\_tor2/](http://www.ofcom.org.uk/about/csg/ocsc_index/ocsc_tor2/) (last visited on 04/10/2010).

<sup>155</sup> Ss. 344 and 345 Communications Act 2003.

<sup>156</sup> S. 2 BBC Editorial Guidelines

<sup>157</sup> S. 3.2 BBC Trust, "BBC protocol on editorial standards", available at: [http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory\\_framework/protocols/d4\\_editorial\\_standards.pdf](http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/protocols/d4_editorial_standards.pdf) (last visited on 04/10/2010).

<sup>158</sup> *Ibid.*, s. 2.2 and s. 44(5)b BBC Agreement.

form and content to television programmes. In case of non-compliance fines can be imposed and in extreme cases the service may be suspended.<sup>159</sup>

The British Board for Film Classification (BBFC) is an independent non-governmental body that regulates the film and video industry in the UK. The BBFC was originally set up by the film industry itself to achieve national uniformity in film classifications. It was granted further powers under the Video Recordings Act 1984,<sup>160</sup> which provided that all video recordings offered for sale or hire commercially in the UK should be classified. It should be noted that though BBFC classifications will generally be followed, statutory powers on film remain with the local councils, which can overrule any of the Board's decisions in their jurisdictions.

#### *General content requirements designed to satisfy citizen's information needs*

One of the principal duties of Ofcom is "to further the interests of citizens in relation to communications matters" and to "further the interests of consumers in relevant markets, where appropriate by promoting competition".<sup>161</sup> Ofcom is responsible for ensuring that the news provided by (regional) Channel 3 services, is capable of competing with other television news services.<sup>162</sup> Ofcom's Broadcasting Code further sets several standards for content that are directly aimed at satisfying citizens' information needs. According to section 319 of the Communications Act 2003, Ofcom is obliged to set standards that will secure the objective of due impartiality and due accuracy. There are further provisions that limit political advertising, ban misleading advertising and prohibit use of techniques which exploit the possibility of conveying a message to, or influencing the mind of, viewers or listeners, without their being aware of it taking place. The rules discussed above concerning media competition and media pluralism are also relevant here, as they are aimed at allowing citizens access to different view points. The BBC editorial guidelines largely mirror the Ofcom Broadcasting Code and contain their own standards for impartiality and accuracy. However, as the BBC's editorial guidelines apply to all BBC content, whether this be for radio, television, online content, mobile devices, interactive services or the printed word,<sup>163</sup> they are of wider applicability than the Ofcom broadcasting Code, which applies mainly to broadcast radio and television services.

There are complicated rules governing Party Political Broadcasts (hereafter, PPB) and referendum campaign broadcasts. Ofcom is required under section 333 of the Communications Act to set standards for these types of broadcasts, which are further developed by the Broadcasters' Liaison Group. All the main parties and those parties standing in at least one sixth of seats in each nation are allocated a specific number of PPB's.<sup>164</sup> The BBC has its own rules concerning PPB's, but these provisions largely mirror those of the Communications Act 2003.

Self-regulation of the printed press through the PCC code of conduct is less extensive than that under the Ofcom Broadcasting Code. There is no requirement for

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<sup>159</sup> Ss. 368i-368n Audiovisual Media Services Regulations 2009.

<sup>160</sup> The act was repealed and brought back into force by the Video Recordings Act 2010, after it was discovered the 1984 act was invalid due to a procedural mistake.

<sup>161</sup> S. 3 Communications Act 2003.

<sup>162</sup> S. 280 Communications Act 2003.

<sup>163</sup> S. 2 BBC Editorial guidelines.

<sup>164</sup> The numbers differentiate between nations but the main parties are generally allocated around 4 broadcasts each, with one broadcast for each 'smaller' qualifying party.

impartiality as most papers have a certain political bias of which readers are well aware. The code does, however, have a requirement of accuracy, which states that the press must take care not to publish inaccurate, misleading or distorted information, including pictures.

Recently there have been calls from James Murdoch to relax the impartiality requirements to make it easier for foreign companies like Fox to obtain a broadcast licence in the UK.<sup>165</sup> While content requirements are applicable to foreign broadcasts that are relayed by broadcasters within the jurisdiction, the application of these rules is somewhat less stringent as the terms *due* impartiality and *due* accuracy have been interpreted by Ofcom to allow the fact that the service is aimed at a different audience to be taken into account.<sup>166</sup>

#### *Codes of conduct, ethic codes and codes on editorial freedom*

As mentioned above, the Press is regulated by the PCC Code of Conduct which is enforced through holding editors responsible for the adherence to the code by the journalists working under them. Recently it has been suggested by the advertising agency that the self-regulation code for non-broadcast media should be extended to social network sites.

#### *Quota rules and obligations to invest in content production*

The vast majority of content that originates from the UK is commissioned and produced by the Public Service Broadcasters (hereafter, PSB's).<sup>167</sup> Ofcom sets UK production quotas for these broadcasters. Due to financial pressure on the commercial PSB's, the investment in UK based content is currently decreasing. The current content requirements for PSB's are laid down in section 273 of the Communications Act 2003, however the only types of content Ofcom can mandate are news and current affairs programmes.

Television broadcasters in the UK are subject to the provisions of the AVMS Directive, which requires that where practicable, more than half of all programming of television channels should consist of EU produced content. The PBS channels easily meet this obligation in the UK, and carry a high proportion of UK original productions.<sup>168</sup> All television channels licensed by Ofcom have to report annually on the proportion of EU content they carry and, where they fail to meet the 50% mark, they must explain why they have failed to do so. It has recently been suggested that Ofcom should work more closely with UK cable and satellite channels to ensure the provisions on EU content of the AVMS Directive are adhered to.<sup>169</sup>

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<sup>165</sup> J. Murdoch, "The absence of trust", lecture given at the Edinburgh International Television Festival 2009, 28/08/2009.

<sup>166</sup> Broadcast, "Fox news cleared of war bias", 19/06/2003, available at: <http://www.broadcastnow.co.uk/news/multi-platform/news/fox-news-cleared-of-war-bias-by-itc/1121070.article> (last visited on 04/10/2010).

<sup>167</sup> House of Lords, "British film and television industries report 2010", para. 172.

<sup>168</sup> *Ibid.*, para. 251 and 169.

<sup>169</sup> *Ibid.*, para 253.

