**Chapter 8**

**Regulating the communications industry**

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| **Key points**This chapter will cover the following questions:○ How is the communications and competition industry regulated in the UK?○ What is the full remit and purpose of Ofcom?○ What are the broadcasting regulations in relation to public service broadcasting?○ How are paid-for and streaming services regulated - if at all?○ Is there any way to regulate online harmful content?○ How is advertising regulated on various UK and international media platform? ○ How is the film and online video industry regulated? ○ What are the laws concerning elections and party political broadcasts in the UK? |

**8.1 Overview**

This chapter follows on from the previous one, looking at statutory, self- and co- regulation of the communications, advertising, video and movie industries. We will also ask whether online harmful content can be regulated?

A free media should be - by definition - decentralized and self-regulated.  While lacking a central authority that pre-approves content and still needing to rectifying mistakes - omissions or distortions - a free media ought to resolve this paradox by acting as a self-regulator.  Specifically, media content itself can be analyzed by others within the media, leaving the final judgment up to the viewers.  Arguably, self-regulation is important because anyone in the media is capable of conveying bias; in lieu of restricting content, a free media would be capable of ‘policing’ itself.

After examining the UK broadcasting regulations under the Communications Act 2003, governing the BBC, all other traditional TV and Radio stations, we will have a look at the main statutory communications regulator Ofcom and how its role and influence have increased in importance over the past decade, especially in relation to the BBC.

We then take a look at how the advertising industry is regulated. This is largely done by self-regulation via the Advertising Standards Authority (ASA) and EU-wide regulation, such as the CAP Code and the Blue Book. The focus will on the commercial powers of social media advertising, such as Facebook and YouTube, including the advertising power of vloggers and increased product placement in films compared with traditional TV and radio advertising.

Linked to the previous topic of election campaigning, we will take a look at some aggressive online advertising strategies which have become intrusive, targeted at specific audiences. The official Vote Leave campaign, for example, spent more than £2.7m on targeting ads at specific groups of people on Facebook, helping it to win the 2016 EU referendum. Two years later, in July 2018, the US social media giant eventually released these ads to the Digital, Media and Culture Select Committee of MPs, investigating fake news.

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See Chapter 7.7

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The ads, created by Canadian company Aggregate AIQ, often focused on specific issues - such as immigration or animal rights – targeting certain groups of people, based on their age, where they lived and other personal data taken from social media, such as Facebook. The 120 pages of Facebook documents appeared to back up the findings of the Electoral Commission (2017-18) which ruled that Vote Leave broke electoral law by working jointly with another campaign, BeLeave - something denied by both groups. The adverts contained in the Facebook data set were seen more than 169 million times in total.

The BeLeave messages were more closely directed at younger voters, promising a ‘brighter future’ if the UK could stop ‘EU regulators keeping us in the past’ and accusing Brussels of regulating ride-sharing apps such as Uber and enforcing quotas on data streaming. Data provided by Facebook suggested some of the most seen images were produced by BeLeave. This image was displayed on the screens of target audience members more than five million times.[[1]](#footnote-1)

Another self-regulatory body is the British Board of Film Classification (BBFC), which has been given statutory recognition to classify and regulate not only cinema films, but also music DVDs, videos and games. In January 2019 the BBFC published new Classification Guidelines for age ratings across different platforms. The BBFC’s consultation - involving more than 10,000 people - confirmed that people feel a heightened sense of anxiety when it comes to depictions of 'real world' scenarios, in which audiences – especially young people – are likely to be concerned that it could happen to them. For example, realistic contemporary scenarios showing terrorism, self-harm, suicide and discriminatory behaviour. The regulator’s new classification demonstrates that young people and parents want to see an increase in classification guidance, particularly around online content, as well as more consistency across all platforms.

The chapter then turns to the laws governing elections and party political and party election broadcasts. Since 1883, the UK has had legislation on its statute books that limits candidates’ spending on political campaigns, corruption and fraud.[[2]](#footnote-2) Broadcasting legislation ensures impartiality and fairness in elections, and rationing of air time. As social media and other online services become primary sources of information for many, and campaign advertising spend moves decisively online, the current framework covers a shrinking amount of campaign activity. Campaign regulation aims to ensure that elections are free and fair and not captured by a narrow range of interests.

**8.2 Broadcasting regulations: TV and radio**

Until the early 1980s, Western European broadcasting was largely state-controlled. For example, advertising ‘spots’ were either not permitted or strictly controlled by state regulation, and increasingly by EU Treaty provision and EU Regulations.[[3]](#footnote-3) The UK was one of the first European countries to dismantle this monopoly by the introduction of commercial broadcasting in September 1955 via ‘Independent Television’ or ITV. ITV came under the regulatory auspices of the Independent Television Authority (ITA) to provide competition to the public service broadcaster the BBC.[[4]](#footnote-4)

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Although this regulatory framework still exists to a certain extent today, it has been frequently challenged by independent broadcasting providers and increasingly by streaming services such as Netflix, Hulu and Amazon Prime. As mentioned before, Amazon is a UK-based service and can therefore be regulated in the UK, whereas Netflix and Hulu are on-demand video and streaming services based in the USA. The Hulu platform differs from Netflix and Amazon Prime in that it allows users earlier access to popular series from multiple traditional networks. Hulu mainly focuses on popular TV series.

Areas covered by any broadcasting or regulatory standards normally include the following guidelines:

● protection of minors;

● offence to human dignity;

● protection against harm, e.g. flashing lights; on-air hypnosis;

● no encouragement of behaviour which is harmful to health or safety;

● no incitement to crime and disorder;

● no incitement to hatred, contempt, racial hatred or hatred on grounds of national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

● rules on advertising and programming.

**8.3 Regulation of public service broadcasting**

The public service TV broadcasters in the UK include the British Broadcasting Corporation (BBC), Channel 4, Channel 5, BBC Scotland TV[[5]](#footnote-5), S4C. While all BBC public service television channels are Public Service Broadcast (PSB) channels, only the main channels of each of the other public service broadcasters have this status. The main objective of PSB is to provide a range of public benefits, including high quality television reflecting UK culture.

The Communications regulator Ofcom found in its survey that linear television continues to be an important part of people’s viewing, with live TV still accounting for 58 per cent of all TV and audio-visual content viewed (2018).[[6]](#footnote-6) Public service broadcasters can reach large audiences, bring the nation together at key moments, and inform, entertain and educate society with popular programmes such as ‘Strictly come Dancing’ (BBC 1) and ‘Britain’s got Talent’ (ITV).

In its Media Nation survey report of 2018, Ofcom found that generally viewers’ confidence in public service broadcasting remains high. Of those people who watch channels from the public service broadcasters, three-quarters (75%) said they were satisfied, and 84 per cent of people considered trusted news to be the most important feature of their output.[[7]](#footnote-7) But the regulator’s report also underlined the challenges facing the UK’s public service broadcasters from changing technology, audience fragmentation and global competition.

As part of the Communications Act 2003 and the Digital Economy Act 2017, the UK Parliament requires that traditional, scheduled television – known as linear channels – that provides PSB programmes (the designated channels) should be given prominence within television guides, known as electronic programme guides (EPG). This ensures that such programmes are easily available and discoverable to audiences, which should encourage more viewing, and greater public benefits.

**8.3.1 The British Broadcasting Corporation: Royal Charter and governance**

The BBC started life as a company, changing to a corporation following a report by the Crawford Committee.[[8]](#footnote-8) The Government accepted the Committee's findings and established by Royal Charter[[9]](#footnote-9), the British Broadcasting Corporation (BBC). The Charter set out the way in which the BBC would be governed. The first Charter ran for ten years from 1 January 1927 and recognized the BBC as an instrument of education and entertainment. Subsequent Charters expanded this remit to include the dissemination of information.

During the first 80 years of the BBC’s existence there was comparatively little change in the way in which it was governed. The BBC began its daily radio transmissions in September 1922, and ‘listening in’ to the ‘wireless’ quickly became a social and cultural phenomenon in Britain. From 1927 – when the BBC was established by Royal Charter to be the monopoly broadcaster in the UK – until 2006 – when the Royal Charter was last reviewed – the BBC had a Board of Governors which acted as ‘trustees’ of the public interest. The BBC’s monopoly lasted until 1955 when Independent Television (ITV) began broadcasting a regional commercial broadcasting service on Channel 3. This heralded the start of an era when a separate regulatory regime was established for commercial television.

Prior to the Royal Charter review in 2016, the BBC governors were constitutionally part of the BBC but were independent of management. Each of the 12 governors, including the Chairman, was appointed by the Secretary of State and they were responsible for the appointment of the Director General, ensuring that the BBC management implemented its strategy and overseeing complaints from the public. The governors were accountable to Parliament by appearing before parliamentary Select Committees.

Harold Wilson’s Labour Government appointed Lord Hill of Luton in 1967 as Chairman of the Board of Governors and the Thatcher Government appointed a succession of governors with the intent of bringing the BBC ‘into line’ with government policy, such as Marmaduke Hussey (latterly Lord Hussey of North Bradley), appointed Chairman of the Board of Governors in 1986. In January 2004 Gavyn Davies, who had been appointed Chairman by the Labour government in 2001, resigned in the wake of the Hutton Inquiry.  Lord Ryder, previously a Conservative Member of Parliament and a member of Margaret Thatcher's personal staff, replaced him as Acting Chairman. It has been claimed that Ryder and other Conservatives on the Board of Governors were effectively responsible for ‘forcing out’ Director-General Greg Dyke, who had not initially believed that his offer of resignation would be accepted by the Governors following the Hutton Report. In May 2004, Michael Grade took over as permanent Chairman. He was to be the last permanent Chairman of the BBC Board of Governors until November 2006.[[10]](#footnote-10)

The eighth Charter (1 January 2007) charged the BBC with delivering the latest technology to the public and taking a leading role in the switchover to digital television, setting out major changes to the governance of the Corporation. The BBC Trust was established with 12 trustees and a chairman. In technical legal terms it was not a ‘trust’ at all but a part of the BBC which was both separate and within the BBC as a whole. The main role of the Trust was to be the guardian of the licence fee and the public interest.

It is fair to say that the BBC Trust has been harshly criticized, for example, for its role in investigating the Jimmy Savile historic child abuse scandal or the way it dealt with false allegations against Lord McAlpine (see: *Lord McAlpine of West Green v Sally Bercow* (2013)[[11]](#footnote-11)). The Trust was condemned by the National Audit Office (NAO) for its over-generous payoffs for departing executives. The NAO annual report of 2013 revealed that the BBC Trust paid the former BBC Director General, George Entwistle, £475,000 after announcing his resignation and that the former Deputy Director General, Mark Byford, received a pay-off package of £949,000.[[12]](#footnote-12)

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As the BBC Charter came to an end in 2016, the Conservative Government commissioned an inquiry asking for a ‘fundamental reform’ of how the Corporation should be governed in future. Rona Fairhead was the last Chair of the BBC Trust before its abolition and the first woman to hold the post.

Sir David Clementi led the inquiry and published his report in March 2016 (the Clementi Report[[13]](#footnote-13)). The Report called the BBC Trust model a ‘mistake’ and Clementi’s recommendations included that regulatory oversight should be overseen by an ‘external’ body, such as the Office of Communications (Ofcom).

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The most recent Royal Charter was awarded from 1 January 2017 for a period of eleven years. The new, unitary, BBC Board is led by a non-executive Chairman, Sir David Clementi, and consists of a majority of non-executive directors alongside executive directors including the BBC’s Director-General and Editor-in-Chief, Tony Hall. The Board is responsible for ensuring the BBC fulfils its mission and public purposes as set out in the Royal Charter. It does this by:

* setting the strategic direction for the BBC
* establishing the creative remit
* setting the BBC’s budget
* determining the framework for assessing performance

The Board is accountable for all the BBC’s activities including the publicly funded services in the UK and around the world, as well as its commercial activities. The Director-General, Tony Hall, chairs the Executive Committee, which is responsible for the day-to-day running of the BBC and consists of the senior directors managing large operational areas of the BBC.

How can the traditional public service broadcasters, such as the BBC, Channel 4 or ITV, survive in this competitive streaming and paid-for services world? Ofcom has urged UK broadcasters to collaborate rather than to compete to match online competitors’ growing scale. That means UK broadcasters joining forces with each other, or with third parties, to share ideas and pool resources. It is important that public service broadcasters adapt for the digital age by finding new ways to distribute programmes; capture younger audiences; and make world-class content that reflects life in the UK – which has not typically been a focus for global internet video streaming companies.

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|  **FOR THOUGHT** |
| You are the legal adviser for a public broadcasting TV service. The newsroom has been sent film footage by an independent news crew of a children’s massacre in Syria. The live footage shows a violent death, bombing and gruesome graphic imagery of many dead bodies in the foreground. The video editor asks your advice whether he should filter and edit out some of these child images? The ten o’clock news editor wants to show the full video coverage of the massacre. What would your advice be before the news goes out that night on national TV? |

**8.4 Office of Communications (Ofcom)**

Ofcom is the UK’s broadcasting, telecommunications and postal regulatory body. Under the BBC’s Royal Charter it has responsibility for regulating the BBC. It does this through an Operating Framework and by setting a licence for the BBC that contains the regulatory conditions the BBC is required to meet. Ofcom also assesses performance, ensures fair and effective competition and regulates how the BBC’s commercial activities interact with its public services. In addition, it regulates BBC content and output against its Broadcasting Code.

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Ofcom was established as a statutory regulator (‘a body corporate’) by the Office of Communications Act 2002, replacing the Broadcasting Standards Commission (BSC), the Independent Television Commission (ITC) and the Radio Authority, the ‘media watchdogs’ that previously dealt with complaints against broadcasters. Sharon White became the Chief Executive of Ofcom in July 2015.

The main statute which covers Ofcom’s duties is the Communications Act 2003.

Section 3(1) states:

It shall be the principal duty of Ofcom, in carrying out their functions:

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

Ofcom operates under a number of statutes, including:

* the Broadcasting Act 1996
* the Broadcasting Act 1990
* the Competition Act 1998
* the Enterprise Act 2002
* the Communications Act 2003
* the Wireless Telegraphy Act 2006
* the Digital Economy Act 2010
* the Digital Economy Act 2017
* the Enterprise and Regulatory Reform Act 2013
* the Postal Services Act 2011

and EU legislation.

Section 355 of the Communications Act 2003 obliges the regulator to carry out periodic reviews and reallocation of (local) radio licences. Part of the remit involves the character of the service, the quality and range of programming and the amount of local content. Ofcom has other responsibilities, such as shaping public policy in the future of broadcasting and new media. Apart from watching over correct allocation of broadband width and ISP compliance, Ofcom also allocates and administers radio frequencies and bandwidths under its periodic ‘spectrum trading process’, the relevant legislation being the Wireless Telegraphy Act 2006. In summary, Ofcom’s key responsibilities related to content standards regulation include the following:

**Ofcom’s role in regulating content standards to protect audiences**

* Since its inception in 2003, Ofcom has been responsible for ensuring that audiences of broadcast TV are adequately protected, by requiring compliance with the Broadcasting Code. Audience protection has been a longstanding statutory duty in the UK, pre-dating Ofcom, and stemming from legislation in the 1950s.
* In 2010, following the Audiovisual Media Services Directive of 2007, Ofcom became responsible for the regulation of on-demand content, including broadcaster on-demand services like All4, and subscription services like Amazon Prime. This duty was previously performed jointly with its co-regulator – the Authority for Television on Demand (ATVOD). In 2015, ATVOD was merged with Ofcom.
* As Ofcom’s statutory duties evolved in 2017 to include sole oversight of the BBC’s output, including its websites and apps – the first time Ofcom had been given a role in relation to written online content.
* With the Advertising Standards Authority (ASA), Ofcom is responsible for the regulation of broadcast advertising; the ASA also oversees online commercial advertising on a self- regulatory basis. One requirement of the broadcast rules is that TV and radio programmes should be free from political advertising. In addition, Ofcom directly regulates party political and election broadcasts.

**8.4.1 The OFCOM Broadcasting Code**

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content to secure the standards objectives. Ofcom also has a duty to ensure that On Demand Programme Services (ODPS) comply with certain standards requirements set out in the Act. Ofcom reflects these requirements in its codes and rules.

The Ofcom Broadcasting Code[[14]](#footnote-14) applies to radio and television content (with certain exceptions for the BBC[[15]](#footnote-15)). Broadcasters are required by the terms of their Ofcom licence to observe the Standards Code and the Fairness Code. This includes any local TV and radio broadcast services and community digital sound programme services.

The Ofcom Code is divided into ten sections which are primarily drawn from the objectives as set out in section 319(2) Communications Act 2003 and section 107(1) Broadcasting Act 1996, as well as the Representation of the People Act 1983 (as amended). In setting these standards, Ofcom must secure the standards objectives set out in the 2003 Act. This not only involves setting minimum standards but also such other standards as may be appropriate.[[16]](#footnote-16) The Code also gives effect to a number of requirements relating to television in EC Directive 2010/13/EU (‘The Audiovisual Media Services Directive’).[[17]](#footnote-17)

The Code has also been drafted in the light of the Human Rights Act 1998 and the European Convention on Human Rights. In particular, the right to freedom of expression, as expressed in Article 10 (1) of the Convention, encompasses the audience’s right to receive creative material, information and ideas without interference but subject to restrictions prescribed by law and necessary in a democratic society (Art 10(2)). This Article, together with Article 8 (1) ECHR regarding the right to a person’s private and family life, home and correspondence; Article 9 ECHR, the right to freedom of thought, conscience and religion; and Article 14 ECHR, the right to enjoyment of human rights without discrimination on grounds such as sex, race and religion – underpin the principles of the Ofcom Code.

In drafting, reviewing and revising the Code (2017), Ofcom also paid regard to the matters specified in section 149(1) of the Equality Act 2010 (‘the public sector equality duty’) and section 75 of the Northern Ireland Act 1998.

Broadcasters must ensure that they comply with the rules, as set out in the Code (this includes all platforms such as BBC iPlayer and all other ‘catch-up’ services. The Code is divided into sections which are primarily drawn from the objectives as set out in section 319(2) of the 2003 Act and section 107(1) of the 1996 Act, as well as the Representation of the People Act 1983 (as amended). The main criteria covered by the Code include:

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| * The degree of harm and offence likely to be caused by the inclusion of any particular sort of material in programmes generally or in programmes of a particular description;
* the likely size and composition of the potential audience for programmes included in television and radio services generally or in television and radio services of a particular description;
* the likely expectation of the audience as to the nature of a programme’s content and the extent to which the nature of a programme’s content can be brought to the attention of potential members of the audience;
* the likelihood of persons who are unaware of the nature of a programme’s content being unintentionally exposed, by their own actions, to that content;
* the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section;
* the desirability of maintaining the independence of editorial control over programme content.
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**THE OFCOM BROADCASTING CODE**

**Section 1: Protecting the under 18s**[[18]](#footnote-18)

**Principle**: **To ensure that people under 18 are protected.**

**Rules**
**Scheduling and content information**

1.1  Material that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast.

1.2  In the provision of services, broadcasters must take all reasonable steps to protect people under eighteen. For television services, this is in addition to their obligations resulting from the Audiovisual Media Services Directive (in particular, Article 27).

