

**Leveson Inquiry into the culture, practices and ethics of the press**

**Written statement of Ed Richards, Chief Executive of Ofcom**

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**A. INTRODUCTION**

**1. Current role and career history**

- 1.1 I am Ofcom's Chief Executive, appointed in October 2006.
- 1.2 I am also a director of Thames Water Utilities Limited, a Director of Donmar Warehouse, a Trustee of The Teaching Awards Trust and a member of the Centre for Economic Performance Policy Committee at the London School of Economics.
- 1.3 I joined Ofcom in 2003 as Partner, Strategy and Market Developments before becoming its Chief Operating Officer, responsible for Strategy, Market Research, Finance, HR and other functions in 2005. Prior to joining Ofcom, I was Senior Policy Advisor to the Prime Minister (Tony Blair) for media, telecoms, the internet and e government and prior to that I was Controller of Corporate Strategy at the BBC. I have also worked in consulting at London Economics Ltd, as an advisor to Gordon Brown MP and the National Communications Union. I began my career as a researcher with Diverse Production Ltd where I worked on programmes for Channel 4.
- 1.4 Ofcom is the sectoral and competition regulator for the UK communications industries. It has responsibility for electronic communications (such as fixed and mobile phones), broadcasting, wireless telegraphy and (from October 2011) postal services. It is a statutory corporation, created by the Office of Communications Act 2002 and all its powers and duties are statutory.

**2. Overview of origins and history**

- 2.1 Ofcom was created by the Office of Communications Act 2002, but its principal functions are conferred on it by the Communications Act 2003.
- 2.2 Its creation involved the merger of multiple regulators.
- (i) The Broadcasting Standards Commission, which produced and enforced codes of conduct for standards and fairness in broadcasting.
  - (ii) The Independent Television Commission (ITC), which licensed and regulated commercial television services.
  - (iii) The Office of Telecommunications (OfTel), which was responsible for regulating telecommunications.
  - (iv) The Radio Authority, which licensed and regulated independent radio.

- (v) The Radiocommunications Agency (part of the DTI), which was responsible for the management of the non-military radio spectrum in the UK.
- 2.3 The rationale for Ofcom's creation was, broadly, to simplify a complex communications regulatory structure in the context of technology convergence and create a more efficient and flexible regulator.<sup>1</sup>
- 2.4 Ofcom's main functions since creation have been as follows:
  - (i) Broadcasting regulatory functions, mainly under the Broadcasting Acts 1990 and 1996
  - (ii) Functions in relation to electronic communications networks and services, under the Communications Act 2003
  - (iii) Spectrum management functions, now under the consolidated Wireless Telegraphy Act 2006 and
  - (iv) Concurrent competition and consumer enforcement powers under the Competition Act 1998 and Enterprise Act 2002
- 2.5 As time has passed, Ofcom has been given more functions under the Digital Economy Act 2010 and the Postal Services Act 2011<sup>2</sup>.

### **3. Organisation and status**

- 3.1 Ofcom is a statutory corporation, created by section 1 of the Office of Communications Act 2002. Its chairman and other non-executive Board members are appointed by the Secretary of State for Culture, Olympics, Media and Sport, subject to a maximum Board (executive and non-executive) membership of 10<sup>3</sup> and Ofcom must have a majority non-executive board. The Chairman and other non-executive members of the Board appoint the Chief Executive subject to the approval of the Secretary of State and also appoint any other executive Board members.
- 3.2 Ofcom reports annually to the Secretary of State and our report is laid before Parliament. Our sponsoring departments are the Department for Culture, Media and Sport and (in relation to postal services) the Department for Business, Innovation and Skills.
- 3.3 The Board is Ofcom's main decision-making authority. It meets at least monthly except in August. Ofcom's senior executive team, the executive committee (known as "Exco") also meets monthly. It oversees the management of the organisation. I have read and agree with the statement of

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<sup>1</sup> See Cm 5010 at paragraph 8.2 and 8.3.1.

<sup>2</sup> In common with other public bodies, we also have functions under and our powers are exercised subject to, a range of other Acts, such as the Equality Act 2010 and the Freedom of Information Act 2000.

<sup>3</sup> SI 2005/2718

Colette Bowe, in which she gives some further information on the Board.

- 3.4 Ofcom's Policy Executive, comprising a slightly larger number of senior executives, meets weekly and is responsible for the development of Ofcom's overall regulatory agenda. As well as providing a forum for discussion, it also has the powers to take certain decisions itself.
- 3.5 We have a statutory duty to establish a Content Board<sup>4</sup>. It is a committee of the main Board and, amongst other things, it oversees Ofcom's work in supervising quality and standards for television and radio. It has members representing each of the countries in the UK, and includes both lay members and members with extensive broadcasting experience. I have read and agree with the statement of Philip Graf, in which he gives some further information on the Content Board.
- 3.6 Internally, Ofcom is organised into seven groups, whose directors report to me. The groups are Content, International and Regulatory Development; Legal; Consumer; Strategy, Chief Economist and Technology; Competition Policy; Spectrum Policy; and Operations.
- 3.7 Of these, functions in relation to media regulation principally fall within the Content, International and Regulatory Development group, which deals with broadcast licensing, content and standards policy and enforcement.
- 3.8 Ofcom is funded by a combination of fees from industry for regulating broadcasting and communications networks, and grant-in-aid from the Government (e.g. for the exercise of our Competition Act functions).

#### **4. Principal duties**

- 4.1 Ofcom's principal duty in carrying out its functions, set out in section 3(1) of the Communications Act 2003, is (a) to further the interests of citizens in relation to communications matters (i.e. matters in relation to which we have functions); and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 4.2 Section 3(2) of the Communications Act 2003 says that Ofcom is required, in carrying out this duty, to secure various ends. Those that directly relate to media are:
  - (i) The availability throughout the UK of a wide range of television and radio services which (taken as a whole) are both of a high quality and calculated to appeal to a variety of tastes and interests;
  - (ii) The maintenance of a sufficient plurality of providers of different television and radio services;

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<sup>4</sup> Section 12 Communications Act 2003

- (iii) The application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services; and
  - (iv) The application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both -
    - unfair treatment in programmes included in such services; and
    - unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.
- 4.3 Many of Ofcom's functions, particularly in relation to electronic communications, are derived from EC law. EC law also sets out a series of duties, which have been implemented in section 4 of the Communications Act 2003. The section 4 duties have priority over the section 3 duties in case of any conflict.
- 4.4 Ofcom is, in addition, required under section 3 to have regard to a number of further matters, including, for example, the principles under which regulatory activities should be carried out: transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed. Under section 5, Ofcom must review regulatory burdens with a view to securing that regulation does not involve the imposition or maintenance of unnecessary burdens, and under section 7, Ofcom must carry out an impact assessment in relation to any "important" proposals in connection with the carrying out of our functions.
- 4.5 Particular activities, for example the issue of formal information requests under the Communications Act 2003 to those which Ofcom regulates, are subject to statutory tests of proportionality.
- 4.6 As a public authority Ofcom is subject to the general requirements of administrative law, which require us amongst other things to act reasonably, to take into account all relevant considerations and not take into account irrelevant considerations, and to consult properly when taking decisions. All of Ofcom's decisions must comply with the Human Rights Act 1998 which incorporates into UK law the European Convention on Human Rights. Of particular relevance to Ofcom's decisions are: the right to a fair trial (Article 6), the right to privacy (Article 8) and the right to freedom of expression (Article 10). We are also subject to the Freedom of Information Act 2000.
- 5. Remit, authority and powers in relation to matters not directly media related**
- 5.1 Media-related regulatory functions are amongst many regulatory functions Ofcom carries out. I sketch these out very briefly below, before turning to the regulation of broadcasting in more detail.

- 5.2 Under the European Telecommunications Framework, Member States are required to appoint an independent national regulator to give effect to the Framework and Ofcom is the national regulator for these purposes. In summary, we regulate electronic communication networks and services, (for example telephone and internet services) principally by setting conditions of authorisation, in particular after undertaking reviews of various telecommunications markets to assess whether they are effectively competitive. We are also given statutory duties and powers to resolve disputes in this area<sup>5</sup>.
- 5.3 Wireless devices of all kinds (from television broadcasts to mobile phones to security swipe cards) use the radio spectrum to convey information. If the radio spectrum were unregulated, different types of use may interfere with one another and prevent communication taking place. We manage the non-military spectrum by licensing its use and creating exemptions from the need to be licensed (by making statutory instruments), so as to ensure that spectrum use is optimal<sup>6</sup>. We also have a role in setting equipment standards<sup>7</sup>. We represent the UK at a number of spectrum-related international bodies, including in relation to satellite filings.
- 5.4 We have a role to approve and/or maintain codes of practice on the obligations of internet service providers where copyright infringements have been reported to them; and (if the Secretary of State so directs) on how internet access for copyright infringers may be limited<sup>8</sup>.
- 5.5 Under the Postal Services Act 2011, the Postal Services Commission (known as Postcomm) will merge with Ofcom from 1 October 2011, transferring responsibility for regulating postal services to Ofcom.
- 5.6 We enforce consumer protection legislation, such as the Unfair Terms in Consumer Contracts Regulations 1999, in relation to our sectors. We have concurrent powers to accept undertakings and obtain court orders under legislation such as The Consumer Protection from Unfair Trading Regulations 2007 and the Sale of Goods Act 1979<sup>9</sup>.
- 5.7 We regularly carry out and publish research into the communications sector<sup>10</sup>. We have a duty to promote media literacy under section 11 of the Communications Act 2003.

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<sup>5</sup> See section 45 Communications Act 2003.

<sup>6</sup> See in particular section 8 Wireless Telegraphy Act 2006.

<sup>7</sup> See sections 54-76 Wireless Telegraphy Act 2006.

<sup>8</sup> See sections 124A to 124N Communications Act 2003 (inserted by the Digital Economy Act 2010).

<sup>9</sup> See Part 8 of the Enterprise Act 2002.

<sup>10</sup> See sections 14 and 15 of the Communications Act 2003.