### *Advertising rules*

Advertising is self-regulated for all media by the Advertising Standards Agency (hereafter, ASA). The ASA enforces codes that are designed for consumer protection and the levelling of the playing field between advertisers. These codes are created by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) and ensure that all non-broadcast marketing communications covered by the codes are “decent, honest and truthful and prepared with a due sense of social and professional responsibility” and “that all broadcast advertisements conform to the enduring principles shared by the self-regulatory and statutory systems, namely that advertisements should not mislead, harm or offend”.<sup>170</sup> The codes are regularly updated, with the latest version coming into force 1 September 2010. Aside from the advertising requirements contained in these codes, broadcast advertising has to comply with the requirements of the AVMS Directive, which are contained in the Communications Act 2003 and monitored by Ofcom. Ofcom has set quotas on the amount of advertising that is permitted per hour, currently between 7-9 minutes for “spot” advertising and between 9 and 15 minutes for the total advertising time per hour.<sup>171</sup>

The UK has an outright ban on political advertising in the broadcast media, intended to prevent wealthy groups gaining undue influence through the media.<sup>172</sup> It is still to be determined whether the ban is compatible with art 10 ECHR in that although the UK government has argued that it is, recent rulings by the ECtHR render this questionable.<sup>173</sup> The possibility of the ban being overruled in future cannot, therefore, be excluded.<sup>174</sup>

### *Rules regarding media publishing*

In the UK, defamation law differs under English and Scottish law. The main differences are that under English law a distinction is made between libel (written) and slander (spoken), which is relevant as in the case of libel, damages can be claimed without having suffered a financial loss as a result of the statement, whereas slander requires actual damage. The distinction between libel and slander is inconsequential under Scottish law as the requirement for a defamation action is that some harm has been caused, not necessarily financially. It should be noted that local authorities and central government bodies cannot sue for defamation, nor can political parties.

The UK is notorious for having a defamation law that is considered favourable to claimants. This, combined with potentially large sums that can be awarded by way of damages, has resulted in a relatively high number of claims, further helped along

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<sup>170</sup>Committee of Advertising Practice, “CAP regulatory statement 2010”, available at: <http://www.cap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/CAP-Code-Review-consultation.aspx> and “BCAP regulatory statement 2010”, available at: <http://bcap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-Code-Review-consultation.aspx> (last visited on 04/10/2010).

<sup>171</sup> See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/rules.pdf>.

<sup>172</sup> S. 321(2) Communications Act 2003.

<sup>173</sup> *TGV and Rogaland Pensioners Party* cases. In the UK the issue was addressed in *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [UKHL] 15; [2008] 2 W.L.R. 781.

<sup>174</sup> See: T. Lewis and P. Cumper “Balancing freedom of political expression against equality of political opportunity: the courts and the UK broadcasting ban on political advertising” Public Law (2009) 89.

by the rise in “no win no fee” actions and the ease of finding a jurisdictional base through the Internet. The UK is increasingly a venue for “libel tourism”, which has led the US to take action in order to protect the position of the First Amendment protection of free speech.

Once a reputation has been defamed, the defendant has to establish the truth of the statement by way of defence, though, as an alternative, the common law recognises certain defences, in particular, “fair comment”, “neutral reportage”, and an absolute privilege for “reporting parliament” and “proceedings in UK and certain international courts”. The courts in the *Reynolds* case also developed a further qualified privilege for “responsible journalism”, which applies to comments made without malice that can reasonably be believed to be true. The person publishing must have a legitimate interest in publishing, or be under a duty to do so (i.e. publishing is in the public interest) and the person receiving must be under a duty to, or have a legitimate interest in, receiving the information.<sup>175</sup> Anyone can invoke this privilege, though it has most often been applied in a journalistic context and while journalists have to act in “good faith” and on an “accurate factual basis”, they are not required to guarantee accuracy of the facts.<sup>176</sup>

Despite the development of defences such as those contained in the *Reynolds* case, there remain concerns about this area of law and the House of Lords Select Committee on the Media has recently reviewed the existing rules on defamation. Their report considered the possibility of introducing statutory defences and noted that under certain circumstances limitations on the ability of companies to obtain damages may be warranted. The review further noted that at the moment there seems to be no temporal limit on bringing defamation actions in relation to on-line publications, a matter that may also require reform.

The influence of the HRA has led courts in the UK to develop a right to privacy on the back of earlier tort law and breach of confidence actions, which are both based in the common law. The courts consider whether “there is a reasonable expectation of privacy”, balancing the individual rights under arts 8 and art 10 of the European Convention without giving initial priority to either article. The courts appear to afford significant protection to sensitive medical details and to children where they may be exposed to publicity, but appear reluctant to go as far as the ECtHR in the *Hannover*<sup>177</sup> case and afford blanket protection to celebrities when in public places. The courts have also allowed sensitive personal information relating to sports and media celebrities to be published, where the person has previously represented themselves to be a role-model.

### *Copyright*

All works produced by the British Government are subject to Crown copyright, though there are eleven general waivers which, amongst others, include primary and secondary legislation and government press notices.<sup>178</sup> Copyright generally does not

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<sup>175</sup> *Reynolds v Times Newspapers* [2001] 1 AC 127.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Von Hannover v Germany* [2004] ECHR 294.

<sup>178</sup> For a full list of waivers see: The National Archives, “Use of information previously covered by the Crown copyright waiver, available at: <http://www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/waiver-of-crown-copyright> (last visited on 04/10/2010).

hinder news reporting as fair dealing for the purpose of reporting current events does not infringe copyright in a work, though sufficient acknowledgement of the work should be given where possible.<sup>179</sup> Copyright can exist in headlines under UK law, which has the potential of hampering news reporting, though copyright protection here is not very strong.<sup>180</sup>

### *Social media*

In the UK there are few rules governing social media publishing. In principle online publications are treated as print publications under the law. There has been some debate as to the extent to which the protection offered to journalists applies to bloggers. The general law regarding media publishing will apply to any publication and will therefore cover social media participants. Most social media sites have their own (additional) rules through contractual terms for the use of a site, but these are by no means standardised and self-regulation in this area does not take place yet. Bloggers can sign up to the PCC code of conduct, though this is by no means common practice, partly due to high costs. It is more common for “serious” bloggers to state that they adhere to the principles of the PCC code or to the NUJ code of conduct.

Interestingly, there has been some discussion whether online defamation is slander or libel. As this generally concerns written content there is a strong argument for considering it libel, though following a recent case under English law it may be classified as slander where comments are made “in the heat of the moment”.<sup>181</sup> This distinction is relevant as slander is not necessarily actionable.<sup>182</sup> Bloggers seem to be liable for defamatory comments on their sites made by third parties, if they fail to remove them after becoming aware of them.<sup>183</sup>

A similar approach applies to Internet Service Providers (hereafter ISP) if they fail to act after having been made aware of defamatory comments on their server.

### *Rules regarding information gathering processes*

In the UK, journalistic sources are protected under section 10 of the Contempt of Court Act 1981, which recognises that in a free and democratic society journalistic sources should be protected and a presumption is made in favour of journalists wishing to protect their sources. There are however exceptions where national security or the prevention of disorder and/or crime are at issue, in which case disclosure of the source will be warranted in almost all cases. There is also an exception where disclosure is in the interest of justice, though courts are rather more reluctant to order disclosure on this ground unless vital public or individual interests are at stake. Concerns have, nevertheless, been voiced that UK courts have been unduly protective of commercial and property interests. In this context, Article 10

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<sup>179</sup> Art. 30, Copyright, Designs and Patents Act 1988.

<sup>180</sup> *The Shetland Times v Wills* [1997] FSR 604.

<sup>181</sup> *Smith v ADVFN Plc* [2008] EWHC 1797.

<sup>182</sup> J. Tumbridge, “Defamation: the dilemma for bloggers and their commenters” 31 *European Intellectual Property Review* (2009) 505, at 505.

<sup>183</sup> *Carrie v Tolkien* [2009] EWHC 29.

