



Case study report

Does media policy promote media freedom and independence?

The case of the UK

Rachael Craufurd Smith and Yolande Stolte

University of Edinburgh (UEDIN)

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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 investigates the configuration of media policies in the aforementioned countries and examines 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, are thoroughly discussed and analysed.

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Information about the authors

Rachael Craufurd Smith is a senior lecturer at the University of Edinburgh. Before becoming an academic, she gained considerable experience working both in private legal practice and as an adviser on media law and policy for the BBC. She teaches media law at both undergraduate and postgraduate levels and supervises a range of PhD research students working in the media field. Rachael Craufurd Smith has written widely on the impact of constitutional guarantees, fundamental rights, and international and domestic laws on media pluralism and diversity. More recently, her research has focused on the impact of convergence on established domestic regulatory regimes and the evolving relationship between individuals and the mass media. She is a member of the Europa Institute and Co-director of the AHRC Script Centre, based in the School of Law of the University of Edinburgh. She is also an editor of *The Journal of Media Law*, launched by Hart Publishing in 2009 to provide scholarly and critical analysis of media law developments.

Yolande Stolte graduated with an LLB degree in 2007 from the University of Leiden and obtained an LLM in Civil Law from the same university in 2008. She was awarded the VSB foundation scholarship to further specialise in her main field of interest: IP and media law. She used this to obtain an LLM in Innovation, Technology and the Law at the University of Edinburgh, writing a dissertation on ‘The impartiality requirement in the UK: Television news reporting in the 21st Century’. After graduating in 2009 she has worked as a research assistant on several projects in the field of IP and media law at the University of Edinburgh and is currently the editor-in-chief for the online legal journal ‘SCRIPTed’.

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Executive summary

Media policy in the UK is constantly evolving and adapting to new technologies. The UK has long recognised the value of freedom of speech and supported an independent newspaper sector, largely free from prior restraint. It has also regulated the broadcasting sector, seen as both particularly influential and subject to specific technical constraints, in order to enhance citizens' access to information and to pursue public interest goals. The influence of the European Convention on Human Rights can be felt in most areas of media law, notably in the areas of privacy and defamation, with proposals for a new defamation act in England. EU law plays an increasingly important role in regulating competition and shaping the structure of UK media markets.

The UK supports self-regulation, particularly in the print and online sectors, viewed as one way of limiting government influence. The future of the current self-regulatory regime for the press overseen by the Press Complaints Commission (PCC) is, however, precarious, given the serious breaches of journalistic standards that have taken place at the *News of the World*.

New technologies have opened up additional avenues for receiving and imparting information but have also destabilised traditional funding models, particularly for the printed press, and challenge traditional demarcation lines between regulatory bodies. The Authority for Video on Demand is, for example, still establishing the outer boundaries of its online remit and relationship to the PCC. The Government has commenced a major review of the Communications Act 2003, which is expected to lead to further deregulation in the broadcast sector. The current economic downturn has also resulted in significant cuts to the budgets of the British Broadcasting Corporation ('BBC') and independent communications regulator Ofcom, which could result in a rebalancing of activities between, on the one hand, the commercial and public broadcasting sectors, and the Government and regulatory authorities, on the other.

1. Introduction

In the UK law is used extensively to regulate the media, though the degree and intensity of regulation varies with the media platform. While newspapers have been subject to very little statutory regulation in the UK,¹ radio and television broadcasting have traditionally been subject to extensive regulatory controls, with television services also subject to EU regulation. State regulation of the broadcast medium is premised on its greater capacity to influence the public than the print medium (Robertson and Nicol, 2007: 912). Limited bandwidth in the transmission spectrum, considered a public resource, has also been used to justify the award of broadcasting licences to prevent interference, coupled with ‘public interest’ programme requirements (Frost, 2007: 187-188). Though digital technology and compression techniques now allow for the transmission of many more channels, regulation has been retained for television broadcasts and extended to certain on-demand services, because the audiovisual sector is still considered a powerful and influential medium. Market research shows that watching television remains the most popular media activity in the UK (Ofcom, 2011d: 24).

All media services are subject to the general law, which maintains a strong presumption against prior restraint. Nevertheless, civil actions for defamation and invasion of privacy, alongside criminal offences for contempt of court and breach of official secrets legislation, can chill investigative journalism and prevent the media performing their ‘watchdog’ role regarding powerful political and commercial interests. Due to the existence of a common law tradition within the UK’s distinct legal jurisdictions, the judiciary has had a relatively strong influence on media practices across all sectors.

The media have become the principal means through which citizens obtain information about the society in which they live and through which individuals and commercial, social, and political interests impart ideas and information to a wider audience. As a result, the media are widely regarded as having an important influence on what is considered normal or deviant and have, throughout history, been used to exert control, create social cohesion, and further particular political or commercial interests (Gibbons, 1998: 1-2).

The values of uncovering truth through open debate and facilitating meaningful democratic government are often emphasised as rationales for protecting the freedom of speech of the media, though the enhancement of individual autonomy is also seen as an important underlying rationale (Gibbons, 1998: 25). While freedom of speech can be used as an argument against state interference, the primary goal of commercial broadcasters is to make a profit, which does not necessarily guarantee the most varied and informative media content (Curran and Seaton, 2010: Ch 21). As a result, content regulation and state support for a varied public service broadcasting sector have been viewed as legitimate means to correct potential market failures.

Media regulation in the UK has developed around a culture of responsibility within the sector and has sought to support media professionals in exercising their ethical responsibilities (Ruth and Mendel, 2004: 16). This structure is thought to render it more likely that media professionals internalise and endorse the regulatory

¹ There is however statutory regulation concerning takeover and mergers and cross-media ownership. These rules have been implemented on the grounds that ownership tends to have an impact on editorial freedom and that therefore rules are needed to protect the political diversity of the press.

standards by which they operate (Ruth and Mendel, 2004: 16), though the recent phone-hacking revelations, now subject to the Leveson Inquiry, suggest both managerial failures and commercial stresses within the system.² Self-regulation is also viewed as a desirable strategy to limit state influence, though the existing legal framework supports a number of self- and co-regulatory structures.³

Media policy is primarily shaped by the UK government of the day, but its implementation is left to a number of influential independent regulators. The broadcast media, public service and commercial, are regulated under the Communications Act 2003, which allocates to the statutory regulator, the Office for Communications (Ofcom), powers relating to both the structure of the communications market and content. In general terms, Ofcom allocates spectrum and regulates the television and radio sectors, fixed line telecoms, cable and mobile networks. Though Ofcom cannot exceed the limits of the Communications Act, it is actively involved in advising on and setting some of the more technical aspects of regulation, as well as implementing and enforcing the law.⁴

The BBC Trust sets out the purpose remits for the BBC's six public services and reviews the BBC editorial guidelines, which regulate BBC output. The press sector is subject to self-regulation by the Press Complaints Commission, which oversees application of the Editor's Code of Practice (hereafter, PCC Code). The advertising industry is regulated by the independent Advertising Standards Authority (ASA), which regulates advertising across all media, including online advertising, through two advertising codes, a co-regulatory code for broadcasting and a self-regulatory code for non-broadcasting advertising. The Authority for Video on Demand (ATVOD) has become an independent co-regulatory body in order to bring the UK into line with the Audiovisual Media Service Directive (AVMS).⁵ In addition, a number of regulatory bodies oversee specific aspects of the media industry, such as the British Board for Film Classification (BBFC), PhonepayPlus and the Video Standards Council (Mac Sithigh, 2011)

In this report we consider media law, regulation and policy in the UK. The report is partly based on interviews conducted with a wide range of professionals active in the media and media regulation, such as journalists, politicians, lawyers, representatives from civil society organisations and media regulators. We start this report by identifying the actors that influence, and values underpinning, media policy (chapter 2) and the structure of the media market, focusing on the role of competition law and media specific structural regulation (chapter 3). This is followed by consideration of the composition and diversification of media content (chapter 4), the journalists' profession (chapter 5) and media literacy and transparency (chapter 6).

² The Leveson Inquiry website (2011) is available at: <http://www.levesoninquiry.org.uk/terms-of-reference-for-judge-led-inquiry/>, last accessed 20 November 2011.

³ See for example s. 3(4)c Communications Act 2003: Ofcom must have regard for "the desirability of promoting and facilitating the development and use of effective forms of self-regulation".

⁴ Ofcom, "what is Ofcom" available at: <http://www.ofcom.org.uk/about/what-is-ofcom/>, last accessed 20 November 2011.

⁵ 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, ((2007) OJ L 332, 27) consolidated in Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), ((2010) OJ L 95/1).

2. Actors and values of media policy in the UK

2.1 Values, regulatory tools and goals in media policy

Media policy in the UK recognises not only the value of the media sector for the UK economy but also its democratic, cultural and social importance. From the early 1980s, particularly under the government of Margaret Thatcher, free market theories have had a marked influence on the development of media policy (Curran and Seaton, 2010: 370). New and traditional media offer important opportunities for the UK economy (Department for Business, Innovation and Skills 'BIS' & Department for Culture, Media and Sport, 'DCMS', 2009) and competition is recognised as a valuable component of broadcasting policy.⁶ Increasingly, reliance has been placed on competition rules and the general law to protect the public interest in place of media specific regulation. Where regulation has been deemed necessary, there has been experimentation with less intrusive styles of intervention such as co-regulation, notably in the field of on-demand television.

The diverse, not always consistent, regulatory objectives underpinning UK media policy find reflection in section 3 of the Communications Act 2003, which requires the communications regulator, Ofcom, to further both the interests of 'citizens in relation to communications matters' and 'consumers in relevant markets, where appropriate by promoting competition.' Intervention to realise these goals takes the form both of structural regulation, though much of this has been dismantled, and content regulation. Public service broadcasters are expected to provide diverse and varied programming, catering to minority as well as mainstream interests, to reflect international, national and regional concerns, while maintaining high journalistic standards of accuracy and fairness.

Industrial and cultural concerns sometimes coincide. Until quite recently, for example, the amount of non-domestic material that both commercial and public service broadcasters could transmit was limited, and foreign ownership of broadcasting licences was prohibited (Curran and Seaton, 2010: 361). Such measures were intended to protect domestic industry but can also be seen as attempting to create a space for national collective expression (Curran and Seaton, 2010: 361).

In relation to the printed press, state regulation has been regarded as a threat to media independence, leading to a system of self-regulation. Providers of online content have argued that they should similarly be free from specific regulation and have to date been subject to only limited regulation. Increasing convergence across the press, broadcast and online sectors has, however, created regulatory tensions and posed difficult questions relating to the style and intensity of future regulation.

2.2 The legal framework and freedom of expression and information

The UK does not have a formal written constitution or bill of rights. With the passing of the Human Rights Act (HRA) 1998, however, domestic effect was given to key articles of the European Convention on Human Rights (ECHR) which has had a major influence on the development of UK law. The HRA has shifted the underlying presumption that anyone, including the media, is free to do anything unless the state

⁶ S. 3 Communications Act 2003.

has legislated against it, to a legal framework where rights and freedoms are formally protected and enshrined in the law. Where possible, legislation must be interpreted compatibly with Convention rights and public bodies are required, unless prevented by explicit primary legislation, to act in conformity with those rights.⁷ While the HRA has created a presumption against legislating contrary to the ECHR, the UK Parliament, though not the devolved nations, can in theory do so, in line with the constitutional principle of the sovereignty of parliament.⁸ Nevertheless, the passage of such legislation would almost certainly put the UK on a collision course with the European Court of Human Rights (ECtHR). The HRA has altered the balance of power between the judiciary and the legislature and has created concern that the ECtHR now exerts too much influence over the development of UK law.

The European Communities Act 1972 has been interpreted by UK courts as giving primacy to directly effective EU law, though the UK has sought to shield itself from the operation of the EU Charter of Fundamental Rights by the adoption of Protocol 30 to the Lisbon Treaty. This states that the legal status accorded to the Charter in the Treaty of Lisbon is not to *extend* the ability of the Court of Justice or UK domestic courts to hold that domestic law is incompatible with the rights, freedoms and principles in the Charter. Moreover, Title IV of the Charter, which covers matters such as employment and family rights, is not to create enforceable rights in the UK. The Protocol does not, however, prevent EU law being interpreted in light of the Charter provisions and the extent to which it will in practice shield UK law from the influence of the Charter within the European law field is open to question (Leczykiewicz, 2011).⁹ This is particularly so, given the continuing application of the pre-Lisbon law that requires EU law to be construed in the light of fundamental rights, with Article 6(3) of the revised Treaty on European Union confirming that the fundamental rights guaranteed in the ECHR have the status of general principles of EU law.

2.3 New media influence on policy making

During the last decade the communications market has undergone a profound change as a consequence of technological innovation and development (Ofcom, 2011d: 27). In the process, it has brought into question certain of the rationales underlying media policy, for example, the limited availability of spectrum (Frost, 2007: 187-188). Increasing technological convergence also suggests a more overarching approach to regulation, one that is not tied to any specific delivery mechanism, an issue that the present Coalition Government is addressing in the run up to a new Communications Act in 2015.¹⁰

New online media are increasingly popular and play an important part in the daily lives of many people in Britain. With activities moving from the offline to the online world, there is pressure for regulation to follow suit. For example, a quarter of all advertising spend is now spent online and the Advertising Standards Agency (ASA) has extended its self-regulatory regime to internet-based advertising. Its remit

⁷ Ss 3 and 6 HRA 1998.

⁸ The Scottish Parliament, however, cannot enact binding legislation contrary to Convention rights.

⁹ See question 7, *S v Secretary of State for the Home Department* [2011] C-411/10.

¹⁰ See: http://www.culture.gov.uk/what_we_do/telecommunications_and_online/8109.aspx.

now covers not only paid-for space but also non-paid for space on, for example, company websites, to enhance consumer protection.¹¹

The proliferation of media channels is viewed as a possible ground for deregulation, both as regards structural and content controls, in the broadcast sector. Nevertheless, the perceived proliferation of sources of information is greater than the reality, and the reliability of online content can be difficult to assess, as discussed further in chapter 5.