## **B. BROADCASTING REGULATION**

### **6. Introduction**

- 6.1 The area of Ofcom's work which I think is most likely to be of interest to the Inquiry is the statutory scheme put in place by Parliament for the regulation of broadcasting of television and radio services in the UK.
- 6.2 We regulate television and radio broadcasting in the UK through a statutory licensing scheme, in which compliance is achieved through licence conditions. I explain further below.

### **7. Television**

- 7.1 One of Ofcom's key functions is to regulate the UK television sector. Television services are provided over different platforms: terrestrial wireless transmission (analogue or digital), via satellite, cable or over the internet. Services are regulated differently according to their platform and nature of the service.
- 7.2 The statutory framework for television broadcasting regulation (minimum standards) derives from EC law which sets a level playing field for European television broadcasting services and lays out criteria for establishing appropriate jurisdiction between Member States for cross border services. In addition to applying the minimum standards to all Ofcom licensed services, Parliament has developed its own domestic regime in certain key areas such as the regulation of public service broadcasting (PSB). The main statutes governing broadcasting regulation are: the Broadcasting Acts of 1990 and 1996 (as amended) and the Communications Act 2003.
- 7.3 All television broadcasting services that Ofcom regulates must be provided under a licence issued by Ofcom. Under section 13(1) of the Broadcasting Act 1990 (the "1990 Act") it is an offence for any person to provide any "relevant regulated television service" without a licence (generically, a "broadcasting licence") under the 1990 Act or the Broadcasting Act 1996 (the "1996 Act")<sup>11</sup>.
- 7.4 A "relevant regulated television service" is a service regulated by Ofcom in pursuance of section 211 of the Communications Act 2003. This captures TV services provided from within the UK, whether they are received in the UK or outside it.

### **8. Radio**

- 8.1 Ofcom also regulates the UK's commercial radio sector. Radio services can be provided over different platforms: terrestrial wireless transmission (analogue or digital), by satellite, by cable, or over the internet. Radio

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<sup>11</sup> Which Act a service requires a licence under is decided by the type of service. Licences for "television licensable content services" such as satellite services are governed by the 1990 Act. Licences for "digital programme services" broadcast over a multiplex are governed by the 1996 Act.

services provided over the internet are not regulated by Ofcom. Services on the other platforms are regulated by Ofcom to differing extents.

- 8.2 Unlike some of the other areas of Ofcom's work, the statutory framework for radio broadcasting regulation does not derive from EC law: it is a domestic regime.
- 8.3 All radio broadcasting services that Ofcom regulates must be provided under a licence issued by Ofcom. It is a criminal offence to provide a service without authorisation under a licence (section 97 Broadcasting Act 1990). The obligations imposed on a licensee will differ depending on the type of radio service being authorised (there is a specific licence category for each type of service), and the process for granting a licence also differs depending on the type of service.
- 8.4 In addition to Ofcom's duty to secure the availability throughout the UK of a wide range of high quality and diverse television and radio services, Ofcom has a duty to do all it can to secure a diversity of national radio services (with one service being a speech-based service, and one a music service which is not pop music), and a range and diversity of local services<sup>12</sup>. The three national analogue licences were awarded under a highest cash-bid process.
- 8.5 Local licences (of which there are around 300) are awarded under a beauty parade, where applications are judged against four statutory selection criteria (ability to maintain the service; extent to which the service would cater for local people's tastes and interests; extent to which the service would broaden the range of programmes in the area; and extent to which there is evidence of local demand or support for the service)<sup>13</sup>. Ofcom is required to secure an appropriate amount of local material of which a suitable proportion consists of locally-made programmes in respect of each local station and has published guidelines about what it considers generally to be appropriate requirements<sup>14</sup>.
- 8.6 Ofcom also issues licences to community radio stations (not-for-profit, small scale services) and restricted service licences (such as hospital radio or services to cover particular events).
- 8.7 For all broadcasting licences (television and radio), there are statutory rules in place which prohibit certain categories of person from holding a broadcasting licence (or certain types of licence)<sup>15</sup>. For example, advertising companies and bodies whose objects are wholly or mainly of a political nature are completely disqualified. Bodies whose objects are wholly or mainly of a religious nature may not hold a Channel 3 or a Channel 5 licence and require permission to hold other licences<sup>16</sup>.
- 8.8 The requirement to be licensed does not arise in the case of the BBC or the Welsh Authority, each of which are both regulators in their own right and

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<sup>12</sup> Section 85(1) 1990 Act.

<sup>13</sup> Section 105 1990 Act.

<sup>14</sup> Section 314 Communications Act 2003.

<sup>15</sup> See Schedule 2 1990 Act.

<sup>16</sup> See Schedule 2 1990 Act and Schedule 14 Part 4 Communications Act 2003.

Public Service Broadcasters (“PSBs”) – the Welsh Authority via the television broadcasting service known as Sianel Pedwar Cymru (“S4C”). However, the BBC’s Charter and Agreement and the Communications Act 2003 provide for us to regulate the content of BBC and Welsh Authority television and radio services in certain respects, including the privacy provisions of the Broadcasting Code<sup>17</sup>. Ofcom does regulate services provided by BBC and S4C companies.

8.9 There are also a variety of detailed rules in relation to cross media ownership (for details see paragraph 24.1).

## **9. Fit and proper**

9.1 There is also a requirement that Ofcom must be satisfied that a licensee is “fit and proper” to hold a licence. Under section 3(3) of each of the 1990 Act and the 1996 Act, Ofcom:

- (a) shall not grant a licence to any person unless satisfied that the person is “a fit and proper person to hold it”; and
- (b) “shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence”.

9.2 It is the licensee (which, if it is a corporate body, will include controlling directors and shareholders), in relation to whom Ofcom has to be satisfied that it is fit and proper.

9.3 We consider that activities such as phone hacking, computer hacking, “blagging”, bribery and/or corruption may be relevant to the question of whether a licensee is fit and proper to hold a licence. See further below at paragraph 28.

## **10. Content regulation for television and radio**

10.1 Parliament has given Ofcom statutory duties in relation to the content of television and radio services in the Communications Act 2003. These general duties are to ensure the application of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services<sup>18</sup>; and the application of standards that provide adequate protection to members of the public and all other persons from both (i) unfair treatment in programmes included in such services; and (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services<sup>19</sup>.

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<sup>17</sup> See Part V of the 1996 Act and sections 198 and 203 Communications Act 2003.

<sup>18</sup> Section 3(2)(e) Communications Act 2003

<sup>19</sup> Section 3(2)(f) Communications Act 2003



- 10.2 Ofcom has a duty to set such standards for the content of programmes to be included in television and radio services as appear to it best to secure the “standards objectives”. The standards objectives for television and radio services set by Parliament are:
- (i) Persons under the age of eighteen are protected;
  - (ii) Material likely to encourage or to incite the commission of crime or to lead to disorder is not included;
  - (iii) News is presented with due impartiality;
  - (iv) News is reported with due accuracy;
  - (v) The proper degree of responsibility is exercised with respect to the content of religious programmes;
  - (vi) Generally accepted standards are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material;
  - (vii) Political advertising is not included;
  - (viii) Advertising which may be misleading, harmful or offensive is prevented;
  - (ix) International obligations of the UK with respect to advertising are complied with;
  - (x) The unsuitable sponsorship of programmes is prevented;
  - (xi) There is no undue discrimination between advertisers
  - (xii) There is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.<sup>20</sup>
- 10.3 These standards have to be published in a code, and in setting or revising these standards, Ofcom must have regard, in particular to matters such as the degree of harm or offence likely to be caused, the likely size and composition of the potential audience, the likely expectation of the audience and the likelihood of persons who were unaware of the nature of the programmes content being unintentionally exposed to that content.<sup>21</sup>
- 10.4 We publish these standards in the Ofcom Broadcasting Code (“the Broadcasting Code”). The most recent version of our Broadcasting Code took effect on 28 February 2011<sup>22</sup>. Ofcom has a specific duty under section 107 of the 1996 Act to draw up a “fairness code” giving guidance as to the principles

<sup>20</sup> Section 319(2) Communications Act 2003

<sup>21</sup> Section 319(4) Communications Act 2003

<sup>22</sup> Available at <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/?a=0>.

to be observed and the practices to be followed by broadcasters in connection with the avoidance of unjust or unfair treatment in programmes and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in them). For the purposes of that duty, Ofcom applies the provisions in Sections 7 ("Fairness") and 8 ("Privacy") of the Broadcasting Code.

- 10.5 All broadcasting licensees (apart from multiplex licensees, which do not control programme content) are required by the terms of their licences to comply with the provisions of the Broadcasting Code. Breach of the Broadcasting Code is breach of a licence condition and Ofcom may take enforcement action against the licensee.
- 10.6 Although it doesn't hold a licence, the BBC is also required by the terms of the BBC Agreement to comply with the provisions of the Broadcasting Code (except in relation to section 5 (due impartiality and due accuracy) and section 6 (elections and referendums) which are governed by the BBC Trust).

## **11. Freedom of expression**

- 11.1 As noted above, all Ofcom's decisions must comply with the Human Rights Act 1998 which incorporates into UK law the European Convention on Human Rights. It is also explicitly stated in section 3(4)(g) of the Communications Act 2003, that Ofcom, in performing its duties in relation to the application of standards, must have regard to "*the need to secure the application in the case of television and radio services ... in the manner that best guarantees an appropriate level of freedom of expression.*"
- 11.2 Ofcom's Broadcasting Code has been drafted in light of the Human Rights Act and the European Convention on Human Rights. In particular its rules and practices take account of the right to freedom of expression, as expressed in Article 10 of the Convention, which encompasses the audience's right to receive certain material, information and ideas in a democratic society and Article 8 regarding the right to a person's private and family life, home and correspondence. As well as the Broadcasting Code being drafted to take account of Convention rights, each and every time Ofcom applies the Broadcasting Code, it does so in a manner that best guarantees an appropriate level of freedom of expression and that complies with the European Convention on Human Rights.

## **12. Privacy**

- 12.1 As the Inquiry is concerned with the media and privacy issues, I will set out in more detail Ofcom's specific duties regarding complaints of unfair treatment and unwarranted infringements of privacy in television and radio services. These duties were first introduced for broadcasting by Parliament in the 1996 Act.
- 12.2 Under section 110 of the 1996 Act (as amended) (and subject to the other provisions of Part 5 of the 1996 Act), Ofcom has a specific duty to consider and adjudicate on complaints which relate to unjust or unfair treatment in

programmes or to unwarranted infringements of privacy in programmes (or in connection with the obtaining of material included in them).