1.3  Children[[19]](#footnote-19) must also be protected by appropriate scheduling from material that is unsuitable for them. Although scheduling requirements in this section are not relevant to the provision of programmes on demand, the BBC must put in place appropriate measures on BBC On Demand Programme Services (ODPS)[[20]](#footnote-20) that provide equivalent protection for children.

1.4 Television broadcasters must observe the watershed.[[21]](#footnote-21)

1.5  Radio broadcasters must have particular regard to times when children are particularly likely to be listening.[[22]](#footnote-22)

1.6  The transition to more adult material must not be unduly abrupt at the watershed (in the case of television) or after the time when children are particularly likely to be listening (in the case of radio). For television, the strongest material should appear later in the schedule.

1.7 For television programmes broadcast before the watershed, or for radio programmes broadcast when children are particularly likely to be listening, or for BBC ODPS content that is likely to be accessed by children, clear information about content that may distress some children should be given, if appropriate, to the audience (taking into account the context).

**The coverage of sexual and other offences in the UK involving under-eighteens**

1.8 Where statutory or other legal restrictions apply preventing personal identification, broadcasters should also be particularly careful not to provide clues which may lead to the identification of those who are not yet adult (the defining age may differ in different parts of the UK) and who are, or might be, involved as a victim, witness, defendant or other perpetrator in the case of sexual offences featured in criminal, civil or family court proceedings:

* by reporting limited information which may be pieced together with other information available elsewhere, for example in newspaper reports (the ‘jigsaw effect’);
* inadvertently, for example by describing an offence as ‘incest’; or
* in any other indirect way.

1.9 When covering any pre-trial investigation into an alleged criminal offence in the UK, broadcasters should pay particular regard to the potentially vulnerable position of any person who is not yet adult who is involved as a witness or victim, before broadcasting their name, address, identity of school or other educational establishment, place of work, or any still or moving picture of them. Particular justification is also required for the broadcast of such material relating to the identity of any person who is not yet adult who is involved in the defence as a defendant or potential defendant.

**Drugs, smoking, solvents and alcohol**

1.10 The use of illegal drugs, the abuse of drugs, smoking, solvent abuse and the misuse of alcohol:

* must not be featured in programmes made primarily for children unless there is strong editorial justification;
* must generally be avoided and in any case must not be condoned, encouraged or glamorised in other programmes broadcast before the watershed (in the case of television), when children are particularly likely to be listening (in the case of radio), or when content is likely to be accessed by children (in the case of BBC ODPS) unless there is editorial justification;
* must not be condoned, encouraged or glamorised in other programmes likely to be widely seen, heard or accessed by under-eighteens unless there is editorial justification.

**Violence and dangerous behaviour**

1.11 Violence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed (in the case of television), when children are particularly likely to be listening (in the case of radio) or when content is likely to be accessed by children (in the case of BBC ODPS) and must also be justified by the context.

1.12  Violence, whether verbal or physical, that is easily imitable by children in a manner that is harmful or dangerous:

* + must not be featured in programmes made primarily for children unless there is strong editorial justification;
		- must not be broadcast before the watershed (in the case of television), when children are particularly likely to be listening (in the case of radio), or when content is likely to be accessed by children (in the case of BBC ODPS), unless there is editorial justification.

1.13  Dangerous behaviour, or the portrayal of dangerous behaviour, that is likely to be easily imitable by children in a manner that is harmful:

* + must not be featured in programmes made primarily for children unless there is strong editorial justification;
	+ must not be broadcast before the watershed (in the case of television), when children are particularly likely to be listening (in the case of radio), or when content is likely to be accessed by children (in the case of BBC ODPS), unless there is editorial justification.

**Offensive language**

1.14  The most offensive language must not be broadcast before the watershed (in the case of television), when children are particularly likely to be listening (in the case of radio), or when content is likely to be accessed by children (in the case of BBC ODPS).

1.15  Offensive language must not be used in programmes made for younger children except in the most exceptional circumstances.

1.16 Offensive language must not be broadcast before the watershed (in the case of television), when children are particularly likely to be listening (in the case of radio), or when content is likely to be accessed by children (in the case of BBC ODPS), unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed.

**Sexual material**

1.17  Material equivalent to the British Board of Film Classification (“BBFC”) R18 - rating must not be broadcast at any time.

1.18  ‘Adult sex material’ - material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services which operate with mandatory restricted access. In addition, measures must be in place to ensure that the subscriber is an adult.

1.19  Broadcasters must ensure that material broadcast after the watershed, or made available on BBC ODPS, which contains images and/or language of a strong or explicit sexual nature, but is not ‘adult sex material’ as defined in Rule 1.18 above, is justified by the context.

1.20  Representations of sexual intercourse must not occur before the watershed (in the case of television), when children are particularly likely to be listening (in the case of radio), or when content is likely to be accessed by children (in the case
of BBC ODPS), unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, when children are particularly likely to be listening, or when content is likely to be accessed by children on BBC ODPS, and must be appropriately limited.

**Nudity**

**Films, premium subscription film services, pay per view services**

1.22  No film refused classification by the British Board of Film Classification (BBFC) may be broadcast, unless it has subsequently been classified or the BBFC has confirmed that it would not be rejected according to the standards currently operating. Also, no film cut as a condition of classification by the BBFC may be transmitted in a version which includes the cut material unless:

* + - the BBFC has confirmed that the material was cut to allow the film to pass at a lower category; or
		- the BBFC has confirmed that the film would not be subject to compulsory cuts according to the standards currently operating.

1.23  BBFC 18-rated films or their equivalent must not be broadcast before 2100, on any service (except for pay per view services), and even then they may be unsuitable for broadcast at that time.

1.24  Premium subscription film services may broadcast up to BBFC 15-rated films or their equivalent, at any time of day provided that mandatory restricted access is in place pre-2000 and post-0530. In addition, those security systems which are in place to protect children must be clearly explained to all subscribers.

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1.25  Pay per view services may broadcast up to BBFC 18-rated films or their equivalent, at any time of day provided that mandatory restricted access is in place pre-2100 and post-0530.

In addition:

* + information must be provided about programme content that will assist

adults to assess its suitability for children;

* + there must be a detailed billing system for subscribers which clearly itemises all viewing including viewing times and dates; and
	+ those security systems which are in place to protect children must be clearly explained to all subscribers.

1.26  BBFC R18-rated films must not be broadcast.

**Exorcism, the occult and the paranormal**

1.27 Demonstrations of exorcisms, occult practices and the paranormal (which purport to be real), must not be shown before the watershed (in the case of television) or when children are particularly likely to be listening (in the case
of radio), or when content is likely to be accessed by children (in the case of BBC ODPS). Paranormal practices which are for entertainment purposes must not be broadcast when significant numbers of children may be expected to be watching, or are particularly likely to be listening, or when content is likely to be accessed by children (in the case of BBC ODPS), (This rule does not apply to drama, film or comedy.)

**The involvement of people under eighteen in programmes**

1.28 Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or
by a parent, guardian or other person over the age of eighteen in loco parentis.

1.29  People under eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes.

1.30  Prizes aimed at children must be appropriate to the age range of both the target audience and the participants.

**Section 2: Harm and offence**[[23]](#footnote-23)

**Principle**: to ensure that generally accepted standards are 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.

 **Rules**

2.1  Generally accepted standards must be applied to the contents of television and radio services and BBC ODPS so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.

2.2  Factual programmes or items or portrayals of factual matters must not materially mislead the audience.

2.3  In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (see meaning of “context” below). Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and marriage and civil partnership). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.

**Violence, dangerous behaviour and suicide**

2.4  Programmes must not include material (whether in individual programmes or in programmes taken together) which, taking into account the context, condones or glamorises violent, dangerous or seriously antisocial behaviour and is likely to encourage others to copy such behaviour.

2.5  Methods of suicide and self-harm must not be included in programmes except where they are editorially justified and are also justified by the context.

**Exorcism, the occult and the paranormal**

2.6  Demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these that purport to be real (as opposed to entertainment) must be treated with due objectivity.

2.7  If a demonstration of exorcism, the occult, the paranormal, divination, or practices related to any of these is for entertainment purposes, this must be made clear to viewers and listeners.

2.8  Demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these (whether such demonstrations purport to be real or are for entertainment purposes) must not contain life-changing advice directed at individuals. (Religious programmes are exempt from this rule but must, in any event, comply with the provisions in Section Four: Religion. Films, dramas and fiction generally are not bound by this rule.)

**Hypnotic and other techniques, simulated news and photosensitive epilepsy**

2.9 When broadcasting material featuring demonstrations of hypnotic techniques, broadcasters must exercise a proper degree of responsibility in order to prevent hypnosis and/or adverse reactions in viewers and listeners. The hypnotist must not broadcast his/her full verbal routine or be shown performing straight to camera.

2.10  Simulated news (for example in drama or in documentaries) must be broadcast in such a way that there is no reasonable possibility of the audience being misled into believing that they are listening to, or watching, actual news.

2.11  Broadcasters must not use 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.

2.12  Television broadcasters must take precautions to maintain a low level of risk to viewers who have photosensitive epilepsy. Where it is not reasonably practicable to follow the Ofcom guidance (see the Ofcom website), and where broadcasters can demonstrate that the broadcasting of flashing lights and/or patterns is editorially justified, viewers should be given an adequate verbal and also, if appropriate, text warning at the start of the programme or programme item.

**Broadcast competitions and voting**

2.13  Broadcast competitions and voting must be conducted fairly.

2.14  Broadcasters must ensure that viewers and listeners are not materially misled about any broadcast competition or voting.

2.15  Broadcasters must draw up rules for a broadcast competition or vote. These rules must be clear and appropriately made known. In particular, significant conditions that may affect a viewer’s or listener’s decision to participate must be stated at the time an invitation to participate is broadcast.

2.16  Broadcast competition prizes must be described accurately.

**Section 3: Crime, Disorder, Hatred and Abuse**

**Principle**: **To ensure that material likely to encourage or incite the commission of crime or to lead to disorder is not included in television or radio services or BBC ODPS.**

 **Rules**

**Incitement of crime and disorder**

3.1 Material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services or BBC ODPS.

Note: Under Rule 3.1, ‘material’ may include but is not limited to:

• content which directly or indirectly amounts to a call to criminal action or disorder;

• material promoting or encouraging engagement in terrorism[[24]](#footnote-24) or other forms of criminal activity or disorder; and/or
• hate[[25]](#footnote-25) speech which is likely to encourage criminal[[26]](#footnote-26) activity or lead to disorder.

**Hatred and Abuse**

3.2 Material which contains hate speech must not be included in television and radio programmes or BBC ODPS except where it is justified by the context.

3.3 Material which contains abusive or derogatory treatment of individuals, groups, religions or communities, must not be included in television and radio services or BBC ODPS except where it is justified by the context.

**Portrayals of crime and criminal proceedings**

3.4  Descriptions or demonstrations of criminal techniques which contain essential details which could enable the commission of crime must not be broadcast unless editorially justified.

3.5  No payment, promise of payment, or payment in kind, may be made to convicted or confessed criminals whether directly or indirectly for a programme contribution by the criminal (or any other person) relating to his/her crime/s. The only exception is where it is in the public interest.

3.6  While criminal proceedings are active, no payment or promise of payment may be made, directly or indirectly, to any witness or any person who may reasonably be expected to be called as a witness. Nor should any payment be suggested or made dependent on the outcome of the trial. Only actual expenditure or loss of earnings necessarily incurred during the making of a programme contribution may be reimbursed.

3.7  Where criminal proceedings are likely and foreseeable, payments should not be made to people who might reasonably be expected to be witnesses unless there is a clear public interest, such as investigating crime or serious wrongdoing, and the payment is necessary to elicit the information. Where such a payment is made it will be appropriate to disclose the payment to both defence and prosecution if the person becomes a witness in any subsequent trial.

3.8  Broadcasters must use their best endeavours so as not to broadcast material that could endanger lives or prejudice the success of attempts to deal with a hijack or kidnapping.

**Section 4: Religion**

**Principles**

**To ensure that broadcasters exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes.**

**To ensure that religious programmes do not involve any improper exploitation of any susceptibilities of the audience for such a programme.**

**To ensure that religious programmes do not involve any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.**

**Rules**

4.1  Broadcasters must exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes.

The religious views and beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment.

4.3  Where a religion or religious denomination is the subject, or one of the subjects, of a religious programme, then the identity of the religion and/or denomination must be clear to the audience.

4.4  Religious programmes must not seek to promote religious views or beliefs by stealth.

4.5  Religious programmes on television services or BBC ODPS must not seek recruits. This does not apply to specialist religious television services. Religious programmes on radio services may seek recruits.

4.6  Religious programmes must not improperly exploit any susceptibilities of the audience.

4.7  Religious programmes that contain claims that a living person (or group) has special powers or abilities must treat such claims with due objectivity and must not broadcast such claims when significant numbers of children may
be expected to be watching (in the case of television), or when children are particularly likely to be listening (in the case of radio), or when content is likely to be accessed by children (in the case of BBC ODPS).

**Section 5: Due impartiality and due accuracy and undue prominence of** **views and opinions**[[27]](#footnote-27)

**Principles**:

**To ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality. To ensure that the special impartiality requirements of the Act are complied with.**

**Rules**

**Due impartiality and due accuracy in news**

5.1  News, in whatever form, must be reported with due accuracy and presented with due impartiality.

5.2  Significant mistakes in news should normally be acknowledged and corrected on air quickly (or, in the case of BBC ODPS, corrected quickly). Corrections should be appropriately scheduled (or, in the case of BBC ODPS, appropriately signaled to viewers).

5.3 No politician may be used as a newsreader, interviewer or reporter in any news programmes unless, exceptionally, it is editorially justified. In that case, the political allegiance of that person must be made clear to the audience.

**Special impartiality requirements: news and other programmes**

**Matters of political or industrial controversy and matters relating to current public policy** [[28]](#footnote-28)

**The exclusion of views or opinions**

5.4 Programmes in the services (listed above) must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking in a legislative forum or in a court of law). Views and opinions relating to the provision of programme services are also excluded from this requirement.

**The preservation of due impartiality**

5.5 Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service (listed above). This may be achieved within a programme or over a series of programmes taken as a whole.

5.6  The broadcast of editorially linked programmes dealing with the same subject matter (as part of a series in which the broadcaster aims to achieve due impartiality) should normally be made clear to the audience on air.

5.7  Views and facts must not be misrepresented. Views must also be presented with due weight over appropriate timeframes.

5.8  Any personal interest of a reporter or presenter, which would call into question the due impartiality of the programme, must be made clear to the audience.

5.9  Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of ‘personal view’ or ‘authored’ programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality. Presenter phone-ins must encourage and must not exclude alternative views.

5.10 A personal view or authored programme or item must be clearly signalled to the audience at the outset. This is a minimum requirement and may not be sufficient in all circumstances. (Personality phone-in hosts on radio are exempted from this provision unless their personal view status is unclear.)

**Matters of major political or industrial controversy and major matters relating to current public policy**

5.11 In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service (listed above) in each programme or in clearly linked and timely programmes.

5.12 In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented.

**The prevention of undue prominence of views and opinions on matters of political or industrial controversy and matters relating to current public policy**

5.13 Broadcasters should not give undue prominence to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy in all the programmes included in any service (listed above) taken as a whole. [[29]](#footnote-29)

**Section 6: Elections and referendums**[[30]](#footnote-30)

**Principle**

**To ensure that the special impartiality requirements in the Communications Act 2003 and other legislation relating to broadcasting on elections and referendums, are applied at the time of elections and referendums.**

**Rules**

**Programmes at the time of elections and referendums**

6.1 The rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums.

**Programmes at the time of elections and referendums**[[31]](#footnote-31) **in the UK [[32]](#footnote-32)**

6.2 Due weight must be given to the coverage of parties and independent candidates during the election period. In determining the appropriate level of coverage to be given to parties and independent candidates broadcasters must take into account evidence of past electoral support and/or current support. Broadcasters must also consider giving appropriate coverage to parties and independent candidates with significant views and perspectives.

<sn>



See below 8.9

</sn>

6.3 Due weight must be given to designated organisations in coverage during the referendum period. Broadcasters must also consider giving appropriate coverage to other permitted participants with significant views and perspectives.

6.4  Discussion and analysis of election and referendum issues must finish when the poll opens. (This refers to the opening of actual polling stations. This rule does not apply to any poll conducted entirely by post.) BBC ODPS are not required to remove archive content for the period when the polls are open.

6.5  Broadcasters may not publish the results of any opinion poll on polling day itself until the election or referendum poll closes. (For European Parliamentary elections, this applies until all polls throughout the European Union have closed.)

6.6  Candidates in UK elections, and representatives of permitted participants in UK referendums, must not act as news presenters, interviewers or presenters of any type of programme during the election period. BBC ODPS are not required to remove archive content for the election or referendum period.

6.7  Appearances by candidates (in UK elections) or representatives (of permitted participants in UK referendums) in non-political programmes that were planned or scheduled before the election or referendum period may continue, but no new appearances should be arranged and broadcast during the period. BBC ODPS are not required to remove archive content for the election or referendum period.

**Constituency coverage and electoral area coverage in elections**

6.8  Due impartiality must be strictly maintained in a constituency report or discussion and in an electoral area report or discussion.

6.9  If a candidate takes part in an item about his/her particular constituency, or electoral area, then broadcasters must offer the opportunity to take part in such items to all candidates within the constituency or electoral area representing parties with previous significant electoral support or where there is evidence of significant current support. This also applies to independent candidates. However, if a candidate refuses or is unable to participate, the item may nevertheless go ahead.

6.10  Any constituency or electoral area report or discussion after the close of nominations must include a list of all candidates standing, giving first names, surnames and the name of the party they represent or, if they are standing independently, the fact that they are an independent candidate. This must
be conveyed in sound and/or vision. Where a constituency report on a radio service is repeated on several occasions in the same day, the full list need only be broadcast on one occasion. If, in subsequent repeats on that day, the constituency report does not give the full list of candidates, the audience should be directed to an appropriate website or other information source listing all candidates and giving the information set out above.