2.4 The influence of the ECHR and its case law on media policy

The ECHR has had a marked impact on UK law, especially in the field of privacy. Where privacy was previously dealt with mostly through the more restrictive law of breach of confidence, under the influence of Article 8 ECHR, English courts have developed the concept of ‘a reasonable expectation of privacy,’ which will come into play in certain situations (Nicol et al., 2009: 52). While the fundamentals of Article 10 ECHR to some extent mirror prior domestic jurisprudence, in fields such as contempt of court, source protection and defamation, the impact of the ECHR is palpable (Nicol et al., 2009: 52). The *Reynolds*¹² defence for responsible journalism, for example, shows clear influence of the Strasbourg Court in assessing responsible journalism (Nichol et al, 2009: 5.56).

The HRA requires courts to ‘take into account’ ECtHR case law,¹³ though it falls short of requiring them to actually follow it, and courts are expected to keep up to date with Strasbourg jurisprudence.¹⁴ Should there, however, be a conflict between a ruling of the UK Supreme Court and a ruling of the ECtHR, the English courts are required to follow the ruling of the Supreme Court.¹⁵ Such a situation could lead to the UK becoming liable for non-compliance in that under Article 46 of the ECHR the UK is obliged to implement judgements of the ECtHR. In practice, the UK has a strong record of implementation of ECtHR judgements, and though it has been found in breach of the Convention on a number of occasions, including in the media field, repetitive breaches concerning the same issue are rare (Council of Europe, Committee of Ministers, 2011).¹⁶ This suggests recognition of the importance of implementing judgements, even when domestically controversial, by the judiciary and the authorities (Ministry of Justice, 2011).

2.5 Constitutional values and regulatory structures in the media sector

All regulatory codes for the media note the importance of freedom of speech. The Ofcom Broadcasting Code mentions freedom of expression in the legislative background to the code. The BBC editorial guidelines mention freedom of expression

¹¹ ASA, available at: <http://www.asa.org.uk/Media-Centre/2011/New-online-remit-enhances-consumer-protection.aspx>, last accessed 20 November 2011.

¹² *Reynolds v Tomes Newspapers Ltd* [2001] 2 AC 127. Though this ruling was technically delivered before the official implementation of the HRA, the judgement anticipated the coming into effect of the HRA.

¹³ S. 2 HRA 1998.

¹⁴ *R (Ullah) v Secretary of State for the Home department* [2004] 2 AC 323, at 20.

¹⁵ *Price v Leeds City Council* [2005] EWCA Civ 289, confirmed by the House of Lords in *Leeds City Council v Price* [2006] UKHL 10.

¹⁶ An exception concerns prisoners’ voting rights, which is an ongoing issue.

both in the introduction and at several points in the code. The Press Complaints Commission (PCC) refers to the importance of protecting freedom of expression in the introduction to the section in the code on the public interest, while the Authority for Video on Demand (ATVOD) refers to freedom of speech in its section on limiting harmful content. Finally, the Advertising Standards Authority (ASA) states in both its broadcasting and non-broadcasting codes that the code will not be used by the ASA to limit freedom of speech unjustifiably. Interviews conducted for this report suggest that for regulators and policy makers ensuring the right to receive information is viewed as a more overarching concern than the right to impart information, which is generally viewed as well guaranteed.

The importance of freedom of expression for democracy is also reflected in certain statutory provisions, for example in section 10 of the Contempt of Court Act 1981, and, most notably, in section 12 of the HRA.

As noted above, in section 2.2, under section 6 of the HRA it is unlawful for a public body to act in a way that is incompatible with Convention rights. Bodies that perform a public function are covered by this provision.¹⁷ The HRA may thus impose obligations on private, self-regulatory, bodies as well as on the state. In relation to the media, Ofcom and the BBC Trust, when acting in a regulatory capacity, the British Board of Film Classification, as well as the ASA and ATVOD, which both operate in line with EU law (Nicol et al, 2009: 52), would all be considered public bodies for the purpose of the HRA (Nicol et al, 2009: 52). The status of the PCC is more questionable, though the fact that its decisions are open to judicial review suggests that it would be considered a public body under the HRA (BBC News, 1998).¹⁸ Broadcasters, whether public service broadcasters or commercial, will not be ‘public authorities’ under the HRA as they act independently of the state in most areas. Where, however, they perform a public function, for example, through the transmission of election broadcasts they will be considered public bodies as far as these functions are concerned (Nicol et al, 2009: 53).

The UK makes active use of statutory, co-regulatory and self-regulatory structures in the media field. EU law has here had an influence: ATVOD, for example, started as a self-regulatory initiative by the industry, in order to pre-empt government regulation, but eventually became a co-regulator under the influence of the AVMS Directive, which requires Video on Demand (VoD) content to be regulated on a co-regulatory basis as a minimum.¹⁹

2.6 Judicial review of self-regulatory structures

Decisions taken by public authorities are amenable to judicial review. To the extent that self-regulatory bodies are, or are acting in the capacity of, a public authority their decisions are open to judicial review. Most self-regulatory bodies with competence in the media field have faced an action for judicial review, but this is, nevertheless, fairly rare. The PCC has only faced two so far in its lifetime and neither was deemed admissible.²⁰ Judicial review relates broadly to illegality, unreasonableness or a

¹⁷ S 6(3)(b) HRA 1998.

¹⁸ See also: *R (Ford) v The Press Complaints Commission* [2001] EWHC Admin 683, para. 11.

¹⁹ Ofcom, “The regulation of Video on demand services” (18 December 2009), at 2.16.

²⁰ *R v Press Complaints Commission, ex p Stewart Brady* [1997] EMLR 185, *R (Ford) v The Press Complaints Commission* [2001] EWHC Admin 683.

breach of natural justice and does not extend to review on factual grounds. In areas such as privacy, the PCC has ‘a margin of discretion’, with which the courts will not interfere, unless the PCC has clearly exceeded it.²¹ Aside from judicial review, most media regulatory bodies have an internal system of appeal. For example, PCC complaints can be appealed to ‘The Independent Reviewer’, formally the Charter Commissioner, though the appeal is limited to questions relating to the handling of the case, rather than the merits.

The ASA will review decisions internally when requested to do so and its decisions are open to judicial review. It recently had a decision overturned in judicial review proceedings concerning an advertisement that quoted Bible scripture of a homophobic nature. While the ASA had banned the advertisement, it was found to be protected by Article 10 ECHR and the advertisement was allowed to run (BBC News, 2011a). ATVOD has a similar internal appeal system and complaints about decisions regarding the scope of ATVOD’s jurisdiction can be appealed to Ofcom. Both a final decision from ATVOD or Ofcom is open to judicial review. Where the BBC carries out a public function, its decisions are open to review, and they have been subject to judicial review proceedings regarding their management of election broadcasts.²²

Section 12 (4) of the HRA emphasises that courts should have regard to any relevant privacy code when dealing with journalistic material, thus highlighting the importance of self-regulatory codes, such as that of the PCC. This creates a basis for recourse to self-regulatory codes during court cases.

²¹ *R (Ford) v The Press Complaints Commission* [2001] EWHC Admin 683.

²² *R (ProLife Alliance) v BBC* [2004] 1 AC 185.

3. The structure of the media market

The structure of media markets can have an important impact on media freedom and independence. Consolidation of media outlets in the hands of a few powerful corporations or individuals can lead to the suppression of information and the abnegation by the press of its important 'watchdog' role. Journalists working for organisations that have interests in other industries or that support particular political parties or policies may not be subject to express reporting restrictions but will know that reports on certain issues are unlikely to be welcomed or, indeed, published and could ultimately lead to them losing their posts. In a concentrated market the public may, therefore, fail to receive important information resulting in the democratic process being undermined. These results are not inevitable and well resourced, large scale media organisations have the capacity to invest in independent investigative journalism but the risk of suppression of information in specific areas remains.

Powerful media players may also be able to keep competitors out of the market and thus restrict the expression of alternative voices, particularly when vertically consolidated with interests in both the provision of media content and distribution. Thus, competitors can be denied access to important facilities such as electronic programme guides or distribution networks, while control of premium content can also be used to restrict market development and, ultimately, consumer choice.

Finally, powerful media organisations can leverage their influence over public opinion into the political domain and exert an undue influence over the development of media policy itself, as governments seek to avoid alienating key support. To address these concerns a mix of media-specific ownership rules and the application of general competition law has, in the UK, been considered necessary.

3.1 Policy formulation and the role of corporate, economic and social interests

The UK government enjoys considerable latitude in developing media policy, which is not a devolved matter.²³ The day-to-day capacity to push through a reform agenda is, of course, affected by the size of the government majority in Parliament and the ability of specific politicians to galvanize political and public concern around certain issues. The fundamental principle of parliamentary sovereignty does, however, mean that a government with a strong majority in Parliament can, in principle, push through measures that constrain press freedom. But, as noted above, the adoption of the HRA 1998 imposes on the courts in the UK an obligation to construe legislation wherever possible in conformity with fundamental rights and recourse to the ECtHR remains possible as a last resort. The ECtHR has increasingly emphasised, in cases such as *Manole and others v Moldova*,²⁴ that Contracting States have a positive duty to protect media pluralism. In addition, the UK must comply with directly effective EU law, which itself must conform to the fundamental rights in the ECHR and the rights contained in the EU Charter of Fundamental Rights, though, as noted in s 2.2, the exact impact of the Charter on UK law has been complicated by the adoption of protocol 30 to the Lisbon Treaty.

²³ This may result in specific interests of the devolved nations failing to receive adequate attention. See, for example, Ofcom's Advisory Committee for Scotland's response to Ofcom's 2009 consultation on relaxation of the local cross media ownership rules (Ofcom, 2009c).

²⁴ App. no. 13936/02 of 17 September 2009.

The present Coalition Government in its initial policy programme for government set out relatively few concrete proposals for the media sector, but did indicate a commitment to maintaining the independence of the BBC, to supporting the roll-out of superfast broadband networks and to facilitating consolidation between local press, radio and broadcasting organisations (HM Government, 2010). A number of departments are involved in the development of government policy in the communications sector, with the Departments of Business Innovation and Skills and Culture, Media and Sport key players.

Both Conservative and Labour administrations over the last twenty years have supported gradual deregulation of the commercial broadcasting sector, particularly in relation to media ownership, but have differed in their level of support for public service broadcasting. It has been suggested that the generous licence fee settlement that the BBC received from the New Labour government in 2000 was because Prime Minister Tony Blair 'recognized that a strong BBC was essential as a counterweight to Murdoch' (Dyke, 2004: 182). Relations were to deteriorate markedly as a result of the BBC's coverage of the Iraq War (Freedman, 2008: 142). The present 16% cut, in real terms, of licence fee revenue agreed by the BBC with the Coalition Government undoubtedly responds to current economic stringencies but also strikes a chord with Conservative preferences for the free market and commercial competition over state provision. Governments themselves draw on the expertise of individuals who have worked in the media sector to manage relations with the media or to assist the development of policy. It is not inconceivable that these links may have an influence on media policy. A number of ex-BBC officials were engaged by, or worked for, the New Labour administration of Tony Blair, including John Birt, a previous BBC Director-General ('Bagehot', 2002), while David Cameron controversially employed Andrew Coulson, former editor of the *News of the World*, as his director of communications, until Coulson's resignation early in 2011 as a result of the ongoing investigation into alleged phone hacking by the paper.

Two influential cross party parliamentary committees, the House of Commons Select Committee on Culture, Media and Sport and the House of Lords Communications Committee, play an important role in reviewing developments and putting forward proposals for reform in the media field. The Culture Media and Sport Select Committee, for example, supported deregulation of the remaining local cross media ownership rules in its report 'Future for local and regional media' (House of Commons Culture Media and Sport Committee, 2010b).

Regulatory bodies such as Ofcom and the BBC Trust have powers to make key decisions that shape the media market and both carry out significant research that can feed into policy development. Moreover, section 391 of the Communications Act 2003 requires Ofcom to conduct a regular review of the state of the communications market and to make proposals regarding possible modifications to the existing media ownership rules. It was on this basis that Ofcom proposed in 2009 that the local cross media ownership rules should be relaxed (Ofcom, 2009c). These findings were supported by those of the House of Commons Select Committee, discussed above, and by a separate investigation carried out by the Office of Fair Trading ('OFT') (OFT, 2009). Both Ofcom and the OFT carried out independent public consultations as part of their investigations. The fact that the Government felt it necessary to refer its proposals, which were more deregulatory than those put forward by Ofcom, back to the regulator suggests that governments are likely to feel politically exposed if they

act contrary to expert advice provided by an independent regulatory authority (Ofcom, 2010b).

Central and devolved administrations usually provide for public consultation where major policy initiatives are being proposed or decisions of strategic importance taken. Key legislative initiatives are preceded by 'Green' and 'White' Papers setting out the Government's thinking and allowing, particularly at the Green Paper stage, for external input. Official public inquiries, such as the present Leveson Inquiry into press standards,²⁵ may also be used to gather information from a wide range of representative individuals and organisations, including industry, trade unions, journalists, regulatory bodies, civil society organisations, politicians, academics and individuals prior to presenting legislative or other policy initiatives. The Leveson Inquiry has taken the unusual step of allowing journalists to present information anonymously to encourage frank discussion and protect them from any potential repercussions by their employers.

Though public consultations are relatively transparent, with most responses published online, certain actors, notably well resourced industry players or established lobby groups, are better placed to monitor and take advantage of these opportunities to influence policy development (Jempson and Powell, 2011: 209-215). The response to consultations can be quite varied, with individuals inevitably finding it difficult to engage with more technical proposals. Ofcom's 2009 consultation on relaxation of the cross-media ownership rules, for example, attracted only 14 responses, the majority of which had links with industry, with one response from a trade union organisation and one from an individual academic. By contrast, the more high profile DCMS consultation on the proposed News Corporation/BSkyB merger in March 2011 received, at one stage of the proceedings, over 40,000 individual submissions. The academic community in the UK appears to have had limited impact on policy development (Freedman, 2008: 101), though with the present financial constraints on regulators and industry it could come to play a more significant role in the future.

It has been noted that, in the past, broadcasting inquiries have tended to be heavily influenced by the BBC, while press inquiries have been shaped by the publishers, in general proponents of market forces (Curran and Seaton, 2010: 366-367). Certain sections of the printed press have, in particular, been 'vocal' critics of the judicial development of a law of privacy. Des Freedman has suggested that under New Labour corporate lobbyists gained greater traction, quoting the comment by Granville Williams from Campaign for Press and Broadcasting Freedom (CPBF), that the main proposals in the Communications Act 2003 on media ownership 'were achieved through the corporate lobbying of groups like News International, Carlton/Granada and the commercial radio industry' (Freedman, 2008: 118). The independent producers association Pact also claimed to have been able to introduce sixty-six points into the Communications Bill (Freedman, 2008: 96). Regulators, too, are heavily targeted by industry. When Ofcom was considering restrictions on the advertising of 'junk food' to children it met with industry groups 29 times and health and consumer groups on only four occasions (Watts, 2006).