ECHR may be beginning to have an influence, in that the ECtHR has overturned several UK cases where source disclosure was ordered.<sup>184</sup>

As mentioned above, the UK has a general right of access to information held by public authorities in England, Wales, and Northern Ireland through the FOI Act.<sup>185</sup> Journalists have generally remarked that the FOI Act has not had a major impact on their reporting, though the added avenue of information-gathering can assist them in certain cases.<sup>186</sup> One of the main issues remains that the process of an FOI request is slow and therefore does not provide an adequate source of information for (one-day) news stories. However, investigative reporters have remarked that the FOI Act has made a “noticeable” difference to their reporting.<sup>187</sup>

In the UK the Data Protection Act 1998 (hereafter, DPA 1998) establishes a range of rights and duties to safeguard personal data. Section 32 of the Act exempts “processing (...) undertaken with a view to the publication by any person of any journalistic, literary or artistic material”, where this is done in the public interest. This is a broad exemption as publication is simply defined as to “make available to the public or any section of the public” and “any person” avoids debates about when a person can be considered a journalist. The exemption, however, is not applicable to the entire act, though it is applicable to all eight data protection principles, minus the 7<sup>th</sup> principle, which provides that “[a]ppropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data”.

Pictures are generally considered to be private data under the DPA 1998 in the UK and breach of confidence claims will often invoke the DPA 1998. Children are well protected from having their pictures published in the press,<sup>188</sup> though no case has been brought to the courts as of yet, relying on the new (far reaching) ruling of the *Reklos and Davourlis v Greece*<sup>189</sup> of the ECtHR. It remains to be seen how this ruling will be interpreted by the UK courts.

The PCC Code of conduct provides that the press “must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening device” and where there is “a reasonable expectation of privacy”, this should be honoured. Under-16s are afforded special protection and should not be interviewed or photographed without parental consent. However, the code notes that there may be exceptions to these provisions where they can be demonstrated to be in the public interest.

### *Rules regarding search engines*

The UK currently has no specific rule governing search engines and access to information. A recent court ruling in the UK concluded, however, that search engines, in this case Google, were not “publishers” at common law and therefore could not be

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<sup>184</sup> Most recently in *Financial Times (Ltd) v United Kingdom* [2010] 50 EHRR 46.

<sup>185</sup> And a similar right to access to information held by public authorities in Scotland under the Information Scotland Act 2002.

<sup>186</sup> S. Holsen et al, “Journalists’ use of the UK FOIA” 3 Open Government: a journal on Freedom of Information (2007), at p.13.

<sup>187</sup> *Ibid.*, p. 9 and 13.

<sup>188</sup> See for example: *Murray v Express Newspapers Plc* [2008] EWCA Civ 446.

<sup>189</sup> *Reklos and Davourlis v Greece* [2009] ECHR 200.

held liable for defamatory content that appears in natural search results, both before and after they have been notified of the defamatory nature of the content.<sup>190</sup> A search engine was ruled to be a “facilitator” rather than a “publisher”. Where search results are generated automatically without human input, there is no control over the search terms chosen by users and the websites indexed in search results. Where this is the case, a search engine is no more than a facilitator. It should be noted though that Google does have a “notice and takedown” system in place which blocks the URLs of the offending material after they have been notified, but this does not stop parts of the text of the blocked URL of showing up in the search results and it is these fragments of text, which can be defamatory, for which Google is not liable as they are deemed a mere “facilitator” here.

### 3.4 Supervision

Under section 6 of the HRA it is unlawful for a public authority to act incompatibly with a convention right. This section applies to “any person certain of whose functions are functions of a public nature” and where a body performs both public and private functions, section 6 only applies to those actions that are public in nature. As most media regulatory bodies can be considered to be a “public authority” or to be performing functions of a public nature their actions can ultimately be reviewed under the HRA. Thus, Ofcom, the PCC, ASA, ATVOD and the BBFC are all covered by section 6 in whole or in part. Newspapers, however, are not covered,<sup>191</sup> and broadcasters only in the few instances where they perform regulatory functions, such as where they are responsible for ensuring that election broadcasts comply with the Ofcom Codes.<sup>192</sup>

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<sup>190</sup> *Metropolitan International Schools Ltd (t/a Skillstrain and t/a/ Train2Game) v Designtecnica Corp (t/a Digital Trends)* [2009] EWHC 1765 (QB).

<sup>191</sup> *Venables and Thompson v News Group Newspapers Ltd* [2001] Fam 430, para D1

<sup>192</sup> A. Nicol, et al., *Media Law and Human rights* (2009), at par. 3.40.

**Table 1**

	<b>Ofcom</b>	<b>BBC Trust</b>	<b>PCC</b>
<i>Regulatory Document</i>	Communications Act 2003 & Broadcast Code	BBC editorial guidelines	PCC Editor's code of practice
<i>Type of regulation</i>	Statutory, contractual undertaking with licensees	Self-regulation	Voluntary self-regulation
<i>Competence</i>	TV and radio sectors, fixed line telecoms and mobiles and the airwaves over which wireless devices operate	All BBC content regardless of creator, method and manner of creation	Newspaper and periodical industry
<i>Composition</i>	Non-Executive Chairman, Executive Directors (incl. Chief Executive), and Non-Executive Directors	Chairman, Vice-Chairman and ten Trustees, declare personal/business interests and interests of immediate family	Independent Chairman appointed by industry, lay members and industry members
<i>Ultimate power of appointment</i>	Nominations Committee appoints board; Chairman of Ofcom is chairman committee. Chairman is appointed jointly by the Secretary of State for Culture, Media and Sport and the Secretary of State for Trade and Industry, under the provisions of the Office of Communications Act 2002	The Queen, on advice of Ministers after an open selection process	Independent appointment commission
<i>Sanctions</i>	Rectification, Fine revocation of licence	Internal discipline and rectification	Rectification
<i>Mode of Financing</i>	Grant-in-aid from the department for BIS, licence fee, and administrative charges for electronic networks and services, the provision of broadcasting and associated facilities	Licence fee	Levy on the newspaper and periodical industries

**Table 2**

	<b>ASA</b>	<b>ATVOD</b>	<b>BBFC</b>
<i>Regulatory Document</i>	Advertising Code	UK AVMS Regulations 2009/2010 ( specific code to follow)	Video Recordings Act 2010
<i>Type of regulation</i>	Self-regulation and co-regulatory with Ofcom in relation to broadcasting	Co-regulation with Ofcom	Self-regulation for cinema and statutory regulation for video works
<i>Competence</i>	Marketing communication in all UK media	Video on Demand services	Cinema and video works offered for sale or hire commercially
<i>Composition</i>	ASA council administers code, 2/3 of members are independent of industry.	Independent chair, five independent and four industry members	One president, two vice-presidents and a management team
<i>Ultimate power of appointment</i>	Appointment following public advertisement by the ASA Chairman	Open recruitment on Nolan principles	Council of management with no actual or perceived interest in classification decisions & policy.
<i>Sanctions</i>	Wide range: fines, pre-vetting, ban, withdrawal of trading privileges etc.	Financial penalties, restrictions or suspension of service	-
<i>Mode of Financing</i>	Levy on advertising spend	Regulatory fees, consultation ongoing	Independently financed by fees charged for classification of submitted works