6.11  Where a candidate is taking part in a programme on any matter, after the election has been called, s/he must not be given the opportunity to make constituency points, or electoral area points about the constituency or electoral area in which s/he is standing, when no other candidates will be given a similar opportunity.

6.12  If coverage is given to wider election regions, for example in elections to the Scottish Parliament, Welsh Assembly, Northern Ireland Assembly, London Assembly or European Parliament, then Rules 6.8 to 6.12 apply in offering participation to candidates. In these instances, all parties who have a candidate in the appropriate region should be listed in sound and/or vision, but it is not necessary to list candidates individually. However, any independent candidate who is not standing on a party list must be named. Where a report on a radio service is repeated on several occasions in the same day, the full list need only be broadcast on one occasion. If, in subsequent repeats on that day, the constituency report does not give the full list of candidates, the audience should be directed to an appropriate website or other information source listing all candidates and giving the information set out above.

**Section 7: Fairness**[[33]](#footnote-33)

**Principle**: **To ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes.**

**Rule**

7.1 Broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes.

**Dealing fairly with contributors and obtaining informed consent**

7.2  Broadcasters and programme makers should normally be fair in their dealings with potential contributors to programmes unless, exceptionally, it is justified to do otherwise.

7.3  Where a person is invited to make a contribution to a programme (except when the subject matter is trivial or their participation minor) they should normally, at an appropriate stage:

* + be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;
	+ be told what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc.;
	+ be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
	+ be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;
	+ be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and
	+ be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it.

Note: Taking these measures is likely to result in the consent that is given being ‘informed consent’. It may be fair to withhold all or some of this information where it is justified in the public interest or under other provisions of this section of the Code.

7.4  If a contributor is under sixteen, consent should normally be obtained from a parent or guardian, or other person of eighteen or over in loco parentis. In particular, persons under sixteen should not be asked for views on matters likely to be beyond their capacity to answer properly without such consent.

7.5  In the case of persons over sixteen who are not in a position to give consent, a person of eighteen or over with primary responsibility for their care should normally give it on their behalf. In particular, persons not in a position to give consent should not be asked for views on matters likely to be beyond their capacity to answer properly without such consent.

7.6  When a programme is edited, contributions should be represented fairly.

7.7  Guarantees given to contributors, for example relating to the content of a programme, confidentiality or anonymity, should normally be honoured.

7.8  Broadcasters should ensure that the re-use of material, i.e. use of material originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create unfairness. This applies both to material obtained from others and the broadcaster’s own material.

**Opportunity to contribute and proper consideration of facts**

7.9  Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that:

* + material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation; and
	+ anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.

7.10  Programmes – such as dramas and factually-based dramas – should not portray facts, events, individuals or organisations in a way which is unfair to an individual or organisation.

7.11  If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

7.12  Where a person approached to contribute to a programme chooses to make no comment or refuses to appear in a broadcast, the broadcast should make clear that the individual concerned has chosen not to appear and should give their explanation if it would be unfair not to do so.

7.13  Where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner.

**Deception, set-ups and ‘wind-up’ calls**

7.14 Broadcasters or programme makers should not normally obtain or seek information, audio, pictures or an agreement to contribute through misrepresentation or deception. (Deception includes surreptitious filming or recording.) However:

* it may be warranted to use material obtained through misrepresentation or deception without consent if it is in the public interest and cannot reasonably be obtained by other means;
* where there is no adequate public interest justification, for example some unsolicited wind-up calls or entertainment set-ups, consent should be obtained from the individual and/or organisation concerned before the material is broadcast;
* material involving celebrities and those in the public eye can be used without consent for broadcast, but it should not be used without a public interest justification if it is likely to result in unjustified public ridicule or personal distress. (Normally, therefore such contributions should be pre-recorded.)

**Section 8: Privacy**[[34]](#footnote-34)

**Principle**

**To ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes.**

**Rule**

8.1 Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

8.2  Information which discloses the location of a person’s home or family should not be revealed without permission, unless it is warranted.

8.3  When people are caught up in events which are covered by the news they still have a right to privacy in both the making and the broadcast of a programme, unless it is warranted to infringe it. This applies both to the time when these events are taking place and to any later programmes that revisit those events.

8.4  Broadcasters should ensure that words, images or actions filmed or recorded in, or broadcast from, a public place, are not so private that prior consent is required before broadcast from the individual or organisation concerned, unless broadcasting without their consent is warranted.

**Consent**

8.5  Any infringement of privacy in the making of a programme should be with the person’s and/or organisation’s consent or be otherwise warranted.

8.6  If the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. (Callers to phone-in shows are deemed to have given consent to the broadcast of their contribution.)

8.7  If an individual or organisation’s privacy is being infringed, and they ask that the filming, recording or live broadcast be stopped, the broadcaster should do so, unless it is warranted to continue.

8.8  When filming or recording in institutions, organisations or other agencies, permission should be obtained from the relevant authority or management, unless it is warranted to film or record without permission. Individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public will not normally be required.

• However, in potentially sensitive places such as ambulances, hospitals, schools, prisons or police stations, separate consent should normally be obtained before filming or recording and for broadcast from those in sensitive situations (unless not obtaining consent is warranted). If the individual will not be identifiable in the programme then separate consent for broadcast will not be required.

**Gathering information, sound or images and the re-use of material**

8.9  The means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

8.10  Broadcasters should ensure that the re-use of material, i.e. use of material originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create an unwarranted infringement of privacy. This applies both to material obtained from others and the broadcaster’s own material.

8.11  Doorstepping[[35]](#footnote-35) for factual programmes should not take place unless a request for an interview has been refused or it has not been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep. However, normally broadcasters may, without prior warning interview, film or record people in the news when in public places.

8.12  Broadcasters can record telephone calls between the broadcaster and the other party if they have, from the outset of the call, identified themselves, explained the purpose of the call and that the call is being recorded for possible broadcast (if that is the case) unless it is warranted not to do one or more of these practices. If at a later stage it becomes clear that a call that has been recorded will be broadcast (but this was not explained to the other party at the time of the call) then the broadcaster must obtain consent before broadcast from the other party, unless it is warranted not to do so.

8.13  Surreptitious filming[[36]](#footnote-36) or recording should only be used where it is warranted. Normally, it will only be warranted if:

* + there is *prima facie* evidence of a story in the public interest; and
	+ there are reasonable grounds to suspect that further material evidence could

be obtained; and

* + it is necessary to the credibility and authenticity of the programme.

8.14 Material gained by surreptitious filming and recording should only be broadcast when it is warranted.

8.15 Surreptitious filming or recording, doorstepping or recorded ‘wind-up’ calls to obtain material for entertainment purposes may be warranted if it is intrinsic to the entertainment and does not amount to a significant infringement of privacy such as to cause significant annoyance, distress or embarrassment.
The resulting material should not be broadcast without the consent of those involved. However if the individual and/or organisation is not identifiable in the programme then consent for broadcast will not be required.

**Suffering and distress**

8.16  Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy, unless it is warranted or the people concerned have given consent.

8.17  People in a state of distress should not be put under pressure to take part in a programme or provide interviews, unless it is warranted.

8.18  Broadcasters should take care not to reveal the identity of a person who has died or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed of the event or unless it is warranted.

8.19  Broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes.

• In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past.

**People under sixteen and vulnerable people**

8.20  Broadcasters should pay particular attention to the privacy of people under sixteen. They do not lose their rights to privacy because, for example, of the fame or notoriety of their parents or because of events in their schools.

8.21  Where a programme features an individual under sixteen or a vulnerable person in a way that infringes privacy, consent must be obtained from:

* + a parent, guardian or other person of eighteen or over in loco parentis; and
	+ wherever possible, the individual concerned;
	+ unless the subject matter is trivial or uncontroversial and the participation minor, or it is warranted to proceed without consent.

8.22  Persons under sixteen and vulnerable people should not be questioned about private matters without the consent of a parent, guardian or other person of eighteen or over *in loco parentis* (in the case of persons under sixteen), or a person with primary responsibility for their care (in the case of a vulnerable person), unless it is warranted to proceed without consent.

**Section 9: Commercial references in television programming**[[37]](#footnote-37)

**Principles**

**To ensure that broadcasters maintain editorial independence and control over programming (editorial independence).**

**To ensure that there is distinction between editorial content and advertising (distinction).**

**To protect audiences from surreptitious advertising (transparency).**

**To ensure that audiences are protected from the risk of financial harm (consumer protection).**

**To ensure that unsuitable sponsorship is prevented (unsuitable sponsorship).**

**Rules**

9.1  Broadcasters must maintain independent editorial control over programming.

9.2  Broadcasters must ensure that editorial content is distinct from advertising.

9.3  Surreptitious advertising is prohibited.

9.4  Products, services and trade marks must not be promoted in programming.

9.5  No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from:

* + the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or
	+ the manner in which a product, service or trade mark appears or is referred to in programming.

**Product placement**[[38]](#footnote-38) **(and prop placement[[39]](#footnote-39))**

9.6 Product placement is prohibited except in the following programme genres:

a) films;

b) series made for television (or other audiovisual media services); c) sports programmes; and
d) light entertainment programmes.

9.7  Programmes that fall within the permitted genres must not contain product placement if they are:

a) news programmes; or

b) children’s programmes.

9.8  Product placement must not influence the content and scheduling of a programme in a way that affects the responsibility and editorial independence of the broadcaster.

9.9  References to placed products, services and trade marks must not be promotional.

9.10  References to placed products, services and trade marks must not be unduly prominent.

9.11  The product placement of the following products, services or trade marks is prohibited:

a) cigarettes or other tobacco products;

b) placement by or on behalf of an undertaking whose principal activity is the manufacture or sale of cigarettes or other tobacco products;

c) prescription-only medicines; or
d) electronic cigarettes or refill containers.

9.12  Product placement is not permitted in the following:

a) religious programmes;

b) consumer advice programmes; or

c) current affairs programmes.

9.13  The product placement of the following is prohibited: a) alcoholic drinks;

b) foods or drinks high in fat, salt or sugar;
c) gambling;
d) infant formula (baby milk), including follow-on formula;
e) all medicinal products
f) cigarette lighters, cigarette papers, or pipes intended for smoking; or

g) any product, service or trade mark that is not allowed to be advertised on television.

9.14 Product placement must be signalled clearly, by means of a universal neutral logo, as follows:

a) at the beginning of the programme in which the placement appears;

b) when the programme recommences after commercial breaks; and
c) at the end of the programme.

<sn>



See below 8.7

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**Sponsorship**

**Content that may not be sponsored**

9.15 News and current affairs programmes must not be sponsored.

**Prohibited and restricted sponsors**

9.16 Programming (including a channel) may not be sponsored by any sponsor that is prohibited from advertising on television. This rule does not apply to electronic cigarettes and refill containers which are subject to Rule 9.16(a).

a) Sponsored programming with the aim or direct or indirect effect of promoting electronic cigarettes and/or refill containers is prohibited.

9.17 Sponsorship must comply with both the content and scheduling rules that apply to television advertising.

**Content of sponsored output**

9.18 A sponsor must not influence the content and/or scheduling of a channel or programming in such a way as to impair the responsibility and editorial independence of the broadcaster.

**Sponsorship credits**

9.19  Sponsorship must be clearly identified by means of sponsorship credits. These must make clear:

a) the identity of the sponsor by reference to its name or trade mark; and

b) the association between the sponsor and the sponsored content.

9.20  For sponsored programmes, credits must be broadcast at the beginning and/or during and/or end of the programme.

9.21  Sponsorship credits must be distinct from editorial content.

9.22  Sponsorship credits must be distinct from advertising. In particular:

a)  Sponsorship credits broadcast *around sponsored programmes*must not contain advertising messages or calls to action. Credits must not encourage the purchase or rental of the products or services of the sponsor or a third party. The focus of the credit must be the sponsorship arrangement itself. Such credits may include explicit reference to the sponsor’s products, services or trade marks for the sole purpose of helping to identify the sponsor and/or the sponsorship arrangement.

b)  Sponsorship credits broadcast *during programmes*must not be unduly prominent. Such credits must consist of a brief, neutral visual or verbal statement identifying the sponsorship arrangement. This can be accompanied by only a graphic of the name, logo, or any other distinctive symbol of the sponsor. The content of the graphic must be static and must contain no advertising messages, calls to action or any other information about the sponsor, its products, services or trade marks.

9.23  Where a sponsor is prohibited from product placing in the programme it is sponsoring, sponsorship credits may not be shown during the sponsored programme.

9.24  Where a sponsorship credit is included in a programme trail, the credit must remain brief and secondary.

9.25  Programme-related material may be sponsored and the sponsor may be credited when details of how to obtain the material are given. Any credit must be brief and secondary, and must be separate from any credit for the programme sponsor.

**Use of Controlled Premium Rate Services** [[40]](#footnote-40)

9.26  Where a broadcaster invites viewers to take part in or otherwise interact with its programmes, it may only charge for such participation or interaction by means of controlled premium rate telephone services or other telephony services for which the revenue generated is shared between relevant parties.

9.27  Controlled premium rate telephony services will normally be regarded as products or services, and must therefore not appear in programmes, except where:

a) they enable viewers to participate directly in or otherwise contribute directly to the editorial content of the programme; or

b) they fall within the meaning of programme-related material.

9.28  Where a controlled premium rate telephony service is featured in a programme, the primary purpose of the programme must continue to be clearly editorial. Promotion of the featured service must be clearly subsidiary to that primary purpose.

9.29  Any use of controlled premium rate telephone numbers must comply with the Code of Practice issued by PhonepayPlus.

**Non-geographic call costs**

9.30 The cost to viewers for using non-geographic telephony services must be made clear to them and broadcast as appropriate.

**Programme-related material (PRM)**

9.31 Programme-related material may be promoted only during or around the programme from which it is directly derived and only where it is editorially justified.

9.32 The broadcaster must retain responsibility for ensuring the appropriateness of promoting programme-related material.

**Charity appeals**

9.33  Charity appeals that are broadcast free of charge are allowed in programming provided that the broadcaster has taken reasonable steps to satisfy itself that:

a) the organisation concerned can produce satisfactory evidence of charitable status, or, in the case of an emergency appeal, that a responsible public fund has been set up to deal with it; and

b) the organisation concerned is not prohibited from advertising on television.

9.34  Where possible, the broadcast of charity appeals, either individually or taken together over time, should benefit a wide range of charities.

**Financial promotions and investment recommendations**

9.35 When broadcasting financial promotions and investment recommendations broadcasters must comply with the relevant provisions in Appendix 4 to this Code.

**Appeals for funds for programming or services**

9.36  Viewers must be told the purpose of the appeal and how much it raises.

9.37  All donations must be separately accounted for and used for the purpose for which they were donated.

9.38  Broadcasters must not offer any additional benefits or other incentives to donors.

9.39  Appeals for funds for programming or services must not be given undue prominence in relation to the overall output of the service.

**Section 10: Commercial communications in radio programming**[[41]](#footnote-41)

**Principles**

**To ensure the transparency of commercial communications as a means to secure consumer protection.**

**Rules**

10.1  Programming that is subject to, or associated with, a commercial arrangement must be appropriately signalled, so as to ensure that the commercial arrangement is transparent to listeners.

10.2  Spot advertisements must be clearly separated from programming.

10.3  No commercial reference, or material that implies a commercial arrangement, is permitted in or around news bulletins or news desk presentations.

This rule does not apply to:

* reference to a news supplier for the purpose of identifying that supplier as a news source;
* specialist factual strands that are not news bulletins or news desk presentations, but may be featured in or around such programming;
* the use of premium rate services (e.g. for station/broadcaster surveys); and
* references that promote the station/broadcaster’s own products and/or services (e.g. the programme/station/broadcaster’s website or a station/ broadcaster’s event).

10.4  No commercial reference, or material that implies a commercial arrangement, is permitted on radio services primarily aimed at children or in children’s programming included in any service.

This rule does not apply to:

* + - credits for third party association with either programming or broadcast competition prize donation;
		- the use of premium rate services (e.g. for broadcast competition entry); and
		- references that promote the station/broadcaster’s own products and/or services (e.g. the programme/station/broadcaster’s website or a station/ broadcaster’s event).

10.5  No commercial arrangement that involves payment, or the provision of some other valuable consideration, to the broadcaster may influence the selection or rotation of music for broadcast.

10.6  No programming may be subject to a commercial arrangement with a third party that is prohibited from advertising on radio. This rule does not apply to electronic cigarettes and refill containers which are subject to Rule 10.6(a).

(a) Sponsored programming with the aim or direct or indirect effect of promoting electronic cigarettes and/or refill containers is prohibited.

10.7  Commercial references in programming must comply with the advertising content and scheduling rules that apply to radio broadcasting.

10.8  Commercial references that require confirmation or substantiation prior to broadcast must be cleared for broadcast in the same way as advertisements.

**Controlled Premium Rate and similar services**

10.9  Any use of controlled premium rate telephony services in programming must comply with the Code of Practice and any additional broadcast-related requirements issued by PhonepayPlus.

10.10  The cost to listeners for using controlled premium rate telephony services, or other communications services for which the revenue generated is shared between relevant parties, must be made clear to them and broadcast as appropriate.

**Charity appeals**

10.11 Fund-raising activity broadcast on behalf of a charity (or emergency appeal) is only permitted if:

* it is broadcast free of charge;
* it does not contain any commercial reference that is subject to a commercial arrangement with the relevant charity (or emergency appeal); and
* the broadcaster has taken reasonable steps to satisfy itself that:
	+ –  the organisation concerned can produce satisfactory evidence of charitable

status, or, in the case of an emergency appeal, that a responsible public

fund has been set up to deal with it; and

* + –  the organisation concerned is not prohibited from advertising on radio.

**Appeals for funds for programming or services**

10.12 Broadcasters may broadcast appeals for donations to make programming or fund their service. Listeners must be told the purpose of the appeal and how much it raises. All donations must be separately accounted for and used for the purpose for which they were donated.

**Financial promotions and investment recommendations**

10.13 When broadcasting financial promotions and investment recommendations broadcasters must comply with the relevant provisions in Appendix 4 to this Code.