But lobbying is not all from one side and controls on advertising junk food certainly did not respond to an industry agenda. In the run up to the Communications Act 2003 a number of pressure groups such as Public Voice called for greater accommodation of plurality concerns, and once these were taken up by the Labour

²⁵ The Leveson Inquiry website is at: <http://www.levesoninquiry.org.uk/>.

peer Lord Puttnam, chair of the joint parliamentary scrutiny committee on the bill, they became much more difficult for the Government to ignore. Lord Puttnam's intervention is widely credited for the Government's ultimate decision to include a media plurality test in the Act (Freedman, 2008: 119; Dyke, 2004:182).

Ultimately, it is up to the government of the day to decide which policies to take forward and disparate views on the actual impact of media ownership consolidation on media diversity means that there is usually evidence available to support its preferred policy approach. Evidence, however, that leading politicians have had regular meetings with representatives of influential media companies, notably News International, raises concerns that specific policies may have been 'bartered', more or less expressly, for media support (Ball, 2011; Des Freedman, 2008: 114; Dyke, 2004: 182). Such influence, though disputed, goes beyond more transparent forms of corporate lobbying. As the editor of the Guardian, Alan Rusbridger, observed in his recent Orwell lecture '[t]here became an unspoken reciprocity about the business and regulatory needs of Mr Murdoch and the political needs of anyone aspiring to gain, or stay in, office' (Rusbridger, 2011). Media ownership controls are important, therefore, not only to preserve media freedom but also the integrity of the democratic process.

3.2 Media ownership

3.2.1 Media ownership structures in the UK

Political concern over concentration of media ownership can be traced back to the first Royal Commission on the Press, which reported in 1949. The Commission was asked to consider the 'control, management, and ownership' of newspapers with a view to furthering freedom of expression and the 'greatest practicable accuracy in the presentation of news' (Royal Commission on the Press, 1949; 3). Although the Commission concluded that the then level of press concentration did not warrant state intervention, it did call for a range of measures designed to maintain press standards and limit the influence of proprietors on editorial content.

Ongoing concern over press concentration led to the introduction of a specific public interest evaluation for significant press mergers in the Mergers Act 1965, though proposals for a specific Press Amalgamations Court were not pursued (Goyder, 1965). The current policy framework in relation to the printed press with heavy reliance on general competition law, supplemented by a public interest test, can thus be traced back to this period.

In relation to the broadcasting sector, the press model of private competition was quickly rejected in favour of a public monopoly, firstly, over radio and then television broadcasting. This was to be executed through the BBC, paid for by a licence fee and operated under a Royal Charter. The preference for public monopoly addressed a number of technical, industrial and political concerns: it prevented spectrum interference, limited broadcast competition with the printed press, then a powerful lobby, through restrictions on the coverage of news and political affairs and prohibition on advertising, and enabled governments to retain broad oversight over content (Craufurd Smith, 1997). When the public monopoly of the BBC was finally broken, it was broken by competition from within the public sector, with the addition of ITV in 1955, a network of regional licence holders.

Unlike the press, therefore, media policy regarding radio and television broadcasting initially favoured controlled expansion, with a mix of public subsidy and commercial funding. It sought to address diversity concerns primarily through content regulation but also, as in the case of ITV, through some structural or ‘architectural’ features. With the development of cable and satellite technology during the course of the eighties, the pressure on this model increased and industry arguments for further liberalisation found a receptive audience in Conservative Prime Minister Margaret Thatcher. British Satellite Broadcasting (BSB) was given a licence to operate three satellite channels in 1988 but was ultimately outflanked by, and merged with, Rupert Murdoch’s Sky satellite television service, operating from the Luxembourg Astra satellite (Curran and Seaton, 2010: 238).

Over the last ten years UK media markets have experienced further consolidation, both in the print and broadcast sectors, particularly at the local level. Five major regional newspaper groups now account for over 70% of circulation (Ofcom, 2009c: 34), while Global holds 22% and Bauer 13.8% of all commercial analogue radio licences (Ofcom, 2011d: 203). Consolidation has been facilitated, on the one hand, by compliant government policy and driven, on the other, by economic incentives and imperatives, stemming, in particular, from the advertising downturn and shift online over the last five years (Robinson, 2008).

Although there are no controls on foreign ownership of the printed press, Schedule 2 to the Broadcasting Act 1990 originally prohibited the award of broadcasting licences to non-EEC nationals. This was controversially removed, without a reciprocity requirement, in 2003 in order to encourage an inflow of foreign capital and expertise to the UK. Significant parts of the UK media are now in foreign hands: News Corporation through its subsidiary News International (NI) owns *The Times*, *Sunday Times* and *Sun* newspapers and has a 39.1% stake in satellite broadcaster BSkyB. The *Independent*, *The Independent on Sunday* and London *Evening Standard* newspapers are owned by Russian billionaire Alexander Lebedev and his son Evgeny, while the German Bauer Media Group has significant radio and magazine interests.

It is difficult to tell whether particular positions adopted by media outlets have been influenced in any way by the nationality of the owner or merely reflect their more general political or policy preferences. All but one of Rupert Murdoch’s papers worldwide supported the Iraq War. *The Sun*, in particular, adopted what has been termed a ‘pro-American fervour’ and urged Tony Blair to ‘stick with the friend you can trust through and through – America’ (Greenslade, 2003). Rupert Murdoch, however, obtained US nationality in 1985 precisely because of restrictions on foreign ownership of US television broadcasting stations. Lebedev, by contrast, has emphasised his commitment to maintaining the editorial independence of his British papers, though it was suggested that a favourable report carried in the paper about the Saint Petersburg governor in 2010 amounted to ‘propaganda’, allegations that in turn have been suggested to be politically motivated (Greenslade, 2010).

3.2.2 The relationship between general competition law and media ownership regulation

Within the UK a combination of both general and media specific competition rules are employed to promote media plurality. General competition law is seen as playing

an important role in ensuring that there is sufficient competition in the market to ensure that consumers, wherever possible, have a choice of services and are not exploited in terms of price. It also operates to review possible anti-competitive practices by established market players, such as preventing access to essential facilities and distribution networks to third parties. Competition law, with its focus on the commercial market and consumer interests, has not, however, been considered sufficient by successive UK governments to address the social and political interests of citizens in a diverse communications sector. As a result, a number of media-specific ownership rules have been adopted.

General competition law is considered in section 3.5, the media specific rules applied by Ofcom and the BBC Trust in section 3.4, and the specific media public interest test that can be activated in certain merger situations in section 3.6 below. In the past the UK has relied on two further mechanisms to reduce the risk that media owners might suppress information or exert undue political power: firstly, it prohibited the award of broadcasting licences to certain categories of owner with specific vested interests, and, secondly, it adopted specific ownership limits.

The first of these strategies remains broadly in place. Schedule 2 to the Broadcasting Act 1990, as amended, prohibits the award of broadcasting licences to local authorities, political organisations, religious bodies (regarding certain national licences), and advertising agencies. In addition, section 3 of the Act requires Ofcom to be satisfied that a licensee or applicant is a ‘fit and proper person’ to hold a licence, a phrase which has still to be adequately clarified (Choueka, Chess and Martin, 2011). In the past, this has been construed to cover serious and repeated breaches of licence conditions and ‘disregard for the regulatory regime as a whole’ (Ofcom, 2011c). Ofcom is currently considering whether BSkyB, in which NI holds a ‘material’ stake, meets these statutory criteria given the phone-hacking allegations regarding NI newspaper *News of the World*.²⁶

The second strategy, which prevented certain accumulations of radio and television licences as well as cross-media amalgamations involving broadcast and print interests, has now been largely abandoned. The Labour Government under Tony Blair concluded in 2003 that digital technology had reduced the need for intervention and that liberalisation would bring ‘real economic advantages, creating more British media players of a size to compete effectively on an international stage and attracting more...investment’ (House of Lords, 2008: para.223). Media concentration thresholds were thus relaxed by the Communications Act 2003 and, more recently, by the Media Ownership (Radio and Cross-media) Order 2011. The sole remaining restriction relates to cross-holdings between major newspaper companies and the holder of the national Channel 3 television broadcasting licence.

3.3 New technological possibilities and developments

Convergence in media markets quickly led to regulatory convergence, with the consolidation of five different regulatory bodies to form one powerful, independent regulator, Ofcom, in 2002. Technological innovation has enabled commercial players to enter the market, as with the pioneering Sky satellite service, and old players to diversify their methods of distribution and prevent a relative decline in audience share

²⁶ Letter to Simon Hughes, Don Foster and Tim Farron MP from Ed Richards, July 22, 2011.

(Dyke, 2004: 187). All of the national terrestrial broadcasters now provide online services with 'catch-up' facilities, and HD is increasingly popular, especially for sport.

Digital transmission has expanded consumer choice, facilitating the provision of televised coverage of Parliament and Welsh and Gaelic language channels S4C Digidol and BBC Alba. It also underpins the Scottish Broadcasting Commission proposals for a new Scottish digital television channel (Scottish Broadcasting Commission, 2008). The digital terrestrial (DTT) broadcasting service Freeview, run by a consortium of public service broadcasters, Sky and transmission company Arqiva, offers primarily free services, while a parallel pay-DTT service, Top up TV, was launched in 2004. Freeview is also to be used to relay 65 new local television stations, supported by public funds, though certain rural areas and cities will not be covered for technical reasons (Sweney, 2011).

In the print context, the Internet has created new possibilities for online delivery with scope to further develop services and incorporate video content, thus blurring the traditional regulatory line between the print and audiovisual sectors. Though some niche providers such as the *Financial Times* have been able to weather this technological storm, for most papers, particularly at the regional level, a successful economic model combining online and traditional services has yet to be established.

The Internet has also facilitated an explosion of user-generated content, which supplements, and is increasingly being drawn on, by the mainstream media. Hybrid sites such as You Tube and Twitter offer access to both professionally produced and user-generated content. Though citizens now have access to a greater diversity of sources, research by Ofcom confirms the continuing importance of mainstream providers, particularly national television channels, as sources of information. A survey of over 2,000 individuals in 2010 found that, from a wholesale perspective, 37% regularly relied on the BBC, 12% on ITN, and 10% on Sky for news and current affairs information, while a further 12% relied on News Corporation's papers (Ofcom, 2010e: para.1.27). There is thus a marked difference between available 'source' and 'consumed' diversity.

With changing patterns of consumption, however slow, it becomes necessary to consider whether websites and other participants in the communications market, such as search engines and information aggregators, should be considered when assessing media concentration thresholds. Recent developments have also underlined the importance that control of conditional access facilities, premium content, and certain 'portals', such as interactive electronic programme guides ('EPGs'), can play in determining the level of competition in specific media markets.²⁷

²⁷ See further s.3.4.i below and Ofcom's Code of Practice on EPGs at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/epgcode.pdf>, last accessed 20 November 2011..

3.4 Media specific competition regulation

3.4.1 The role of Ofcom

Ofcom is subject to a general duty under s. 3 of the Communications Act to ensure the ‘maintenance of a sufficient plurality of providers of different television and radio services’. This serves to dilute the risk that specific information will be suppressed, even where there is an overarching obligation of impartiality, and the existence of multiple outlets may help to ensure that there remains an outlet for those who wish to express alternative views, for example on the Iraq war or phone-hacking, that would not otherwise find a publisher. Ofcom is able to promote this objective through its power to allocate spectrum, licence broadcast radio and television services, and enforce sector specific competition rules.

Under the Competition Act 1998 certain designated industry regulators are given concurrent powers with the Office of Fair Trading (OFT) to apply the competition rules in the act (s.54 and schedule 10). Ofcom is such a designated regulator and is required by ss.316-318 of the Communications Act 2003 to ensure ‘fair and effective competition’ among licensed or connected services. It can require licensed operators to comply with specific directions, follow a designated code or, alternatively, can impose or vary licence conditions on competition grounds.

One of the most controversial competition decisions taken by Ofcom to date concerns the fixing of a wholesale price for BSkyB’s popular satellite sports channels, Sky Sports 1 and 2 (Ofcom, 2010d). The decision focused on the central role that content, as opposed to access to distribution networks, now plays in determining the level of competition in pay-tv markets. Without access to Sky channels at commercially viable prices, retailers on other platforms are placed at a significant disadvantage. The decision, which controversially does not apply to HD channels, is subject to appeal before the Competition Appeal Tribunal.²⁸

A number of other provisions in the Communications Act 2003 have a potential bearing on media plurality and thus on media freedom. Sections 273-275 enable Ofcom to impose must-carry/provide requirements relating to the public service channels to ensure their accessibility and availability (see Goldberg, Sutter and Walden: 2009, 49). Section 280 of the Act seeks to ensure that the ‘designated’ national news provider for the ITV network can compete effectively with other national news services, in particular those of the BBC, and is adequately financed.

3.4.2 The role of the BBC Trust

The BBC Trust is required to take into account the impact of the BBC’s activities on competitors and the wider market. To prevent anti-competitive practices, the BBC has developed a set of Fair Trading Guidelines, monitored by the Trust’s Finance and Compliance Committee.²⁹ In relation to its public services the BBC is required, firstly, to ‘endeavour to minimise its negative competitive impacts on the wider

²⁸ See case no 1157/8/3/10, *Appeal to the Competition Appeal Tribunal by The Football Association Premier League and others*, and case 1156/8/3/10, relating to the appeal by Virgin Media, both available on the CAT website at: www.catribunal.org.uk, last accessed 20 November 2011.

²⁹ BBC, *Fair Trading Guidelines*, 2009 at:

<http://www.bbc.co.uk/aboutthebbc/policies/fairtrading/>, last accessed 20 November 2011.

market' in line with its 'Competitive Impact Principle' ('CIP'). Secondly, to ensure that all significant changes to BBC public services are assessed according to a public value test ('PVT'), set out in clauses 23-33 of BBC's 2006 Agreement with the Government.³⁰ The PVT requires Ofcom to investigate the market impact of the proposed change, while the BBC Trust examines its public value. The Trust then determines whether the public value outweighs any potential negative market impact. Consultation with a wide range of stakeholders is built into the evaluation process.