- 12.3 Sections 111 to 114 and 130 of the 1996 Act provide for certain statutory criteria which must be satisfied before Ofcom is entitled to proceed to consider fairness and/or privacy complaints, in addition to certain procedures to be followed by Ofcom, complainants and broadcasters. Fairness and/or privacy complaints may be made by an individual or by a body of persons (whether incorporated or not). However, Ofcom is normally under a duty not to entertain such a complaint unless it is made by “the person affected” or by a person authorised by him/her to make the complaint on their behalf<sup>23</sup>. In relation to privacy, “the person affected” means a person whose privacy was infringed.
- 12.4 However, in exceptional circumstances, where Ofcom considers it necessary in order to fulfil its general duty (under section 3(2)(f) of the 2003 Act) to secure the application of standards that provide adequate protection to members of the public (and all other persons) from unfair treatment in programmes and unwarranted infringements of privacy, we may consider fairness or privacy issues in the absence of a complaint from “the person affected” .
- 12.5 Our procedures for considering and adjudicating on fairness and privacy complaints are set out in our *Procedures for the consideration and adjudication of Fairness and Privacy complaints* dated 1 June 2011<sup>24</sup>. An investigation will look into whether there is an issue to be considered under the Broadcasting Code and, if so, whether the Broadcasting Code has been breached.
- 12.6 In each and every privacy decision, we make it clear that in applying Rule 8.1 of the Broadcasting Code, it is Ofcom’s view that the individual’s right to privacy has to be balanced against the competing rights of the broadcaster’s right to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus intensely on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.
- 12.7 We would take into account use of techniques such as phone hacking, computer hacking or blagging in considering whether a complainant’s privacy had been unwarrantedly infringed in making a programme, such that the Broadcasting Code had been breached. I set out at paragraph 20 our experience of dealing with fairness and privacy complaints.

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<sup>23</sup> “The person affected” is a statutory term defined by section 130 of the 1996 Act.

<sup>24</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/854750/fairness-privacy-complaint.pdf>.

### **13. Statutory Sanctions**

- 13.1 In the event of a breach of a condition of a licence issued under the 1990 or 1996 Acts, Ofcom has the power to impose statutory sanctions on the broadcaster under provisions contained in those Acts (or the 2003 Act in some cases)<sup>25</sup>.
- 13.2 The imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if we consider that a broadcaster has seriously, deliberately, repeatedly, or recklessly breached a licence condition.
- 13.3 The sanctions available to Ofcom include a decision to:
- (i) Issue a direction not to repeat a programme or advertisement;
  - (ii) Issue a direction to broadcast a correction or a statement of Ofcom's findings which may be required to be in such form, and to be included in programmes at such times as Ofcom may determine;
  - (iii) Impose a financial penalty;
  - (iv) Shorten or suspend a licence (only applicable in certain cases); and/or<sup>26</sup>
  - (v) Revoke a licence (not applicable to the BBC, S4C or Channel 4).
- 13.4 In relation to the imposition of a financial penalty, in most cases the maximum financial penalty for commercial television or radio licensees is £250,000 or 5% of the broadcaster's "Qualifying Revenue", whichever is the greater. For licensed public service broadcasters, the maximum financial penalty payable is 5% of "Qualifying Revenue". For the BBC or S4C, the maximum financial penalty is £250,000.

### **14. Advertising Standards Authority**

- 14.1 Ofcom is also required to set standards in relation to TV and radio advertising<sup>27</sup>. Ofcom established a co-regulatory partnership with an industry body, the Advertising Standards Authority ("ASA"), in 2004. The arrangements are underpinned by an enabling statutory instrument<sup>28</sup> and a Memorandum of Understanding<sup>29</sup>.
- 14.2 Although Ofcom has devolved the exercise of this function to the ASA (in this case, through an Order made under the Deregulation and Contracting Out Act 1994), it remains ultimately responsible for ensuring that broadcasters

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<sup>25</sup> The specific provision which empowers Ofcom to impose sanctions for a breach of licence conditions will depend upon the type of licence.

<sup>26</sup> In some cases, Ofcom may impose more than one sanction

<sup>27</sup> See section 321 Communications Act 2003.

<sup>28</sup> The Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004.

<sup>29</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/reg\\_broad\\_ad/statement/mou.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/mou.pdf).

observe relevant standards.

- 14.3 As the 'backstop' regulator, Ofcom must ensure that the advertising code remains appropriate in the light of the standards objectives and of any international obligations notified to Ofcom by the Secretary of State that may require amendments to the code. For this reason, Ofcom retains the right to require the code to be amended. For example, when Ofcom concluded in 2007 that it was appropriate in the light of the standards objectives for certain types of advertising to be excluded from children's television programmes (advertising for products that are high in fat, salt or sugar), we directed the ASA to amend the code accordingly. The reason for this was that the ASA body responsible for making code changes (the Broadcast Committee of Advertising Practice, drawn from industry members) was unable to agree the changes that Ofcom considered necessary.
- 14.4 By the same token, the ASA must obtain Ofcom's agreement to any changes the ASA wishes to make to the way in which the standards are codified. For example, following a review of the code by the Broadcast Committee of Advertising Practice, the ASA proposed in 2010 that a new version should be issued. Following discussion, Ofcom agreed that the new version could be published, but asked the ASA to undertake a further consultation in relation to rules on the advertising of post-conception advisory services, and to retain the existing rule until that process had been completed<sup>30</sup>.
- 14.5 If the ASA has been unable to secure compliance with its decisions, Ofcom may step in and impose sanctions. Under the co-regulatory arrangements, the ASA holds advertisers (not broadcasters) responsible for compliance with its code. If the ASA considers that a breach of the code has occurred, it will ask the advertisers to withdraw voluntarily the advertisement and, if the case is sufficiently serious or novel, may publish an adjudication explaining why this is so. As the ASA was established with the consent and support of the advertising industry, advertisers normally comply with ASA adjudications. In the rare cases where they do not, the ASA may ask Ofcom to consider enforcement action. Any enforcement action by Ofcom would be taken against broadcasters.
- 14.6 In these cases, Ofcom will consider whether or not the broadcaster has breached the ASA's code by showing an advertisement. We will take account of any facts provided by the ASA, but will reach our own decision on whether a breach has occurred and, if so, on whether a particular sanction is warranted. For example, in October 2007, the ASA referred to us, the case of Venus TV, which had repeatedly broadcast a number of advertisements which the ASA considered had breached its code. Ofcom considered the case, heard representations from Venus TV, and ultimately concluded that the breaches had occurred, and that they were sufficiently serious and repeated to warrant a financial penalty<sup>31</sup>.

<sup>30</sup> <http://www.cap.org.uk/Media-Centre/2011/Consultation-on-post-conception-advice-services.aspx>

<sup>31</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/venustv.pdf>

14.7 As backstop regulator, Ofcom must also regulate those types of commercial communication that the ASA does not regulate. This includes sponsorship (responsibility for which was not devolved to the ASA) and certain forms of teleshopping. When the European Court of Justice determined that certain types of television (e.g. adult chat services) constituted teleshopping<sup>32</sup>, the ASA said that it would prefer that this should be by Ofcom. By agreement with the ASA, Ofcom now regulates these services, in accordance with the ASA's code. Ofcom has imposed a number of sanctions on providers of such services that have breached the ASA's code. These sanctions have included the imposition of fines<sup>33</sup> and the revocation of licences<sup>34</sup>.

## 15. TV on Demand

15.1 The Communications Act 2003 was amended in December 2009 to implement the European AVMS (Audio Visual Media Service) Directive<sup>35</sup>. The Communications Act makes provisions for the regulation of on demand programme services, which are essentially services whose principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television services, i.e. TV-like video on demand services. These services are subject to a notification scheme and must comply with minimum content standards under the Directive, which has been implemented in the UK by Part 4A of the Communications Act 2003.

15.2 Section 368B(1) of the Act confers a power on Ofcom to designate any body corporate satisfying specified criteria to be, to the extent provided by the designation, the appropriate regulatory authority for the purposes of any provision. Ofcom has formally designated the Authority for Television On Demand (ATVOD) (formerly the Association for Television On Demand) as the co-regulator for editorial content<sup>36</sup>, and the Advertising Standards Authority (ASA) as the co-regulator for advertising content. Ofcom remains ultimately responsible for ensuring that providers of on demand services observe relevant standards.

15.3 As the 'backstop' regulator, Ofcom must:

- (i) approve ATVOD's guidance on which types of on demand service providers are required to notify ATVOD, and consider appeals from service providers who do not believe that they fall within the scope of ATVOD's jurisdiction<sup>37</sup>. As this is a relatively recent area of new regulation, Ofcom has received a number of such appeals from service

<sup>32</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0195:EN:NOT>.

<sup>33</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/venustv.pdf>

<sup>34</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangmedia-revocation.pdf>.

<sup>35</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 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).

<sup>36</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>.

<sup>37</sup> <http://stakeholders.ofcom.org.uk/enforcement/video-on-demand-services/>

providers including a number of appeals from newspaper publishers against decisions by ATVOD that their website services are within the scope of this regulation. Ofcom has dealt with one appeal from one provider<sup>38</sup> and is currently considering 16 further appeals;

- (ii) ensure that ATVOD's code of standards and associated guidance are consistent with the legislation. Ofcom therefore discussed and agreed ATVOD's code and guidance in draft. Ofcom retains the right to require the code to be amended; and
- (iii) decide whether or not to impose sanctions on service providers in cases referred to Ofcom by ATVOD. Ofcom has to date not imposed a sanction on an on demand service provider but is currently considering a number of referrals from ATVOD.