#### 4. Media policy and democratic government

##### *The status of the media in the UK*

Though the media in the UK have not generally been afforded any special legal status, both the political establishment and the courts regard the media to play a central role in the democratic process. In 1995, for example, the then Conservative government in its 1995 White Paper on media ownership observed: “[a] free and diverse media are an indispensable part of the democratic process. They provide the multiplicity of voices and opinions that informs the public, influences opinion, and engenders political debate. They promote the culture of dissent which any healthy democracy must have”.<sup>193</sup> Similar views were expressed by the subsequent Labour administration.<sup>194</sup> With the coming into force of the Human Rights Act 1998, UK courts are required to “take into account” the jurisprudence of the European Court of Human Rights relating to Convention rights, although prior to this, freedom of expression was already considered by some judges to have a special constitutional status.<sup>195</sup> In *McCartan Turkington Breen v Times Newspapers Ltd*, Lord Bingham stated: “[t]he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognized the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.”<sup>196</sup>

##### *Multiple democratic functions*

Although political parties, politicians, and UK government and devolved bodies increasingly have their own websites, the traditional print and broadcast media continue to be the primary means through which they convey their policies to the general public. And for members of the public, the mass media constitute their main source of information on domestic and foreign events.<sup>197</sup> As Niklas Luhmann has observed “[w]hatever we know about our society, or indeed about the world in which we live, we know through the mass media”.<sup>198</sup>

But to perform this democratic function the media need to do more than simply act as a conduit for the views of politicians: they can enhance citizens’ abilities to make informed choices through explaining the wider context to political decisions and examining alternative policy options; they can go beyond merely reporting on political developments and take a more activist role, seeking to set the political agenda, raise awareness of problems, or campaign for change; they can provide a location for public (rather than merely professional) debate through, for example, the publication of readers letters, “phone-ins”, or internet fora; and they can perform a vital investigative or “watchdog” role, checking for abuses within government, public and also powerful private bodies – what Leonard Downie refers to as “accountability

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<sup>193</sup> S. Barnett, “Journalism, democracy and the public Interest: Rethinking media pluralism for the digital age”, Reuters Institute for the Study of Journalism working paper, (September 2009) at p. 3.

<sup>194</sup> *Ibid.*

<sup>195</sup> HRA 1998, section 2 and see discussion of relevant case law and academic commentary by Lord Steyn in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 at 296-298.

<sup>196</sup> [2001] 2 AC 277, at 290-291.

<sup>197</sup> See section on the Role and Power the Media at section 2.3.

<sup>198</sup> N. Luhmann, *The reality of the mass media* (2000), p. 1.

journalism”.<sup>199</sup> A central question for those framing media policy in the UK today is consequently whether the media are able to perform, and are actually performing, these various roles – mediator; expositor/educator; agenda setter/campaigner; public forum and investigator/watchdog – given the current economic climate and technological developments. In both the print and audiovisual sectors there is increasing concern that this, unfortunately, is not the case.

### *Media regulation: the bifurcated approach in the UK*

As discussed above, the UK has adopted a bifurcated approach to media regulation, with the printed press and broadcast media subject to distinct regimes. The print sector has fought hard for the maintenance of a “light touch” self-regulatory system, which it considers necessary to insulate it from government influence. To date this has been accepted by both Labour and Conservative administrations, the previous government expressing its “strong belief” that “*a free press is vital to the health of our democracy. There should be no laws that specifically seek to restrict that freedom and Government should not seek to intervene in any way in what a newspaper or magazine chooses to publish*”.<sup>200</sup> The main constraints on the printed press stem from general laws relating to obscenity, national security, privacy, contempt of court and defamation, though print mergers can be reviewed on media pluralism grounds where the Secretary of State decides to intervene under the Enterprise Act 2002.<sup>201</sup> Unlike in some European countries, the print sector does not benefit from state subsidies, which could threaten its independence, though newspapers and magazines are zero rated for VAT purposes.<sup>202</sup>

By contrast, the broadcast media are subject to a variety of restrictions intended to ensure coverage of the main strands of political thought and to insulate broadcasters from undue political and commercial influence. These measures include ownership restrictions; impartiality requirements, restrictions on editorialising; specific rules relating to party political and party election broadcasts; prohibitions on political advertising and the sponsorship of news programmes; restrictions on the amount of advertising that can be included within news programmes and a right of reply.<sup>203</sup> In addition, commercial public service broadcasters who receive operating licences from Ofcom are required to transmit a certain proportion of public interest programming, including national and regional news.<sup>204</sup> The BBC is required by its Agreement with the Government to meet a range of public service obligations, including the provision of news and current affairs, requirements that are fleshed out further by the BBC Trust.<sup>205</sup> Apart from its regular radio and television news broadcasts and its online news services, the BBC provides dedicated coverage of the

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<sup>199</sup> L. Downie, “The new news”, James Cameron Memorial Lecture, 22/09/2010, City University London.

<sup>200</sup> Department of Culture, Media and Sport, “Privacy and Media Intrusion”, 2003, Cm 5985, at p.1. The reference to ‘intervention’ here is rather ambiguous: the Labour Government did not use the law to repress the media but they certainly sought to manipulate news coverage through the activities of communications officers such as Alastair Campbell and carefully cultivated links, see, for example, N. Davies, *Flat earth news* (2008), 198-202.

<sup>201</sup> Enterprise Act 2002, s. 58(2A-2B).

<sup>202</sup> HMRC Reference: Notice 701/10 (August 2003).

<sup>203</sup> See more detailed coverage in chapter 3.

<sup>204</sup> Communications Act 2003, ss. 264-271 and 279.

<sup>205</sup> Department for Culture, Media and Sport, “Agreement between HM Sec. State for Culture, Media and Sport and the BBC”, July 2006, Cm 6872.

Welsh and Northern Ireland Assemblies, Scottish and Westminster Parliaments and key parliamentary committees.

Although the combination of two very different regulatory models operating side by side in one system is not the result of a carefully thought out master plan for the media sector, it can be rationalised on the basis that it may in fact enhance content diversity, firstly, by offering citizens both partisan (newspapers and magazines) and non-partisan (radio and television) sources, and, secondly, by providing a range of services more or less insulated from direct governmental (printed press) and commercial (licence fee funded broadcasters) pressures. It has also been justified on the basis of the perceived greater emotional impact of the audiovisual media and the limited spectrum available for broadcast services, necessitating regulation in the public interest. Yet, the coherence and legitimacy of singling out a specific media sector to meet costly public interest requirements is debatable and the spectrum scarcity rationale has been undermined by signal compression techniques and digitisation.<sup>206</sup> With growing convergence among what were previously discrete media sectors – newspapers, for example, now operate across a number of platforms offering online versions with video inserts, links to related stories, and sites for reader interaction – the bi-polar regulatory model that characterised much of the last century is now under considerable strain.