The European Commission has observed that state supervision 'would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster' (European Commission, 2009: para. 54). Though the Trust is structurally separated from the BBC, its role in setting the BBC's overall strategic direction could bring into question the decision to entrust it with the final PVT assessment. Commercial competitors have criticised the Trust for taking an unduly narrow interpretation of what constitutes a new 'service', excluding, for example, proposals for 'YouView', which will enable broadband services to be accessed via television sets (House of Lords: 2011, para 123).

Despite the majority of proposals being accepted by the Trust, in February 2009 it ruled against development by the BBC of a range of local broadband video services on the basis that this could have a 'negative market impact... at a time when commercial providers face structural and cyclical pressure' (House of Lords: 2011, para.1.5). The BBC subsequently took steps to improve its local linear services, without a PVT reference, and thus addressed by other means what it considered to be a limitation in its public service provision.³¹ To date, therefore, the PVT has had only a fairly limited impact on the BBC's provision of services but a change in personnel within the BBC Trust could impact on the way in which the public/private balance is exercised in the future, illustrating once more the importance of potential governmental influence in the selection of BBC Trust members.

3.5 The role of general competition law

Competition law is not a devolved matter. It is governed by the Competition Act 1998, which deals with restrictive practices and abuses of a dominant position, and the Enterprise Act 2002, which relates to mergers. As noted above, the OFT and Ofcom have concurrent powers under the Competition Act 1998 to consider anti-competitive practices involving media companies and, where systemic competition concerns arise, can request the Competition Commission to carry out an in-depth market investigation.³² The Competition Commission also rules on mergers referred to it by the OFT.³³

As indicated above, competition law can play an important role in ensuring that markets are contestable and that there are a number of distinct players operating in a given media market. Market definition in all cases is important. Although a narrow, sector specific, market definition - the newspaper/magazine or broadcast

³⁰ Cm 6872.

³¹ BBC press release, 'Trust approves local service proposals', 31 July 2009, available at: http://www.bbc.co.uk/bbctrust/news/press_releases/2009/july/local_proposals.shtml, last accessed 20 November 2011.

³² Part 4 Enterprise Act 2002, s 131-132.

³³ See, for example, the reference relating to the bid by Kent Messenger Group (KMG) to buy several Northcliffe local papers (OFT: 2011).

television sectors, for example - may make a finding that a merger is problematic for competition more likely, it may also fail to respond to concerns over media plurality, where distinct media sectors all contribute to access to diverse information. Consolidation across sectors may consequently be problematic from a plurality perspective but not a competition perspective, which suggests that merger rules may support but are not themselves sufficient to guarantee media pluralism. It is also possible that competition law may restrict media consolidation that would not be considered problematic from a media plurality perspective, as illustrated by the BSkyB/ITV share acquisition case, discussed further below.

Although there is pressure from the industry to employ a broad definition of media markets for competition purposes, the OFT adopts an 'evidence-based approach', evaluating the degree of competition and substitutability among different media services on a case-by-case basis (OFT, 2009: para 1.4). In its KMG/Northcliffe report, for example, it concluded that other regional or online papers and websites would not act as a sufficient counter-weight to KMG's strengthened market position (OFT, 2011).

A number of cases decided by the Competition Commission have had a marked impact on competition in the UK communications sector (Goldberg, Sutter and Walden: 2009). In 2008 the Commission approved, subject to undertakings, a merger between the two leading providers of transmission services for terrestrial broadcasting, while in 2003 it approved the merger of regional Channel 3 companies Carlton and Granada, subject in this case to conditions designed to protect advertisers (Competition Commission, 2008 and 2003 respectively). Most recently it has provisionally concluded that Sky's control of premium film rights restricts competition between pay-tv companies, emphasising once again the importance of addressing all aspects of the value chain in order to maintain open and contestable markets and, indirectly, media plurality (Competition Commission, 2011).

UK law has been heavily influenced by EU law and the UK is required to ensure compliance with EU competition rules. Proposed mergers with a European dimension that meet the thresholds in the EC Merger Directive, such as the proposed News Corporation/BSkyB merger, are referred to the European Commission, though this does not preclude separate evaluation by the UK of the media plurality implications of a merger.³⁴

3.6 'Competition law plus'; the role of the media public interest test

As discussed above, the UK does not consider competition law to be a sufficient mechanism for protecting media plurality and qualifications to the merger regime were made, initially in relation to newspapers, and subsequently in relation to broadcasting, through the Communications Act 2003. The media public interest considerations are now set out in section 58 of the Enterprise Act 2002 and, for press mergers, concern the need for accuracy, freedom of expression and, 'where reasonable and practicable', a sufficient plurality of views. For mergers involving

³⁴ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, *OJ* L24, 29.01.2004, Art. 21(4). See European Commission, Case No COMP/M.5932 – News Corp/BSkyB, decision of the 21 December 2010, available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5932, last accessed 20 November 2011.

broadcast media, the considerations include the need for a ‘sufficient plurality of persons’ with control of the media enterprises serving specific audiences; a ‘wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes’; and a commitment on the part of the owners to certain programme standards set out in the Communications Act 2003, including due impartiality. The underlying objective of these provisions is thus to assist the expression of diverse voices over competing outlets and to ensure that, in relation to broadcast news, competing opinions and views find reflection.

Consideration of these matters can only be triggered by the Secretary of State. Ofcom then carries out a preliminary examination into the specified plurality concerns on the basis of which, together with other representations, the Secretary of State decides whether and on what basis to accept the merger, or to refer it to the Competition Commission for further detailed examination before concluding the matter.³⁵ To date, there have been two proceedings under Section 58. The first concerned B SkyB’s bid to purchase a 17.9% shareholding in terrestrial broadcaster ITV, rejected on competition grounds.³⁶ The second, News Corporation’s recent attempt to obtain full control of B SkyB (see: DCMS, 2011b), was ultimately engulfed by the phone-hacking scandal, the company withdrawing its bid prior to a possible reference to the Competition Commission.

The two cases revealed problematic aspects, both procedural and substantive, in the existing system (Arnott, 2010; Craufurd Smith, 2009). In particular, the Government enjoys considerable discretion in deciding whether to initiate and how to resolve a media public interest investigation, raising in theory, if not in practice, concerns over potential conflicts of interest. Review is triggered only where there is a qualifying merger and does not address the problem of ‘endogenous’ growth. The mechanism for determining when there is a ‘sufficient plurality’ of providers is opaque and contested, creating considerable uncertainty for the companies involved. The News Corporation merger also brought into question the effectiveness of structural and behavioural undertakings, employed to constrain proprietorial influence in the past, with questionable effect (Burrell, 2011; Marr, 2004: 229-230).

3.7 The role of state subsidies and public service media

State subsidy has to date played a limited role in the print sector, though books, magazines and newspapers are subject to relief from VAT.³⁷ The most enduring and significant form of state subsidy has been the licence fee, which supports the radio, television and online services of the BBC. The licence fee, agreed by the BBC with the Government, is currently fixed at £145.50 a year until March 2017. Under the most recent settlement, the BBC agreed to take over the funding of the World Service and BBC Monitoring, to enter into an expanded partnership with the Welsh language television service S4C, and to support new local television services through a partnership fund. In real terms this means a cut in income of around 16% a year and licence fee revenue is, controversially, to be used for non-BBC activities.³⁸ The BBC

³⁵ Though may be subject to appeal on to the CAT and from there to the Court of Appeal or Court of Session.

³⁶ *British Sky Broadcasting Group plc v Competition Commission* [2010] EWCA Civ 2, [2010] 2 All E.R. 907.

³⁷ VAT Notice 7010/10.

³⁸ For details see , BBC, BBC ‘licence fee settlement’, available at:

Trust is currently consulting on the proposed cuts but has indicated an ongoing commitment to maintain its investment in news programming and to increase investment in network programming produced in the devolved nations (BBC Trust, 2011c).

The settlement was also controversial for the lack of transparency and accountability surrounding its negotiation (House of Commons, 2011). Neither Parliament nor licence fee payers were given an opportunity to comment on the proposals. Though clause 6 of the BBC Charter requires the BBC to be independent ‘in all matters’ regarding its content and management, the licence fee constitutes one mechanism through which the Government can exert pressure on the Corporation. One suggestion, for example, made by the Government during the last set of negotiations was that the BBC should carry ‘a large amount of information produced by the Central Office of Information’ (House of Commons: 2011, para.14). From this perspective the importance of agreeing licence fee settlements spanning a number of years becomes apparent.

The Chair and members of the BBC Trust are appointed by the Queen, on the advice of Ministers, after an open call for applicants (BBC Charter, 2006, cl.13.3). This appointment mechanism may give the Government some scope to influence the Corporation’s strategic direction. An attempt to facilitate a degree of oversight over the Government’s appointment of key BBC regulatory personnel recently took place with the House of Commons, though not the House of Lords, being afforded the opportunity to interview Lord Patten prior to confirmation of his appointment as chairman of the BBC Trust (Deans, 2011).

The BBC, supported by public finance, has played a significant role in technological innovation, notably the switch to digital radio and television broadcasting. Both the BBC and Channel 4 have in the past benefited from free use of spectrum, though are likely to be affected by plans to charge for digital terrestrial spectrum from 2014. The Government is currently prioritising the rollout of superfast broadband in rural areas with £362 million available for Scotland and England and additional funds for Wales and Northern Ireland.³⁹ It is also actively promoting the development of 65 local commercial digital TV services, with an initial cross subsidy from the licence fee of £40million. Ofcom administers a £500,000 annual fund for community radio.⁴⁰

State subsidy has been challenged at the European level under EU state aid rules, but a number of European Commission investigations in the late nineties/early 2000’s upheld funding for the BBC’s 24 hour news channel, new digital services and a proposed digital curriculum.⁴¹ The likelihood of the licence fee being successfully challenged has been reduced by the introduction of more specific programme remits and the operation of the PVT. The BBC has used its subsidy to help it to keep abreast

www.bbc.co.uk/aboutthebbc/therealstory/licencefee_settlement.shtml, last accessed 20 November 2011.

³⁹ DCMS, ‘Broadband website’ available at: www.culture.gov.uk/what_we_do/telecommunications_and_online/7763.aspx, last accessed 20 November 2011.

⁴⁰ Ofcom, Community Radio Fund, 2011, available at: <http://stakeholders.ofcom.org.uk/broadcasting/radio/community-radio-fund/>, last accessed 20 November 2011.

⁴¹ NN 88/98: *BBC 24 hours news channel*; N 631/2001: *BBC licence fee*; N 37/2003: *BBC digital curriculum*.

of, if not lead, developments in the distribution field. Evidence that BBC services fare less well when transmitted over the BSkyB pay-television satellite system underscore the value of the BBC's commitment to the development of the free digital terrestrial television service, Freeview (Dyke, 2004: 187). The BBC internet 'catch-up' iplayer service has also been extremely successful.

3.8 The impact of EU law and policy

EU law and policy has had an important, though not always that visible, influence on the structure of the communications market in the UK. The EU actively supports technological standardisation, particularly in the field of digital broadcasting,⁴² while its 2002 Framework Directive⁴³ and Authorisation Directive⁴⁴ established important principles relating to the authorisation of electronic communication networks and services, implemented through the Communications Act 2003. Passage of the Audiovisual Media Services Directive in 2007 necessitated the introduction of a co-regulatory regime for on-demand 'television-like' services, overseen by ATVOD, with back-stop powers vested in Ofcom.⁴⁵ Given the development of online newspapers, which increasingly incorporate significant video content, this has resulted in potential regulatory overlap with the PCC. In this context, therefore, the EU has increased regulatory oversight, emphasising the importance of individual rights to dignity and non-discrimination alongside child protection over the press's freedom of expression.

As noted above, the European Commission has decided a number of important competition decisions relating to the UK, most recently approving the proposed News Corporation/BSkyB merger, discussed at s.3.6 above.⁴⁶ Although the Commission's state aid rulings regarding the application of the licence fee were resolved in the UK's favour, they underlined the importance of clear objectives and a proper awareness of the market impact of new public services.⁴⁷ The EU's growing emphasis on the independence of regulatory authorities from government and industry has yet to have a significant influence on the way in which the broadcasting sector in the UK is managed, though it does bring into question the present composition of the BBC Trust and its role, for example, in the PVT.

⁴² Article 17, Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), (2002) *OJ L* 108/33.

⁴³ *Ibid.*

⁴⁴ Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive) (2002) *OJ L* 108/ 21.

⁴⁵ Directive 2010/13/EU, AVMS Directive, (2010) *OJ L* 95/1.

⁴⁶ European Commission, Case No COMP/M.5932 – News Corp/ BSkyB, decision of the 21 December 2010, available at:

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5932, last accessed 20 November 2011.

⁴⁷ See s.3.7 above.

4. Composition and diversification of media content

The UK has a long history of regulating the content of radio and television broadcast services in order to promote content diversity. One strand of UK media policy has thus been to encourage the transmission of a wide range of representative views and opinions.⁴⁸ While such regulation restricts the freedom of expression of media owners and editors, intervention of this kind has been regarded by successive governments to be legitimate in order to achieve other general interest objectives, notably public access to information and media pluralism.

4.1 Promotion of diversity of views

All Ofcom regulated commercial and Public Service Broadcasting (PSB) channels are subject to regulatory requirements, some of which are designed to promote content diversity set out in the Communications Act 2003. On demand services are regulated by ATVOD, which regulates television-like content, though only basic content restrictions are in place, pertaining to the regulation of harmful content, sponsorship and product placement. Newspapers do not require a licence to operate and the sector is mostly self-regulated, leaving this sector relatively free from state interference.

4.1.1 General content regulation

The broadcast market, both public and commercial, is regulated by the Communications Act 2003, which states in section 3(4) that Ofcom must have regard when performing its duties for ‘the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the UK and of persons living in rural and in urban areas.’ Part 3 of the Act requires Ofcom to establish certain standards for the content of programmes transmitted as part of television or radio services, such as impartiality and accuracy standards, discussed below.⁴⁹

Under the Communications Act 2003 Ofcom has power to establish content quotas that differ depending on the channel’s remit and circumstances, including quotas for original productions, out-of-London productions, independent productions, networked national and international news, and networked current affairs (Ofcom, 2011e: 3). PSBs generally meet and exceed these targets, as was the case in 2010 (Ofcom, 2011e). The BBC has an extensive public service remit, which includes coverage of the nations and regions and output in minority languages (BBC Trust, 2007).