**8.4.2 Co-regualtion: the BBC, Ofcom and ATVOD**

Until the BBC Charter Review in 2016, there existed a degree of uncertainty of overlap of jurisdiction between the BBC Trust and Ofcom. It was unclear whom viewers and listeners could complain to or seek redress from. For example, in cases of ‘TV-like’ VoD services, complaints about programmes accessed online via BBC iPlayer could be raised with either the BBC or with Ofcom. But, if a BBC iPlayer programme was accessed on another platform (e.g. via Virgin Media or BT Vision), the complaint had to first be raised directly with the BBC. Only once this process had been exhausted could the complainant go directly to the Authority for Video On Demand (ATVOD) since that regulator operates under a ‘broadcaster first’ system of regulation.[[42]](#footnote-42)

The Authority for Television on Demand (ATVOD) was an industry body designated by Ofcom as the ‘co-regulator’ of video on demand - services (VOD). ATVOD - formerly the Association for Television On-Demand - had originally been created as a self-regulatory industry body with the support and encouragement of the government on 2007. As EU legislation in this sphere increased, ATVOD was founded following the EU Directive on the regulation of audiovisual media (‘the Audiovisual Media Services Directive’ 2007/65/EU[[43]](#footnote-43)). ATVOD was responsible for regulating on-demand services such as ITV Player and Channel 4’s More Four, as well as paid-for content on websites which were deemed to be ‘TV-like’. On 31 December 2015 all these regulatory functions were taken over by Ofcom. This arrangement was given legal force when the UK Parliament passed the Audiovisual Media Services Regulations 2010 which came into force on 18 March 2010. The Communications Act 2003 was further revised giving ATVOD greater enforcement powers in relation to VOD services. Minimum editorial and advertising standards were drawn up and published and became part of the Ofcom Code (see above).

However, neither Ofcom nor ATVOD had any jurisdiction over BBC ‘non-TV like’ online content; so, any complaints made about the BBC website had to be made directly to the BBC. Likewise, complaints about BBC radio programmes listened to online via iPlayer Radio had to be made directly to the BBC and could not be appealed to either Ofcom or ATVOD.

From April 2017 with the new BBC Charter and Agreement,Ofcom became the first independent regulator responsible for the content standards of the BBC’s television, radio and on-demand programmes. Ofcom also became responsible for the regulation of the BBC’s competitive and commercial services (such as BBC World and BBC Studioworks).

The unitary BBC Board continues to be responsible for governing and running the Corporation and the BBC also handles complaints about its contents in the first instance, with Ofcom overseeing that process and handling appeals through a transparent process. The National Audit Office is responsible for the ensuring the BBC delivers value for money, while the Royal Charter and the BBC licence fee remain matters for government.

**8.4.3 OFCOM’s statutory enforcement powers**

Where the Code has been breached, Ofcom will normally publish a finding and explain why a broadcaster has breached the Code. When a broadcaster breaches the Code deliberately, seriously, repeatedly or recklessly, Ofcom may impose statutory sanctions against the broadcaster this can include a fine or losing the licence to the service.

As a statutory regulator, Ofcom takes enforcement action across a number of industry sectors and is able to use a range of statutory powers granted by the various statutes mentioned above.

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See above 8.4

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Section 392(6) of the Communications Act 2003 gives Ofcom the power to punish breaches of the Code and impose penalties as it sees fit. Before determining how to publish, the regulator must consult the Secretary of State.

One such example is that in July 2015, Ofcom imposed a £1 million fine on EE, Britain’s biggest mobile phone operator at the time, for misleading customers who made complaints. The company which had been bought by BT did not tell some of its 27 million customers that their complaint could be decided by an independent adjudicator. EE, whose brands included Orange and T-Mobile, sent letters to customers that did not inform them of their right to take a complaint to alternative dispute resolution (ADR) after eight weeks. Ofcom’s investigation into EE’s complaints handling between July 2011 and April 2014 found that EE had failed to give certain dissatisfied customers correct or adequate information about their rights. The fine was Ofcom’s largest penalty for poor complaints handling in any industry and the regulator’s fifth biggest overall.[[44]](#footnote-44)

**8.4.4 OFCOM adjudications and decisions**

In 2018, Celebrity Big Brother was once again the television programme that attracted most viewer complaints to Ofcom, followed by Loose Women and Sky News. During 2018, Ofcom received almost 56,000 complaints about programmes from viewers and listeners. Following investigations, the watchdog found that its broadcasting rules had been broken in 80 cases in 2018.[[45]](#footnote-45)



**Key issues prompting audience complaints about the top 10 programmes in 2018:**

* + **Celebrity Big Brother: 27,602 complaints** (of which 25,327 related to the incident involving Roxanne and Ryan (30, 31 Aug and 1 Sept 2018); and 1,101 related to Rodrigo Alves using a racial slur (17Aug 2018)).
	+ **Loose Women: 8,002 complaints** (of which 7,912 related to an interview with guest Kim Woodburn which resulted in her walking off set (29 Aug 2018)).
	+ **Sky News: 4,251 complaints**(of which 3,462 alleged bias in the editing of Tommy Robinson in an interview (27 Sept 2018); and 592 related to comments by Kay Burley’s comparing Simon Weston’s injuries to a woman wearing a burqa (7 Aug 2018)).
	+ **Love Island: 4,192 complaints** (of which 2,644 related to Dani Dyer’s reaction when shown a video of boyfriend Jack reacting to his former partner entering Casa Amour (1 July 2018); 632 raised concerns about the emotional wellbeing of contestant, Laura Anderson (10 July); and 540 related to perceived unfair editing of contestant, Samira Mighty (12 July 2018)).
	+ **Coronation Street: 1,098 complaints**(of which 214 related to the storyline involving the date-rape of David Platt and its aftermath (16,19 March 2018); 211 related to Billy Mayhew taking drugs in a church (26 Feb); and 95 related to Pat Phelan’s murder of Luke Britton (5 Jan 2018)).
	+ **Emmerdale: 759** **complaints**(of which366 complaints related to an acid attack storyline (8 Feb 2018); and 116 related to the murder of Gerry Roberts (17 May 2018)).
	+ **Good Morning Britain: 548 complaints**(of which 86 considered that Piers Morgan displayed bias in favour of President Trump during an interview with Ash Sarkar (12 July 2018); and 74 related to Adil Ray’s introduction of the show as ‘Good Morning Asian Britain’ (13 August 2018)).
	+ **This Morning: 402 complaints**(of which 133 raised concerns that a guest who featured in a segment about breastfeeding was not sufficiently expert (12 Sept 2018); and 30 related to a discussion about donor breastmilk which complainants considered did not support breastfeeding and promoted formula milk (12 Apr 2018).
	+ **I’m a Celebrity…Get me Out of Here: 335:**The majority of these complaints (180) related to the use of animals in Bushtucker trials.
	+ **The X Factor: 286 complaints**(of which 104 related to Cheryl’s routine (18 Nov 2018); and95 related to sound issues affecting the performances of Danny Tetley and Anthony Russell (3 Nov 2018)).

Ofcom is responsible for securing standards on television and radio to protect audiences from harm. Each complaint made to Ofcom is carefully assessed against our broadcasting rules to determine whether further action against the broadcaster might be necessary. Upon the receipt of a complaint, Ofcom will follow a procedure where it investigates cases and applies statutory sanctions to broadcasters where the Code has been breached. When a broadcaster breaches the Code deliberately, seriously or repeatedly, Ofcom may impose statutory sanctions against the broadcaster. Where the Ofcom Broadcasting Code has been breached, the regulator will normally publish a finding and explain why a broadcaster has breached the Code. Here follow a few examples of broadcast standards cases[[46]](#footnote-46) which were in breach (or not) of the Code.

The *George Galloway* ruling of January 2019 (below) concerned a live chat show on ‘Talk Radio’ in which the former MP for Glasgow Hillhead discussed the Salisbury poisoning and attempted murder of of Yulia and Sergei Skripal in March 2018 on live radio. The Ofocm ruling followed shortly after the regulator announced in December 2018 that the RT news channel - formerly Russia Today - had not been impartial in seven of its news and current affairs programmes aired in the UK over a six-week period following the Skripals’ attack. The seven RT breaches took place over six weeks between 17 March and 26 April.[[47]](#footnote-47)

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See below 8.4.6

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| **❖ KEY CASE** | **George Galloway** ***Talk Radio, 16 March 2018, 19:00***  |

❖ **Breach of Rule 5.11** (…’due impartiality must be preserved on matters of major political and industrial controversy…’)

❖ **Breach of Rule 5.12** (…’an appropriately wide range of significant views must be included and given due weight in each programme…’)

**Introduction and background**

Talk Radio is a national digital speech radio station, the licence for which is held by Talksport Ltd. The *George Galloway* programme is typically broadcast on Fridays between 19:00 and 22:00. A complainant alleged the programme on 16 March 2018 contained ‘biased and unbalanced views’ about the response of the UK and Russian Governments to the poisoning of Yulia and Sergei Skripal in Salisbury on 4 March 2018.

The three-hour programme aired on 16 March 2018 - 12 days after the former Russian double agent and his daughter were discovered unconscious on a bench in Salisbury, having been poisoned with the nerve agent Novichok. A UK investigation blamed Russia for the attack and sanctions were placed on the country as a result - with many allies following the UK's lead, including the US. But the Kremlin denied any involvement.

After questioning Russia's culpability and saying the county was ‘the least likely suspect of them all’, Mr Galloway then spoke to a number of listeners, most of whom agreed with his point of view. When, on three occasions, listeners disagreed with his view, Mr Galloway joked that they had sent their messages from Broadmoor psychiatric hospital. During his chat show Mr Galloway acknowledged that Russia was capable of committing a crime such as poisoning of Yulia and Sergei Skripal but queried Russia’s culpability in this case. At about 19.25 he said:

And it’s not that I’m saying that Russia would not, could not carry out such a crime. Russia has carried out many such crimes. I’m not saying the Russian intelligence services are above such a crime. They have committed many such crimes, just like every other intelligence agency in the world, including – and perhaps particularly – our own. Don’t get me started on intelligence services. The question is ‘Why?’ ‘Why would Putin – who is personally, overwhelmingly likely responsible, said the clown Boris Johnson, who is in charge of our foreign affairs – Putin, Why?’

The regulator requested comments from the Licensee (Talk Radio and therein Talk Sport) that the programme had not complied with the Ofcom Broadcasting Code Rules 5.11 and 5.12 regarding impariality.

**The Licensee’s Response (Talk Sport)**

Talksport described Mr Galloway as a ‘national figure known for his controversial views which would not come as a surprise to listeners’. It added that the ‘majority of listeners are familiar with his reputation as well as the format of his ‘personal view’ phone-in programmes...and would be comfortable with adjusting their expectations of due impartiality’. The Licensee also described Mr Galloway as ‘famous for holding highly partial opinions that are anything but mainstream and are more often than not at odds with the majority of his fellow presenters on Talk Radio’. Talksport said it was ‘reasonable to suggest the Government’s view on who was responsible for the Skripal poisoning was universally known to Talk Radio listeners at the time of the broadcast’ and ‘it was merely the Government’s strong opinion of what happened, not a matter of policy’.

The Licensee acknowledged that Mr Galloway’s ‘introduction against the Government’s position on the Skripal-Novichok affair went unchallenged’ but considered it ‘reasonable to assume that Galloway’s colourful critique would be regarded by listeners as a highly opinionated personal-view attack by Galloway that did not require a formal rebuttal’. Talksport was also of the view that Mr Galloway’s comments were largely ‘questioning the calibre of those in power and their comments...rather than major matters of government policy’. It also considered that, rather than ‘attacking government policy or action’, Mr Galloway was ‘putting forward a number of hypotheses as to who was responsible for the Skripal poisoning’. By way of example of a balanced programme output, Talk Sport told Ofcom that the breakfast programme, presented by Julia Hartley-Brewer, broadcast on the same day - 16 March 2018 - included four guests who discussed the Skripal poisoning and expressed support for the Government’s handling of the crisis.

Talk Sport defended Mr Galloway’s right to broadcast his opinions without interference, as well as its overall approach to complying with due impartiality requirements across the radio station. However, it accepted that perhaps on this occasion, there had not been enough lively debate provided by either listeners or guests to challenge Mr Galloway’s views within the programme itself.

**Response from George Galloway**

Mr Galloway told Ofcom that he did not merely welcome alternative views to his programme but relished them and when listeners with alternative views were included in his programme he treated them respectfully and listened to them at length without interruption. In conclusion, Mr Galloway described the regulator’s investigation as a ‘transparently politically motivated attempt at censorship’, which had ‘already received its intended result’, namely the partial stifling of his ‘lone voice on the airwaves’.

**Decision**

Ofcom considered that this programme had been dealing with a matter of major political controversy and major matter relating to current public policy, namely, the policies and actions of the UK and Russian authorities, concerning the poisoning of Sergei and Yulia Skripal in March 2018. It its ruling, Ofcom said that TalkSport had, failed to include and give due weight to an appropriately wide range of significant viewpoints in relation to the relevant matters of major political controversy and major matters relating to current public policy dealt with in the programme.

Ofcom stated that it had taken the broadcaster’s right to freedom of expression into account when making its decision, as set out in Article 10(1) ECHR. At the same time, it established the audience’s right to receive information and ideas without interference (referring to *Lingens v Austria* (1986)[[48]](#footnote-48)). It applies not only to the content of information but also to the means of transmission or reception (referring to *Autronic v Switzerland* (1990)[[49]](#footnote-49)). The Ofcom ruling further stated that any interference must pursue a legitimate aim and be necessary in a democratic society (i.e. proportionate to the legitimate aim pursued and corresponding to a pressing social need) – as outlined in Article 10(2) ECHR. Decisions of the European Court of Human Rights make clear that there is little scope for restrictions on freedom of expression in two fields, namely political speech and on matters of public interest. Accordingly, a high level of protection of freedom of expression will normally be accorded, with the authorities having a particularly narrow margin of appreciation.

Ofcom ruled that George Galloway’s radio show seriously breached impartiality rules, namely Rules 5.11 and 5.12 of the Ofcom Code. Ofcom stated that the majority of comments from Mr Galloway and his listeners were highly critical of the government, while the small number of opposite views were treated dismissively.

**Analysis**

In passing the Communications Act 2003, Parliament set out in legislation the restrictions prescribed by law necessary in a democratic society – these have been adhered to by Ofcom in its Code. The statutory framework set by Parliament specifically assigns an area of judgment, to be exercised by Ofcom, as to how the requirements of the legislation are to be applied to the facts of each case. As envisaged by section 320 of the Act – which is given effect by Rules 5.11 and 5.12 of the Ofcom Code – a broadcaster must maintain an adequate and appropriate level of impartiality in its presentation of matters of major political controversy, including times when it is being critical of a nation state’s policies and actions on a major matter. How this is done is an editorial matter for the broadcaster.

The Ofcom Code makes clear that the approach to due impartiality (Section 5) may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content and the extent to which the content and approach is signalled to the audience. In addition, context, as set out in Section Two (Harm and Offence) of the Code is important in preserving due impartiality. Context includes a number of factors such as the editorial content of the programme, the service on which the material is broadcast, the likely size, composition and expectation of the audience and the effect on viewers who may come across the programme unawares.

As highlighted in Ofcom’s Guidance on Section Five of the Code, the broadcasting of highly critical comments concerning the policies and actions of, for example, any one state or institution, is not in itself a breach of due impartiality rules. It is essential that current affairs programmes are able to explore and examine issues and take a position even if that is highly critical.

In order to reach a decision on whether due impartiality was maintained in the *George Galloway* radio programme, Ofcom stated it had careful regard to the Article 10 rights and relevant contextual factors. Given the nature and amount of criticism of it in the programme and taking into account that the programme was dealing with a matter of major political controversy, it could have been reasonably expected that the viewpoint of the UK Government on the Skripal incident be appropriately reflected.[[50]](#footnote-50)

Following its ruling, Ofcom was considering whether to impose a statutory sanction over the breach, which could include a fine.

Another Ofcom investigation included the use of offensive language into Jeremy Vine’s Channel 5 TV show. [[51]](#footnote-51) Broadcaster Anne Diamond was filling in for Vine on 24 October 2018 during the morning show, when a caller suddenly used the c-word to verbally attack her live on-air. The word was used by the telephone caller, identified as ‘Chris’, just after 10.30am. Diamond apologized to viewers twice ‘for that creeping in on air.’ A viewer alerted Ofcom to offensive language in the programme during a discussion around oversharing on social media.

The regulator considered the material raised potential issues under Rule 1.14 of the Code which states that the most offensive language must not be broadcast before the watershed on television. Ofcom’s 2016 research[[52]](#footnote-52) on offensive language clearly indicates that the word ‘cunt’ is considered by audiences to be amongst the most offensive language. The inclusion of the word in this programme at 10:33 was therefore a clear example of the most offensive language being broadcast before the watershed. Programmes which feature live interaction with viewers carry an increased risk of offensive language being used on air and broadcasters should have procedures in place to minimise the risk, as far as practicable.

In the *Jeremy Vine* case Ofcom took into account that the Licensee (ITN) had taken a number of measures in advance to minimize the risk of offensive language being broadcast. While it was unfortunate that the software system did not identify the caller’s number, steps had been taken by ITN to minimize further the risk of offensive language being broadcast in future. In light of these factors, Ofcom’s decision was that this matter had been resolved.

In the ruling on *Lokkho Praner Sur*[[53]](#footnote-53)*,* a talent show for young contestants on TV ONE, the licensee, Light Upon Light Media Limited, was found in breach of Rule 9.5: ‘No undue prominence may be given in programming to a product, service or trade mark.’ TV One is a general entertainment channel aimed at the Muslim community in the UK.

Ofcom had received a complaint that the programme on 11 July 2018 had contained several visual references to the fruit juice manufacturer ‘Shezan’[[54]](#footnote-54) as the young contestants had performed religious themed songs for a panel of judges. Logos for Shezan and the product Shezan Mango were situated on the talent judges’ desks and in various locations around the stage area. Although sometimes obscured by on-screen graphics, these logos were clearly visible to viewers on many occasions throughout the programme.

Rule 9.5 requires that references to products, services or trade marks in programming must not be unduly prominent. In this case, there were several visual references to Shezan and Shezan Mango during a singing contest. Given the circumstances, there did not appear to be any editorial justification for their inclusion in the programme. Ofcom accepted that the appearance of the logos occurred as a result of human error and acknowledged the Licensee’s assurance that the error would not be repeated. However, Ofcom’s decision was that the programme gave undue prominence to Shezan and Shezan Mango, in breach of Rule 9.5 of the Code.

**8.4.5 Judicial review and OFCOM**

The ruling in *Ali v Channel 5* (2018)[[55]](#footnote-55) is an important one. Arnold J did not only consider the balance between the programme makers’ freedom of expression (Article 10 ECHR) and their advancing the public interest test, but also Mr Ali and Ms Aslam’s Article 8 rights as well as the relevant Ofcom broadcasting privacy codes. The defendant broadcast was part of a popular Channel 5 TV series called ‘Can't Pay? We'll take it away’. This particular episode in April 2015 had been watched by 9.65 million viewers. The eviction was filmed by a television production company called Brinkworth Films Ltd which showed a landlord having obtained a High Court writ of possession and enforcement officers (bailiffs) attended the couple’s property to evict the claimants. The first claimant, Shakir Ali, who was the voluntary media secretary of a Muslim political party, was awoken as they entered the property. He was given an hour to vacate. The second claimant, Shahida Aslam, had just returned after taking her children to school. The landlord's father, also in attendance during the filming, posted on social media two videos he had recorded of the eviction. The claimants' daughter subsequently suffered bullying at school. The claimants accepted that the writ was a public court order and that the defendant was entitled to broadcast the fact that they had been evicted, but contended that the programme included filming of them in their home, in distress and being taunted by the landlord's father in breach of their right to respect for private and family life under Article 8(1) ECHR.