## 16. Public service TV broadcasting

- 16.1 Ofcom licences a wide variety of different satellite and cable services that contribute to fulfilling its duty to secure a wide range of television services<sup>39</sup>. It also regulates Public Service Broadcasters ("PSBs") through licence conditions intended to promote the fulfilment of the purposes of public service television. PSB services (for example ITV, Channel 4, Five), are delivered on the terrestrial platform (analogue and digital). PSBs would face a significant financial penalty if they ceased to provide the service. (In contrast, licensees of non-PSB services and services delivered over satellite and cable are authorised to provide the licensed service, but are under no obligation to do so.)
- 16.2 Regulation of commercial PSBs comprises three 'tiers'. Tier 1 requirements apply to all broadcasters, and include the obligation to comply with the Ofcom Broadcasting Code, with licence conditions giving effect to the UK's international obligations (e.g. European production quotas required by virtue of the Audiovisual Media Services Directive), with requirements to provide subtitling, signing and audio description, and to promote equality of opportunity in training and employment.
- 16.3 Tier 2 production and programme quotas apply to PSBs only. Under the Act, Ofcom is required to set minimum requirements (or quotas) for the commercially-funded public service channels – ITV1, Channel 4 and Channel 5. Each is required to fulfil programme quotas for news and current affairs<sup>40</sup>, and ITV1 only is required to meet regional programme quotas<sup>41</sup>. Each is also required to fulfil production quotas for originally-commissioned programmes, programmes made by independent producers, and programmes made outside London<sup>42</sup>. With the exception of independent production quotas

<sup>38</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Climax3Uncut.pdf>

<sup>39</sup> Section 3(2)(c), Communications Act 2003.

<sup>40</sup> Section 287 Communications Act 2003.

<sup>41</sup> Section 287 Communications Act 2003.

<sup>42</sup> Sections 277 and 278 Communications Act 2003

(which are prescribed by legislation<sup>43</sup>), Ofcom is empowered to set and vary quota levels for ITV1, Channel 4 and Channel 5.

- 16.4 Tier 3 describes those aspects of public service content set out in legislation that are not subject to quotas (such as children's programming, drama and religion), but which Ofcom must report on as part of its periodic assessment of the extent to which the public service remit is being fulfilled<sup>44</sup>. With the exception of Channel 4, public service broadcasters are no longer required to consult Ofcom about how they will fulfil the remits that are specific to them<sup>45</sup>.
- 16.5 Finally, Ofcom is required to set conditions requiring that PSB broadcasters carry party political broadcasts<sup>46</sup>.

**C. OFCOM REMIT, AUTHORITY AND POWERS TO REGULATE THE MEDIA IN RELATION TO PHONE HACKING, COMPUTER HACKING, "BLAGGING", BRIBERY AND/OR CORRUPTION**

**17. Introduction**

- 17.1 Ofcom has additional powers which could relate to phone hacking, computer hacking, "blagging", bribery and/or corruption in certain limited circumstances. (For the purposes of this statement, I have taken "blagging" to mean the practice of obtaining personal information by means of deception.) These are in relation to the security of networks and persistent misuse of an electronic communications network. We have no powers in relation to such activities as undertaken in the print media.

**18. Security of networks**

- 18.1 During the time period we understand to be associated with cases of hacking on the part of the press, the most obvious obligations on communications providers arose under data protection and privacy legislation.
- 18.2 For example, the Data Protection Act 1998 requires data controllers to take appropriate technical and organisational measures against unauthorised or unlawful processing of personal data, which includes, for example, taking reasonable steps to ensure the reliability of employees having access to data and a level of security. Under the Privacy and Electronic Communications (EC Directive) Regulations 2003 (which replaced the Telecommunications (Data Protection and Privacy) Regulations 1999), providers of public electronic communications services are required to take appropriate technical and organisational measures to safeguard the security of their services. It is not Ofcom, but the Information Commissioner's Office ("ICO"), which enforces these.

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<sup>43</sup> Section 277 Communications Act 2003.

<sup>44</sup> Section 264 Communications Act 2003.

<sup>45</sup> Section 198A, Communications Act 2003.

<sup>46</sup> Section 333 Communications Act 2003.



- 18.3 However, the Electronic Communications and Wireless Telegraphy Regulations 2011<sup>47</sup> recently amended the Communications Act 2003 to give communications providers new duties, and Ofcom new functions, in relation to the security of networks. The new powers and duties are the UK's implementation of Article 13a and 13b of the revised EC "Framework Directive"<sup>48</sup>. Ofcom issued guidance on these new requirements on 10 May 2011<sup>49</sup>.
- 18.4 Under these new provisions, providers of public networks and services must take appropriate measures to manage risks to security, in particular to minimise the impact on end users and interconnected networks. They must take all appropriate steps to protect, so far as possible, network availability and they must notify Ofcom of breaches of security or reductions in availability which have a significant impact on the network or service.
- 18.5 As set out in our guidance, we understand that matters falling specifically under the privacy regulations are for the Information Commissioner's Office to consider. More generally, where there is overlap in our functions, expertise is one of the factors we take into account in determining which organisation is best placed to lead. For example, the ICO may lead if issues of privacy are critical to an investigation, and Ofcom may lead if an investigation would benefit from technical knowledge of the communications sector<sup>50</sup>.
- 19. Persistent misuse**
- 19.1 Under sections 128 to 130 of the Communications Act 2003, Ofcom may take action against a person who "persistently misuses" an electronic communications network or service. "Misuse" occurs if the effect or likely effect of the person's use of the network or service is to cause another person to suffer unnecessary inconvenience, annoyance or anxiety; or if they use the network or service to engage in conduct the effect or likely effect of which is to cause another person to suffer unnecessary inconvenience, annoyance or anxiety. To be "persistent", the misuse must be repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

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<sup>47</sup> SI 2011/1210.

<sup>48</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, revised by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

<sup>49</sup> <http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/851653/guidance.pdf>.

<sup>50</sup> <http://www.ofcom.org.uk/data-protection/letter-of-understanding-between-the-office-of-communications-and-the-information-commissioner%E2%80%99s-office/>.

- 19.2 The definition of persistent misuse is very broad. Ofcom is required to issue a statement of policy with respect to the exercise of these powers. Our statement of policy was issued on 1 October 2010<sup>51</sup>. The principal enforcement action we have taken has been against makers of silent and abandoned calls, for example for direct marketing purposes.
- 19.3 The legislation is likely to be broad enough to catch cases of interception, depending on how it is carried out and whether it is “persistent”. However, we are not aware of any precedent for use of these powers in this way and such a use is not currently foreseen in our guidance. We generally presume that we will not enforce under sections 128 to 130 where an alternative legal remedy is available<sup>52</sup>.

**D. EXPERIENCE IN RELATION TO PHONE HACKING, COMPUTER HACKING, “BLAGGING”, BRIBERY AND/OR CORRUPTION AS IT RELATES TO MEDIA REGULATION**

**20. Introduction**

- 20.1 It may be useful to the Inquiry if I set out some information about how we deal with complaints about unfair treatment and unwarranted infringements of privacy in programmes (or in connection with the obtaining of material included in them) in television and radio services.
- 20.2 As noted above at paragraph 12.2, we have a statutory duty under the 1996 Act (as amended) to consider and adjudicate on complaints which relate to unjust or unfair treatment in programmes or to unwarranted infringements of privacy in programmes (or in connection with the obtaining of material included in them).
- 20.3 We set out in Section 7 (Fairness) and Section 8 (Privacy) of the Broadcasting Code rules and practices that broadcasters should follow in making and broadcasting programmes on television and radio services. Complaints are often made under both sections together.
- 20.4 In relation to fairness, Section 7 sets out the general principle “*to ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes*”, followed by practices to be followed.
- 20.5 These practices include obtaining informed consent from contributors and taking reasonable care that “*material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation*”. Another practice is that “*anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute*”. Failure to follow the practices will only constitute a breach where it results in unfairness to an individual or organisation. Section 7 does not seek to set out all the practices to be followed in order to avoid unfair treatment

<sup>51</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>.

<sup>52</sup> see our guidance, paragraph A1.80.

- 20.6 In relation to privacy, Section 8 sets out the general principle *“to ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes”* and the Rule (8.1) *“Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.”*
- 20.7 “Warranted” is defined in Section 8 as: *“it means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.”*
- 20.8 Section 8 also sets out the meaning of legitimate expectation of privacy explaining that it *“will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place. Some activities and conditions may be of such a private nature that filming or recording, even in a public place, could involve an infringement of privacy. People under investigation or in the public eye, and their immediate family and friends, retain the right to a private life”*.
- 20.9 The rest of Section 8 sets out practices for the broadcasters to follow when dealing with individuals or organisations participating or otherwise directly affected by programmes, or in the making of programmes. These cover issues of consent, doorstepping, persons caught up in emergencies/victims of accidents, people under 16 and vulnerable people. As the foreword to Section 8 explains, following these practices will not necessarily avoid a breach of this section of the Code. However, failure to follow these practices will only constitute a breach where it results in an unwarranted infringement of privacy. Section 8 does not seek to set out all the practices to be followed in order to avoid an unwarranted infringement of privacy.
- 20.10 A practice to be followed in Section 8 of the Code which might be considered to be related to phone hacking, blagging or deception is the use by programme makers of surreptitious filming or recording.
- 20.11 The Broadcasting Code defines surreptitious filming or recording as including *“the use of long lenses or recording devices, as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording telephone conversations without the knowledge of the other party, or deliberately continuing a recording when the other party thinks that it has come to an end.”*

- 20.12 Surreptitious filming therefore very often entails deception of some kind and to the extent that individuals are secretly filmed, information which may be personal data may be recorded. Some surreptitious filming may therefore be considered to be akin to “blagging”.
- 20.13 Rule 8.13 states that surreptitious filming or recording “*should only be used where it is warranted. Normally, it will only be warranted if:*
- (i) *there is prima facie evidence of a story in the public interest;*
  - (ii) *there are reasonable grounds to suspect that further material evidence could be obtained; and*
  - (iii) *it is necessary to the credibility and authenticity of the programme”.*
- 20.14 Material gained by surreptitious filming and recording should only be broadcast when it is warranted. (The Broadcasting Code also sets out where surreptitious filming for entertainment purposes may be warranted.)
- 20.15 An example of where Ofcom has considered this is when Ofcom dealt with a series of complaints in relation to a programme broadcast in 2004 by the BBC, called “*Nurseries Undercover: The Real Story*”. An undercover reporter had obtained work at a number of nurseries and secretly filmed there. The BBC had also obtained the contact details of parents whose children had been filmed, in order to make contact with them prior to the broadcast. The complaint to Ofcom was made by a parent<sup>53</sup>. Ofcom found that both the secret filming and the accessing of personal information in order to contact parents were warranted in the public interest.
- 20.16 The Broadcasting Code does not prevent broadcasters commissioning private investigators. Their use would only be prohibited by the Code if the activities of the private investigator resulted in unfair treatment of individuals or organisations in the programme or in unwarranted infringements of privacy in programmes and in connection with obtaining material included in programmes.