The vast majority of UK-originated content, other than sport, is commissioned by PSBs (House of Lords, UK, 2010: para 172). Commercial broadcasters are less likely to invest in several types of UK content, such as children’s programmes, regional news or documentaries as the potential returns are deemed too low (House of Lords, UK, 2010: para 175). This suggests that if left to the market, this type of content could be at risk. While the PSB channels easily exceed their original content quotas (Ofcom, 2011e), investment in UK content is currently declining due to

⁴⁸ How representative this has been in practice has, of course, been the subject of lively debate. For a critical perspective see the work of the Glasgow Media Group at: <http://www.glasgowmediagroup.org/content/section/5/17/>.

⁴⁹ S. 319 Communications Act 2003.

financial pressure on the sector, which, in the long term, could lead to a loss of content diversity.

The UK press, which is largely free from regulation, is not subject to any content regulation and diversity of views is stimulated through ownership controls, as discussed in chapter 3.

4.1.2 Impartiality, accuracy and balanced reporting

Programmes, which are seen as having an important function for society as a whole and not a specific group, must be relevant and accurate for all (minority) groups. In order to accomplish this, standards are set which require news programmes, including documentaries, to be presented with ‘due impartiality’ and ‘due accuracy’.⁵⁰ The Communications Act states that ‘due impartiality’ should be preserved when dealing with news; matters of political or industrial controversy; and matters relating to current public policy, in radio or television services.⁵¹ These requirements are detailed in the Ofcom Broadcasting Code. The BBC editorial guidelines (BBC, 2010) require all BBC content to be impartial, broadly mirroring the Ofcom Broadcasting Code, with oversight by the BBC Trust.

Both regulations allow for impartiality to be achieved through a series of programmes, thus a single programme can focus on a single viewpoint, as long as this is balanced out by other programmes in the series. The requirement that all PSB and commercial broadcasters should be impartial is currently controversial, with suggestions that commercial broadcasters, like the press, should be free to present one side of a debate (Ofcom, 2007). Under the PCC Code the press must merely take care not to publish inaccurate, misleading or distorted information, including pictures.⁵² Moreover, it is argued that impartiality regulation can lead to a simplistic, polarised presentation of issues or even undue weight being given to minority views (Ofcom, 2007: 2, also: BBC Trust, 2011b).

4.1.3 State subsidies

As discussed in chapter 3, there are subsidies available for a range of services, such as PSBs, community radio and local television.

4.1.4 Access to media and the impact of new technologies

Community radio can offer an important opportunity for public access to broadcasting. The Communications Act 2003 allows in section 262 for the introduction of radio services that are ‘primarily for the good of members of the public or of a particular community, rather than for commercial reasons’ and which would confer ‘significant benefits on the public or on the communities for which they are provided.’ Community Radio provides unique content and benefits in the area in which they broadcast, giving a voice to groups who have difficulty accessing the mainstream media (Ofcom, 2010c: 6). Currently 14 per cent of licensees focus on a

⁵⁰ S. 319(2)c,d and 320 Communications Act 2003.

⁵¹ S. 320(2) Communications Act 2003.

⁵² S. 1 PCC Editor’s code of practice.

minority ethnic group, while 46 per cent of licences are awarded to services with a general audience focus (Ofcom, 2010c: 9).

Digital television lifted spectrum constraints, with 510 channels, commercial and PSB, now broadcast in the UK (Ofcom, 2011d: 97). The BBC launched a range of digital channels for different interests and has created a highly popular online service (Humphreys, 2009: 171). Commercial players protested at some of these developments pointing to unnecessary market distortion, which eventually led to the implementation of the Public Value Test, discussed above in chapter 3.

Commercial broadcasters have also moved to provide services online, with most providing on-demand services to watch programming previously broadcast. Newspapers offer online news sites, mostly free accessible. Blogs and discussion fora, both those attached to online websites of traditional media and independent ones, allow a wider audience to disseminate views to the public. However, unpopular views still find it difficult to attract attention and space (Curran and Seaton, 2010: 320). Finally, the Internet has opened up opportunities for new (minority) voices to find an audience and for media users to interact with content.

4.1.5 Effect of EU law and policy

The Audiovisual Media Service Directive (AVMS) incorporates European content quotas for linear services, but the requirements for non-linear services are far less strict. Ofcom has designated the duty to ATVOD to ensure that service providers promote, where practicable and by appropriate means, production of and access to European works (ATVOD, 2011a and ATVOD, 2011b). The PSBs comply with European programming requirements, but tend to fill the quota with UK originated content (House of Lords, UK, 2010: 249). Compliance by UK commercial broadcasters is less clear, and the House of Lords has called on Ofcom to work more closely with cable and satellite channels to ensure compliance (House of Lords, UK, 2010: 253).

The AVMS left open the possibility of extending the right of reply to online content and the UK has chosen not to do so.

State aid rules, as discussed further in chapter 3, required that greater attention be paid by the PSBs to the impact of new services on the commercial sector.⁵³

4.2 Content disputes and balancing competing interest

In the media field, a significant number of disputes concern competing rights and interests, with the resultant balance proving particularly controversial in the fields of defamation and privacy. Although there is scope for regulatory bodies and the courts to reach different conclusions, the Human Rights Act (HRA) may act to ensure a broad degree of consistency in the way such issues are addressed and evaluated.

Under section 6 of the HRA it is unlawful for a public body to act in a way that is incompatible with the human rights guaranteed in the HRA. Bodies that have functions of a public nature are covered by this provision. This can lead to the HRA imposing obligations on private regulatory bodies as well as the state, to ensure that

⁵³ European Commission, 'Communication from the Commission on the application of State aid rules to public service broadcasting', (2009) OJ C257/1.

human rights, including the right to freedom of expression and to a private and family life, are protected (Nicol and Miller, 2009: 50-54).

As discussed in chapter 2, most self-regulatory bodies are considered public authorities under the HRA and regulatory codes refer to the HRA as well as to specific human rights such as the freedom of expression and privacy. Different regulators are therefore likely to take a similar approach to the courts to issues where fundamental rights are in conflict. Sections 3, 6 and 12 of the HRA thus necessitate a degree of consistency in the application of fundamental freedoms and conformity, as a minimum, with the standards as developed by the ECtHR. Section 12 of the HRA requires courts to take into account any relevant privacy code, such as the PCC code, though it is worth noting that this code is only applicable to those papers whose editors subscribe to the PCC regime.

4.2.1 Balancing freedom of expression with competing rights and interests under the HRA

The drafting of the HRA reflected concern among the media and politicians that freedom of expression, derived from Article 10 of the ECHR, could be unduly restricted in a balancing exercise with other rights, notably the right to privacy and family life in Article 8 ECHR. Section 12 of the HRA appeared to address these concerns by stating that courts must have particular regard to the importance of freedom of expression when deciding whether to grant any relief, in particular when granting an injunction prior to publication. In doing so courts should take into consideration the public interest in the availability of the contested information and whether the information is already, or is about to, become available to the public.

Opinions regarding the practical effect of section 12 HRA differ (House of Commons, UK, 2010: paras 26-39). Judges are required to have regard to the jurisprudence of the ECtHR when applying Convention rights and courts in the UK have, in practice, followed the lead of the ECtHR and have not afforded freedom of expression any special weight when balanced against other Convention rights.⁵⁴

4.2.2 Balancing freedom of expression with competing private rights and interests: the example of privacy and defamation

The development of a generalised law of ‘privacy’ as opposed to the protection of more circumscribed fiduciary interests through, for example, the action for breach of confidence, has to date been court led (House of Commons, UK, 2010: para 61). There is still much uncertainty surrounding ‘privacy law’, partly due to the relatively small number of judgements from higher courts in this area. The PCC has, however, resolved a significant number of privacy disputes over the past few years, with the second most common complaint to the PCC relating to invasion of privacy and grief.⁵⁵ Despite discussions regarding the introduction of statutory protection, the common law approach to developing protection on a case by case basis, with development also by the media regulatory bodies, has been retained (House of Commons, UK, 2010: 67).

⁵⁴ *Re S* [2003] EWCA Civ 963 and *Campbell v Mirror Group newspapers* [2004] UKHL 22.

⁵⁵ After accuracy and the opportunity to reply (PCC, 2011b), see also previous year’s statistics.

Defamation is another area where the courts have had a major influence with, to date, limited legislative intervention (House of Commons, UK, 2010: 120). The Defamation Acts of 1952 and 1996, however, made some changes to the existing legal framework, notably through the introduction of an ‘innocent publisher’ defence, to deal with technological developments, notably the Internet; the 1996 Act also offers protection for the publication of fair and accurate reports of court proceedings and reports of a range of other public proceedings provided the publication is made ‘without malice’.⁵⁶

The law of defamation is generally considered to be favourable to claimants as they do not have to prove the statements made are false, rather it is up to the defendant(s) to prove they are true (Robertson and Nicol, 2007: 3-043). Nevertheless, the English courts developed an important qualified privilege for ‘responsible journalism’ in the *Reynolds* case, which applies to comments made without malice that can reasonably be believed to be true.⁵⁷ Publication of the information must be in the public interest, and though journalists have to act in ‘good faith’ and on an ‘accurate factual basis,’ they are, importantly, not required to guarantee accuracy of the facts.⁵⁸ While *Reynolds* has been successfully used,⁵⁹ it is still considered difficult for the press to rely on in practice, partly due to the costs involved in collecting the evidence necessary to use the defence (House of Commons, 2010: paras 151-153). There also remains the more intractable problem of the costs of defending an action even where there is a good defence.

Concerns over the difficulties facing libel defendants in the UK, have led to the introduction of a new defamation bill to amend the law in England and Wales (Lord Chancellor and Secretary of State for Justice, UK, 2011). The legislation, if passed, will update and extend statutory defences, address to the lack of a single publication rule and concerns around libel tourism (Lord Chancellor and Secretary of State for Justice, UK, 2011: 5-6).

4.2.3 Prior restraint and the threat to media freedom

Both in relation to defamation and privacy there have been concerns over the chilling effect that interim injunctions/interdicts and now super-injunctions may have over press reporting. This is particularly so given the high costs of defending legal proceedings and the absence of legal aid. This area is now covered by section 12 of the HRA but the willingness of the courts to grant interim relief varies depending on whether the case concerns privacy or defamation. In relation to defamation, prior constraint has been restricted under the rule in *Bonnard v Perryman*,⁶⁰ which provides that no injunction should be granted against publication in a libel action, unless it is clear that no justification or other defence put forward by the publisher would succeed.⁶¹ In relation to privacy matters, where damages are not considered likely to

⁵⁶ Defamation Act 1996, ss.8(2), 14, 15 and schedule 1.

⁵⁷ *Reynolds c Tomes Newspapers Ltd* [2001] 2 AC 127.

⁵⁸ Defamation Act 1996, s.8(2), see also: *Jameel and others v Wall Street Journal Europe Sprl* [2006] UKHL 44.

⁵⁹ See for example: *Charman v Orion Publishing Group Ltd.* [2007] EWCA Civ 972.

⁶⁰ *Bonnard v Perryman* [1891] 2 Ch. 269.

⁶¹ See: *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462.

provide sufficient satisfaction if privacy is invaded,⁶² the courts have been more willing to impose controls under *Cream Holdings v Banerjee*.⁶³

This has encouraged some litigants to frame their actions in terms of privacy rather than defamation and the line between the two causes of action, though relevant, may appear quite fine. This is illustrated by the recent unsuccessful attempt by *John Terry*,⁶⁴ an England Football captain to obtain a super-injunction (Tryhorn, 2010). Terry, who did not put forward any evidence of personal distress as result of the allegations, failed to prove he was seeking damages for invasion of privacy rather than trying to protect his reputation and commercial interests.

The award by the courts of super-injunctions, a specific form of prior-restraint defined as: ‘an interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and (ii) publicising or informing others of the existence of the order and the proceedings’ have also caused concern among the media (Master of the Rolls Lord Neuberger, 2011: 20).⁶⁵ Due to the nature of super-injunctions it is difficult to collect data on their use but there is anecdotal evidence that courts have been increasingly willing to grant them. A recent report by the committee chaired by the Master of the Rolls, set up to look into the matter, recommended that the judiciary should only grant this type of injunction when, and for as long as, absolutely necessary. In particular, members of the media who might become subject to the injunction should be notified (Master of the Rolls Lord Neuberger, 2011: ii and 79).

The Internet is complicating the award of injunctions, in that information subject to a court order binding the media in the UK will often be readily accessible online on foreign websites or social networks, and thus more difficult to control (Hudson: 2011). As section 12(4) HRA states that courts should have particular regard to the freedom of expression and should consider the extent to which the material has, or is about to, become available to the public. Publication on the Internet could thus have an effect on a decision under the HRA concerning traditional media.

Prior restraint has also become controversial because of the recent bid by Max Mosley to impose on the media a legal obligation to pre-notify the subject of a story of its imminent publication, where their privacy might be infringed.⁶⁶ The ECtHR came to the conclusion that Article 8 ECHR does not require pre-notification as this could have a chilling effect on investigative journalism, particularly where the subject then has recourse to prior injunctive relief.

Although the PCC, until recently, did not provide guidance on pre-notification, pre-notification to give people an opportunity to comment on a report, is common, though as the *Mosley*⁶⁷ case itself illustrates by no means universal, across the newspaper industry (House of Commons, UK, 2010: para 91). The PCC recognises that there may be reasons why, in the public interest, the subject should not need to be contacted in advance and the Government has rejected the suggestion that it should introduce legislation establishing such a requirement (House of Commons,

⁶² See: *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at 28.

⁶³ *Cream Holdings Ltd v Banerjee and the Liverpool Post and Echo Ltd* [2004] UKHL 44.

⁶⁴ *John Terry (previously referred to as “LNS”) v Persons Unknown* [2010] EWHC 119 (QB).

⁶⁵ Super-injunctions pose a particular problem for reporting of parliamentary proceedings, which are privileged, where this overlaps with matters covered by a super-injunction.

⁶⁶ *Mosley v United Kingdom* [2011] ECHR 774.

⁶⁷ *Ibid.*

UK, 2010: 93). In response to a Government recommendation, however, the PPC does now provide guidance on pre-notification (PCC, 2011c: 17).