The ruling means that broadcasters will have to make sure they have a strong public interest argument for filming – in this case – a very public eviction of a family in the middle of the night, made for public viewing. The judge considered that the restriction was justified and proportionate in the circumstances of this case and that the broadcasters should have adhered to the relevant broadcasting codes.

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| **❖ KEY CASE** | ***Shakir Ali and Shahida Aslam v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch)** |

**Precedent**

❖ The ‘ultimate balancing test’ must be between the individuals’ right to privacy (Art 8 ECHR) and the general public interest.

❖ s 12(4)(b) HRA 1998 requires the court to have regard to any relevant privacy codes (including Ofcom) when Art 10 ECHR is at issue (the broadcaster’s right to freedom of expression).

❖ Rule 8.1 of the Ofcom Code provides that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be ‘warranted.’

**Facts**

The legal challenge by the claimants Shakir Ali and Shahida Aslam concerned the Channel 5 TV series and reality show ‘Can’t Pay? We’ll Take It Away’. The episode complained of was a one-hour programme, featuring the eviction of the couple from their home they had been renting at 137 Fanshawe Avenue, Barking, Essex on 2 April 2015. The eviction was executed by ‘High Court Enforcement Agents’ enforcing a ‘Writ of Possession’ obtained by their landlord Rashid Ahmed. The programme showed shots of Mr Ali having just woken up, wearing pyjama bottoms and a vest, and shots of the couple’s bedroom and their two children’s rooms and of family possessions stored in bags. It also showed the landlord’s son humiliating the couple, and revealed details including that the couple were unemployed and receiving housing benefit. The show was watched 9.6m times on Channel 5 channels over an 18-month period, also resulted in the couple’s daughter being bullied at school. The couple claimed they had a reasonable expectation of privacy under Art 8 ECHR. Channel 5 defended the filming tactics as in the public interest as the show addressed real-life issues including personal debt and the dependence of tenants on benefits and claimed viewing such scenes ‘was the best way to engage the public and stimulate debate’. But the production notes on the ‘story synopsis’ showed capturing the drama of the eviction scene was the main focus.

**Decision**

Mr Justice Arnold allowed the claim by the couple and awarded £20,000 in damages (£10,000 each). Arnold J referred to the ‘ultimate balancing test’ between the individuals’ right to privacy and the general public interest:

*I consider that the Claimants did have a reasonable expectation of privacy in respect of the information included in the Programme about which they complain. The justification relied upon by Channel 5 for interfering with the Claimants’ Article 8 rights is that the Programme contributed to a debate of general interest. As I have explained, I accept that the Programme did contribute to a debate of general interest, but I consider the inclusion of the Claimants’ private information went beyond what was justified for that purpose*. [[56]](#footnote-56)

In addition to the couple’s right to privacy the judge also referred to the OFCOM Code and OFCOM adjudications.[[57]](#footnote-57) Furthermore that s 12(4)(b) HRA 1998 required the court to have regard to any relevant privacy code when Art 10 ECHR is at issue (the broadcaster’s right to freedom of expression). The relevant privacy code in force at the time of the first broadcast of the Programme was s 8 of the OFCOM Broadcasting Code of July 2015. Rule 8.1 of the Code provides that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be ‘warranted’.

**Analysis**

The court ruling in *Ali v Channel 5 TV* is an important one. The court found that the focus of the programme was not upon the matters of public interest, but upon the drama of the conflict between the landlord, the eviction agents (‘bailiffs’) and the claimants, a conflict which had been encouraged by the programme makers to make ‘good television’, resulting in the millions of viewings. The claimants’ and their children’s faces were not pixelated in the programme. The judge made the point that he did not find the programme in itself was materially unfair or inaccurate in its presentation of what happened during the eviction; but his ruling and justification relied upon by the claimants for restricting Channel 5’s Article 10 rights was their right to respect for their private and family life and their home.

Ofcom’s handling of complaints and its adjudications will – at times – be challenged in the courts by way of judicial review applications in the Administrative Court. Allegations of possible breaches of Ofcom’s ‘Standards’ and ‘Fairness Codes’ as well as its ‘Privacy Code’ tend to be the most frequent legal challenges – substantially arguing that the programmes complained of were unfair.

The judgment in *R (Traveller Movement) v Ofcom* (2015)[[58]](#footnote-58) contains an important ruling in relation to applications involving regulators and the non-adversarial procedure. In February 2015 Ouseley J dismissed a judicial review application brought against Ofcom by the Traveller Movement (TM), a charity supporting 300,000 gypsies and travellers. The charity had claimed that the Channel 4 broadcasts of *Big Fat Gypsy Wedding* and *Thelma’s Gypsy Girls* had depicted children in a sexualized way, that the gypsy communities engaged in and endorsed violent sexual assaults of female children and young women and portrayed men and boys as feckless, violent and criminal as a cultural norm.

TM, the claimant charity, had made a complaint to Ofcom about the programmes in November 2013. The gist of the complaint was that the programmes, particularly *Big Fat Gypsy Wedding,* were unfair and portrayed Irish Traveller, English Traveller, Gypsy and Romany groups in a negative and racially stereotypical way. TM’s lawyers argued on grounds of procedural unfairness and irrationality and that the regulator had acted unlawfully. TM specifically complained to Ofcom that the ‘Standards’ and ‘Fairness’ Codes had been breached. Ofcom found no breach of either Code.

TM’s application for judicial review (at standing stage) included procedural impropriety, that Ofcom should have used its powers to seek further information to enable the regulator to reach a properly considered decision; that Ofcom acted irrationally in not accepting the extended assistance of the Equality and Human Rights Commission in considering the complaint; and that the decision not to accept TM’s expert evidence as adequate evidence of harm was irrational. The charity also argued on grounds of unfairness that Ofcom’s ‘draft decision’ had only been visible to one party (the broadcaster) but not to the complainant and that this was manifestly unfair.

Ouseley J rejected each of these grounds and held that it was not necessary in the interests of fairness for parties to have sight of a preliminary or provisional view of an adjudicatory body in order for its decision, or the process as a whole, to be fair. He ruled that a ‘standards’ complaint could be made by anyone, even by someone who had not seen the programme at all. By contrast, the broadcaster (here Channel 4) was directly affected by the outcome of the complaint and decision, and might face sanctions and financial penalties.

In these circumstances, there was nothing unfair or irrational in the ‘standards’ complaint by the travellers’ representatives nor was the procedure unfair for Ofcom to provide its preliminary view to the broadcaster but not to the complainant. Ofcom’s counsel, Dinah Rose QC, told the judge that it was fully aware of the sensitivity of potentially racially negative stereotypes and had conducted a ‘careful and painstaking’ investigation before concluding that the programmes did not breach the broadcasting code.

The judge then agreed Ofcom’s decision that Channel 4 had not depicted such stereotypes but that the programmes were, in fact, a balanced portrayal which offered considerable insight into those communities, including the challenges they faced when dealing with prejudice.

The *Jon Gaunt* case also questioned an Ofcom decision, and therein challenged the Ofcom Broadcasting Code in relation to harmful and offensive broadcasts (here involving Talk Sport radio).[[59]](#footnote-59) Gaunt also argued that the Code breached his Article 10 ECHR right. The *Ken Livingstone* case[[60]](#footnote-60) was cited in this case, where the judge said that Mr Livingstone was not to be regarded as expressing a political opinion, attracting a high level of protection, when he indulged in offensive abuse of an *Evening Standard* journalist outside a City Hall reception.

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| **❖ KEY CASE** | ***R (on the application of Jon Gaunt) v Ofcom* [2011]** EWCA Civ 692 |
| **Precedent**❖ An interference with a person’s Article 10 rights has to be proportionate to the legitimate aim pursued and must be established convincingly.❖ When deciding whether any interference with freedom of expression falls foul of Article 10, the court will have particular regard to the words used, the context in which they were made public and the case as a whole.❖ There is a distinction to be drawn between harsh words which constitute a gratuitous personal attack and those which form part of a political debate.**Facts**The case concerned an explosive outburst by radio show host ‘Shock Jock’ Jon Gaunt on his *Talk Sport* radio programme on 7 November 2008. Around 11am Gaunt interviewed Michael Stark, Cabinet Member for Children’s Services for Redbridge London Borough Council, live on radio about the council’s controversial proposal to ban smokers from becoming foster parents on the ground that passive smoking has a propensity for harming foster children. Gaunt, himself a foster child, had published a controversial article ‘Fags didn’t stop my foster mum caring for me’, criticizing Redbridge Council as ‘health and safety Nazis’, referring to a ‘master race philosophy’ by Redbridge Social Services, whom he called ‘the SS’, though the High Court did not hold this article to be unduly offensive.[[61]](#footnote-61)Mr Stark explained the council’s stance on the radio show, stating that smoker foster parents would not be used in the future, to which Mr Gaunt responded, ‘So you are a Nazi, then?’ After Mr Stark protested, Mr Gaunt reiterated, ‘No you are, you’re a Nazi’, with the interview degenerating into an unseemly slanging match. When Mr Stark protested that the insult, as he saw it, was probably actionable, the claimant, Jon Gaunt, replied, ‘Take action if you wish’, adding, ‘You’re a health Nazi’ and a little later ‘you ignorant pig’ and ‘health fascist’ and an ‘ignorant idiot’. Gaunt’s live broadcast apology an hour later included: ‘The councillor wants me to apologize for calling him a Nazi. I’m sorry for calling you a Nazi.’ Gaunt was subsequently suspended with his contract terminated immediately.Ofcom received 53 complaints from listeners and issued its adjudication on 8 June 2009, stating that Mr Gaunt had breached rules 2.1 and 2.3 of the Broadcasting Code.[[62]](#footnote-62)Jon Gaunt claimed that Ofcom’s decision breached his Article 10 right and amounted to an unlawful interference with his freedom of expression. Gaunt was represented by the human rights group Liberty. Mr Millar QC, on behalf of the claimant, submitted there was no pressing social need and that Ofcom’s reasons were insufficient to justify the interference with Article 10(2) ECHR[[63]](#footnote-63) (see for this approach: *R v Shayler* (2003);[[64]](#footnote-64) *R (on the application of SB) v Governors of Denbigh High School* (2007);[[65]](#footnote-65) *Belfast City Council v Miss Behavin’ Ltd* (2007)[[66]](#footnote-66)).In July 2010, Mr Gaunt lost his High Court ‘freedom of expression’ challenge against Ofcom. The High Court ruled that Ofcom’s findings did *not* interfere with Mr Gaunt’s Article 10 right, but that the ‘ignorant pig’ comment and the continued bullying and insulting of the Redbridge councillor on live radio amounted to gratuitous and offensive abuse, therefore breaching the Broadcasting Code.Mr Gaunt’s appeal reached the Court of Appeal where he did *not* argue that the Ofcom Code breached his Convention rights. However, Mr Gaunt argued that Ofcom’s finding was a breach of his Article 10 rights because it was a *disproportionate* interference and did not meet a pressing social need. The CA dismissed Mr Gaunt’s appeal in a judgment given by the Master of the Rolls, Lord Neuberger, endorsing the approach of the Divisional Court (High Court).The CA emphasized that the freedom of expression, encompassing the right to say what one wants and how one wants, was the ‘lifeblood’ of democracy. But freedom of expression also carried with it responsibilities, which necessitated certain restrictions (referring to *Handyside v UK* (1976)[[67]](#footnote-67)). Jon Gaunt applied for judicial review on human rights legislation grounds.**Decision**The CA dismissed Mr Gaunt’s claim for judicial review. Reasons included that the public interest aspect (i.e. ‘standing’) was of limited importance when set in the context of the actual contents of the Michael Stark interview. It concluded that the court’s task was to decide whether the amended finding *disproportionately* infringed the claimant’s Article 10 right? The court found that there was no ‘pressing social need’ and that Ofcom’s adjudication did not constitute an interference with Mr Gaunt’s freedom of expression.The CA held that the claimant’s right to freedom of expression did *not* extend to gratuitous offensive insult or abuse, nor to repeated abusive shouting that served to express no real content.**Analysis**Since it was a live broadcast and Jon Gaunt was considered an experienced interviewer, the interview with the Redbridge Councillor could have been stopped by either Mr Gaunt or the *talkSport* producers, once it had become clear that Jon Gaunt had lost control on live radio. The tone of the interview degenerated from the point where he called Michael Stark a ‘Nazi’ and the claimant – Mr Gaunt’s – conduct of the interview became increasingly abusive, hectoring and out of control. This was followed by the expression ‘ignorant pig’ which had no contextual justification, said with ‘such venom’ as to constitute gratuitous offensive abuse.It was therefore right that the regulator Ofcom found a breach of the Broadcasting Code. The decision of the courts (Divisional Court and CA) acknowledged the adjudication of the statutory regulator was correct. Consequently, there had been no unlawful interference with Mr Gaunt’s Article 10 rights. Ofcom was therefore justified in its conclusion, because the offensive and abusive nature of the broadcast was gratuitous, having no factual content or justification, and the ‘Amended Finding’ constituted no material interference with the claimant’s freedom of expression. |

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|  **FOR THOUGHT** |
| Compare and contrast the two Ofcom decisions involving Talk Radio (*George Galloway* March 2018) and Talk Sport (*Jon Gaunt* June 2009). Do you agree with the regulator’s decisions in each case? Why could both broadcasters not avail themselves of Article 10(1) ECHR? Discuss with reference to each ruling, legislation and the Ofcom Code.  |

**8.4.6 Regulating converged media platforms**

Who then is editorially responsible for content on media platforms? The answer would seem to be found in the Ofcom ruling in the *Vice News* ‘case’.

*Vice News*[[68]](#footnote-68)*, BuzzFeed*[[69]](#footnote-69)and *The Canary* are online current affairs and social media brands with news services located in the USA and the UK – which is where the problem of regulation lies. *Vice News, BuzzFeed* and *The Canary* are primarily targeted at a younger demographic audience.

The Vice Media, Inc. group (*Vice*) is based in New York, though it has bureaus worldwide. Vice mainstream news covers events that may not be as well covered by other news sources, distributing written articles and video content on its website and YouTube.

*BuzzFeed* - also American - receives the majority of its traffic by creating content that is shared on social media websites, such as *Twitter* and *Facebook*. The site continues to test and track their custom content with an in-house team of data scientists and external-facing ‘social dashboard.’ Staff writers are ranked by views on an internal leaderboard.

The UK- based *The Canary* is a left-wing news website, set up in 2015. The media outlet prides itself of being free from advertising and political parties; at the same time it has been financially struggling. Canary’s Editor, Kerry-Anne Mendoza, says of the Canary’s ideology that it is ‘here to disrupt the status quo of the UK and international journalism, by creating content that compels audiences to view the world differently’.

How are these online services to be regulated? *Vice*, for example,has several forms of output, including photo galleries, news videos, and articles about the writers’ personal experiences. The platform covers subjects other traditional media sources do not, in a casual editorial voice others avoid. This ‘Gonzo-style’ journalistic approach means that the range of subjects its output deals with is exceptionally broad, from neuropsychology to pornography. Examples such as, ‘I Went Undercover in America’s Toughest Prison’ and ‘Making Friends Inside Brooklyn’s Last Porno Theatre’ give an idea of the sort of content *Vice* is known for.

Video is central to Vice’s output, and *Vice* has been putting video online longer than most media companies. The main *Vice* channel is on YouTube, ranging from one-minute comedy videos to half-hour or longer in-depth documentaries on subjects such as Ukraine Fashion Week. *Vice News* frequently produces ‘raw coverage’ videos, which are hours of unedited footage from areas of instability streamed live and then uploaded alongside the edited news stories.

The Ofcom ruling (‘determination’) in the *Vice News* ‘case’ means that on-demand video services on Vice’s UK website cannot be regulated by the British authorities because the firm’s head office is in America, it is outside British jurisdiction. The decision means on-demand video on Vice’s UK website will not be subject to the British Communications Act 2003, as its UK-based rivals are. The Vice-Ofcom ruling contradicts an earlier ruling by the Authority for Television On Demand (ATVOD).

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| **❖ KEY CASE** | ***The Vice News – Ofcom determination* (2015)[[70]](#footnote-70)** |
| **Facts & background**The regulator ‘The Authority for Television On Demand’ (ATVOD) determined in 2013 that Vice’s UK news office provided ‘on-demand programme services’ (ODPS) because the video tab constituted ‘a service in its own right, the principal purpose of which is the provision of TV-like programmes’. Vice appealed this decision to Ofcom – the ‘umbrella’ regulator of ATVOD. In July 2015 Ofcom upheld Vice UK’s appeal and quashed ATVOD’s determination.[[71]](#footnote-71)**Vice’s Appeal to OFCOM**Ofcom made its decision on the basis of new information provided by Vice, which submitted that the person with editorial responsibility for its video tab was established in the United States and therefore outside the jurisdiction of the UK for the purposes of the Communications Act 2003. Ofcom agreed with Vice’s submission.In determining where Vice’s service was established, Ofcom considered Article 2(3) of the Audiovisual Media Services Directive (2010/13/EU), which states:For the purposes of this Directive, a media service provider shall be deemed to be established in a member state in the following cases:(a) The media service provider has its head office in that member state and the editorial decisions about the audiovisual media service are taken in that member state;(b) If a media service provider has its head office in a member state but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the member state concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that member state.**Decision**Ofcom determined that the entity with editorial responsibility was, for the purposes of Article 2(3)(a) of the Directive, the US-based Vice Media Inc., rather than Vice UK. The decision was based on the following facts:❖ the UK Vice team had no role in selecting which video content to include;❖ all US video content had to be included (except if deemed culturally offensive or legally problematic); and❖ decisions on arranging the content were also made by the team based in the USA.Ofcom also considered the jurisdiction test at Article 2(3)(c); it found this to be relevant as although Vice’s head office was in a third country, some decisions on the audiovisual media service were taken in an EU Member State. Ofcom determined that there was no significant part of the UK workforce involved in the audiovisual media service activity because only an estimated 18 of Vice’s 192 staff were based in the UK. In addition, it was determined that the US head office’s authority greatly limited the decision-making capacity of the UK-based staff.**Analysis**In *the Vice News case*, Ofcom made some observations for future regulatory reference. The communications regulator said it is necessary to look at what the website offers as a whole: purely written content or audiovisual material or both? Ofcom noted that a video tab could be an *incidental* part of a text- and photo-based magazine-style website. It also said that faced with similar decisions in future, ATVOD may find it helpful to seek evidence to show how consumers in fact access and use the audiovisual material on the site in question.Ofcom’s decision provides a clear indication that where editorial responsibility for an ondemand programme service (ODPS) is established outside the EU, that service will not fall within the definition of an ODPS for the purposes of the UK Communications Act 2003 and so will not be subject to regulation in the UK.[[72]](#footnote-72) |

**8.5 Regulating paid-for services: who controls YouTube, Netflix and Amazon?**

The wider media landscape in which the public service broadcasters operate is changing rapidly. In today’s market, viewers are no longer bound by the television schedule or watching programmes only on a television set. They have access to a much wider range of content, from a wider selection of providers ranging from the streaming pioneer Netflix or Google’s YouTube. This has contributed to a drop in the viewing of live TV. Whilst Netflix has around 150m global subscribers, there is other serious competition from other US media companies, such as Disney and AT&T-owned WarnerMedia who are taking a share of the market. Apple is also getting ready to launch its own video streaming service and Amazon Prime has taken a fair share of the UK market.