### *The written press*

As indicated above, the press has not generally been afforded any special legal status over and above that afforded ordinary citizens. It is, however, the main beneficiary of the protection from defamation actions afforded fair and accurate reports of parliamentary and judicial proceedings, certain public meetings and reports, including reports prepared by companies and civil society organisations.<sup>207</sup> The press is also, on occasion, allowed to attend certain judicial hearings that are closed to the public.<sup>208</sup> At present the main concerns regarding the UK printed press are the implications for independent journalism of dwindling revenues; the failure of certain newspapers to maintain ethical standards; the perceived weakness of the existing self-regulatory regime; and media consolidation. In relation to the former, all of the quality daily newspapers have encountered a steady loss of readers, with *The Times*' circulation falling to less than half a million for the first time since 1994.<sup>209</sup> Regional papers have been badly affected, with sixty UK newspaper titles and 25 offices closing over a period of just six months in 2009, though the pace of decline appears now to be slowing.<sup>210</sup> The Scottish press, in particular, has been exposed to damaging competition from modified versions of London based daily papers, such as *The*

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<sup>206</sup> See discussion by E. Barendt, *Broadcasting law: A comparative study* (1995), pp. 5-9.

<sup>207</sup> Defamation Act 1996, sections 14 and 15, schedule.

<sup>208</sup> Primarily those involving children and family matters, see G. Robertson and A. Nicol, *Media law* (2007), pp. 19-20.

<sup>209</sup> S. Busfield, "ABC's: Times Slips below 500,000 for the First Time in 16 Years", *The Guardian*, 10/09/2010, available at: <http://www.guardian.co.uk/media/2010/sep/10/abcs-national-newspapers> (last visited on 04/10/2010).

<sup>210</sup> D. Ponsford, "Regional ABCs: improving picture for UK dailies", *Press Gazette*, 25/08/2010 and C. Rowe, "How are freelance journalists coping in the current economic downturn?", *journalism.co.uk*, 02/04/2009, available at: <http://www.journalism.co.uk/5/articles/533978.php> (last visited on 04/10/2010). For a recent overview of the state of the local press see House of Commons, Culture, Media and Sport Select Committee Report, "Future for local and regional Media", HC 43-1, 6 April 2010, 11-17.

Times.<sup>211</sup> All papers have been affected by the growth of free online news sites provided, for example, by the BBC. Although online versions of the established daily papers are attracting increasing numbers of readers and thus advertising revenue, they have not compensated for the loss of advertising, in particular of classified advertising, experienced by the printed press. Newspapers are thus looking to establish new business models and the News International papers, The Times, Sunday Times and News of the World, all recently moved to charge for access to their online sites, joining the Financial Times.<sup>212</sup>

The financial crisis in the print media has resulted in many journalists losing their jobs and those who remain in employment, often lower paid young journalists with less experience, are now expected to provide material for both online and print services.<sup>213</sup> As a result, journalists have less time to engage in serious investigative journalism and careful fact checking, leading to greater reliance on press releases and recycled agency material. The run-up to the Iraq War illustrated once again how dependent the press are on government information and selective briefings in times of conflict, as well as the reluctance of certain papers to go against the official line even when in receipt of contrary reports.<sup>214</sup> A few papers and journals have, however, been established with, or have subsequently developed, structures designed to insulate them from corporate, proprietorial or political pressures.<sup>215</sup> The Guardian newspaper, for example, is backed by the Scott Trust, while the constitution of the Economist prevents any individual or corporation gaining a majority shareholding and the magazine's independent board of trustees has power to appoint and dismiss the editor.<sup>216</sup> The House of Lords Communications Committee in their report, *The Ownership of the News*, concluded that they did not believe "an internal company structure can be an adequate substitute for competition law and statutory regulation in ensuring that no single voice becomes too powerful. We are clear that regulation to ensure a plurality of media ownership is still relevant and necessary".<sup>217</sup>

In relation to press governance, self-regulation through the Press Complaints Commission ('PCC') has been subject to repeated criticism.<sup>218</sup> In particular, the PCC is thought to have focused unduly on addressing individual complaints regarding breaches of the PCC Code of Conduct, rather than raising press standards more generally. It has no power to fine newspapers and does not adjudicate on matters

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<sup>211</sup> R. Greenslade, "Can the Scottish press be saved? The declining sales figures suggest not", 18/05/2010, *The Guardian*, available at: <http://www.guardian.co.uk/media/greenslade/2010/may/18/newspapers-scotland> (last visited on 04/10/2010).

<sup>212</sup> P. Robins, "Paywalls: Why papers' websites could be the next iTunes or amazon", 18/05/2010, *The Guardian*, available at: <http://www.guardian.co.uk/media/organgrinder/2010/may/18/newspaper-paywalls-reader-offers> (last visited on 04/10/2010).

<sup>213</sup> The consequences for democratic government are well set out by Davies, *Flat earth news*. See also House of Commons, Culture, Media and Sport Select Committee Report, "Press standards, privacy and libel", 24/02/2010, HC 362-1, at pp.77-80.

<sup>214</sup> Davies, *Flat earth news*, chapter 9, 'The Blinded Observer'.

<sup>215</sup> Such systems may also be introduced to ease competition authority concerns. When Rupert Murdoch purchased The Times and Sunday Times in 1981 he strengthened the role of the Independent National Directors, a majority of whom must agree to the appointment or dismissal of the papers' editors., House of Lords "The ownership of the news", paras. 215-217.

<sup>216</sup> See Barnett, "Journalism, democracy and the public interest", at p.10.

<sup>217</sup> House of Lords, *The Ownership of the News*, para. 220.

<sup>218</sup> The numerous official reports on the functioning of the PCC are detailed at House of Commons, Culture, Media and Sports Committee report, "Press Standards, Privacy and Libel", at chapter 6.

where legal proceedings have been initiated. There is also the perception that the PCC is unduly accommodating to press interests: although the proportion of independent members of the Commission has gradually increased, seven of its seventeen members are serving editors or editorial directors. The Code Committee, which updates and reviews the PCC Code, has no lay members. With such limited powers it is not, perhaps, surprising that the tabloid press has at times cynically resorted to unethical, if not illegal, practices, such as phone tapping, and celebrity harassment in order to obtain copy.<sup>219</sup> The House of Commons Culture Media and Sports Committee recently proposed that the PCC should take a more proactive role in monitoring press conduct, have greater lay participation, and enhanced enforcement powers.<sup>220</sup> Reform during the present Coalition Government appears likely so that a move to tighten regulation rather than deregulate may take place in the print context. It is also possible that press conduct will increasingly be subject to review in the courts, given the gradual evolution of a right to privacy following passage of the Human Rights Act in 1998.

### *Ongoing concentration of ownership in the media*

Concentration of ownership in the press sector, particularly at the local level, has been significant, and four large groups now account for around 72% of the regional press.<sup>221</sup> In relation to the national press, eight companies dominate, with News International, a subsidiary of News Corporation, owning The Times, Sunday Times, News of the World and the Sun.<sup>222</sup> Although consolidation has been supported by the major press groups on the basis that it leads to cost savings and synergies, enabling titles to survive that would otherwise fold, consolidation can also lead to a reduction in the number of distinct voices, centralisation, and an undue focus on profitability.<sup>223</sup> Section 58 of the Enterprise Act 2002 incorporates a series of media pluralism considerations that the Secretary of State can address where mergers involve print and broadcasting companies. In relation to the press, this requires consideration of the need for “accurate presentation of news”, “free expression of opinion” and whether there is “a sufficient plurality of views in each market for newspapers in the United Kingdom or a part of the United Kingdom”.<sup>224</sup> The House of Lords Communications Committee has suggested that this should be extended to cover an examination of whether the merger would “impact adversely on newsgathering” and Steven Barnett has noted that this could be taken further to “demand safeguards for professional training, for investment, and for different kinds of investment output”.<sup>225</sup> To date there has been no government support even for a more limited amendment.