4.2.4 Balancing the interest of the state, society and the media: The field of criminal law

Contempt of Court is a criminal offence in the UK and the Contempt of Court Act 1981 contains several provisions which limit journalists' ability to report trials. For the legal system to function, publications which may unduly influence the result of a trial should be banned, leading to a conflict between free press and the demands of a fair trial (Robertson and Nicol, 2007: 7-001). In the UK courts are open to citizens and the media, though in some cases the courts may be closed in the public interest, for example, to protect witnesses or victims.⁶⁸ Media content disputes may also arise where the freedom of expression clashes with security and terrorism legislation. There are several acts limiting access to data, such as the Official Secrets Acts, Police and Criminal Evidence Act 1984 and the Terrorism Acts. Here too, the influence of the ECHR can be discerned, though states have a wide margin of appreciation in limiting freedom of speech where national security is concerned.⁶⁹

Alongside these limitations on reporting there is the Defence Advisory (DA) Notice system, a voluntary code providing guidance to the British media on the publication or broadcasting of national security information. Compliance with these notices is on a voluntary basis, but they are generally adhered to (Grimley, 2011). Controlling all the media through such a notice is unlikely to be effective with the rise in new media. It is, for example, unlikely that such a notice would have stopped Wikileaks, nor would they likely be effective against, for example, bloggers and twitter.

4.3 Judicial influence on media policy

Due to the English legal system being founded on the common law, the judiciary has a relatively strong influence on the development of media policy, as illustrated by the discussion of the law of privacy and defamation above.⁷⁰ The development of the law of privacy has been controversial and in part lies behind the Government's establishment of the Commission on a Bill of Rights, an independent commission investigating the creation of a UK Bill of Rights.⁷¹ Legislation tends therefore to be enacted against the backdrop of the common law, either to remedy what are seen as its failings, to supplement gaps or to enshrine, as is proposed with the *Reynolds*⁷² defence, certain common law rules in statutory form. Though judges are state appointed, and therefore not democratically elected, the judicial development of media policy allows for a degree of flexibility and sensitivity to the facts of specific cases. Statutory law tends to be more rigid and is relatively slow to react to new issues, whereas the courts can deal with novel developments from the moment they arise. The high costs of litigation, however, serve to deter media organisations from

⁶⁸ *Alt-Gen v Leveiler Magazine Ltd* [1997] A.C. 440.

⁶⁹ *The Observer and Guardian v United Kingdom* [1991] 14 EHHR 153.

⁷⁰ Scots law is based on civil law principles with common law elements.

⁷¹ Ministry of Justice, 'Commission on a Bill of Rights', available at:

<http://www.justice.gov.uk/about/cbr/index.htm>, last accessed 20 November 2011.

⁷² *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

defending (or pursuing) legal actions and, as a result, key issues may not be resolved causing considerable uncertainty for all parties. Fear of litigation can result in an unduly defensive approach to reporting controversial issues.

There are concerns that the judiciary in the UK have been unduly receptive to commercial and property interests as opposed to media interests (Robertson and Nicol, 2007: 5-052) as illustrated by *Goodwin v UK*,⁷³ in which Strasbourg overturned the ruling by the House of Lords which stated that a companies' commercial interests outweighed the public interest in source protection. Judgements of the ECtHR have also had an impact on legislation, leading, for example, to the introduction of section 10 of the Contempt of Court Act 1981, which offers protection to journalistic sources.

4.4 Freedom of Information

The Freedom of Information Act (FOIA) is intended to assist those seeking information. The purpose of an information request does not have to be revealed and public authorities cannot impose conditions on the use of the requested information (Hayes, 2009: 6). There are however 24 grounds on which information can be withheld, of which 6 are unqualified and 18 require a public interest test.⁷⁴ Most of the exemptions are of a very general nature and may therefore be used to withhold much information, or where the cost involved exceeds a certain amount (Hayes, 2009: 6). Full use is being made of the current exemptions (Hayes, 2009: 12).

Where an information request is refused, an appeal can be made to the Information Commissioner, who will decide whether the public interest requires the information to be released.⁷⁵ This decision can be appealed to the Information Tribunal, whose decision can be appealed to the High Court⁷⁶ and ultimately an appeal can be made to the House of Lords.⁷⁷ The appeal system is generally conceived to be slow, for which both the Government's liberal user of exemptions and the adequacy of staff at the Information Commissioners office may be blamed (Holsen et al., 2007: 13 and 17).

The Central Clearing House, part of the Ministry of Justice, was established by the Government in 2004 to ensure consistency across government in dealing with freedom of information (FOI) requests. FOI requests that have a 'likelihood of harmful media interest/story running at the time' are referred to the Clearing House.⁷⁸ There has been serious criticism directed at the Clearing House, claiming it hinders the disclosure of information rather than aids it, especially where sensitive and media related issues are concerned (Worthy, 2008: 104, and O'Neil, 2005) and request for information by the media can be slowed down significantly through this route.

During the first two years of use of the FOIA, journalists accounted for approximately 16 per cent of the total costs of central Government FOI requests, which led to the then Lord Chancellor noting that the FOIA was not introduced to

⁷³ *British Steel Corp v Granada Television Ltd* [1981] AC 1096 *Goodwin v United Kingdom* [1996] 22 EHR 123.

⁷⁴ Ss. 21 to 44 FOIA.

⁷⁵ S. 50 FOIA.

⁷⁶ Court of Session in Scotland.

⁷⁷ The exception here is s53 of the FOIA, which grants veto powers to a responsible cabinet minister.

⁷⁸ Ministry of Justice, available at: <http://www.justice.gov.uk/guidance/docs/foi-clearing-house-referral-triggers.pdf>, last accessed 20 November 2011.

provide journalists with page leads, but to provide citizens with information (Lord Falconer of Thoroton, 2007). Journalist making a broad request under the FOIA to ‘fish’ for information in the hope of finding a newsworthy story have been criticised, due to the high cost and workload burden of these requests (Holsen et al., 2007: 19-20, 24). Activists and politicians are increasingly using the act as a means to get information for campaigning purposes which is subsequently handed to and used by the media for news items (Holsen et al., 2007: 28-29).

The main issue for journalists is that in the current 24-hour news culture, a response to the FOIA is too slow for most (one-day) news stories. Journalists have generally remarked that the FOIA has not had a major impact on their reporting, though the added avenue of information-gathering can assist them in certain cases (Holsen et al., 2007: 13). The act is of more use to investigative reporters, who have remarked that the FOIA has made a “noticeable” difference to their reporting (Holsen et al., 2007: 9 and 13) and a number of investigative reporters have become skilled in the use of the FOIA for stories (Hayes, 2009: 109). Journalists have also noted that the statutory right to access information provides some ‘leverage’ in situation where press officers could previously claim data was not available or rebuff requests with a simple ‘no comment’ (Holsen et al., 2007: 8-9).

5. The profession of journalism

5.1 Relationship between the media and the political class

The Broadcasting Act 1990, as amended by the Broadcasting Act 1996 and the Communications Act 2003, contains several provisions designed to limit political influence on both commercial and public service broadcasting. Political organisations and local authorities are banned from holding a broadcasting licence,⁷⁹ there is a ban on political advertising and there are strict rules, set by Ofcom, relating to party political broadcasts.⁸⁰

As a Public Broadcasting Service (PBS), there are several ways in which the BBC is dependent on the Government. As noted in s 3.7 above, the appointment mechanism offers a potential way to indirectly influence BBC output, while the BBC is dependant for its financing on the licence fee, which is set by the government. Recent cuts to the licence fee could threaten the BBC's independence in the longer term and affect the quality of output (Hewlett, 2010). The BBC's Royal Charter and Agreement are renewed every ten years, which helps to insulate the BBC from political pressure, though a recent report suggests this could change (House of Lords, UK, 2011: 20). The heavy-handed use of a judicial enquiry to investigate journalist Andrew Gilligan's flawed report into Iraqi weapons of mass destruction and the editorial and governance decisions surrounding its broadcast, could deter the transmission of controversial views at times of crisis, when they may be most needed (Lord Hutton: 2004).

The newspaper sector is relatively free from Government regulation and its only form of state subsidy is through an exemption from VAT. As newspapers are free to have a political bias, they are often aligned with a political party, though remain free to switch political allegiance and have done so in the past (BBC News, 2009). As the backing of a candidate or party by a newspaper can have an effect on voting behaviour, this affords scope for powerful media interests to attempt to exert an influence over politicians and governments.

When considering the primary sources quoted in both press and broadcast news, a study from 2008 shows politicians and governments are the most successful at having their voices and opinions noted, though of course not always in a positive light (Lewis, et al., 2008: 24). Recent developments surrounding the phone-hacking scandal have shown, however, that there is little transparency in the actual relationship between the government and the media (Wintour, 2011). This has led to Prime Minister, David Cameron, proposing that ministers should 'record all meetings with newspaper and other media proprietors, senior editors and executives - regardless of the nature of the meeting' (BBC News, 2011b) in a bid to improve transparency.

⁷⁹ S. 2 of the Broadcasting Act 1990, S. 2 of the Broadcasting Act 1996 and ss. 348-350 & S. 14 of the Communications Act 2003.

⁸⁰ S. 333 of the Communications Act 2003.

5.2 Relationship between journalists, media owners and businesses

Newspaper output is influenced by both editors and newspaper owners, with the latter in many cases more influential than the former (Marr, 2004: 235). Interviews conducted for this report indicate that there is a fairly strong compliance culture within newspapers, as output generally needs to match the orientation of the newspaper. Journalists are often hired on short-term rolling contracts, which creates pressure to comply with the style and political orientation of the newspaper (Fenton, 2009: 56-57). A number of initiatives have sought to limit, if not remove, proprietorial influence, by creating alternative ownership structures. The most notable example is the Scott Trust,⁸¹ which is the sole shareholder of the Guardian news group. The Scott Trust was created in 1936 to ensure independent, liberal journalism and its profits are reinvested in order to eliminate commercial and political interference.⁸²

Businesses have a significant influence on news stories in both the press and broadcasting through the provision of PR material. Where PR material is used in the press as a source for news stories, 38% of this material comes from the business sector, which is only slightly less for broadcasting at 32% (Lewis et al., 2008: 22). The Internet has facilitated the circulation of PR material as news agencies are now easily bypassed and PR material can be e-mailed directly to reporters (Fenton, 2009: 94). Given the positive spin of PR material, it is unlikely any opposing facts and arguments will be included, which means that journalists need to treat this material with caution and conduct additional research, particularly as it will rarely be made clear to the public that a story has been based on PR material.

5.3 Journalists' associations and unions

The National Union of Journalists (NUJ) in the UK was founded in 1907 and is the largest journalists' trade union with a majority of journalists as members (Hallin and Mancini, 2004: 223-224). The NUJ is an active organisation, which seeks to improve conditions for journalists, as well as protect media freedom, professional standards and ethics in the media.⁸³ It is active in all media sectors, including new media. It provides a broad range of training for union representatives, in order to provide an effective service to their members, as well as training for journalists to keep their skills up-to-date, especially with the demands of the digital age. The NUJ's policy is decided at the annual meeting of delegates and covers such matters as media freedom, government policy and international concerns (National Union of Journalists, 2006: 23). The NUJ is politically active, running campaigns, responding to government consultations and publishing opinions on matters that concern media independence and freedom (see for example: NUJ, 2011a and NUJ, 2011c). The right to strike is used and supported by NUJ members where necessary (see for example: NUJ, 2011b).

⁸¹ Guardian Media Group (GMG), 'The Scott Trust', available at: <http://www.gmgplc.co.uk/the-scott-trust/>, last accessed 20 November 2011.

⁸² GMG, 'History', available at: <http://www.gmgplc.co.uk/the-scott-trust/history/>, last accessed 20 November 2011.

⁸³ NUJ, 'About Us' (2008), available at: <http://www.nuj.org.uk/innerPagenuj.html?docid=27>, last accessed 20 November 2011.

The smaller, and more recently formed, British Association of Journalists (BAJ) also seeks to improve working conditions for journalists and to defend and promote media freedom.⁸⁴

5.4 Working conditions

Over the last 20 years employment levels of editorial staff in the national newspapers have increased slightly. During the same period, however, the editorial and news pages of the national newspapers have, on average, almost tripled, increasing work pressure (Lewis et al., 2008: 11). While there have been some technological advances, resulting in increased efficiency, it is unlikely that editorial staff can spend the same time on a single news story as they could two decades ago (Lewis et al., 2008: 12).

A 2008 study found that the media rely heavily on pre-packaged sources, especially the press, where nearly half of all stories are mainly derived from wire services, (Lewis et al., 2008: 15). The figures are slightly better for broadcast media at around 30% (Lewis et al., 2008: 15). The same study found that for 41% of press articles and 52% of broadcast items, PR material played an agenda setting role or provided most of the story (Lewis et al. 2008: 17 and 20). Worryingly, most stories are based on a single primary source, and only half of the stories in the press make a visible attempt to contextualise and verify this information, with broadcast news faring only slightly better (Lewis et al., 2008: 26). Of equal concern is the fact that it has become accepted practice to ‘cannibalise’ stories appearing elsewhere, often rewritten without any additional fact checks or attribution to the original work (Fenton, 2009: 96).

Time pressure has become a significant concern in journalism in the UK. Most journalists are producing more stories than they would have done a decade ago and are now expected to produce content for multiple media platforms. This results, as noted above, not only in an increase in the use of ‘pre-packaged’ content, but also in fewer checks being run on a story, though the number of checks varies widely per story (Lewis et al., 2008: 47). Online editions, in particular, require fast production of content, leaving less time to check stories. Most worryingly this applies also to content produced by press agencies (Lewis et al., 2008: 47) so mistakes or omissions may be passed along the line of production.

5.5 Technological developments and diversity of news sources

The development of new technologies has opened up new sources of information for stories, such as blogs and Internet news sites. While these new possibilities of finding information from more (independent) sources can have a positive influence on freedom of information, many of these new sources cannot be considered reliable. Information found in these unofficial sources will often need to be checked more thoroughly and should not be used if they cannot be independently verified. Journalists have noted that where in the past they had privileged access to information, most information is now freely accessible on the Internet, necessitating the creation of something original that cannot be found elsewhere (Lewis, 2008: 51) which also adds to work pressure.

⁸⁴ BAJ, ‘BAJ aims’, available at: <http://www.bajunion.org.uk/aims.htm>, last accessed 20 November 2011. See also for example: (Luft, 2010).