## **21. Fairness & Privacy Enforcement**

- 21.1 In the financial year 2010 -11, Ofcom published 9,202 decisions concerning broadcast content standards. Of these 9,202 cases, 9,031 related to “standards” issues and 171 related to fairness and/or privacy issues. Of the 171 fairness and/or privacy cases, 9 were upheld as in breach of the Code; 36 were not upheld (not in breach of the Code); 13 were resolved and 113 were either not entertained or discontinued after initial consideration. In the financial year 2010-11, there were no fairness and privacy cases considered serious enough for consideration of a statutory sanction.

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<sup>53</sup> Ofcom Broadcast Bulletin Issue number 72, Complaint by Ms P  
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb72/>.

- 21.2 I am aware of two previous fairness and privacy cases where Ofcom has considered the case serious enough to warrant the imposition of a statutory sanction. These are:
- 21.3 Kiss FM<sup>54</sup> - Ofcom upheld a privacy complaint about a hoax telephone call broadcast on a radio service, Kiss 100, on 5 July 2005. The radio presenter pretended to be the complainant's (Mr R) HR officer. He telephoned Mr R mocking Mr R's application for redundancy, which caused Mr R to become distressed on the call. The telephone call was subsequently broadcast without Mr R's consent. Ofcom considered that this was a very serious breach and imposed a fine of £75,000 on the licensee. This case was the first time Ofcom imposed a fine for a fairness and privacy complaint.
- 21.4 Russell Brand<sup>55</sup> - During two editions of the Russell Brand show broadcast on BBC Radio 2 on 18 and 25 October 2008, Russell Brand and his guest, Jonathan Ross, made offensive references to the actor Andrew Sachs and about his granddaughter, Georgina Baillie, which resulted in their privacy being unwarrantably infringed. Ofcom imposed a financial penalty of £80,000 against the BBC for breaches of Rule 8.1 of the Code (privacy) and £70,000 for breaches of Rules 2.1 and 2.3 of the Code (harm and offence) and, in addition, required the BBC to broadcast a statement of Ofcom's findings on its service Radio 2, on a specified occasion, at a time, and in a form to be determined by Ofcom.
- 21.5 (See paragraph 29 for more details of content decisions and sanctions generally).

## **E. OTHER FUNCTIONS IN RELATION TO MEDIA REGULATION**

### **22. Introduction**

- 22.1 In this section, I give an overview of Ofcom's other functions in relation to media regulation but I do not seek to describe every section of the Broadcasting Acts and Part 3 of the Communications Act.

### **23. Multiplexes**

- 23.1 Multiplex services (DTT) require a broadcasting licence. For the most part, regulation of multiplexes is only indirectly "media" regulation, since the multiplex is merely the platform over which media content is provided. However, due to the scarcity of spectrum, appropriate conditions are included in multiplex licences to secure that the provider delivers the range of services proposed in its application, on the basis of which its licence was awarded<sup>56</sup>.

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<sup>54</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/kiss100.pdf>

<sup>55</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/BBCRadio2TheRussellBrandShow.pdf>

<sup>56</sup> See section 12 1996 Act, cf section 7(4)(c) and (e)

## **24. Media ownership and plurality**

24.1 A variety of detailed rules apply in relation to cross media ownership:

- (i) A person may not own both a Channel 3 licence and one or more national newspapers with an aggregate market share of 20% or more<sup>57</sup>;
- (ii) A person may not own both one or more national newspapers (with an aggregate market share of 20% or more) and more than a 20% interest in a company which holds a Channel 3 licence<sup>58</sup>;
- (iii) The BBC and its companies, a Channel 4 company and the Welsh Authority and S4C companies may not hold Channel 3 or Channel 5 licences<sup>59</sup>; and
- (iv) National and international news must be provided to Channel 3 by a news source that is independent of the BBC, not under the control of political or religious bodies and suitably well funded<sup>60</sup>.

24.2 Applicants for broadcast licences must provide details of their ownership structure to enable Ofcom to ensure that these rules are complied with, and are required by their licences to notify us when there are proposals to change their ownership.

## **25. Merger control**

25.1 In general, Ofcom does not have jurisdiction over mergers in the sectors we regulate. Mergers which fall within the EC Merger Regulation are considered by the European Commission<sup>61</sup>; those which do not may be considered by the Office of Fair Trading (and, where appropriate, the Competition Commission)<sup>62</sup>. However, it is common practice for the OFT and EC to ask Ofcom for significant input when considering a merger in relation to the sectors we regulate.

25.2 In media mergers involving newspaper publishing and/or commercial radio or television broadcasting, where the case raises prima facie competition concerns, the Office of Fair Trading ("OFT") has published guidance saying it will ask Ofcom to provide it with a local media assessment, to inform the OFT's decisions on whether it is or may be the case that the merger may be expected to result in a substantial lessening of competition, and on the application of any available exceptions to the OFT's duty to make a reference

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<sup>61</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation):

[http://ec.europa.eu/competition/mergers/legislation/regulations.html#merger\\_reg](http://ec.europa.eu/competition/mergers/legislation/regulations.html#merger_reg)

<sup>62</sup> Part I, Enterprise Act 2002.

to the Competition Commission where that threshold is met<sup>63</sup>.

- 25.3 Where there is a change of control of an ITV or Channel 5 licensee, the legislation requires Ofcom to review the effects or likely effects of the change firstly, on the extent to which time is allocated in the service to original productions, news programmes and current affairs programmes and the extent to which those programmes are broadcast at peak viewing times (6pm to 10.30pm); and secondly, on the effects on regional programme making<sup>64</sup> and, for ITV, the quality and range of regional programmes.
- 25.4 Ofcom has a formal statutory role in relation to certain media mergers, which is triggered by an intervention notice issued by the Secretary of State which specifies a "media public interest consideration"<sup>65</sup>. A media public interest consideration is any consideration which, at the time of the giving of the European intervention notice concerned, is specified in section 58(2A) to (2C) of the Enterprise Act 2002, or in the opinion of the Secretary of State, is concerned with broadcasting or newspapers and ought to be specified in section 58 of the Act (i.e. would need to be "finalised" by statutory instrument).
- 25.5 The currently recognised media public interest considerations are:
- (i) S.58(2A): The need for accurate presentation of news and free expression of opinion in newspapers;
  - (ii) S.58(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK;
  - (iii) S.58(2C)(a) The need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;
  - (iv) S.58(2C)(b) The need for the availability throughout the United Kingdom of 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 interests; and S.58(2C)(c) The need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003. These require, among other things, "that news included in television and radio services is reported with due impartiality and the impartiality requirements of s.320 are complied with" and that news is reported with "due accuracy".

<sup>63</sup> See paragraph 6.15, *Mergers - Jurisdictional and Procedural Guidance*, June 2009 (OFT527), [http://www.ofcom.gov.uk/shared\\_ofcom/mergers\\_ea02/ofcom527.pdf](http://www.ofcom.gov.uk/shared_ofcom/mergers_ea02/ofcom527.pdf).

<sup>64</sup> Section 351 and 353 Communications Act 2003.

<sup>65</sup> Depending on the type of merger, the power to issue such a notice may arise under sections 42(2), 59(2) or 67(2) of the Enterprise Act 2002.

Paragraph 7.24 of the DTI's guidance identifies as relevant to this question: previous compliance with Ofcom standards, the behaviour of the media owner's other broadcasting enterprises, behaviour in other jurisdictions and compliance with other standards (including under self-regulatory regimes).

- 25.6 An enterprise is a media enterprise if it consists in or involves broadcasting<sup>66</sup>; but where the public interest concern is that in section 58(2C)(a) and a merger involves only one broadcasting company, a merger is still a media merger of media enterprises if the other company is a newspaper enterprise<sup>67</sup>.
- 25.7 Where there has been an intervention notice, Ofcom is required to report to the Secretary of State on whether, having regard only to the public interest consideration specified in the intervention notice, it is or may be the case that the merger may be expected to operate against the public interest. It is then for the Secretary of State to determine whether or not the merger should be referred to the Competition Commission for further review and, if necessary, consideration of remedies.
- 25.8 In paragraph 32, I set out our experience in relation to previous interventions in media mergers.
- 25.9 Ofcom must carry out regular reviews (at least every three years) of statutory provisions on media ownership and the public interest test, and must send a report on the review to the Secretary of State<sup>68</sup>. We undertook our most review in 2009.<sup>69</sup>

## 26. Competition

- 26.1 Ofcom has both general and sector-specific powers in relation to competition in the media sector.
- 26.2 Section 370 of the Communications Act 2003 gives Ofcom "concurrent" powers with the OFT in relation to functions the OFT has under Part 4 of the Enterprise Act 2002, (which allows the OFT to make a "market investigation" reference to the Competition Commission, requiring it to investigate competition issues<sup>70</sup>). This means that in relation to commercial activities connected with communications matters as defined in section 369 of the Communications Act 2003, Ofcom can do everything that the OFT can do.

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<sup>66</sup> Section 58A(1)

<sup>67</sup> Section 58A(2). A newspaper company is an enterprise consisting in or involving the supply of newspapers (Section 58A(3)). A "newspaper" is a daily, Sunday or local (other than daily or Sunday) newspaper circulating wholly or mainly in the UK or in a part of the UK (Section 44(10)).

<sup>68</sup> Section 391 of the Communications Act 2003.

<sup>69</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/morr/statement/morrstatement.pdf>

<sup>70</sup> A reference may be made if the OFT has reasonable grounds for suspecting that any feature or combination of features of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK.



