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**House of Lords Communications and Digital Select Committee inquiry:
The future of news: impartiality, trust and technology**

The evidence provided reflects the views of the author.

1. The impartiality rules on the broadcast media have helped to define the way politics is conducted in the UK and play an important role in the democratic system. This system needs to be supported and adapted in light of various changes. In this submission, I make the following points:

- The impartiality rules in broadcasting provide a way for the UK to meet its positive obligation to secure effective media pluralism under Article 10 of the ECHR. The extension of the rules to some streaming services also serves that positive obligation.
- The independence of the regulator (in relation to decisions on impartiality) is of central importance in meeting the Article 10 obligations.
- The nature of impartiality means that a broadcaster's decisions will inevitably be the subject of disagreement and criticism. The independence of the regulator is important to maintain confidence in its decisions and adjudications.
- There are multiple approaches to impartiality, which underline the importance of plurality in the providers of impartial coverage.

Why impartiality rules are necessary for (and not a threat to) free speech

Impartiality rules can serve the positive obligation to secure pluralism

2. Normally a person is free to express their own viewpoint and do so with whatever bias they want. The impartiality rules represent a departure from the norm for a specific sector of the media. Despite the legal constraint on the speech of the broadcaster, the courts have spoken of the importance of impartiality in the broadcast sector on several occasions.

3. Notably, the Grand Chamber of the European Court of Human Rights in *NIT Srl v Republic of Moldova* (2022) ruled that the revocation of a broadcasting licence following failures to comply with rules on impartiality in Moldova was compatible with Article 10 of the ECHR. The Court noted that the state is under a positive obligation 'to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.'¹ To meet that obligation, the state must do more than secure the existence of different channels, and must 'allow effective access to the market so as to guarantee diversity of overall programme

¹ App no 28470/12 (5 April 2022) at [186].

content'.² The Court stated that the rules on impartiality, along with rules securing external pluralism, are one way to meet that goal.³

4. The domestic courts have also stressed the importance of the regulations. In *Novosti* (judicial review of Ofcom's sanction in relation RT's coverage of the Salisbury poisonings), Dingemans LJ stated that allowing a television service to 'avoid the requirement of "due impartiality", even for one programme, would severely harm the quality of political discourse in this country'.⁴ While recognising the importance of the rules, the domestic courts also give considerable respect to the regulator's judgment.⁵

5. A key point to draw from the cases is that, while restricting the speech of the regulated broadcaster, the impartiality rules serve freedom of expression by securing a degree of internal pluralism to provide audiences with diverse views and opinions. The regulations also serve democratic values by ensuring that the broadcast media does not simply become an instrument to amplify the voice of the media owners or controllers.

Compatibility with Article 10 comes with conditions

6. The margin of appreciation assigned under Article 10 grants considerable leeway to states in deciding how to secure media pluralism. However, the state's margin comes with conditions. The Grand Chamber of the ECtHR in *NIT Srl v Republic of Moldova* stated that to be compatible with Article 10, there must be 'effective safeguards against arbitrariness and abuse'.⁶ Looking at the facts of the case, the Court noted the importance of the independence of the regulator, including in appointments to that body.⁷ Article 10 requires sufficient procedural safeguards to prevent political interference with the system of broadcast regulation. Without such safeguards there is a risk that regulatory decisions will be taken to steer broadcasters in a direction favourable to those in government, or to punish critics (or at least be perceived in that way).

7. For the UK's system of regulation to remain compliant with Article 10, it is important to maintain the independence of the regulator (and of institutions governing public broadcasters). In recent years, concern has been expressed about the potential for a more politicised appointments process, which can undermine the regulator's actual or perceived independence. The independence of the regulator is also jeopardised if people in government are seen to put pressure on the regulator to take action or not take action against certain broadcasters.

² at [185].

³ at [190]. The specific form of regulation will normally fall within the margin of appreciation [191].

⁴ *R (on the application of Autonomous Non-Profit Organisation TV-Novosti) v Ofcom* [2020] EWHC 689 (Admin) at [67]. The appeal was dismissed by the Court of Appeal [2021] EWCA Civ 1534.

⁵ *R (on the application of Star China Media Limited) v Ofcom* [2023] EWCA Civ 843

⁶ App no 28470/12 (5 April 2022)

⁷ at [205].

The nature of impartiality

8. Impartiality requires that the regulated media give due weight and a fair hearing to relevant viewpoints in news and political coverage. The rules do not require that every possible viewpoint be included in the coverage, and no reporter can cover every possible angle of a story. Some editorial selection is required. Once that selection is made, the journalist or editor will have to decide what weight to give a particular viewpoint, when to challenge that view and when to offer an assessment of the arguments. These questions are matters for editorial judgment, on which there will be disagreement. Impartiality is therefore unlikely to be something that any media body can attain to the satisfaction of all audience members. Given the scope for disagreement, it is important to ensure that there is a plurality of impartial content providers, so the audience is exposed to different editorial assessments on these questions.

9. Even if impartiality is difficult to attain, it is something editors and journalists can aspire to. What distinguishes an impartial media organisation is its *orientation* to provide coverage that gives a fair representation of the parameters of a debate and does not favour one side over another. The broadcasting regulations aim to reinforce this orientation and provide a counter to pressures to provide polemical or politically attached content.