A negative consequence of the enhanced access to information is that there is less need for journalists to leave the office and this, combined with the pressure to produce several stories a day, has resulted in independent investigation by journalists becoming rarer (Lewis, 2008: 51), with a potential reduction in news quality. While the Internet has opened up a new way for journalists to find stories, most stories come from other newspapers or specialist magazine websites, and only a small percentage come from sites such as a blogs and news groups (Fenton, 2009: 93).

5.6 Effectiveness of co- and self-regulatory standards

The written press in the UK is subject to self-regulation by the PCC, established in 1991 after its predecessor, the Press Council, was disbanded. The original Press Council was set up to promote a professional culture among journalists, but was generally viewed as an ineffective body (Curran and Seaton, 2010: 334). Though several reforms were made to improve its independence and effectiveness, especially after the threat of statutory regulation, these were not considered adequate and the Press Council was disbanded.

The self-regulatory regime, now overseen by the PCC, has equally been heavily criticised (see Department for National Heritage, Calcutt, 1993 and House of Commons, UK, 2003). The PCC is not truly independent of the industry that funds it⁸⁵ and as regulation by the PCC is voluntary not all publications fall under its authority, creating an obstacle to effective regulation. One of the latest examples of this is the withdrawal from the Code of Northern & Shell, a newspaper group that includes titles such as the Daily Star, OK! and the Daily Express, after a funding dispute with Pressbof, the PCC's funding body (PCC, 2011c). The PCC has been subject to public scrutiny and criticism followed by reform in much the same way as its predecessor (see Curran and Seaton, 2010: 335).

Significant improvements have been made, such as updates to the code to strengthen its privacy protection and the appointment of lay members to the board. However, the PCC has been criticised for failing adequately to investigate complaints (Curran and Seaton, 2010: 335) and is still widely regarded as an ineffective body (see Press Gazette, 2011).⁸⁶ Without competence to fine or award compensation the PCC has to rely on its power to force publications to print negative adjudications. The effectiveness of this as a mechanism to keep the press in line is debatable and interviews conducted for this report with pressure groups, the PCC and professionals working in the field revealed a wide range of opinions as to its deterrent effect.

There are, however, benefits to the self-regulatory system, as it is faster and cheaper than taking a newspaper to court, though some complainants pay for professional legal assistance, which inevitably inflates costs. Lord Leveson has recently been appointed to undertake a wide-ranging inquiry into 'the culture, practices and ethics of the press.' The inquiry's final report, expected during the

⁸⁵ The PCC has seventeen members of which ten, including the chairman are 'lay' members. See: PCC, 'The Press Complaints Commission', available at: <http://www.pcc.org.uk/AboutthePCC/WhatisthePCC.html>, last accessed 20 November 2011.

⁸⁶ The PCC will conduct a review of both its funding arrangements and sanctions. See also Pugh, 2011b.

course of next year, is likely to have an important influence on the future of the PCC and the system of press self-regulation more generally.⁸⁷

Video on demand (VoD) is co-regulated by ATVOD and Ofcom in order to give effect to the AVMS Directive.⁸⁸ ATVOD sets minimum content standards for VoD services that offer content comparable in form and content to television programmes. In case of non-compliance fines can be imposed by Ofcom and, in extreme cases, the service suspended.⁸⁹ As a relatively new regulator its effectiveness has yet to be extensively tested, though some of its decisions have already proven controversial. For example, rulings that video content available on some newspaper websites is 'TV-like' and therefore subject to ATVOD's jurisdiction and a fee, have proven especially contentious and an appeal from one such decision is pending.⁹⁰

5.7 Journalists in the complex contemporary media environment

While in theory the Internet could lead to greater accountability, as it is now far easier to check facts and compare news stories, this is not necessarily the case. Many of the heavily used rewrites of wire copy stories, data and facts are difficult to check because they are not generally attributed to clear sources (Davies, 2008: 74). The opportunities offered by the Internet have also increased the speed at which stories are expected to be produced. This negatively affects journalists' ability to further investigate and independently verify stories (Fenton, 2009: 90). On the other hand, the Internet has opened up a new source of information, allowing for relatively easy information gathering. Where a journalist previously had to go out to 'find' stories, search engines have now become much used tools. Experienced reporters are often contacted directly and may be confronted with a barrage of information, e-mailed directly to them, which can make it difficult to filter out what is valuable or of genuine interest (Fenton, 2009: 95).

The National Council for the Training of Journalists accredits training schemes for all types of journalism and both undergraduate and graduate university courses are widely available. The NUJ estimates that currently 80% of all entrants to the profession have a degree, though not necessarily in journalism.⁹¹ It is further generally necessary to have relevant work experience in order to access the profession (The Panel on Fair access to the Profession, 2009: 101 and 103), which can create a barrier to entry as the majority of work experience placements are unpaid. Multi-media skills are increasingly part of journalism training and are valued by employers (National Council for Training of Journalists, 2010: 6).⁹² Media law is included in journalism degrees and qualifications, though one of the main challenges in this area is the constantly evolving law, which makes it difficult for journalists to keep up with

⁸⁷ The Leveson Inquiry website (2011) is available at: <http://www.levesoninquiry.org.uk/terms-of-reference-for-judge-led-inquiry/>, last accessed 20 November 2011.

⁸⁸ Communications Act 2003, as amended by the Audiovisual Media Services Regulations 2009 and the Audiovisual Media Services Regulations 2010.

⁸⁹ Ss. 368i-368n, Audiovisual Media Services Regulations 2009.

⁹⁰ See for example ATVOD, 'Scope determination', available at: <http://www.atvod.co.uk/regulated-services/scope-determinations/sunday-times-video-library>, last accessed 20 November 2011. See also: (Pugh, 2011a).

⁹¹ See: <http://www.nujtraining.org.uk/faqs.phtml#6>, last accessed 20 November 2011.

⁹² See also: NUJ, 'Training Policy' (2006) available at: http://www.nujtraining.org.uk/show_title.phtml?ref=0&category=Training%20Policy, last accessed 20 November 2011.

the latest legal developments once they have left education. Both the NUJ and PCC offer (short) journalism courses, to keep journalists in practice up to date with developments and to teach new skills. Interviews conducted for this paper indicated that it may be difficult for journalists to keep up to date with an area of law that is evolving at a rapid pace.

5.8 New media influence on journalism

New media are having a marked influence on journalistic practice. The online news market, for example, encourages journalists to plan stories around popular Google search words, as advertising rates are increasingly based on the number of 'hits' a page receives (Fenton, 2009: 59). This can lead to increased commercialisation and potential distortion of the choice of news topics.

There are also many blogs that focus on political and media gossip, which have become an established part of the media industry. These blogs can have an impact on the traditional media field when they generate such a level of interest in a story that it is taken up by the mainstream media (Fenton, 2010: 141). While a small study found a number of blogs view themselves as 'new news sources', few bloggers saw themselves as journalists (Fenton, 2010: 144-145).

The new media are also having an impact on the legal framework for journalism. The line between journalists and citizens is becoming increasingly blurred both as a result of citizens acting as journalists and by journalists straying from the main stream media by, for example, running a Twitterfeed that contains important news items.

There is no internationally accepted legal definition of a journalist, nor is there a legal definition of journalist in the UK. In general, the courts in the UK have not sought to draw distinctions between professional journalists and private publishers. Both are equally at risk, for example, of actions for defamation and invasion of privacy and both are able to rely on a range of public interest and other defences, including the *Reynolds*⁹³ defence. Nevertheless, professional journalists, unlike private publishers, will generally be subject to a professional code of conduct such as the PCC editorial guidelines or the Ofcom Code. Some interesting developments have taken place in this context. The PCC, for example, is currently investigating how it can regulate official Twitterfeeds from newspapers and reporters (Sabbagh, 2011), as the public could expect these to adhere to the same standards applied to both hard copies and online versions of newspapers. Such a move would extent the PCC's remit further into the online world.

Ivan Lewis, the shadow Culture Secretary, seemingly indirectly, suggested the possibility of creating a register for journalists, thus requiring journalists to be 'approved' before they could be considered journalists (Mulholand, 2011). This has, understandably, led to protest from many sides (see for example: Wheeler, 2011; Thunder, 2011 and NUJ, 2011) and it is unlikely such a register will be implemented.

⁹³ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

6 Media literacy and transparency requirements

6.1 State policy and media literacy

The Communications Act 2003 assigns several duties to Ofcom, amongst them the duty to promote media literacy in the UK.⁹⁴ There is no single agreed definition of media literacy,⁹⁵ though the definition applied by Ofcom is: ‘the ability to use, understand and create media and communications’ (Ofcom, 2011b: 9). This closely mirrors the definition for media literacy used by the European Commission.⁹⁶

While Ofcom’s focus lies with electronic media,⁹⁷ the definition allows Ofcom to look beyond the simple ability to use media and to consider whether people can understand and evaluate the information they access through the media (Ofcom 2011b: 9). Ofcom also emphasises that there are many players who can make a difference and should take an active role in promoting media literacy (Ofcom, 2004: 5).

In 2004 several such organisations came together to form the Media Literacy Task Force, an informal group of stakeholders, comprising, amongst others, the BBC, British Board of Film Classification, British Film Institute, Channel 4, ITV, the Media Education Association, Ofcom and Skillset.⁹⁸ In 2005 the Task Force produced, the Charter for Media Literacy (Ofcom, 2011b: 57),⁹⁹ which influenced the European Charter for Media Literacy, supporting the establishment of media literacy across Europe.¹⁰⁰ The Charter specifically notes the need to understand media content in its broader technological, legal, economic and political context.¹⁰¹ The Media Literacy Task Force was disbanded in 2009 when members moved on to focus on specific initiatives by their individual organisations.¹⁰²

Aside from Ofcom, the BBC is also assigned a role in the promotion of media literacy in its Royal Charter and Agreement (BBC, 2006 and Department for Culture Media and Sport, 2006).¹⁰³ This states that in developing and reviewing its remit for ‘sustaining citizenship and civil society’ the BBC must have regard to the need to

⁹⁴ S. 11 Communications Act 2003.

⁹⁵ Ofcom, ‘What is Media Literacy’, available at: <http://stakeholders.ofcom.org.uk/market-data-research/media-literacy/about/whatis/>, last accessed 20 November 2011.

⁹⁶ Commission of the European Communities: ‘A European approach to Media literacy in the digital environment’, COM (2007) 833 final, available at: <http://ec.europa.eu/culture/media/literacy/docs/com/en.pdf>, last accessed 20 November 2011.

⁹⁷ Ofcom, ‘What is Media Literacy’, available at: <http://stakeholders.ofcom.org.uk/market-data-research/media-literacy/about/whatis/>, last accessed 20 November 2011.

⁹⁸ UK Film Council: ‘Media Literacy Task Force’, available at: <http://www.ukfilmcouncil.com/10022?page=1&step=10&viewby=category&value=16974>, last accessed 20 November 2011.

⁹⁹ ‘Charter for Media Literacy’ (2005), available at: <http://www.bfi.org.uk/education/research/advocacy/pdf/bfi-edu-advocacy-charter.pdf>, last accessed 20 November 2011.

¹⁰⁰ ‘European Charter for Media Literacy’ (2006), available at: <http://www.euromedialiteracy.eu/charter.php>, last accessed 20 November 2011.

¹⁰¹ Paragraph 2, Charter for Media Literacy, above at note 6.

¹⁰² Media Literacy Task Force, available at: <http://www.ukfilmcouncil.org/12336>, last accessed 20 November 2011.

¹⁰³ For full amendments see: BBC Trust, ‘Governance Framework’, available at: http://www.bbc.co.uk/bbctrust/about/how_we_govern/charter_and_agreement/index.shtml, last accessed 20 November 2011.

promote media literacy.¹⁰⁴ The BBC aims to assist its audience to engage critically with the media, enabling the location of trustworthy sources and critical engagement with information (BBC, 2009: 6). It notes specifically that media literacy can be an important tool in assisting people to participate equally in society. Ofcom and the BBC co-ordinate their activities and run joint initiatives (Ofcom & BBC Trust, 2011).

6.2 Media literacy, freedom of expression and the right to be informed

Media literacy is often connected to active citizenship in strategy documents and policy outlines, as it stimulates access to information essential for participating in the democratic process.¹⁰⁵ This is why the need for skills to critically evaluate and engage with information is emphasised (Ofcom, 2009a: 30). The opportunities offered by digital media have become the focal point in the policy discussions surrounding media literacy. This is due to the fact that the Internet is becoming one of the main sources of access to information and breaking news, both at local, national and international level (Department for Business, Innovation and Skills & Department for Culture, Media and Sport, 2009: 32). The majority of Internet users are interested in, and capable of, finding information from their local government and council. Political participation online is, however, not very popular, with 74% of adult Internet users not interested in contacting MPs or MSPs online, and 64% not interested in signing online petitions (Ofcom, 2011b: 42). Many government agencies are now online. A good example is DirectGov, which brings a multitude of government services together in one easily accessible place.¹⁰⁶

Media literacy is also considered to have positive effects in the creative, cultural, health, education, economic and social fields (Ofcom, 2009a: 28). The economic importance of media literacy is strongly emphasised in the 2009 Digital Britain report, which noted that to be competitive in a global market the workforce needs, at a minimum, a reasonable grasp of ICT skills (Department for Business, Innovation and Skills & Department for Culture, Media and Sport, 2009: Ch 6).

6.3 Evaluation of media literacy initiatives

The Digital Britain report noted that the approach to media literacy in the UK was very fragmented. There were several organisations involved in the promotion of media literacy, but there was a lack of an overarching strategic vision to connect them and maximise resources (Department for Business, Innovation and Skills & Department for Culture, Media and Sport, 2009: 17). The situation is complicated by the fact that different aspects of media literacy, for example education, fall under the competence of the devolved nations, making an overarching UK approach more difficult to implement. Use of the term media literacy has not been consistent across the different initiatives and the Report suggested a move away from media literacy as a discrete subject and development of a more comprehensive, government led, plan for digital participation (Department for Business, Innovation and Skills & Department for Culture, Media and Sport, 2009: 17). This resulted in the launch of the

¹⁰⁴ S. 6(2)b BBC Agreement (2006).

¹⁰⁵ See for example: UK Charter for Media Literacy, at note 6 above, (Ofcom, 2009a: 5) and (Department for Business, Innovation and Skills & Department for Culture, Media and Sport, 2009: 29).