- 26.3 Similarly, section 371 of the Communications Act 2003 gives Ofcom concurrent powers with the OFT in relation to Part I of the Competition Act 1998, (which allows the OFT to take enforcement action against anti-competitive agreements and/or abuses of a dominant position under UK and/or EC law).
- 26.4 Under section 316 of the Communications Act 2003, we must include in the regulatory regime for licensed services, the conditions we consider appropriate for ensuring “fair and effective competition” in the provision of licensed services or connected services.
- 26.5 All broadcast licensees are required not to enter into any arrangement or engage in any practice which is prejudicial to fair and effective competition in the provision of licensed services or of connected services and must comply with any code or guidance for the time being approved by Ofcom for the purpose of ensuring fair and effective competition in the provision of licensed services or of connected services.
- 26.6 I describe, in paragraph 33, below the action Ofcom has taken using these powers.

## **27. Summary**

- 27.1 Overall, therefore, Ofcom has extensive supervisory powers in relation to TV and radio broadcasting content. Our role in relation to internet services is much more limited. We have only an extremely narrowly defined - and rarely triggered - role in relation to the regulation of newspapers. We have no role in relation to newspaper content.

## **F. EXPERIENCE IN EXERCISING POWERS IN RELATION TO MEDIA REGULATION**

### **28. Fit and proper**

- 28.1 Ofcom routinely assesses whether applicants for broadcast licences are “fit and proper” to hold them. (We require applicants for licences to give us information on their ownership structure including details of, for example, previous criminal convictions; and to notify us of changes to such information). However, to date we have not needed to determine formally that any applicant was not fit and proper.
- 28.2 We have on one occasion revoked licences on the basis that the licensee was no longer fit and proper to hold them. This was in the case of Bang Media (London) Ltd and Bang Channels Ltd, (25 November 2010), where the licensees’ serious and repeated breaches of the Ofcom Broadcasting Code and their licence conditions demonstrated a disregard for the licensing regime<sup>71</sup>.

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<sup>71</sup> The decision is available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangmedia-revocation.pdf>.

## 29. Content and standards

- 29.1 Enforcement activity in relation to television and radio content forms a significant part of Ofcom's day to day business. For example, in the financial year to 2011, Ofcom received 24,462 complaints about broadcasting standards (i.e. harm, offence, impartiality, commercial matters), and 171 complaints were about unfairness and/or unwarranted infringements of privacy.
- 29.2 We published decisions on 9,202 cases in 2010/11. Of these 9,202 cases, 9,031 related to standards issues. Of those relating to standards, 168 cases were found to be in breach of the Broadcasting Code and other Ofcom codes or licence conditions; 36 cases were resolved, and 8,827 cases were found "not to be in breach" of the Broadcasting Code.
- 29.3 As noted above paragraph 21.1, of the 9,202 decisions published in 2010/11, 171 related to fairness and/or privacy issues. Of these 9 were upheld as in breach of the Code; 36 were not upheld (not in breach of the Code); 13 were resolved and 113 were either not entertained or discontinued after initial consideration.
- 29.4 There were three cases which we considered serious enough for consideration of statutory sanctions in the financial year 2010-11. These are:
- (i) Teletext Limited<sup>72</sup> – Ofcom imposed a financial penalty of £225,000 in respect of Teletext's failure to provide the public service content of the licence;
  - (ii) DM Digital Television Ltd<sup>73</sup> – the ASA referred three breaches of the BCAP Code to Ofcom for consideration of a statutory sanction in relation to the broadcast of an advertisement which the ASA had held to be harmful and in breach of the code. Ofcom imposed a financial penalty of £17,500 and required the licensee to broadcast a statement of Ofcom's finding on its service;
  - (iii) Bang Channels and Bang Media (London) Ltd<sup>74</sup> - Ofcom imposed a financial penalty totalling £157,250 in respect of multiple breaches of the Broadcasting Code and licence conditions by the adult chat and daytime programming on these services. Ofcom concluded that the licensees had been operating a wholly inadequate compliance system which amounted to manifest recklessness. As noted above at paragraph 28.2, Ofcom revoked all the licences held by these licensees on the basis that they were no longer fit and proper to hold those licences.

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<sup>72</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/teletext.pdf>

<sup>73</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/dmdigitaltd.pdf>

<sup>74</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangchannels.pdf>

29.5 Any financial penalty imposed as a sanction against a licensee is payable to HM Paymaster General and Ofcom forwards all monies received to the Treasury.

### 30. Appeals

30.1 If a complainant, broadcaster or a directly affected third party (such as a presenter) is unhappy with an Ofcom decision relating to content and standards of a television or radio programme, the route to appeal the decision is by way of application for a judicial review to the Divisional Court. We have recently dealt with one judicial review of an Ofcom standards decision in which the Divisional Court and then the Court of Appeal agreed with Ofcom's decision that the programme in question was a breach of the Broadcasting Code. I set out below a brief summary of this case.

### 31. Jon Gaunt – judicial review

31.1 On 8 June 2009, Ofcom published a Finding that Jon Gaunt's interview on Talksport Radio on 7 November 2008 was in breach of rules 2.1 and 2.3 of the Broadcasting Code.<sup>75</sup>

31.2 Jon Gaunt appealed the earlier decision of the Divisional Court that the Finding had not infringed his rights of freedom of expression. "Liberty" intervened in support of his application in the Divisional Court and in the Court of Appeal.

31.3 The interview with Michael Stark, a local councillor for Redbridge Council, concerned Redbridge Council's proposal to ban smokers from becoming foster parents. Jon Gaunt had had foster parents as a child and he strongly opposed this proposal. During the interview Jon Gaunt called the councillor a "Nazi", a "health Nazi", "a health fascist", an "ignorant pig", and told him to "shut up". The Court described the interview as an "unseemly slanging match", being "completely out of control" and "a rant".

31.4 Jon Gaunt argued that the Finding was in breach of Article 10 of the European Convention on Human Rights. He did not argue that the Broadcasting Code or the Communications Act 2003 infringed Article 10, but that the way in which Ofcom had applied the Code was a disproportionate interference and did not meet a pressing social need.

31.5 On 17 June 2011, the Court of Appeal rejected his appeal<sup>76</sup>, holding that Ofcom's Finding was not a disproportionate interference with Jon Gaunt's freedom of expression. Lord Neuberger said that [it] "*serves to underline the importance of anxiously scrutinising any curb on freedom of expression...and that anxious scrutiny is precisely what Ofcom gave the matter*". The Court of

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<sup>75</sup> Rule 2.1 "Generally accepted standards must be applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material"; Rule 2.3 "In applying generally accepted standards, broadcasters must ensure that material which may cause offence is justified by the context".

<sup>76</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2011/692.html>

Appeal found that Ofcom had reached the correct decision and that the programme was a breach of the Broadcasting Code.<sup>77</sup>

## 32. Public interest interventions in media mergers

- 32.1 There have only been two occasions on which the Secretary of State has issued an intervention notice in relation to a media merger. On both occasions, the public interest consideration was: “the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience”.
- 32.2 The completed acquisition by British Sky Broadcasting Group plc (“BSkyB”) of a 17.9% stake in ITV was a UK merger. Ofcom considered the plurality public interest consideration and recommended a reference to the Competition Commission<sup>78</sup>. At the same time, the OFT advised that the transaction was a merger and that it was or may be the case that the merger may be expected to result in a substantial lessening of competition<sup>79</sup>. The Secretary of State referred the case to the Competition Commission. The Competition Commission considered that the transaction raised competition issues but not plurality issues and on its recommendation the Secretary of State required BSkyB to sell shares so as to reduce its holding to below 7.5%<sup>80</sup>. The decision was appealed to the Competition Appeal Tribunal<sup>81</sup> and to the Court of Appeal; the Court of Appeal upheld the Competition Commission’s decision<sup>82</sup>.
- 32.3 The proposed acquisition by News Corporation of the shares in BSkyB it did not already own was an EC merger. The Secretary of State’s intervention notice specified the plurality public interest consideration<sup>83</sup>, and Ofcom reported on 31 December 2010<sup>84</sup>. (By the time Ofcom was due to report, the European Commission had already cleared the merger for competition purposes<sup>85</sup>).
- 32.4 Ofcom recommended a reference to the Competition Commission, considering that as a result of the proposed transaction there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross media audiences. The effect of the

<sup>77</sup> Jon Gaunt has applied to the Supreme Court for permission to appeal

<sup>78</sup>

<http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/files/file39607.pdf>.

<sup>79</sup>

<http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/files/file39606.pdf>.

<sup>80</sup>

<http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/files/file44136.pdf>.

<sup>81</sup> *British Sky Broadcasting Group PLC v The Competition Commission and the Secretary of State for Business Enterprise and Regulatory Reform* [2008] CAT 25.

<sup>82</sup> *British Sky Broadcasting Group PLC and Virgin Media, Inc v The Competition Commission and the Secretary of State for Business Enterprise and Regulatory Reform* [2010] EWCA Civ 2.

<sup>83</sup> <http://www.bis.gov.uk/assets/biscore/business-law/docs/b/skyb-intervention-notice-nov-2010.pdf>.

<sup>84</sup> Ofcom’s report is available at:

[http://www.culture.gov.uk/images/publications/OfcomPITReport\\_NewsCorp-BSkyB\\_31DEC2010.pdf](http://www.culture.gov.uk/images/publications/OfcomPITReport_NewsCorp-BSkyB_31DEC2010.pdf).

<sup>85</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1767>.

proposed transaction would have been to bring together one of the three main providers of TV news and the largest provider of newspapers, significantly increasing News Corporation's ability to influence opinion and control the agenda. Further, in circumstances of 100% ownership and control, we did not believe that cultural safeguards and internal plurality could be relied upon to ensure plurality.