**There are now more UK subscriptions to Netflix, Amazon Prime and NOW TV than to ‘traditional’ pay TV services**. We have already highlighted that **broadcast TV remains popular but viewing among 16 to 34-year-olds is moving online** as Ofcom’s Media Nations UK Report in 2018 pointed out. The report highlights a competitive shift within the UK television industry, driven by the rise of the major global internet companies and the changing habits and preferences of UK audiences. With more choice for viewers than ever before, traditional UK broadcasters are competing for viewers in an increasingly fragmented landscape.Spending by the BBC, ITV, Channel 4 and Channel 5, on new UK-made TV programmes fell to a 20-year low.[[73]](#footnote-73) At the same time, people are spending less time watching television: average daily broadcast viewing on the television set fell by nine minutes in 2017 – and is down 38 minutes since 2012. The amount of revenue generated from pay TV fell for the first time in 2018 after a period of sustained growth.[[74]](#footnote-74) **In music, streaming revenues now outstrip physical sales.**

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See Chapter 10

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The number of UK subscriptions to TV streaming services like Netflix has overtaken those to traditional pay TV, marking a major shift in the UK’s viewing habits.The total number of UK subscriptions to the three most popular online streaming services – Netflix, Amazon Prime and Sky’s Now TV – reached 15.4 million 2018[[75]](#footnote-75), overtaking, for the first time, the number of pay TV subscriptions, at 15.1 million.

Ofcom’s Media Nations UK Report in 2018[[76]](#footnote-76) confirmed that traditional viewing of broadcast television on a TV set fell for the sixth successive year. Between 2016 and 2017, viewing per person declined by 4.2 per cent to 3 hours 22 minutes, down by nine minutes. The Ofcom report stated that the BBC is facing an existential crisis as a result of its failure to reach younger audiences in the face of competition from commercial rivals and online services such as YouTube and Netflix. Nearly half (47.5%) of all the decline in TV viewing levels is due to under 25s.

One in eight young Britons currently consume no BBC content at all in a given week – a worrying figure given the corporation’s current funding model is based on convincing the vast majority of the public to pay £150.50 a year for a TV licence. The regulator pointed out in its report that the online-only BBC Three channel was reaching only about 8 per cent of people in the 16-34 category each week, despite being specifically designed to appeal to younger viewers.

Young people told Ofcom they felt the BBC focused on older audiences too much. ‘Young people also want the BBC to take more risks and felt it was too reliant on conventional formats,’ the regulator said. For young adults (16-34s), the consumption of non-broadcast sources (across all devices) is now greater than their broadcast-derived consumption. They watch subscription video-on-demand services (SVOD) for half an hour a day on average, but the largest chunk of their time is spent on YouTube, which they watch for an hour a day on average. Audiences are also watching content on a much wider range of devices. This includes tablets, smartphones, internet-connected TVs, set-top boxes, and plug-in devices such as Amazon’s Fire TV stick.

Radio listening reached a significant milestone in the first quarter of 2018, as, for the first time, more than half of all listening hours (50.9%) were through a digital platform - DAB, online or through digital TV. This is being driven by an increase in the proportion of adults who now have a DAB set (64%) and the greater choice of national commercial stations now available to listeners.[[77]](#footnote-77)

**8.5.1 Regulating TV streaming services and pay-TV**

In 2017 Netflix screened the 13-episode series ’13 Reasons Why’, aimed at teenagers, based on a novel by Jay Asher. The series depicts Hannah and her graphical account about her own suicide. The Royal College of Psychiatrists warned of potentially tragic consequences of the series. But the creators of the series claimed they were hoping to ‘help’ young people struggling with the issues shown in the show. The Samaritans reported that ’13 Reasons Why’ exposed serious failings in the UK’s media regulation. It remains of serious concern that a drama series, aimed at young audiences, can be produced outside of the UK and made available to UK audiences and yet not be subject to UK media regulation.

Since there have been increasing calls for streaming services to monitor their harmful content, some have actioned against violent content.

In January 2019 some 45 million Netflix subscribers streamed the thriller *Bird Box*, starring Sandra Bullock, in its first week of release: a record for original movie content on the platform. Netflix had to issue a public health warning upon release of the film responding to a growing social media fad for ‘the Bird Box challenge’ in which people emulate characters in the film who must perform every task blindfolded, lest lurking monsters drive them to suicide. Netflix’s call for moderation (but not abstention) from the craze came after thousands of videos posted online showed people stumbling around houses, stairs and woods with scarves wrapped round their eyes.

YouTube also took action against creators who copied or re-enacted scenes from dangerous *Bird Box* challenges, after a wave of incidents prompted by a viral challenge, involved YouTubers who drove blindfolded into oncoming traffic, and trying to imitate online celebrities, such as Jake Paul, walking through blindfolded through traffic. This, in turn, led to a Utah teenager crsashing her car into oncoming traffic whilst repeating the stunt. The original, and still the most famous, challenge to hit YouTube was the ‘Ice Bucket Challenge’ in 2014, attracting over one billion views in one month when ever bigger celebrities jumped on board to support the charitable aims of the challenge. Users who violate the YouTube ‘code’, having their videos removed from the platform, receive a ‘strike’ against their account; this means they are limited in what they can do for 90 days, but then all privileges arfe being restored if they do not receive a second strike in that time. YouTube tightened rules on creators in 2019 and now applies ‘strikes’ to users’ accounts who ‘egregiously’ violate rules in video thumbnails, or links to external content.

More controversially, Netflix took down an episode of the satirical comedy ‘the Daily Show’ where comedian Indian-American Hasan Minhaj had been critical of the Kingdom of Saudi Arabia and Crown Prince Mohammed bin Salman. In his weekly episode, Minhaj had used his comedic voice questioning the brutal killing of the Saudi dissident and *Washington Post* columnist, Jamal Khashoggi, inside the Saudi consulate in Istanbul in October 2018. US senators had linked Khashoggi’s death to the Saudi Crown Prince. The episode of ‘Patriot Act’ with Hasan Minhaj was removed on 2 January 2019, following a legal demands from the Saudi Kingdom which reportedly said the episode violated a Saudi anti-cybercrime law. The episode featured Minhaj mocking the actions of Saudi officials following the murder of Khashoggi, condemning the crown prince’s policies. Netflix said it backed artistic freedom but had to ‘comply with local law’.

Currently, there is no statutory regulation of these streaming services and the Ofcom Code does not apply to television delivered via the internet and on-demand services outside the UK, such as Netflix or YouTube, smart TVs or streaming sticks. The UK Parliament would need to introduce new legislation to extend regulation to online platforms and services. Ofcom does however, regulate Amazon Prime.

That said, the streaming and online services are beginning to regulate their own inappropriate content. YouTube (Google) announced a clampdown on disturbing and inappropriate children’s videos in 2019, following accusations that the site enabled ‘infrastructural violence’ through the long-run effects of its content recommendation system.[[78]](#footnote-78) Google’s new privacy policy provides restrictions which apply to content featuring ‘inappropriate use of family entertainment characters, such as unofficial videos depicting Peppa Pig being ‘tortured’ by a dentist. The company already had a policy that rendered such videos ineligible for advertising revenue, in the hope that doing would reduce the motivation to create them in the first place.

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Age-restricted content is automatically not allowed in YouTube Kids. Age-restricted videos cannot be seen by users who are not logged in, or by those who have entered their age as below 18 on both the site and the app. The Google age-restricted content policy makes clear that their ‘review team’ may place an age restriction on a video once they are notified of the content. Age-restricted videos are then not visible to users who are logged out, are under 18 years of age, or have the ‘restricted mode’ enabled. When evaluating whether content is appropriate for all ages, here are some of the things which Google consider:

# Google/ YouTube policy on harmful or dangerous content (2019)

* **Vulgar language** - such as the use of sexually explicit language or excessive profanity in the video; associated metadata may lead to the age-restriction of the video.
* **Violence and disturbing imagery** – such as terrorist organizations using YouTube for their purpose, including recruitment and content promoting terrorist acts, inciting violence or celebrating terrorist attacks. Graphic or controversial footage may be subject to age-restrictions or a warning screen.
* **Nudity and sexually suggestive content** – such as pornography or videos containing fetish content. These will be removed or age-restricted depending on the severity of the act in question. In most cases, violent, graphic, or humiliating fetishes are not allowed to be shown on YouTube. Content that contains nudity or other sexual content may be allowed if the primary purpose is educational, documentary, scientific, or artistic, and it is not gratuitously graphic. For example, a documentary on breast cancer would be appropriate, but posting clips out of context from the same documentary might not be.
* **Portrayal of harmful or dangerous activities** – such as instructional bomb making, challenges that encourage acts that have an inherent risk of severe physical harm, pranks that make victims believe they are in physical danger, pranks that cause emotional distress to children, hard drug use or anhy acts that may result in serious injury

**8.5.2 Regualting the watershed**

So, how is the watershed regulated on streaming and paid-for services such as Netflix? Broadly speaking, the watershed covers all aspects of unsuitable material, including distressing images, after 9 p.m., in order to protect children. Ofcom rules state that even after 9 p.m. frequent bad language or violence must be justified by context in all programming and special care must be taken for shows that children are liable to watch.

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See above 8.4.1

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The fact that many people now record their viewing and watch at another time presents issues, as does the fact that YouTube services can be freely available online. None of these online services, such as Netflix, Hulu, Rakuten, YouTube TV, HBO Online, Pluto TV, FuboTV and many more, have any watershed restrictions. And how an on-demand service is regulated depends on where the provider is established and the server is situated. Most of these are outside the EU, therefore fall outside the EU’s Audio Visual Media Services Directive (AVMS).[[79]](#footnote-79)

European programming no longer allows some programmes partly financed from European sources to be screened after the watershed. In the case of Netflix, it falls within the jurisdiction of Holland, but it still has to abide by the terms of the Directive (AVMS), which dictates standards for on-demand services, particularly covering potential harm to children. But Ofcom has no power to issue sanctions on Netflix, as it is regulated by the Dutch regulator and its server and overall jurisdiction is situated in the USA.

The country of origin principle is therefore at the core of this Directive, as it is regarded essential for the creation of an audio-visual internal market to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.[[80]](#footnote-80) It is worth having a look at the Directive in detail and what it says about the watershed; Chapter VI Article 16 AVMS (‘Promotion of Distribution and Production of Television Programmes’) states:

1. In accordance with the Audio Visual Media Services (‘AVMS’) Directive, television broadcasters shall ensure that, where practicable, and subject to paragraphs 2 and 3:

a) a majority of their Transmission Time is devoted to European programming;

b) at least 10% of their Transmission Time or programming budget is devoted to European programming created by producers who are independent of broadcasters; and

c) at least 50% of programming included in their Transmission Time in accordance with (b) above is created no less than five years earlier by producers who are independent of broadcasters.

Ofcom has regulatory procedures in place for the handling and resolution of complaints, or conduct investigations, for potential breaches of rules applying to on-demand programme services (ODPS) such as Amazon Prime. However, these procedures do *not* apply to BBC UK public broadcasting ODPS, but *do* apply to the BBC’s commercial world-wide services. It is important to note the nature of ODPS (in comparison with linear broadcast) that material will often remain available for viewing on demand, for a long time, meaning a risk of any harm from a breach may be ongoing. Breaches are potentially very serious where the protection of minors is concerned.[[81]](#footnote-81) Complaints under these procedures can be made to Ofcom by any person or body who considers that an ODPS provider has failed to comply with the relevant requirements as set out in the Rules. Examples related to the Ofcom Code are cited here:

**Making a complaint to Ofcom about an ODPS provider**

* Harmful Material: Material Likely to Incite Hatred (Rule 10).
* Harmful Material: Protection of under 18s (Rule 11).
* Sponsorship (Rule 12).
* Product Placement (Rule 13).
* Harmful Material: Prohibited Material (Rule 14).

Ofcom will not normally consider a complaint unless the complainant has sought to follow the ODPS provider’s own complaints procedure first.

**8.6 Regulating online harmful content**

The internet has revolutionized how people communicate and access news, entertainment and other media, creating an increasingly converged communications market, with the major UK communications companies increasingly in the business of telecoms, content and online distribution. Innovation in online services has delivered major benefits to individuals and society. But there is an intensifying, global debate over how to address the various problems that people experience online. Issues include:

* Young people’s exposure to harmful content and conduct;
* privacy and use of personal data;
* the growth in cyber-crime;
* concerns with the ways in which online businesses compete, and the impact of this on innovation, investment and consumer choice; and
* the potential effects on content production, including journalism, and media plurality.

Issues related to harmful content and conduct – including illegal and age-inappropriate content, misleading political advertising, ‘fake news’ and bullying – are particular areas of focus. The UK Government has said it will legislate to improve internet safety. The UK Parliament’s Digital, Culture, Media and Sport (DCMS) Committee has published an interim report on disinformation and ‘fake news’, which includes a recommendation that existing broadcasting standards be used as the basis for new online standards.[[82]](#footnote-82)

**8.6.1 Molly Russell’s suicide after Instagram self-harm searches**

British schoolgirl, Molly Russell, 14, took her own life in November 2017. When her family looked into her Instagram account they found distressing material about depression and suicide. In a distressing video account, Molly’s father, Ian Russell, told the BBC he believed that Instagram was partly responsible for his daughter's death. He said that harmful suicide and self-harm content online ‘has the effect of grooming people to take their own lives’ and that images are easily found at #suicide or #selfharm. For a year Molly’s family tried to get Molly’s iPhone and iPod Touch unlocked to see what she was exposed to and what messages she might have received the night she took her life. They were rebuffed by Apple. Yet Ian Russell and his oldest daughter could see some of the sites Molly had accessed on the family computer. They found her Instagram account and saw that among the hundreds of people she followed, were 50 or 60 with tags such as ‘sad’, ‘lonely’ or ‘depressed’. The sites seemed to be completely encouraging of self-harm, linking depression to self-harm and to suicide, making it seem inevitable, normal, graphically showing things such as cutting, biting, burning, bruising, taking pills. Mr Russell told the BBC, ‘’here’s no doubt that Instagram played a part in Molly’s death.’ When he examined Molly’s email account, he was shocked to realise that Pinterest had been sending her automated messages suggesting she look at distressing images.[[83]](#footnote-83)

Mr Russell had asked Apple to help with unlocking Molly’s devices, but calls to its call centre proved futile. Only when the inquest into Molly’s death opened in north London in January 2019, did Coroner Andrew Walker, presiding over the inquest, write to Apple, WhatsApp, Instagram, Snapchat, YouTube and Pinterest, asking the tech firms to disclose everything they held about Molly’s accounts. In a statement, Adam Mosseri of Instagram responded that it did not allow content that promoted or glorifies self-harm or suicide and would remove content of this kind. Adam Mosseri, who took over Instagram after the app’s founders departed suddenly in 2018, promised a series of changes such as the introduction of ‘sensitivity screens’ to hide images of self-harm in an attempt to protect young people who use the site. In a commentary for the Daily Telegraph, Mosseri stated that the Facebook-owned app already bans posts that promote or encourage suicide or self-harm, but that Instagram faced challenges in finding those posts to take them down, as well as ensuring that users could still share imagery related to those topics in ways that allow them to express themselves but do not amount to incitement.[[84]](#footnote-84)

The UK government has urged social media companies to take more responsibility for harmful online content which illustrates and promotes methods of suicide and self-harm. Digital Minister Margot James promised to ‘crack down’ on many of the social media platforms that had fallen short in their response to online bullying, abuse and misinformation. In a speech at a conference for ‘Safer Internet Days’ at BT’s UK Safer Internet Centre in February 2019, Ms James said: ‘We will soon be publishing an Online Harms White Paper which will set out clear expectations for companies to help keep their users, particularly children, safe online. We will introduce laws that force social media platforms to remove illegal content, and to prioritise the protection of users beyond their commercial interests.’[[85]](#footnote-85)

Apart from self harm and suicide apps children are also using dating apps, lying about their age and thereby being manipulated and groomed by adults. Anne Longfield, the Children’s Commissioner for England and Wales, called for a statutory duty of care which would ensure that social media companies take more responsibility for what is happening on their platforms. In a letter to the Times she wrote: ‘I hope the government and the companies themselves will seize the moment and back measures that would make them do more to protect children from harm. Those who wish to exploit children are always quick to spot opportunities to do so. It is our duty to be equally speedy in preventing them. The era of letting the internet giants write their own rules is coming to an end.’[[86]](#footnote-86) The failure of tech giants to enforce adult age limits on dating apps has placed a generation of children at risk of grooming and sexual exploitation. Lax controls on apps used by millions, such as Tinder and Grindr, are giving sexual predators and paedophiles easy access to children across Britain.

Self-harm, suicide, bullying and sexual content should have no place on social media sites, yet Facebook, YouTube, Twitter, Snapchat and Pinterest have repeatedly failed to enforce their own rules and have failed to protect young people despite repeated promises. They should be forced by law since the tech companies have lost control. Alongside legislation a digital ombudsman could also be introduced.