The audiovisual sector has also been subject to significant consolidation in light of the deregulation initiated by the Communications Act 2003. This has been

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<sup>219</sup> Ibid., chapter 5.

<sup>220</sup> Ibid., Conclusions and Recommendations.

<sup>221</sup> See House of Lords Select Committee on Communications, “The ownership of the news”, vol.1 HL Paper 122-I, 2008, at para.162 and Barnett, ‘Journalism, Democracy and the Public Interest’, at p. 4.

<sup>222</sup> House of Lords, “The ownership of the news”, at para. 161.

<sup>223</sup> For examples of these diverse views see the evidence given to the House of Lords, “The ownership of the news”, at paras. 170-201 and discussion by Barnett, “Journalism, democracy and the public interest”, at pp. 2-4.

<sup>224</sup> Enterprise Act 2002. s. 58(2A-2B).

<sup>225</sup> House of Lords “The ownership of the news”, at para. 243; Barnett, ‘Journalism, democracy and the public interest’, at p.14.

particularly marked in the radio sector, with two conglomerates, Global and Bauer, owning the majority of commercial stations.<sup>226</sup> Tony Stoller observes that much of the output is common across these stations, with a concomitant loss of genuinely local programming.<sup>227</sup> Mergers have also taken place in the television sector, with Granada and Carlton merging in 2004 to become ITV plc. The remaining independent Channel 3 companies continue to have specific geographical links: Scottish Television Group, which serves central and northern Scotland; Ulster Television, Northern Ireland; and the Channel Islands Group.

The Communications Act 2003 also facilitated further cross-media consolidation, a recent example being the purchase by Richard Desmond, owner of the Daily Express and Daily Star, of the Five Group which runs the fifth television channel in July 2010. News Corporation, owner of News International, which currently owns 39% of the pay television broadcaster BSkyB, has also indicated its intention to retake complete ownership of the company. Earlier this year, the Government requested Ofcom to further investigate the impact of removing the remaining local cross media ownership rules, which restrict ownership of print, television and radio services in the same local area. Ofcom concluded, contrary to its earlier findings, that complete removal of the rules would not be unduly prejudicial to media pluralism and the Government now appears likely to press ahead with deregulation in this area.<sup>228</sup> Further liberalisation is primarily justified on the basis that this will support struggling local newspapers, though the synergies to be gained from cross, as opposed to mono, media consolidation are disputed.<sup>229</sup> With these final restrictions removed, the main constraint on media mergers will be the operation of competition law, incorporating the media plurality test.

### *The financial struggle in the audiovisual media sector*

In economic terms, the pay television sector does not appear to have been particularly affected by the downturn, subscriber numbers remaining buoyant with BSkyB moving close to 10 million subscribers, 3 million for its high definition services.<sup>230</sup> By contrast the advertiser funded commercial broadcasters have seen a significant downturn in revenues and have had to face increasing audience fragmentation, with competition from pay television and online services.<sup>231</sup> In 2004 Ofcom identified certain programme genres that it considered the commercial broadcasters would be unlikely to continue to fund in the current climate, in particular, regional news and documentaries.<sup>232</sup> Ofcom research also revealed that expenditure on network news and current affairs programmes by the five main PSB channels fell by £39m or 14%,

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<sup>226</sup> House of Lords, "The ownership of the news", at para. 282.

<sup>227</sup> T. Stoller, *Sounds of your life* (2010).

<sup>228</sup> Ofcom, "Response to the Secretary of State (DCMS): Local Media – cross media ownership rules", (9 August 2010).

<sup>229</sup> G. Doyle, "The economics of monomedia and cross-media expansion: A study of the case favouring deregulation of TV and newspaper ownership in the U.K.", 24 *Journal of Cultural Economics* (2000) pp.1-26.

<sup>230</sup> Ofcom, "The communications market report 2010", at p. 98. J. Plunkett, "BSkyB Signs up 3 millionth subscriber to high-definition service", (2/09/2010), *The Guardian*, available at: <http://www.guardian.co.uk/media/2010/sep/02/bskyb-high-definition-subscribers> (last visited on 04/10/2010).

<sup>231</sup> Ofcom, "The communications market report 2010", at p. 121.

<sup>232</sup> Ofcom, "Review of public service broadcasting phase 2 - meeting the digital challenge", 28/09/2004.

from £289m in 2004 to £250m in 2008, with a reduction in news and current affairs output particularly marked in Scotland and Wales.<sup>233</sup> Recent figures relating to the production of news and current affairs content to 2009 are, however, somewhat more encouraging, indicating that the position has at least now stabilised on the public service channels and in some cases marginally improved.<sup>234</sup> In particular, the decline in news viewing appears to have halted, with the majority of viewers still watching the flagship news programmes on linear channels rather than dedicated news services.<sup>235</sup>

There remains, however, real concern over whether the commercially funded public service broadcasters will be able, or will wish, to continue to meet the same level of public service commitments in the future. ITV, whose licence comes up for renewal in 2014 previously indicated that it no longer wished to continue to provide regional news coverage and, as indicated above, Ofcom has made a number of proposals for alternative means of funding such programming in the future.<sup>236</sup> Although the present Coalition Government will not be implementing the previous government's plans for local news consortia, Culture Secretary Jeremy Hunt has initiated a review into how local news services can be provided, possibly involving a combination of networked and local news. The viability of such services without significant public subsidy has, however, been questioned.<sup>237</sup> At the ultra-local level Steven Barnett has noted the valuable role that Community radio services can play in providing information and campaigning on local issues, though he notes that they do not have the resources or staff to carry out sustained investigative journalism.<sup>238</sup> These services are licenced by Ofcom and are required to be not-for-profit, to engage where possible members of the community, and to fulfil certain social objectives, namely, facilitating discussion, providing education and enhancing awareness of, and strengthening, the particular community.<sup>239</sup> Licensed community radios are funded through a range of public grants, including seed money provided directly by Ofcom.

Concerns over television news coverage are not restricted to regional and local news, in that just three companies – BBC, BSkyB and ITN - provide the news services for the main commercial broadcasters Sky, BBC, ITV, Channels 4 and 5.<sup>240</sup> Although new web services would appear to be offering additional independent sources of news, research carried out by Chris Paterson suggests that the situation, at least in relation to international news, is little different on the web: “[w]e are left with a picture of an online news world (in the English language) where only four organisations do extensive international reporting (Reuters, AP, AFP, BBC) a few others do some international reporting (CNN, MSN, New York Times, Guardian and a few other large newspapers and broadcasters), and most do no original reporting”,

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<sup>233</sup> Ofcom, “Public service broadcasting annual report”, 21/07/2009, at p. 4.

<sup>234</sup> Ofcom, “The communications market report 2010”, pp. 134-135.