- 32.5 News Corporation offered undertakings in lieu of a reference ("UILs") to the Secretary of State<sup>86</sup>. The Secretary of State asked Ofcom to advise him on whether the proposed UILs met the plurality concerns identified in our report and asked the OFT to advise him on their practicability<sup>87</sup>. After a period of negotiation and public consultation, during which News Corporation made changes to the UILs it was prepared to offer, Ofcom and the OFT recommended on 22 June 2011 that the UILs be accepted<sup>88</sup>. Before the Secretary of State came to a decision, however, News Corporation withdrew first the proposed UILs and then its offer to acquire the shares in BSkyB.
- 32.6 In the course of considering the proposed merger, Ofcom came to the view (and advised the Secretary of State) that the current statutory regime is not effective to secure plurality. In our report to the Secretary of State of 31 December 2010, we recommended that the Government should consider undertaking a wider review of the statutory framework to ensure sufficient plurality in the public interest. Specifically, we argued that there may be value in providing for intervention where plurality concerns arise in the absence of any transaction involving media enterprises and which are not safeguarded by the current media ownership rules.

### 33. Other matters related to broadcasting competition

- 33.1 Broadcasting-related matters for which Ofcom has opened Competition Act investigations in the past are:
- (i) Complaint about the joint selling of national radio broadcast rights to Football Association Challenge Cup ("FA Cup") matches by the Football Association to a single purchaser<sup>89</sup>;
  - (ii) Complaint from Independent Media Support Limited against BBC Broadcast about provision of media access services<sup>90</sup>.

<sup>86</sup> [http://www.culture.gov.uk/images/publications/News\\_Corp\\_revised\\_undertakings\\_24\\_Jan\\_11.pdf](http://www.culture.gov.uk/images/publications/News_Corp_revised_undertakings_24_Jan_11.pdf).

<sup>87</sup> [http://www.culture.gov.uk/images/publications/JeremyHunt\\_Statement\\_25JAN2011.pdf](http://www.culture.gov.uk/images/publications/JeremyHunt_Statement_25JAN2011.pdf);

[http://www.culture.gov.uk/images/publications/SoS\\_Ofcom\\_27\\_01\\_11.pdf](http://www.culture.gov.uk/images/publications/SoS_Ofcom_27_01_11.pdf);

[http://www.culture.gov.uk/images/publications/SoS\\_OFT\\_27\\_Jan11.pdf](http://www.culture.gov.uk/images/publications/SoS_OFT_27_Jan11.pdf).

<sup>88</sup> [http://www.culture.gov.uk/images/publications/Ofcom\\_to\\_SoS\\_further-advice-UIL\\_220611.pdf](http://www.culture.gov.uk/images/publications/Ofcom_to_SoS_further-advice-UIL_220611.pdf);

[http://www.culture.gov.uk/images/publications/OFT\\_report\\_sent\\_toSoS\\_220611.pdf](http://www.culture.gov.uk/images/publications/OFT_report_sent_toSoS_220611.pdf).

<sup>89</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_790/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_790/).

<sup>90</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_842/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_842/).

- 33.2 The first investigation was closed without a finding, as the European Commission was investigating overlapping issues. The second led to a non-infringement finding.
- 33.3 Ofcom recently consulted on whether we should refer the UK's TV advertising trading market to the Competition Commission for a market investigation under the Enterprise Act 2002<sup>91</sup>. We expect to make a decision in the autumn.
- 33.4 Under section 316 Communications Act 2003, we have recently completed an investigation into fair and effective competition in pay television. For many years BSkyB has held the exclusive rights to broadcast first-run Hollywood movies and many of the most sought-after premium sports.
- 33.5 Following our investigation, in a statement of 31 March 2010, we concluded that BSkyB has market power in the wholesale of certain channels including this content and that it exploits its market power by limiting the wholesale distribution of its premium channels, with the effect of restricting competition from retailers on other platforms<sup>92</sup>. This is prejudicial to fair and effective competition, reducing consumer choice and holding back innovation by companies other than BSkyB. In the case of movies the fact that Sky also owns but barely uses the subscription video-on-demand rights denies competitors the opportunity to develop innovative services.
- 33.6 We decided that we should use our powers under section 316 of the Communications Act 2003 to ensure fair and effective competition by requiring Sky to offer the most important sports channels - Sky Sports 1 and Sky Sports 2 - to retailers on other platforms. This decision was appealed to the Competition Appeal Tribunal by BSkyB, the Football Association Premier League, Virgin Media and BT and we await its judgment.
- 33.7 We decided it would not be appropriate to impose a similar obligation on Sky's movies channels because our main forward looking concern related to the sale of video-on-demand rights. We did not consider we could adequately address this concern under section 316 (which relates primarily to linear channels). We made a market investigation reference to the Competition Commission under the Enterprise Act 2002 of movies on pay TV<sup>93</sup>. The Competition Commission has issued provisional findings that features of the market do adversely affect competition and is considering remedies<sup>94</sup>.
- 33.8 In parallel with the Pay TV investigation, we considered an application by multiplex provider Arqiva and BSkyB to change the channels broadcast on Arqiva's multiplex, replacing three BSkyB free-to-air channels with five pay TV channels. This proposal was known as "Picnic". We determined that BSkyB

<sup>91</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/tv-advertising-investigation/summary/TV\\_advertising\\_MIR.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/tv-advertising-investigation/summary/TV_advertising_MIR.pdf).

<sup>92</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/third\\_paytv/statement/paytv\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/statement/paytv_statement.pdf).

<sup>93</sup> Specifically, of "Subscription Pay TV Movie Rights and the wholesale supply and acquisition of packages including Core Premium Movies channels" – see [http://www.competition-commission.org.uk/inquiries/ref2010/movies\\_on\\_pay\\_tv/pdf/terms\\_of\\_ref.pdf](http://www.competition-commission.org.uk/inquiries/ref2010/movies_on_pay_tv/pdf/terms_of_ref.pdf).

<sup>94</sup> [http://www.competition-commission.org.uk/inquiries/ref2010/movies\\_on\\_pay\\_tv/index.htm](http://www.competition-commission.org.uk/inquiries/ref2010/movies_on_pay_tv/index.htm)

should be permitted to launch Picnic only once it had concluded a wholesale agreement with at least one third party retailer for the premium sports and movies channels that BSkyB wished to retail on DTT - Sky Sports 1 and Sky Movies Screen 1<sup>95</sup>.

**34. Relevance of recent phone hacking events to our existing broadcasting duties**

- 34.1 As explained above, under section 3(3) of the Broadcasting Acts 1990 and 1996, Ofcom has a continuing duty to be satisfied that persons holding broadcasting licences are fit and proper.
- 34.2 BSkyB holds broadcasting licences. News Corporation owns a shareholding of 39.14% in BSkyB, which we considered, in the context of our review of News Corporation's proposed takeover of BSkyB, as giving News Corporation material influence over BSkyB. In light of our ongoing duty to be satisfied that BSkyB remains fit and proper to hold broadcasting licences, we are considering the relevance of recent events in relation to any relevant conduct of the controlling directors and shareholders of BSkyB which will include any relevant conduct of News Corporation, as well as the conduct of BSkyB. We have written to the relevant authorities (the Metropolitan Police, the Information Commissioner's Office and the Press Complaints Commission) to explain our duty and to ask these bodies to keep us informed of any information which may assist us in investigating whether BSkyB remains fit and proper.
- 34.3 In this context, we are conscious that it is not Ofcom's role to investigate matters which lie in the hands of other authorities, such as the police and the criminal or civil courts. We will not seek to reach a judgment on the question of whether BSkyB remains fit and proper to hold its broadcast licences on the basis of unsubstantiated allegations. We are also conscious of the need not to pre-empt any official enquiries.
- 34.4 Following our letter to the Information Commissioner to explain our duty in relation to fit and proper, his office has now informed us that the records of the Operation Motorman investigation into the private investigator Steve Whittamore disclosed that a small number of broadcasters and television production companies had instructed the private investigator on a limited number of occasions in the period 2000-2003.
- 34.5 We are considering the information provided to us by the ICO and I will update the Inquiry if we find that any broadcasters have breached the Broadcasting Code in this regard.

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<sup>95</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/picnic/statement/picnicstatement.pdf>.

**G. VIEWS ON THE STRENGTHS AND WEAKNESSES OF OFCOM AND, IN PARTICULAR, ON THE STEPS WHICH MIGHT BE TAKEN TO IMPROVE THE REGULATORY FRAMEWORK AND EFFORT**

- 35.1 The system of regulation of standards in broadcasting has provided protection for audiences and created the conditions which have seen the delivery of high quality, trusted output from the UK's broadcasters.
- 35.2 Independent statutory broadcasting regulation results from the historic recognition of the particular nature and significance of broadcast communications, requiring the establishment of certain safeguards as specified by Parliament to be in the public interest. The evolution of a system of statutory regulation in broadcasting is also linked to the era of analogue spectrum constraints, when only a small number of commercial entities were permitted to deliver a small number of TV services in the UK.
- 35.3 As we have moved into the world of multi-channel television and radio, the system of statutory regulation for broadcasting has continued to have widespread industry, parliamentary and public support (research shows that the public value highly the role played by regulation in securing certain key objectives, for example, protecting children from harmful material, providing accurate news and protecting individuals from unwarranted infringements of privacy).
- 35.4 We operate under a strong legislative framework which gives:
- (i) A clear articulation of which services are and are not subject to regulation;
  - (ii) Statutory objectives that provide clarity for Ofcom, industry and members of the public in relation to the standards expected of services subject to regulation;
  - (iii) The power and flexibility to create a Broadcasting Code containing a set of rules that provide a proportionate framework to protect the public. These rules are complemented by guidance which assists the industry in understanding how to comply with the rules and meet the standards required;
  - (iv) Members of the public the means of complaining about unfair treatment or unwarranted infringements of privacy by the television and radio broadcasters which is easily accessible and free, with no associated costs;
  - (v) A licensing regime which allows us to impose obligations on regulated companies to ensure that we can achieve regulatory objectives and the ability to remove those licences to operate. We can require licensees to provide us with any information we require in order to investigate possible breaches of licence conditions;



- (vi) Effective sanctions and enforcement powers to apply in the event of a breach of the regulations. Sanctions range from requiring the publication of a statement, imposing financial penalties, through ultimately to licence revocation; and
- (vii) Clear procedures, underpinned by statute, which ensure both that we follow due process and that there is transparency around our decision making.