Since the inquest into Molly Russell’s suicide, social media companies have faced increasing demands from the UK government to protect children from harmful online content, amid growing concerns over suicide and self-harm among teenagers. Health Secretary, Matt Hancock, warned companies including Facebook, Google and Twitter that would use the law to force them to act should they fail to remove inappropriate content. He warned that the benefits of new technology could be ‘lost because of reasonable concerns about its risks’. In an exclusive interview to *The Sun on Sunday* Mr Hancock revealed he would set up a handpicked cyber-squad to oversee the removal of self-harm pictures from Instagram. He declared: ‘This is far too important to be left to the whims of social media companies.’[[87]](#footnote-87)

New European legislation is scheduled to extend some protections to activities of video sharing platforms, such as YouTube. As we have seen above, some of the major online platforms have already introduced a range of initiatives aimed at protecting their users from harmful content, although concerns remain around the consistency and effectiveness of these measures.

Germany introduced a controversial new law which allows for the deletion of hate-speech, defamatory, extreme-sexual etc. content that can harm children, teenagers and vulnerable adults from TV, on-demand and paid-for services, and social media platforms.

The Network Enforcement Act[[88]](#footnote-88) (NetzDG) came into full effect on 1 January 2018. Though the NetzDG covers mainly social media platforms it applies to all telemedia service providers which, for profit-making purposes, operate internet platforms and pay-TV services which are designed to enable users to share any content with other users or to make such content available to the public (i.e. social networks).[[89]](#footnote-89) Journalistic or editorial content remain the responsibility of the service provider and do not constitute ‘social networks’ within the meaning of this Act. Online platforms and paid-for TV services face fines of up to €50m (£44m) if they do not remove ‘obviously illegal’ hate speech and other offensive publications within 24 hours of receiving a notification. A seven-day period is granted for removal of ‘illegal’ content. [[90]](#footnote-90) But a number of controversial deletions and suspensions in the German law’s first few days have bolstered critics who say the statute impacts on free speech, as companies try to avoid fines.

**8.6.2 Regulating harmful content in broadcasting**

How is harmful content regulated in broadcasting and private streaming services? The Ofcom Broadcasting Code allows for films rated up to ‘15’ by the BBFC to be broadcast during the daytime on premium subscription channels and up to ‘18’ on pay per view film channels, provided that they are protected by a mandatory PIN code – called mandatory daytime protection and cannot be removed or bypassed by viewers. But the these PIN code rules only affect premium pay channels in the UK, such as Sky and Virgin. Technical limitations make it unfeasible for free-to-air services delivered via digital terrestrial television, such as Freeview, to use a mandatory daytime protection system. Ofcom has made it clear that hard core pornography must not be broadcast pre-watershed.

But the NSPCC[[91]](#footnote-91) has raised concerns that PINs are an inadequate form of protection because children often gain knowledge of the PIN, either through parents or older siblings, and may then access potentially harmful content for extended periods of time until a parent opts to change the PIN. The NSPCC also said that children may sometimes be more ‘tech savvy’ than their parents; particularly older adults, and parents can be dependent on their children to install PINs on devices.[[92]](#footnote-92)

It is of course up to parents and supervising adults to invoke parental controls on subscriptions on all devices, Netflix offers these safeguards for example. The principle of choice was surveyed by Ofcom’s in 2018, which found that a majority of adults (58%) thought that adults should be able to view post-9 p.m. watershed content on TV channels during the daytime or early evening if a mandatory PIN was in place to prevent children from accessing the content. Agreement levels were higher (73%) among those who watched post-9 p.m. watershed content during the day on catch-up and VOD services. However, personal interest was lower (24%), with the main reason cited that they tended not to watch TV during the day or early evening, rather than an objection to being able to view post-9 p.m. watershed programmes behind mandatory daytime protection.[[93]](#footnote-93)

**8.6.3 The future of regulating online platforms: summary and analysis**

In this section we discussed experiences by regulators – such as Ofcom – social media platforms and individual challenges, such as by Molly Russell’s family, the teenager who committed suicide in 2017 ‘inspired’ by harmful content on Instagram. What then are the specific challenges presented online and in broadcasting and how they might affect future regulation. These include:

* **Scale:** the sheer volume of text, audio and video generated or shared by online platforms is far beyond that available on broadcast television and radio.
* **Service variety and innovation:** the nature and features of online platform services vary widely, including the level of control over what content users see;
* **Multinational nature of online platform operators:** most of the services are US-based and fall outside EU jurisdiction, i.e. fall outside UK and EU law enforcement.
* **Role in content creation:** many online platforms do not create or commission the content that is accessed by their users; a great deal is audience and client- generated; though this should not exhonourate social media platforms, such as Facebook (and therein Instagram), YouTube (Google) and Twitter et al.
* **Variety of content types, voices and opinions:** the diversity of types of content available online is much broader than that of traditional broadcast content and includes user-generated content and conversations between people; many will argue that the regulation of such content would infringe freedom of expression.
* **Audience expectations and context differ between broadcasting and online**. In some areas, people’s expectation of protection online maps closely to the standards that apply to broadcasting – the protection of minors, protection from illegal content and from a range of other harmful content and conduct. There are certain broadcasting standards – such as those for impartiality and accuracy (Ofcom) – that might be undesirable or impractical to introduce online in the same way.

Currently, the UK regulates audiovisual media services in line with the requirements of the European-wide Audiovisual Media Services (AVMS) Directive[[94]](#footnote-94) which also includes the regulation of the video sharing platforms such as YouTube.

Harmful content and conductare now the focus of multiple EU governments’ policy initiatives, and each Member State must now impose certain minimum requirements on audiovisual media services regulated according to the legislative principles of the AVMS. The quid pro quo is that a service regulated in any Member State may then be transmitted for reception in other Member States without further regulation (commonly referred to as the ‘country of origin principle’). The UK is currently a significant hub for audiovisual services, being the home to a wide variety of audiovisual media services intended for reception both within the UK and elsewhere.

If the UK were to cease to be party to AVMS Directive (after Brexit), there are some benefits in that the UK would no longer have to be bound by the minimum requirements laid out in the AVMS Directive.

That said, current UK regulation leans towards being more, rather than less, restrictive than those minimum requirements and the UK would still be bound by the European Convention on Transfrontier Television.[[95]](#footnote-95) This Convention was the first international treaty creating a legal framework for the free circulation of transfrontier television programmes in Europe, through minimum common rules, in fields such as programming, advertising, sponsorship and the protection of certain individual rights. It entrusts the transmitting signatory states with the task of ensuring that TV programme services transmitted comply with its provisions. The Convention provides similar rules to the AVMS Directive in terms of freedom of reception of linear services originating from a signatory state.  However, not all EU member states have ratified the Convention and unlike an EU Directive, the way the Convention has been incorporated in local law will be relevant, meaning that anyone seeking to rely on it will need to seek local advice in each relevant jurisdiction.

Several countries including Germany and Australia have enacted new legislation in relation to ‘fake news’ and online harmful content. The General Data Protection Regulation (GDPR) has set common rules within the European Economic Area (EEA) on how organizations and individuals can collect, process and store personal data.

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See Chapter 6.5

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Regulators in the UK, France, Germany have undertaken enforcement action and investigations around data protection. One example is the UK ICO’s investigation into the use of data analytics in political campaigns.

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See Chapter 6.4

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Global policymakers are considering the competitive dynamicsof online markets, amid wider concerns from academics and other experts.[[96]](#footnote-96) In the UK, the Cairncross Review (2019) commissioned by the Government, looked at commercial relationships between online platforms and news publishers, among other things. Dame Frances Cairncross[[97]](#footnote-97) was appointed chair of the review into the sustainability of high-quality journalism in the UK in March 2018. Its purpose was to examine and make recommendations relating to:

* + the overall state of the UK news market;
	+ threats to financial sustainability of the UK news industry;
	+ the role and impact of digital search engines and social media platforms;
	+ and the role of digital advertising.

Cairncross considered ways in which the news industry in the UK could become more sustainable, supporting it whilst it transitioned from print to digital. The report presents an overview of the challenges facing high quality journalism in the UK, considers where intervention might be focused, and puts forward a range of recommendations to help secure its future. The Cairncross Report has wide-ranging implications for the news media market, the threats to the financial sustainability of publishers, the impact of search engines and social media platforms, and the role of digital advertising. The aim of the review was to advocate measures that would ensure the market in which journalists and publishers operate today is efficient, and to defend their most democratically significant outputs. In tackling the challenging market facing publishers, the Cairncross Review made the following recommendations:

1. Online platforms should set out codes of conduct for commercial agreements with news publishers, which should be approved and overseen by a regulator ‘with powers to insist on compliance’.
2. The UK competition watchdog, the Competition and Markets Authority, should carry out a market study into the online advertising industry, taking a closer look at the different players, their ‘roles, costs and profitability’ and identify whether the market is working and what remedies are needed, if any.
3. A regulator should supervise online platforms’ efforts to improve users’ news experience, including expanding efforts to identify reliable and trustworthy sources. ‘This task is too important to leave entirely to the judgment of commercial entities.’
4. The Government should develop a media literacy strategy, working with Ofcom, online platforms and news publishers and broadcasters, voluntary groups and academics to ‘identify gaps in provision’ and opportunities to collaborate further.
5. A new Institute for Public Interest News should be created as a dedicated body, free from political or commercial obligations, that can ‘amplify efforts’ to ensure the future sustainability of public-interest news.
6. The Government should launch an innovation fund to develop new approaches and tools to improve the supply of public-interest news which would ultimately be run by the Institute for Public Interest News once it is established.
7. The Government should introduce new forms of tax relief, including extending zero-rated VAT to digital newspapers and magazines as well as digital-only publications, and develop a new form of tax relief, under the Charities Act or along the lines of Creative Sector reliefs, to support public interest journalism.
8. The local democracy reporting service, managed by the BBC in partnership with the News Media Association, should be expanded. Eventually the management of this should be passed to Institute for Public Interest News.
9. Ofcom should assess whether BBC News Online is ‘striking the right balance’ between getting a wide reach for itself and driving traffic to commercial publishers, particularly local ones. The BBC ‘should do more to share its technical and digital expertise’ to help local publishers.[[98]](#footnote-98)

The Cairncross Review was published at a time when the UK print press were facing declining print and circulation revenues and stiff competition for online advertising revenues from the Duopoly, namely Facebook and Google. In her report, Dame Frances recommended expanding the local democracy reporter scheme (which at that time employed about 140 journalists) - set up by the BBC and News Media Association. Regional publishers of local newspapers welcomed this expansion, advocating using the infrastructure already in place in regional newsrooms nationwide. Jonathan Heawood, chief executive of the (alternative to IMPRESS) regulator Impress, called The Cairncross Review a milestone in the history of journalism. ‘Dame Frances has focused not on rebuilding the industry of the past, but on sustaining high-quality journalism for the future.’[[99]](#footnote-99)

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In April 2019 the UK Government announced in its White Paper ‘Online Harms’ that a statutory regulator would be established with powers to punish internet giants as part of new measures to crack down on the spread of harmful and extremist content online.[[100]](#footnote-100) Tech companies and social media platforms will be compelled to abide by a ‘duty of care’ code at the behest of a digital regulator, according to draft proposals, to rival Ofcom and the Information Commissioner’s Office (ICO). The Rt Hon Jeremy Wright MP, Secretary of State for Digital, Home Secretary Culture, Media and Sport, and Home Secretary, The Rt Hon Sajid Javid MP, jointly set out their vision for:

* + A free, open and secure internet;
	+ Freedom of expression online;
	+ An online environment where companies take effective steps to keep their users safe, and where criminal, terrorist and hostile foreign state activity is not left to contaminate the online space;
	+ Rules and norms for the internet that discourage harmful behaviour;
	+ The UK as a thriving digital economy, with a prosperous ecosystem of companies developing innovation in online safety;
	+ Citizens who understand the risks of online activity, challenge unacceptable behaviours and know how to access help if they experience harm online, with children receiving extra protection;
	+ A global coalition of countries all taking coordinated steps to keep their citizens safe online;
	+ Renewed public confidence and trust in online companies and services.[[101]](#footnote-101)

The new regulator (not yet defined at the time of publication) has the power to levy fines against companies for breaching standards. Senior managers will also be subject to these fines and held liable in a criminal context. The new regulatory framework will apply to companies that allow users to share or discover user-generated content or interact with each other online (which is a reminder of the Cambridge Analytica scandal).

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The regulator will take a risk-based and proportionate approach across this broad
range of business types. This will mean that the regulator’s initial focus will be on those companies that pose the biggest and clearest risk of harm to users, either because of the scale of the platforms or because of known issues with serious harms.

In addition the ICO published proposals on 12 April 2019 on 16 standards that online services, such as Facebook and Instagram, must meet to protect children’s privacy (under 18s). Snapchat could be prevented from allowing the age group to build up ‘streaks’, under the new rules proposedby Information Commissioner Elizabeth Denham. She believes the tools, such as ‘likes’, encourage users to share more personal data and spend more time on apps than desired. ‘Likes’ also help build up profiles of users' interests while streaks encourage them to send photos and videos daily. The ICO’s ‘Age appropriate design Code’ sets out the standards expected of those responsible for designing, developing or providing online services likely to be accessed by children and which process their data. In addition to calling for restrictions on children being exposed to so-called ‘nudge techniques’, the ICO advocates internet firms make the following changes among others for their younger members:

* make privacy settings "high" by default
* switch location-tracking off by default after each session and make it obvious when it had been activated
* give children choices over which elements of the service they want to activate and then collect and retain the minimum amount of personal data
* provide "bite-sized" explanations in clear language about how users' personal data is used
* make it clear if parental controls, such as activity-tracking, are being used

The ICO suggests that firms that do not comply with the code could face fines of up to 20 million euros (£17.2m) or four per cent of their worldwide turnover under the General Data Protection Regulation (GDPR).[[102]](#footnote-102)

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See Chapter 6.4

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**8.6.4 Does online regulation infringe freedom of expression?**

The right to freedom of expression includes freedom to seek and receive information. It is a key component of democratic governance as the promotion of a participatory decision-making process in a modern democratic internet society. While the internet has brought global freedom to communicate and exchange ideas, its growth has introduced difficulties too, for instance, the expression of personal opinion on social media sites bringing with it risk of ‘fake news’, misinformation, defamation, harassment and invasion of privacy.

Freedom of expression is fundamental to the functioning of democracy. This applies especially to the communication of opinions and includes views and arguments advanced on social media platforms and traditional broadcasts (see: *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* (2008)[[103]](#footnote-103)). Even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgement without any factual basis to support it may be excessive (see: *Dichand v Austria* (2002);[[104]](#footnote-104) also: *Monnat v Switzerland* (2006)[[105]](#footnote-105)).

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See Chapter 1

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Freedom of expression includes not only the inoffensive, but also the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence (see: *Redmond-Bate v DPP* (1999)[[106]](#footnote-106)). But in the *Otto-Preminger-Institut v Austria* (1994)[[107]](#footnote-107) case, the ECtHR concluded in relation to the obligations expressed relating to Article 10(2) ECHR, that expressions which are gratuitously offensive to others must be avoided wherever possible. It is then accepted that Strasbourg jurisprudence does not protect gratuitous abuse unrelated to a topic being discussed (on the radio for example), but this is a very limited exception to the broad protection of political expression. For this reason, the regulatory body – Ofcom’s – decision in the *Jon Gaunt*[[108]](#footnote-108) case may well be incompatible with Convention Article 10 if tested in the ECtHR; though to date radio broadcaster Jon Gaunt has not pursued his case in the Strasbourg Court.

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See above 8.4

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In the *CG* case (below), the Belfast court granted a right to privacy to a convicted sex offender, including any publications on social media (here: Facebook).

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| **❖ KEY CASE** | ***CG v Facebook Ireland Ltd and Joseph McCloskey* [2015] NIQB 11. Queen’s Bench Division (Northern Ireland) 20 February 2015** |
| **Precedent**❖ Every person has an expectation of privacy online (on the internet) in respect of their personal information – including sex offenders.❖ Information which can harm the public interest may also create a risk of re-offending.❖ A social media company (here: Facebook) is a primary publisher and liable for misuse of private information.❖ An ISP must remove any publication (relevant page/s) from its website which exposes the claimant to vilification and the risk of serious harm.❖ Regulation 22 of the Electronic Commerce (EC Directive) Regulations 2002 take into account all matters which appear to be relevant with postings on social networking sites.**Facts**CG was a convicted sex offender, jailed for five years and released on licence. He lived with his disabled father, and had a disabled son with whom he had regular, supervised contact. He had complied with the terms of his licence, had been assessed as not presenting any significant risk to the public and was under supervision by the authorities. Joseph McCloskey operated a page on Facebook’s website named ‘Keeping our Kids Safe from Predators 2’. McCloskey had posted a newspaper article with a photograph of CG from the time of his conviction on the Facebook page. In response, between 160 and 180 comments appeared on the page containing abusive and violent language as well as expressions of support for acts of violence against CG. There were also postings of his location, abusive language in relation to his family and allegations of other criminal acts.CG lived in increased fear of violence, worried about his whereabouts being identified. Direct contact with his son was suspended and relations with other family members were strained. CG told the court that he had been approached and threatened in public as a result of the posts.Facebook also facilitated a page operated by the father of one of CG’s victims, namely RS. The father had posted a photograph of CG and information about his whereabouts which attracted more comments suggesting that CG should be harmed. No proceedings were brought against RS. After receiving letters from CG’s lawyers, Facebook refused to investigate the comments until CG provided the URL for each specific comment. Facebook removed the entire series of comments two weeks later.CG claimed against both defendants that the material posted amounted to a misuse of private information, was in breach of Articles 2, 3 and 8 ECHR and amounted to harassment of him contrary to the Protection from Harassment (Northern Ireland) Order 1997 as actionable negligence. CG further asserted that Facebook was in breach of the Data Protection Act 1998 (DPA). It was further submitted for CG that the case against Facebook was most properly categorized as ‘misuse of private information’ and against Mr McCloskey as ‘misuse of private information and harassment’, and it was upon these claims that the judgment was focused.[[109]](#footnote-109)CG sought damages and injunctions preventing Mr McCloskey from harassing him by publishing any information on Facebook’s website, and requiring Facebook to terminate McCloskey’s page.**Decision*****The case against Joseph McCloskey***The High Court in Northern Ireland found that Mr McCloskey’s purpose in setting up the profile and Facebook page was to destroy the family life of sex offenders, to expose them to total humiliation and vilification, to drive them from their homes and expose them to the risk of serious harm. Stephens J found that McCloskey knowingly encouraged harassment of sex offenders by other individuals by the comments he made and by the aim and purpose of his page on Facebook.[[110]](#footnote-110)The court found that Mr McCloskey had engaged in a course of conduct in relation to harassment of CG so that he ‘was extremely concerned and lived in increased fear as he anticipated violence being inflicted on him’.[[111]](#footnote-111)In relation to misuse of private information and the DPA the court found that CG’s privacy, data protection and Article 8 rights had been infringed. The data disclosed via social media had been ‘sensitive personal data’ under the DPA, including information relating to sexual life, the commission of offences and criminal proceedings. Stephens J said that CG had an expectation of privacy in relation to such information after his conviction had been spent. Accordingly, Mr McCloskey was liable for harassment and misuse of private information of CG.***The case against Facebook***Stephens J ruled that Facebook had misused private information in not deleting the information about CG on the ‘Keeping our Kids Safe from Predators 2’ profile, the content of which was unlawful being a misuse of private information. The page and postings had incited violence and hatred and had placed CG in serious risk of harm. The judge said that this was indiscriminate and could have led to the development of public order situations. Facebook was the primary publisher and was liable for misuse of private information.The court ruled that Facebook could not claim lack of knowledge under regulation 22 of the Electronic Commerce (EC Directive) Regulations 2002;[[112]](#footnote-112) and was therefore liable for the whole period of posting.[[113]](#footnote-113) The court reached the same conclusion in relation to the postings on RS’s profile page except that liability only arose from the date of receipt of CG’s solicitors’ letters in relation to each of the two series of postings.Stephens J pointed out that regulation 22 also provides that the court ‘shall take into account all matters which appear to it in the particular circumstances to be relevant’. The judge was highly critical of demands made by Facebook in correspondence for the provision of the URL for every offending posting and comment, together with an explanation in relation to each as to why it transgressed, before it would take any steps to investigate a complaint. Stephens J commented that regulation 22 is ‘not an attempt to be prescriptive as to precisely how notice is to be given to a service provider or as to how actual knowledge is required’ and must be seen in the context of a requirement to take into account all matters which appear to be relevant.[[114]](#footnote-114)The court awarded CG damages totalling £20,000. An anti-harassment injunction was made against Mr McCloskey and a mandatory injunction was made against Facebook requiring it to terminate the entirety of the ‘Keeping our Kids Safe from Predators 2’ profile, including all material referring to other sex offenders.[[115]](#footnote-115)**Analysis**The Northern Ireland High Court’s decision in *CG* has a number of notable features. First, a mandatory injunction was made against Facebook requiring it to take down an entire page despite the fact that the offending material had been removed from it immediately following receipt of CG’s solicitors’ letter. Secondly, the mandatory injunction was made not only to protect the privacy rights of CG but of other sex offenders featured on the web page. Thirdly, the judge used the provisions of the Data Protection Act 1998 for the definitions of sensitive personal data and misuse of private information. Fourthly, Stephens J declared Facebook a primary publisher rejecting its argument that the social media provider had no ‘actual knowledge’ for the purpose of regulation 22 of the Electronic Commerce (EC Directive) Regulations 2002 for each offending post or comment (unless and until it had provided with the URL) (see also: *AB Ltd v Facebook Ireland Ltd* (2013);[[116]](#footnote-116) *XY v Facebook Ireland Ltd* (2012)[[117]](#footnote-117)). |