¹⁰⁶ Directgov, available at: <http://www.direct.gov.uk/en/index.htm>, last accessed 20 November 2011.

short-lived Digital Participation Consortium in October 2009.¹⁰⁷ The Consortium, led by Ofcom, brought together government and a wide range of organisations from the public sector, the field of education and the industry to help ‘everyone who wants to be online to get online, do more online and benefit from the advantages of being online’ (Ofcom, 2010a). The work programme of the consortium was re-scoped in the review of public spending undertaken by the new coalition government, leading to a more limited programme focussing on encouraging non-Internet users to go online.¹⁰⁸ The responsibility for the promotion of media literacy as assigned by the Communications Act 2003 remains with Ofcom.

Ofcom regularly reviews its work on media literacy and produces a yearly report on media literacy for both children and adults (Ofcom, 2011b). These reports consider specific aspects of literacy, such as the take-up of media and use and understanding of information. They help to identify areas for concern, the type of information accessed and not accessed by children and adults, as well as attitudes towards this information. The most recent report signalled, for example, that a quarter of adults believe that if websites are listed by a search engine they must be accurate and unbiased (Ofcom, 2011b: 54). More encouragingly, it showed that take-up levels of broadband are still rising and that levels of confidence in Internet use are increasing (Ofcom, 2011b: 214).

A study assessing media literacy levels across Europe ranked the UK as having a very high level of media literacy. Of the countries studied, it noted that the UK, together with Finland, Sweden, Holland and Denmark scored remarkably high, up to two or three times higher than other countries (EAVI, 2009: 69).

6.4 Transparency requirements and media literacy

Transparency requirements are generally not linked to media literacy in the UK, though several measures to enhance media transparency are in place. The required degree of transparency varies with the medium, with the broadcast sector being the most heavily regulated. Ofcom licenses all commercial broadcasters in the UK, and publishes on their website a list of current licence holders for television and radio broadcast licences (Ofcom, 2011f and Ofcom, 2011g). This list includes the company name, the address and contact details, as well as the type of content the broadcaster provides, thus providing an accessible overview of all broadcast licence holders, though it does not include any shareholder information. There is no equivalent register available for these newspapers and websites, though under the AVMS, ATVOD requires websites to include the name, address and electronic address for users of their service.¹⁰⁹ Ofcom further has the statutory duty to review media ownership rules at least every three years.¹¹⁰ While these reports are published and accessible to the public, they do not provide a comprehensive overview of ownership of the market. Ofcom’s broadcasting code has several provisions relating to the transparency of commercial arrangements, ensuring that the audience is made aware

¹⁰⁷ Ofcom, ‘Consortium launch’, available at:

<http://consumers.ofcom.org.uk/2009/10/consortium-launch/>, last accessed 20 November 2011.

¹⁰⁸ <http://www.digitalparticipation.com/> and <http://raceonline2012.org/>, last accessed 20 November 2011.

¹⁰⁹ Section 368D (2) Communications Act 2003.

¹¹⁰ S. 391 Communications Act 2003.

of instances where material is broadcast in return for payment or other valuable consideration.¹¹¹

The Disclosure and Transparency rules for shareholders (FSA, 2011) which were updated after the implementation of the European Transparency Directive,¹¹² apply to media companies. Major shareholdings have to be notified to the Financial Service Authority (FSA) and notification is triggered by control over the exercise of voting rights attached to shares (FSA, 2011: 5). While this information is largely accessible to the public, and thus improves the transparency of media ownership, it is unlikely that many people will access this information. The complicated nature of the information provided and the knowledge necessary to access this information means it only has limited use in improving transparency for the general public.

Aside from these provisions there are several civil society organisations which are active in enhancing media transparency, for example the Media Standards Trust's Transparency Initiative (Media Standard Trust, 2010), which seeks to make online news more transparent, through the use of meta data which includes information relating, inter alia, to who wrote the article, who published it, and its source.

¹¹¹ Ofcom Broadcasting Code, ss. 9-10.

¹¹² Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC ((2004) *OJ L* 390/38).

7. Conclusion

The communications sector in the UK is at something of a crossroads: there are undoubted elements of continuity with the past but also considerable pressure for change to accommodate technological innovations, new production and consumption practices, and straightened economic circumstances. The last of these three factors was identified by the majority of our interviewees as currently posing the greatest threat to the media in the UK. Inevitably, certain media have been affected more severely than others, with the print media particularly exposed. Cuts of over 16% will curtail BBC output, while, at the regulatory level, Ofcom's budget has been reduced by over 20%. The position of two important players in the existing market, the key public service broadcaster and independent regulator, will thus be weakened.

Three current Government initiatives could significantly affect the development of media law and the future shape of the communications industries. Firstly, it is possible, though unlikely, that the Commission on a Bill of Rights could recommend the adoption of a UK Bill of Rights and abolition of the HRA 1998. Though such a Bill would 'build on' the obligations in the ECHR, it could go further in developing certain rights, liberties and responsibilities for the media. One reason for establishing the Commission was concern in certain political quarters at the growing influence of the ECHR on the UK legal system, and, more specifically, its role in the development of a law of privacy, undercutting a specific revenue stream for the press. But if the UK were to remain a signatory to the ECHR, it would be difficult for UK courts to ignore how the ECtHR balances free speech and other rights, unless the ECtHR itself were to expressly afford greater discretion to contracting states in the field.

Whether or not such a bill is passed, the balance between judicial and legislative development of the law will remain controversial. The HRA undoubtedly imposed on UK courts a more central role in the protection of human rights, while limitations at the domestic level can be referred on to the ECtHR. The latter court, despite press criticism, has played an important role in enhancing media freedom in the UK, addressing such substantive and procedural matters as contempt of court, source protection, the level of damages in defamation cases, and liability for costs. Legal costs pose a real threat to critical media reporting of powerful commercial interests and only a few major players have the will or resources to challenge court restrictions. A relatively small number of defamation and privacy cases proceed to a full court hearing, in part because the financial risks of defending and losing such actions are considerable. As a result, important guidance on key issues, such as when the release of private information will be considered to be in the public interest, may not be immediately forthcoming. Statutory intervention, as illustrated by the proposed defamation bill, can thus establish or clarify defences and address ongoing concerns, such as the continuing liability of the media for content downloaded from their online archives.

Legislative bodies at both the national and EU level need to ensure, however, that press freedom is 'mainstreamed' across all initiatives so that advances in one field are not undermined by developments in another. A particular area of concern is the potential impact of anti-terrorism legislation at both the domestic and EU levels, which, if inappropriately applied, could give security services extensive access to

journalists' materials or contact details, thereby restricting their ability to obtain information or even putting reporters' lives at risk.¹¹³

The second initiative, the Leveson Inquiry, is considering the culture, practices and ethics of the press in the aftermath of the *News of the World* phone-hacking scandal. Evidence that certain newspapers have tolerated a culture of illegal and invasive journalistic practices raises troubling questions about the impact that the drive for profit and reliance on celebrity gossip has had on press standards. More particularly, the current model of press self-regulation is seen as having failed so that the existing regulatory structures are no longer viable. Some form of statutory underpinning, possibly a co-regulatory regime along ATVOD lines, could be introduced in the future. Key concerns will be to ensure that all newspapers are brought within the scope of the regime, that the dispute resolution body is seen to be impartial and sufficiently distanced from the industry it regulates (one interviewee suggested that a greater role could be given to journalists as opposed to editors in the process), and that effective sanctions are available if needed. The new regulator could also play a more proactive role in investigating poor conduct and promoting high standards of journalism, a role extending well beyond the current reactive resolution of disputes over code breaches.

The future of press regulation cannot, however, be addressed in isolation from broader questions of regulatory coherence and capacity. If all newspapers are to be required to participate in the new scheme, how should 'newspaper' be defined for this purpose, should it, for example, cover a successful amateur blog? Should non-professional providers of online content be able to subscribe to the system and benefit from its 'quality assurance' even if not required to do so, and, if so, is there not a need for greater coordination among such regimes at the European level to prevent a proliferation of standards? As newspapers begin to include more and more video content on their online sites, the demarcation between ATVOD and the PCC has become increasingly fine. We now have a paradoxical situation where the standards expected of online newspapers in the UK exceed those set for on-demand audiovisual media services. A proliferation of regulatory bodies is in the interests of neither citizens nor business, and the Leveson Inquiry together with the new Communications Bill, discussed below, create an opportunity to reconsider the existing regulatory framework for online content.

The phone-hacking revelations also raise the question of professional training and education. Editors are under no obligation to ensure that their journalists have access to continuous education and with present financial and time constraints, further training may seem an impossible ideal. Although young journalists may be aware of recent developments, for instance relating to data protection or freedom of information, this may not be the case with their more established colleagues and it is worth considering how continuing education on law and ethics could be built into any new press regime. Online facilities provided, for example, by the BBC College of Journalism, or accredited by organisations such as the Broadcast Journalism Training Council, could here play a role and could equally be used to support and enhance standards among the growing number of individual or amateur publishers who now

¹¹³ See joint letter of the 22 June 2010 to Cecilia Malmström, European Commissioner for Home Affairs, in relation to the EU data retention directive 2006/24, noting its potential implications for journalism, available at: http://www.vorratsdatenspeicherung.de/images/DRletter_Malmstroem.pdf, last accessed 20 November 2011.

complement the activities of the mainstream media. Our interviews have also highlighted the positive role that ‘readers’editors’ can play in maintaining standards within the industry, as well as helping to prevent disputes escalating, contrary to the interests of all involved.

More positively, the phone-hacking scandal also reveals that the UK media sector retains the capacity for dogged investigative journalism and self-criticism. The *Guardian* newspaper continued to explore the issue even when regulators, politicians, the police and other sections of the press appeared content to let it die. The ensuing investigation underlined the danger of media corporations obtaining undue (and covert) political influence with scope to leverage this influence to secure policies supportive of further market consolidation - and enhanced influence. The capacity of the *Guardian* to pursue this story, working in collaboration with the *New York Times*, serves to re-emphasise the importance of a plural media sector under diverse ownership and the value of mechanisms such as the Scott Trust, that help to insulate the media from commercial constraints.

A final initiative with important ramifications for the media sector in the UK concerns a new Communications Act, which the Coalition Government plans to have adopted by 2015. This will address not only questions of regulatory coherence but also reform of the present media ownership rules, picking up on two key areas of concern noted above. As discussed in section 3.3, although UK citizens now have access to a greater variety of media services than ever before they still primarily rely on four mainstream providers for news and current affairs information. For some in the commercial sector the strength of the licence fee funded BBC is part of the problem, necessitating a rebalancing between public and commercial providers. Such a rebalancing may indeed be underway with constraints imposed by the operation of the Public Value Test and an ongoing cut to the BBC’s income. But public services have been at the heart of the UK’s audiovisual sector from its inception and have played a key role not only in providing a wide range of comparatively low cost services on multiple platforms but also in the development and roll-out of new technology. Public provision is thus likely to be seen as an important part of the UK media landscape for the foreseeable future.

Key questions to be addressed in the run up to the new Communications Act are whether it remains feasible to hold the *commercial* public service sector, which includes ITV and Channel 4, to current levels of public service programming and whether the requirement of due impartiality in the reporting of news and current affairs on broadcast services should be retained, particularly given the development of online services, many produced abroad under very different regulatory regimes. The present Culture Secretary, Jeremy Hunt, has indicated he is willing to consider whether there are areas where the state should move out of regulation altogether and, despite the phone-hacking revelations, a pronounced deregulatory emphasis can be anticipated. Devolution of regulatory responsibilities to the individual consumer in an increasingly complex media environment underlines the importance of access to effective consumer information, not least in relation to media ownership. As suggested above, these are issues that require co-ordination at the international as well as the domestic level and are currently being explored by a range of regulators, academics and civil society organisations, including, in the UK, the Open Society Foundation and the Media Standards Trust.

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9. List of interviews

The authors would like to thank the following individuals who gave up time in their busy schedules to help with this report and share their ideas. Though discussions with these individuals have helped to inform our views, opinions expressed in this report should not be ascribed to specific interviewees.

Emily Davidson, Strategy Analyst, Ofcom, London, 7 June 2011

Campbell Deane, Lawyer and Partner, specialising in media law, Bannatyne, Kirkwood Deane and Co., Glasgow, lecturer in media law at the University of Glasgow, Glasgow, 24 August 2011

Kate Devlin, UK Political Correspondent, *Herald* newspaper, 14 October 2011

Chris Elliot, Readers' Editor at *The Guardian* newspaper, journalist, telephone interview, 17 August 2011

William Gore, Press Complaints Commission, London, 18 April 2011

Paul Holleran, NUJ representative for Scotland, Edinburgh, 17 October 2011

Lord Inglewood, Chairman, House of Lords Select Committee on Communications, House of Lords, London, 7 June 2011

Mike Jempson, Director MediaWise, Senior Lecturer, University of the West of England, telephone interview 3 May 2011

Peter Johnson, CEO ATVOD, Windsor, 16 May 2011

David Levy, Director, Reuters Institute Oxford, telephone interview, 18 August 2011

Justin Lewis, Professor of Communication and Head of the Cardiff School of Journalism, 19 October 2011

Matteo Maggiore, BBC's Head of EU and International Policy, BBC White City, London, 22 June 2011

Kirsteen Macdonald, Lawyer and Associate, specialising in media law, Burness and Co., Edinburgh, 27 September 2011

Rosalind McInnes, In-house solicitor at the BBC, Glasgow, 13 July 2011

David McKie, Lawyer and Partner, specialising in media law, Levy and McRae, Glasgow, 24 August 2011

Martin Moore, Media Standards Trust, London, 18 April 2011

Julian Petley, Chair Campaign for Press and Broadcasting Freedom, freelance journalist and Professor of Screen Media and Journalism in the School of Arts at Brunel University, London, 18 April 2011

Stewart Purvis, previously Ofcom Partner for Content and Standards, journalist, with experience across radio, television and the printed press, Special Advisor to the House of Lords Select Committee on the media and currently Professor of Television Journalism at City University London, London, 7 June 2011

Alex Towers, Deputy Director and Head of Strategy, BBC Trust, London, 7 June 2011

Richard Wilkins, Scottish Parliament, Head of Broadcasting Policy and Arts Council,
Edinburgh, 15 September 2011