- 35.5 This defined approach to rules, procedures and enforcement allows broadcasters to develop effective compliance regimes and to operate with a level of regulatory certainty that the evidence suggests is compatible with a thriving commercial sector. It also provides assurance and protection, and a means of redress, to members of the public against unfair treatment or unwarranted infringements of privacy by television and radio broadcasters.
- 35.6 The regulatory framework has contributed to broadcasting having a reasonably strong culture of compliance within the programme-making processes and high levels of recognition of the relevant rules and guidance amongst programme-makers, commissioning and scheduling teams and legal and compliance departments, further enhancing our ability to regulate effectively.
- 35.7 Whilst no system will ever be able to provide complete assurance and noting, on the other hand, that we do not want to risk creating a culture which may stifle innovation, risk taking and investigative journalism, the broadcasting standards regulatory regime has contributed to creating an effective model of responsible broadcast journalistic activity.
- 35.8 I note that a statutory regime carries the risk of being less able to adapt quickly to changes in technology, business models and consumer behaviour. However, this is true of the statutory regime as it applies across the whole communications sector and is not specific to content regulation. One of the main tasks therefore for a communications regulator is, within the scope of the relevant statutory regime, to perform its duties and to give effect to its powers in a constructive and effective manner, in light of changes in technology, business models and consumer behaviour. In this context, I would note that the Government is proposing to bring forward a new Communications Bill shortly, a large part of the focus will, I understand, be intended to recognise and take account of recent developments in communications and convergence.
- 35.9 I would also note that some members of the public seeking redress against broadcasters have raised with us Ofcom's lack of power to award damages if we find that a broadcaster has treated them unfairly or has unwarrantably infringed their privacy.
- 35.10 As noted above, as well as acting as a direct statutory regulator (where we carry out the basic functions of regulation itself) Ofcom also acts as the

backstop statutory regulator in co-regulatory relationships (where we retain key enforcement powers and responsibilities but designate a third party to carry out some of the basic functions of regulation), most noticeably in relation to broadcast and video on demand advertising (through the Advertising Standards Authority) and on video on demand editorial standards (through ATVOD).

- 35.11 We remain legally responsible for the actions of our co-regulators.
- 35.12 Ofcom's experience of co-regulation to date has been mostly positive. We worked with the ASA and others to create a successful co-regulatory model for broadcast advertising, which has led to a high standard of audience protection in relation to broadcasting and video on demand advertising and we have now helped to establish ATVOD as the co-regulator for editorial video on demand regulation.
- 35.13 We would provide the following comments on what is necessary to make co-regulation work effectively, based on our experience over the last few years:
- (i) Co-regulatory models typically provide a greater degree of industry involvement and, as a result *can* be more flexible than statutory regulation;
  - (ii) Co-regulation can be particularly effective where there is widespread industry support for the objectives of regulation;
  - (iii) However, co-regulation requires effective monitoring by the backstop regulator, both to ensure effective performance, to manage risk and to prevent capture or undue influence by industry participants. It also requires the backstop regulator to carry out significant enforcement activity and to deal with complex appeals;
  - (iv) In particular, co-regulation can struggle where controversial issues create a conflict of interest between industry and the regulator. For example, Ofcom has been required to direct the ASA on rules restricting certain types of television advertising where an industry consensus could not be reached; and

- (v) Finally, co-regulation tends to be more expensive than statutory regulation, due to the fixed costs of maintaining dedicated resources. This is particularly true of smaller co-regulators, where for example industry stakeholders of ATVOD continue to express concern about the cost of applying the co-regulatory model.

**36. Steps which might be taken to improve Ofcom's regulatory framework and effort**

- 36.1 The current regulatory regime for broadcasting began in an era of analogue television, when there were only a small number of channels available to watch in the UK. Over time, the system has developed effectively to accommodate the development of multi-channel television, provided predominantly in the UK through satellite (Sky and Freesat), cable (Virgin) and through the aerial (Freeview). As set out above, Ofcom also has a more narrow regulatory responsibility in the UK for "TV like" on demand services (such as BBC iPlayer), resulting from European legislation.
- 36.2 Whilst we expect viewing of live multi-channel television to remain very popular over the next decade, viewing of content will increasingly take place in the future through a number of new platforms and services, live, streamed and on demand, at home and on the move. The speed of change around technology, service and product development is increasing and predicting the many ways that people will view content in the future is a challenge.
- 36.3 Increasingly, the method of distribution of content is likely to be less apparent to consumers as products combine broadcast and IP delivery technologies and live and on demand services, often into the same set top box and often accessed through the same Electronic Programme Guide. BT's Vision box is a current example of this type of product and we would expect to see further examples being released, including Google TV and YouView.
- 36.4 The integration of different modes of delivery and types of service and content into one product will increasingly challenge the clarity of regulatory boundaries. As businesses take advantage of the new opportunities and as consumers increasingly access audiovisual content on new devices such as connected TVs, tablets (e.g. Ipad) and smartphones, it may become more difficult for consumers to understand which audiovisual services are regulated under which regulatory regimes.
- 36.5 Recent research conducted by Ofcom continues to suggest that consumers expect a minimum level of protection, wherever and however programming is delivered. If regulatory reform is to be considered, the challenge will be to ensure that the level of protection and assurance which consumers expect will remain in relation to broadcast television services and television-like services, whilst avoiding unnecessary regulation for new services. It will also be important to ensure that broadcasting itself is not subject to a level of regulation which is disproportionate in light of the regulation of other

audiovisual services.<sup>96</sup>

36.6 Finally, the internet means that more content today can be accessed over the internet from providers who are not located in the UK and therefore cannot be regulated by national rules and mechanisms. This leads to significantly different enforcement challenges in relation to illegal or harmful content.

36.7 We are currently considering the potential shape of the future of broadcast and audio-visual regulation and would be happy to return to the Inquiry to update you on this in due course.

### **37. Plurality, competition and cross media ownership**

37.1 Plurality is concerned with ensuring a sufficient number of media owners, with the overall goal of ensuring no one individual or organisation has too great an ability to influence and hence control, public opinion, with potential implications for democracy. In addition, media mergers are also subject to the restrictions imposed by the media ownership rules.

37.2 Competition and plurality, while linked, are not the same thing: a market may be competitive with few providers but low barriers to entry. However, such a market may not provide sufficient plurality of media owners.

37.3 Today's market is very different from the one that existed when the current plurality and cross media ownership rules were introduced. Companies are increasingly seeking to provide services cross platform meaning that further convergence and consolidation is likely due to the economies of scale required to deliver services across multiple platforms, potentially resulting in fewer media owners and a greater ability to influence for those who remain.

37.4 Our judgement is that the current powers in relation to plurality have worked reasonably effectively in the circumstances where the current statutory framework has triggered regulatory involvement. However, in the absence of such a trigger it is possible that plurality concerns may arise for which there is no regulatory locus.

37.5 As Ofcom set out in its Public Interest Test in relation to the proposed acquisition of the remaining shares in BSkyB by NewsCorp, we believe the current system in relation to protecting plurality is deficient in one key respect, namely in failing to provide for intervention to be considered where plurality concerns arise in absence of corporate transactions involving media enterprises.

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<sup>96</sup> This research is currently being finalised and we will make it available to the Inquiry when completed.

- 37.6 In our report to the Secretary of State of 31 December 2010, we recommended that the Government should consider undertaking a wider review of the statutory framework to ensure sufficient plurality in the public interest. Specifically, we believe there may be value in providing for intervention where plurality concerns arise in the absence of any transaction involving media enterprises and which are not subject to safeguards through the current media ownership rules.
- 37.7 Any review would need to consider potential protections necessary in light of:
- (i) Non-transactional market developments which lead to changes in audience shares and hence ability to influence;
  - (ii) Changes in audience shares (and ability to influence) resulting from market entry and exit;
  - (iii) Adoption and use of new media technologies;
  - (iv) Changes to wholesale news provision; and
  - (v) Evolution of upstream content provision.
- 37.8 Ofcom also has a statutory duty to review the operation of the media ownership rules at least every three years and to report on its findings – and recommend any changes - to the Secretary of State for Culture, Media and Sport. The aim of this review is to examine whether the rules continue to deliver the purposes which Parliament intended: to protect plurality of viewpoints in the media and to give citizens access to a variety of sources of news.
- 37.9 The media ownership rules that we are required to review currently include: national cross-media ownership – across Channel 3 and national newspapers; restrictions on holding broadcasting licences; the appointed news provider rule - for the Channel 3 licences; and the public interest test. Until recently, the rules also included local cross media ownership and radio ownership rules.
- 37.10 We submitted our last review to the Secretary of State on 13 November 2009, following evidence published in a consultation on 31 July 2009 and stakeholder responses to that consultation. We made two main recommendations: to remove the rules around local radio service and multiplex ownership and national multiplex ownership; and to liberalise (rather than remove) the *local* cross media ownership rules.
- 37.11 The Secretary of State has recently asked Ofcom to advise him on the options for measuring media plurality across platform and to recommend the best approach. We will make this available to the Inquiry when completed.
- 37.12 In my view, any review of the potential changes to the plurality rules would most productively be conducted in combination with reviewing the specific media ownership rules.

**38. Network resilience and security and protection of personal data**

- 38.1 Under the European Framework, Ofcom has new responsibilities in relation to network security. Network and service providers must take appropriate steps to safeguard the security of their networks in relation to confidentiality, availability and integrity.
- 38.2 In addition, the protection of personal data is a growing area of regulatory concern; increasingly personal data is becoming an important feature of media commerce, underpinning many new businesses built around using personal information to target advertising more effectively. As the social web increasingly complements the information web in people's lives, the protection of personal data will become an increasing concern.
- 38.3 The Data Protection Act requires that parties storing data on users must take "appropriate" steps to ensure that it is securely held. As hacking techniques become more sophisticated, and the necessary knowledge for hacking becomes more widely distributed on the internet, it is reasonable to expect that service providers will need to invest more in security to comply with their legal obligations. The European Commission is currently looking at the Protection of Personal Data and the European Commission proposals are expected in November.
- 38.4 The ICO is the lead authority in the UK. Ofcom works closely with the ICO where there are overlapping interests. We will continue to provide assistance to the ICO. Any views on the strengths and weaknesses of the current regulatory framework in this area are primarily a matter for the ICO. Of course, as the issues around network resilience and security and protection of personal data develop, it may be necessary to consider further how different regulators can work more effectively together in the future.