<sup>235</sup> S. Purvis, “Halt in decline of flagship news programmes”, Ofcom news release, 03/06/2010.

<sup>236</sup> Ofcom, “Review of public service television broadcasting phase 3 – competition for quality”, 08/02/2005.

<sup>237</sup> R. Andrews, “Why Hunt’s local TV news idea is a non-starter”, 26/07/2010, paidContent:UK, available at: <http://paidcontent.co.uk/article/419-why-hunts-local-tv-news-idea-is-a-non-starter/> (last visited on 04/10/2010).

<sup>238</sup> Barnett, “Journalism, democracy and the public interest”, p. 12.

<sup>239</sup> Community Radio Order 2004, Statutory Instrument No. 1944, Stationery Office, 2004, s.2.2.

<sup>240</sup> See Ofcom, “Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of BSkyB’s acquisition of 17.5% shareholding in ITV plc”, 27/10/2007 and R. Craufurd Smith, “Media ownership and the public interest: The case of Virgin media, British Sky Broadcasting and its ITV shares”, 1 *Journal of Media Law* (2009), pp. 21-36.

relying on pre-existing agency copy.<sup>241</sup> As Paterson notes, many online sites, such as Google News, operate merely as aggregators, and although a wide array of news and current affairs sites run by freelance journalists, civil society and not-for-profit organisations have sprung up, the economic challenges facing independent online news sites makes it difficult for them to engage in systematic independent news gathering and investigation.<sup>242</sup> Nor can the same level of philanthropic support be counted on as in the USA, where private funding has facilitated the introduction of ventures such as the non-profit news service “ProPublica”.<sup>243</sup>

### *The future of the BBC*

It is not solely the commercial public service broadcasters who are being affected by changes to the broadcasting market and the current economic difficulties; the BBC has been subject to increasing criticism from commercial operators for its expansion into areas that they see as potential fields for development. In particular, its highly successful online, free, news site, which attracts more UK readers than any other, poses an undoubted challenge to alternative advertiser funded and subscription online services. In his 2009 MacTaggart Lecture at the Edinburgh International Film Festival, James Murdoch controversially stated that “dumping free, state-sponsored news on the market makes it incredibly difficult for journalism to flourish on the internet...We seem to have decided as a society to let independence and plurality wither. To let the BBC throttle the news market and then get bigger to compensate.”<sup>244</sup> Particular criticism has been levelled at the purchase by the BBC’s commercial arm, BBC Worldwide, of the Lonely Planet Guide, considered to bear little relation to the BBC’s primary broadcasting activities. In part to pre-empt the inevitable, the BBC has already started to cut back on certain services, overheads and salaries, and in September 2010 announced that it would not increase its licence fee, as previously planned, in 2011. Its Charter and Agreement come up for renewal in 2012, during the course of the present Coalition Government, and the present Culture Secretary has indicated that the BBC both needs to adapt to the changing economic environment and that cuts to the licence fee settlement are likely.<sup>245</sup> Given the financial pressures on the commercial public service sector, the role of the BBC as a core provider of quality news and current affairs programming would appear to be even more important than ever - indeed its existence was relied on by Ofcom as a basis for accepting further relaxation to the local cross-media ownership rules.<sup>246</sup> As Mark Thompson, Director-General of the BBC argued in the subsequent MacTaggart Lecture in 2010, the BBC is crucially important because it is founded on the idea of

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<sup>241</sup> C. Paterson, “International news on the internet: Why more is less” (2007) 4 *Ethical Space: The International Journal of Communication Ethics* (2007) 57, at p. 63. See also: ‘News agency dominance in international news on the internet’, Centre for International Communications Research Papers in International and Global Communication No.1/06 (May 2006) 5.

<sup>242</sup> For discussion see the papers in N. Fenton (ed.), *New media, old media, journalism and democracy in the digital age* (2010).

<sup>243</sup> For discussion of this and other non-profit US news ventures see Downie, “The new news”.

<sup>244</sup> J. Murdoch, “The absence of trust”, lecture given at the Edinburgh International Television Festival 2009, 28/08/2009.

<sup>245</sup> M. Brown and J. Robinson, “BBC licence freeze could prove costly”, *The Guardian*, 20/09/2010.

<sup>246</sup> See Ofcom, “Response to the Secretary of State (DCMS) local Media – cross media ownership rules” (2010).

creating a public space.<sup>247</sup> If funding is removed from the BBC, it will not only remove funding from the UK creative economy as a whole, it could also bring into question the continuing viability of that unique public space.

The BBC also sought to respond to criticisms of the scale of its activities by the introduction of “public value” test, an approach outlined in its 2006 Agreement with the Government.<sup>248</sup> A similar test has been endorsed by the European Commission in a number of its state aid broadcasting cases.<sup>249</sup> When the BBC proposes new services, their potential impact on the commercial sector is reviewed by Ofcom and their potential advantage to the public examined by the BBC Trust, which then decides, balancing the various benefits and disadvantages, whether the service should be allowed to proceed.<sup>250</sup> It is apparent that this process has led the BBC to be more cautious in launching new services and in 2009 the BBC Trust decided against the provision of an online local news video service, in part because the market impact assessment indicated that the launch would have a significant negative effect on commercial providers, particularly newspaper publishers.<sup>251</sup> Supporters of the proposal had, however, argued that this was an important opportunity for the BBC to improve its local provision, to combat centralisation, and connect further with local communities as part of its public service mission.<sup>252</sup>

In terms of the quality of its coverage, the BBC has in the past been criticised for limited coverage, and inclusion, of programmes from the devolved nations, and for over-simplified coverage of European affairs.<sup>253</sup> Indeed, centralisation of production has been seen as a wider problem within the public service sector, with the Culture Secretary recently observing that “*three out of five PSB programmes are made in London. Our news is horribly centralised and I do believe that we should be giving more space to local policies.*”<sup>254</sup> In 2007 the Scottish Government sought to raise the profile of these concerns by appointing a Broadcasting Commission, chaired by Blair Jenkins, to consider, inter alia, whether broadcasting policy should be devolved to Scotland.<sup>255</sup> Although the Commission stopped short of calling for the devolution of media powers to Scotland, it did propose that Scottish Ministers should have greater responsibility, within the UK framework, for operational matters relating specifically to Scotland and that there should be enhanced Scottish representation on the Ofcom Board. The Commission also proposed the establishment of a new Scottish

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<sup>247</sup> M.Thompson, “The battle for quality”, MacTaggart Lecture given at the Edinburgh International Television Festival 2010, 27 August 2010.

<sup>248</sup> BBC Agreement 2006, Cm 6872, paras. 23-33.

<sup>249</sup> European Commission, “Communication from the Commission on the application of State aid rules to public service broadcasting”, 02/07/2009, OJ C257/1, paras. 88-89.

<sup>250</sup> For further discussion see BBC Trust website, available at: [http://www.bbc.co.uk/bbctrust/our\\_work/pvt/index\\_shtml](http://www.bbc.co.uk/bbctrust/our_work/pvt/index_shtml) (last visited on 04/10/2010).

<sup>251</sup> BBC Trust, “Local video, public value test, final conclusions” (2009).