10. One reason for compliance with the rules is the prospect of a reprimand or sanction for a breach. However, such measures will tend to be reserved for the clear failures. Ofcom will not micromanage every decision of a broadcaster, and the impartiality rules leave considerable scope for editorial discretion in meeting the standards. Aside from the prospect of an adverse ruling, the process of accountability and answerability under the regulatory framework can help maintain the orientation towards impartiality. For example, Ofcom's complaints process requires broadcasters to sometimes justify their choices (the prospect of which should focus their minds during the production process).

11. The approach outlined above shows that the system assigns considerable trust both to the broadcasters and to the regulator. However, the nature of impartiality means that the system is vulnerable from different directions. For example, the broadcaster's discretion means that there is scope to push the boundaries. The risk here is that a media body without a strong orientation towards impartiality could go through the motions of compliance, doing the minimum possible to avoid regulatory action. This risk calls for vigilance on the part of the regulator. The risk also explains why regulators can look at a company's 'genuine commitment' to broadcasting standards when assessing the public interest of a merger involving a broadcaster.⁸

12. Another vulnerability is that a broadcaster with a genuine orientation towards impartiality may be subject to strategic complaints from those that disagree with its coverage. Here the risk is that an allegation of a regulatory failure is used to put pressure on a broadcaster to change their selection of viewpoints or framing of an issue.⁹ Such criticism is an important part of media

⁸ Enterprise Act 2002 s 58(2C)(c).

⁹ See A Rusbridger, 'How the Government Captured the BBC' *Prospect Magazine* (March 2024) for discussion of similar issues in relation to the BBC.

accountability, but the broadcaster should not be unduly swayed by the most powerful or vocal critics. This problem calls for some resilience on the part of the broadcaster. The risk also underlines the importance of the independence of the media and of its regulator, to reduce the vulnerability to external pressure.

Impartiality in the changing media landscape

13. As the call for evidence makes clear, some of the challenges facing the impartiality rules are a result of changes in the media landscape. The licensed broadcasters no longer hold a monopoly on audio-visual news content and political coverage. The changes can also influence broadcast content. For example, the more opinionated audio-visual content circulating online can change audience expectations about what political coverage looks like, which can put pressure on broadcasters to adopt a different style to compete.

14. The content circulating online can potentially change the range of views that warrant inclusion in the broadcaster's impartial coverage. When assessing whether to give weight to such views, broadcasters need to take care to avoid amplifying conspiracies or misinformation, for example. Similarly, journalists need to show caution if they rely on AI tools in the process of research and writing. For example, there is a risk of media content reflecting the biases of the generative tools that are used.

15. However, the proliferation of diverse content online strengthens the need for an impartial media sector. Such a sector can help people evaluate the various viewpoints circulating online and provide forum in which different perspectives are compared and assessed. The continuing importance of impartiality was underlined by Dingemans LJ in *Novosti*:

There is nothing to suggest that the need for accuracy or impartiality in the broadcasting media, or the contribution that an adherence to those standards in broadcasting makes to a properly informed democratic debate, has diminished or is any less important to safeguarding the interests of citizens now than it was at the time of the White Paper or the enactment of the 2003 Act. Indeed, there is reason to consider that the need is at least as great, if not greater than ever before, given current concerns about the effect on the democratic process of news manipulation and of fake news.¹⁰

Under that view, an impartial media sector can act as an antidote to biases and false statements made elsewhere.

16. While an impartial media sector remains important for all the reasons mentioned above, some of the steps in the Media Bill are necessary to secure its future. As viewing habits change, the obligations need to move beyond licensed broadcasters. The Media Bill takes an important step by extending impartiality rules to certain streaming platforms. Without such an extension of the rules, large streaming services (with a larger audience than many TV channels) would remain free to provide partisan news and political advocacy if they wished to do so. If that path were taken, broadcasters would face a competitive disadvantage,

¹⁰ [2020] EWHC 689 (Admin) at [23].

potentially creating a deregulatory pressure. The changes to the prominence rules in the Media Bill are also important to ensure that public service news providers remain visible (and the rules will need to be kept under review as viewing habits change). These changes provide a way to ensure that the UK continues to meet its obligations to secure pluralism.

17. What steps the technology companies should take to support impartial news sources remains an ongoing question. The Online Safety Act 2023 takes a step in regulating the discretion of the large platforms, for example in having to show regard for content of democratic importance, and to devise systems that apply in the same way 'to a wide diversity of political opinion'.¹¹ These provisions are still in the process of being implemented.

18. There are further steps that could be taken to maintain an impartial media sector. For example, news organisations that register as a charity could be subject to an impartiality obligation. Such an approach would create an impartial media sector outside of the regulated audio-visual media.

19. The media plurality rules could also be adapted to the current media landscape. The media plurality/public interest controls should be extended to apply to online news creators.¹² As the Committee has previously discussed, Ofcom could also conduct periodic reviews of media plurality, which opens the possibility for an assessment and remedies to be applied outside of the merger stage.¹³

12 February 2024

¹¹ Online Safety Act 2023, s 17.

¹² Ofcom, *The Future of Media Plurality in the UK* (2021) at [4.37]–[4.41].

¹³ House of Lords Communications Committee, *Media Plurality* (HL 2013–14, 120) at [196]–[222]. Such a review would be separate from the current reviews of the media plurality rules.