<sup>252</sup> Ibid., para 4.3.1-4.3.8.

<sup>253</sup> In relation to European affairs, the BBC commissioned an independent report, “BBC news coverage of the European Union”, January 2005, available at: <http://www.bbcgovernorsarchive.co.uk/docs/reviews/independentpanelreport.pdf> (last visited on 04/10/2010). The corporation has subsequently sought to address the issues raised in the report.

<sup>254</sup> Reported in allmediascotland.com, “Hunt reiterates support for local TV”, 28/08/2010, available at: [www.allmediascotland.com/press\\_news/26846/hunt-reiterates-support-for-local-tv](http://www.allmediascotland.com/press_news/26846/hunt-reiterates-support-for-local-tv) (last visited on 04/10/2010).

<sup>255</sup> Scottish Broadcasting Commission, “Platform for Success”, 8/09/2008, available at: <http://www.scottishbroadcastingcommission.gov.uk/about/Final-Report.html> (last visited on 04/10/2010).

digital television network and called on public service broadcasters to comply with existing commitments to include Scottish programming and in certain cases to extend these commitments further.<sup>256</sup>

### *UK media and EU law*

One notable aspect of UK media policy has been the growing influence of European Union law, both competition law – particularly important in relation to state aid and the sale of premium television programme rights – and media specific regulations. The adoption by the EU of the Audiovisual Media Services Directive (AVMS) in 2007 led to the introduction of a co-regulatory system for on demand television services, the UK previously having taken the view that the internet, very much like the press, should be an area subject to self-regulation.<sup>257</sup> On-demand programmes are to be overseen by the Association of Television on Demand, ATVOD, and commercial content by the Advertising Standards Authority but with back-up power of oversight retained by Ofcom.<sup>258</sup>

### *Judicial development of the law relating to the media and the impact of the Human Rights Act 1998*

In any overview of the development of media policy and democratic politics it is necessary to mention briefly the continuing role and influence of courts in the UK. Although section 12 (4) of the Human Rights Act 2008 calls on courts to have “particular regard to the importance of the Convention right to freedom of expression”, this has not afforded freedom of expression any special priority over other competing rights.<sup>259</sup> Indeed, the Human Rights Act is not regarded as an unqualified good by certain sections of the press, particularly given its role in the development of the law of privacy.<sup>260</sup> In other areas, such as the protection of journalists’ sources, the courts have continued to show limited understanding of press interests, as evidenced by the ruling of the European Court of Human Rights in the *Financial Times* case.<sup>261</sup> There is also concern at the willingness of the English courts to grant what are known as “super-injunctions”, which both prohibit media reporting on a particular issue and coverage of the fact that the injunction has been sought and granted.<sup>262</sup>

More positively, English courts had, even prior to the coming into force of the Human Rights Act 1998, developed a “responsible journalism” defence to defamation claims in *Reynolds v Times Newspapers*, discussed further above.<sup>263</sup> The defence

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<sup>256</sup> Ibid.

<sup>257</sup> Directive 2007/65/EC, amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities 18/12/2007, OJ L332/27–45.

<sup>258</sup> See: <http://atvod.co.uk/>.

<sup>259</sup> For an early but extensive appraisal of the impact of the Human Rights Act on press freedom see H. Fenwick and G. Phillipson, *Media freedom under the Human Rights Act* (2006).

<sup>260</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457, in particular Lord Hope at para. 113.

<sup>261</sup> See ECtHR, *Financial Times and Others v United Kingdom*, [2010] E.M.L.R. 21.

<sup>262</sup> Most controversially in relation to the ‘Trafigura case’, on which see A. Rusbridger, “Trafigura: anatomy of a super injunction”, [guardian.co.uk](http://guardian.co.uk), 20/10/2009.

<sup>263</sup> [1998] 3 All E R 961.

requires the court to assess a wide range of factors, including the steps taken to verify published information, the urgency of the matter, and the “tone” of the article, and although these factors have been held not to be cumulative they nevertheless impose on journalists a high standard of investigation and careful record keeping.<sup>264</sup> The law of defamation is currently under wide ranging review, given concerns that it unduly favours claimants with deep pockets and is increasingly being used to deter legitimate debate on matters of public interest, for example, in the scientific field.<sup>265</sup> There is also a perceived need to respond to the introduction in the USA of “anti-libel tourism laws”, designed specifically to prevent the enforcement of UK defamation rulings in the US.<sup>266</sup>

## 5. Conclusion

The media in the UK are in the process of adapting to a difficult economic climate and political change. With a receptive Conservative Party dominating the present Coalition Government there will undoubtedly be pressure for further deregulation in the commercial broadcasting sector. The remaining cross-media ownership restrictions are to be abolished, Ofcom’s policy making powers are likely to be curtailed, and it is possible that existing content requirements, such those relating to impartiality, imposed on commercial television broadcasters such as BSkyB could be removed. On the other hand, some strengthening of the self-regulatory press regime can be anticipated and a new co-regulatory system for television on demand is now in force, so there are also counter pressures at work in certain sections of the system.

UK governments are able to exert an indirect influence over key regulatory bodies, such as Ofcom and the BBC Trust, through their power of appointment and new appointments under the existing government could thus influence the strategic approach of these bodies. The position of the BBC is also likely to be weakened when the next Charter is agreed with the Government, with an anticipated reduction in the licence fee, a move that should assist commercial competitors, particularly those keen to develop online services.

Although the UK media are widely seen as being largely free from governmental influence, pressure points and indirect forms of influence consequently remain. In particular, the Government has considerable power to influence the overall balance and structure of the domestic media landscape and a reluctance to alienate powerful media voices, notably the Murdoch owned press, may lead it to exercise this power in specific ways. The links between the political and media spheres frequently lack transparency and are, by their very nature, difficult to detect and evaluate.

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<sup>264</sup> See, for example, discussion in T. Welsh, W. Greenwood and D. Banks, *Essential Law for Journalists* (2007), pp. 275-281.

<sup>265</sup> As in the case involving Dr. Singh, who, though successful on appeal, spent two years defending an action brought against him by the British Chiropractic Association: *British Chiropractic Association v Singh* [2010] EWCA 350. On defamation, see the current Defamation Bill [HL] 2010-11 and, for general discussion, M. Sweeney, “UK government plans major review of libel law: Ministry of Justice announces draft defamation bill to be put out for consultation and pre-legislative scrutiny in the new year”, *The Guardian*, 9/07/2010.

<sup>266</sup> The securing the protection of our enduring and established constitutional heritage Act or ‘Speech Act’, H.R. 2765 (2010), prohibits US courts from enforcing foreign defamation judgements where these fail to comply with US First Amendment or similar state constitutional protections.

On a more positive note, the UK has an extremely diverse media marketplace, incorporating different regulatory approaches. Within this system it is possible to identify a number of innovative models, designed to provide at least a degree of insulation from both political and commercial influences. Freedom of information legislation has given the media access to new sources, facilitating its watchdog role, and UK courts are now required to take into account the importance of freedom of expression alongside other human rights. Finally, the internet offers additional opportunities for conveying information, enhancing dialogue, influencing the media agenda and, as illustrated by wikileaks, evading domestic legal constraints.

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