In December 2008, the European Court of Human Rights handed down its judgment in the *Norwegian Pensioner* case.[[118]](#footnote-118) The ECtHR found that a blanket ban on advertising for political parties violated Article 10 ECHR. The background to the case concerned regional elections in Rogaland province where the Pensioner Party (Pensjonistparti *–* located in Stavanger) broadcast three political advertising slots on TV (‘TV Vest’) in the spring of 2003 with elections in September that year. Since political advertising is illegal in Norway and contravenes the broadcasting legislation, the Pensioner Party received a warning from the Norwegian Media Authority. Nevertheless, the commercials were broadcast from 14 August to 13 September and TV Vest was fined NOK 35,000 by the Oslo City Court (Oslo tingrett) for violating the prohibition on political advertising in TV broadcasts.[[119]](#footnote-119)

TV Vest appealed against the decision stating that the prohibitions in the Norwegian Broadcasting Act and Regulations were incompatible with the right to freedom of expression under Article 10 ECHR. The City Court upheld the Media Authority’s decision in February 2004, supported by the Norwegian Supreme Court in November of that year. The case progressed to the Strasbourg Human Rights Court where Christos Rozakis, President of the ECtHR (First Section) ruled that there had been a violation of Article 10, because the proportionality aspect had not been addressed; there had not been:

[a] reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means deployed to achieve that aim. The restriction which the prohibition and the imposition of the fine entailed on the applicants’ exercise of their freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10, for the protection of the rights of others, notwithstanding the margin of appreciation available to the national authorities.[[120]](#footnote-120)

The judgment in the *Norwegian Pensioner* case caused great controversy and subsequently had considerable consequences for political advertising in other signature countries to the Convention.

In the light of rather mixed messages from Strasbourg jurisprudence, it is increasingly left to the regulators of a country to strike a balance between the parameters of indecent, obscene and violent material as well as sensitive issues, such as ethics and morals, in broadcasting, media and online platform publications. In this context, it is submitted that the courts should regard rulings or adjudications by a regulatory authority as an additional ‘jurisprudence’ to assess what are ‘generally accepted standards’. Examples are the Ofcom Broadcasting Code or IPSO’s Editors’ Code.

Where should the line be drawn between regulating indecency, obscenity, invasion of privacy on one hand and freedom of expression and ‘freedom to view’ and ‘freedom to blog and tweet’ on the other? Ultimately should this not be left to the autonomy of and freedom to choose of the end-user? While the international community is fast promoting the transfer of technology and information, there appear to be a number of different policies and laws in place across Europe, the United States[[121]](#footnote-121) and other international jurisdictions, each attempting to regulate, control and curtail the internet and digital media technology.

In summary, regulation of the internet as far as online activities are concerned poses ongoing challenges to national governments and the big tech companies should take more responsibility for what is published on their sites.

**8.7 Advertising Standards**

Print media advertising has, in the past, been the most widely used form of advertising. Traditionally advertisements (‘ads’) appeared in newspapers or magazines and occasionally in form of brochures or fliers. With the demise of newspaper publishing, the print media has been losing increasing advertising revenue as people are browsing online. A new way of advertising, especially on social media platforms, has grabed individuals’ attention. The structure of the online advertising sector and the enormous growth in the digital advertising business brings with it potential harms to young and vulnerable people.

In addition to online advertising, brands use online platforms for other forms of marketing, not generally considered to be online advertising, such as influencer marketing and product placement. This can involve brands paying social media influencers to mention advertisers’ products and services in their social media output. Online display advertising is often targeted to reach the right people, at the right time in the right context in order to achieve an advertiser’s objectives.

The online advertising market has evolved fast. Emerging online advertising formats include augmented reality (e.g. sponsored AR lenses), virtual reality (e.g. 360 video ads), dynamic content optimisation (e.g. creating different ads for each user) and voice advertising (e.g. paid search results on voice assistants). Increasingly, trading techniques developed for online advertising are being applied to advertising on other platforms such as television and digital out of home (e.g. digital billboards). The main types of targeting used in online advertising include contextual (e.g. content attributes), demographic (e.g. age, gender), behavioural (e.g. interests inferred from user web browsing), retargeting (e.g. targeting users to recapture interest in products or services after they have browsed away from an e-commerce site), personalized (e.g. content personalized to an individual, based on user data).

A report commissioned by the House of Commons Digital, Culture, Media and Sport Committee (‘The Plum Report 2018) found that the UK internet advertising expenditure increased from £3,508m in 2008 to £11,553m in 2017, a compound annual growth rate of 14 per cent. In 2017, internet advertising overtook all other forms of advertising (television, press, radio, cinema and outdoor) combined, to reach 52 per cent share of total advertising spending. Paid for search has been the largest category of online advertising, accounting for 50% of the UK online advertising market in 2017, compared to 36 per cent for display, 13 per cent for classifieds and one per cent other formats. Mobile accounts for an increasing share of the online advertising market, with smartphone expenditure accounting for 45 per cent of total online advertising in 2017, compared to 37 per cent in 2016. Of the internet display advertising market, video (£1.6bn) accounts for the largest share, followed by banners (£1.3bn) and native (£1.0bn). Social media (mainly Facebook and YouTube) accounts for an increasing share of display advertising. In 2017, 57 per cent of online display advertising expenditure was on social media compared to 49 per cent in 2016.[[122]](#footnote-122)

Advertising is generally self-regulated, though at times some ads are close to bribery so that the police have to get involved.

**8.7.1 The Advertising Standards Authority**

The Advertising Standards Authority (ASA) is the UK’s independent self-regulator of advertising across all media. The ASA applies the Advertising Codes, which are written by the Committees of Advertising Practice (known as ‘the CAP Code’). The regulator’s work includes acting on complaints and proactively checking the media to take action against misleading, harmful or offensive advertisements. The ASA senior management team is the executive decision-making team responsible for setting the direction for the organization, overseeing the management of core responsibilities and ensuring the delivery of the regulator’s objectives. The Chief Executive is Guy Parker.[[123]](#footnote-123)

The ASA Council is the jury that decides whether advertisements have broken the advertising rules. Those ads that break the rules have to be withdrawn or changed. Led by ASA Chairman, David Currie[[124]](#footnote-124), two-thirds of the 13-strong Council are independent of industry and the remaining members have a recent or current knowledge of the advertising or media sectors. While it would not be appropriate to publish details of deliberations, the parties to a complaint are made aware of the collective decision of Council, along with detailed reasoning. This information is also made publicly available online by way of detailed weekly rulings.

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See below 8.7.6

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Unlike a statutory regulator, such as OFCOM, the ASA does not have the power to issue fines. But an adjudication (or ruling) which finds a breach of the CAP code will generally request an immediate amendment of or a withdrawal of the ad. This in itself is costly to the ad agency and often results in a greater deterrent than a fine.[[125]](#footnote-125)

Ofcom acts as a backstop regulator, which means the ASA can refer cases to Ofcom if advertising continues to appear despite an ASA adjudication against it. Ofcom can then take immediate action on serious breaches of the ASA rules, for instance by using its statutory powers to order the immediate suspension of an advertisement accompanied by a fine.

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See above 8.4

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The ASA is funded by advertisers through an arm’s length arrangement that guarantees the ASA’s independence. Collected by the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof), the 0.1 per cent levy on the cost of buying advertising space and the 0.2 per cent levy on some direct mail ensure the ASA is adequately funded to keep UK advertising standards high. Advertisers can choose to pay the levy, but they cannot choose to comply with the Advertising Codes or the ASA’s rulings.

The ASA responds to approximately 31,000 complaints each year. It reviews the advertisement against the CAP Code and, if it decides to uphold the complaint, takes up the matter with the advertiser. In the majority of cases the advertiser amends or withdraws the ad. If it refuses, the ASA has a range of sanctions it can apply (though these are not statutory). The ASA also proactively conducts compliance surveys in various sectors, particularly those of public concern.

**8.7.2 Advertising codes: regulating broadcast and non-broadcast advertising**

The Code on the Scheduling of Television Advertising (COSTA), containing rules on how much advertising and teleshopping may be scheduled on commercial television, how many breaks are allowed and when they may be taken. The UK Code of Broadcast Advertising is for television and radio services for which Ofcom retains regulatory responsibility. These include:

* + - the prohibition on ‘political’ advertising;
		- ‘participation TV’ advertising, e.g. long-form advertising predicated on premium rate telephone services – notably chat (including ‘adult’ chat), ‘psychic’ readings and dedicated quiz TV (Call TV quiz services); and
		- gambling, dating and ‘message board’ material where these are broadcast as advertising.

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See above 8.4

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The UK advertising industry is committed to self-regulation for advertising. The requirement for advertising is that it is ‘legal, decent, honest and truthful’. Detailed rules setting out what this means in practice have been drawn up by the Committee of Advertising Practice (CAP) and are known as the Advertising Code or CAP Code. The CAP code deals with non-broadcasting.[[126]](#footnote-126) CAP is primarily concerned with the content of marketing communications and not with terms of business or products themselves. Some rules, however, go beyond content; for example, those that cover the administration of sales promotions, the suitability of promotional items, the delivery of products ordered through an advertisement and the use of personal information in direct marketing. Editorial content is specifically excluded from the Code, though it might be a factor in determining the context in which marketing communications are judged. The main aim of the CAP Code is that advertisements must not mislead or be unfair. There are specific rules that cover advertising to children, and adverts for alcohol, gambling, motoring, health and financial products.

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| **The CAP non-broadcast code applies to:**a. advertisements in newspapers, magazines, brochures, leaflets, circulars, mailings, emails, text transmissions (including SMS and MMS), fax transmissions, catalogues, follow-up literature and other electronic or printed material;b. posters and other promotional media in public places, including moving images;c. cinema, video, Blu-ray advertisements;d. advertisements in non-broadcast electronic media, including but not limited to: online advertisements in paid-for space (including banner or pop-up advertisements and online video advertisements); paid-for search listings; preferential listings on price comparison sites; viral advertisements; in-game advertisements; commercial classified advertisements; advertgames that feature in display advertisements; advertisements transmitted by Bluetooth; advertisements distributed through web widgets and online sales promotions and prize promotions;e. marketing databases containing consumers’ personal information;f. sales promotions in non-broadcast media;g. advertorials;h. advertisements and other marketing communications by or from companies, organizations or sole traders on their own websites, or in other non-paid-for space online under their control, that are directly connected with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitations of donations as part of their own fund-raising activities. |

The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant sections of the legislation concern the protection of children and young persons:

● section 319(2)(a) that persons under the age of 18 are protected; and

● section 319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

The BCPA Code applies to broadcast advertising in the UK. The overarching principles of this Code are that advertisements should not mislead or cause serious or widespread offence or harm, especially to children or the vulnerable.[[127]](#footnote-127) Broadcasters are responsible for ensuring that the advertisements they transmit comply with both the spirit and the letter of the Code. All compliance matters (copy clearance, content, scheduling and the like) are the ultimate responsibility of each broadcaster.

**8.7.3 Data flows in online advertising: the ‘walled garden’**

In the open internet market, data collection and processing are fragmented across multiple different publishers and intermediaries. When AOL first started it was essentially a ‘walled garden’, carefully tended and pruned to encourage users to remain on AOL-owned and affiliated sites. ‘Walled garden’ is a term for a browsing environment that controls a user’s access to content – like Facebook Instant Articles, Snapchat Discover or Twitter Moments. Theoretically, it is more convenient to stay in the proverbial garden than to venture outside. ‘Walled gardens’ have been the major successes of internet tech giants, such as Google*,*Facebook (and therein Instagram)and Amazon which are leading the digital market by taking over **65 per cent of the total advertising spend and representing up to 90 per cent of the industry’s annual growth.** Meanwhile, the rest of the advertising industry is **shrinking** of about three per cent each year.

Increasingly, with the growth of social media platforms, the ‘walled garden’ approach also includes mobile apps that cannot or will not communicate with each other. All internet tech firms rely on the walled garden approach from large numbers of logged-in users’ data sets on their multiple platforms. This logon data allows them to identify users, based on registration data, across devices and browsers. ‘Walled garden’ then meansthey do not share data with third-parties but do allow partners to import data onto their platforms for use in advertising and marketing targeting or to measure attribution.

Data is the lifeblood of the online advertising industry, enabling brands to target advertising and to analyse campaign performance and impact. Data types include user data (demographic, interest, browsing, location, purchasing), device data (browser, operating system), contextual data (ad format, environment) and campaign data. The main sources of data are advertisers (customer data), publishers (browsing data, sign-up data), major internet companies such as Facebook (vast array of data such as location, communications, network of friends, contacts), and specialist data providers. Data may be first-party (collected directly from consumers), second- party (first-party data shared directly with a partner) or third-party data (data sold on via an intermediary). The online advertising market is increasingly divided between the ‘walled gardens’ of major internet companies and the fragmented open internet.

Collecting data can be problematic and lead to errors. For example,when family members share devices and logons, or consumers lie when they fill in forms.All data may quickly become out of date. Consequently, audience advertisingtargeting can be imperfect. The Plum Report found although 91 per cent of digital advertising targeted at over 18-year-olds reached this audience, only 50 per cent of advertising aimed at over 18-year-old females was on target in 2016.[[128]](#footnote-128)

The use of data in advertising has been affected by regulatory developments. The implementation of the General Data Protection Regulation (GDPR) has decreased availability of third-party data in the open internet market and led Google and Facebook to stop third-party access to user IDs. The proposed ePrivacy Regulation (so-called ‘cookies law’) by the EU Commission in January 2019 would require the consent of users for the lawful use of cookies and other advertising identifiers.

The Privacy and Electronic Communications Regulations (PECR)[[129]](#footnote-129) sit alongside the Data Protection Act 2018 (DPA) and the GDPR. They give people specific privacy rights in relation to electronic communications. Specifically relating to:

* marketing calls, emails, texts and faxes;
* cookies (and similar technologies);
* keeping communications services secure; and
* customer privacy as regards traffic and location data, itemised billing, line identification, and directory listings.

In the UK the Information Commissioner is the guardian of all these data protection laws and will commence enforcement action against any organization that persistently ignores their obligations in relation to the DPA, GDPR and PECR. These pieces of UK legislatlion are derived from the EU ‘ePrivacy Directive’[[130]](#footnote-130) which complements the GDPR regime and sets out more-specific privacy rights on electronic communications. It recognizes that widespread public access to digital mobile networks and the internet opens up new possibilities for businesses and users, but also new risks to their privacy. PECR have been amended seven times. The more recent changes were made in 2018, to ban cold-calling of claims management services and to introduce director liability for serious breaches of the marketing rules; and in 2019 to ban cold-calling of pensions schemes in certain circumstances. The EU is in the process of replacing the e-privacy Directive with a new e-privacy Regulation to sit alongside the GDPR. However, the new Regulation is not yet agreed. For now, PECR continues to apply alongside the GDPR.

For network or service providers, Article 95 of the GDPR says the GDPR does not apply where there are already specific PECR rules. This is to avoid duplication, and means that network or service providers only need to comply with PECR rules (and *not* the GDPR) on:

* security and security breaches;
* traffic data;
* location data;
* itemised billing; and
* line identification services.

**8.7.4 Assessment of potential harms in online advertising: dark ads**

The online advertising industry has put in place numerous policies and procedures to quality assure ads and publishers involved in data flows and to prevent fraud. Social media and search platforms generally conduct checks on ads and advertisers involving automated screens and human escalation. The growth and complexity of the online advertising market has generated policy and regulatory debate in the UK and overseas. This debate has included consideration of a number of potential harms to consumers, firms and wider society that could arise as a result of the structure and operation of the sector.

We have by now heard of the dark net. Increasingly, we are made aware of ‘dark ads’ comprising of ‘dark posts’, targeted ads on social media, which do not appear on the user’s timeline. To avoid confusion: this does not mean ‘dark social’, which refers to traffic to your website from social media that is not detected by analytics tools (dark net). Dark ads are different: they do not show up in the feeds of one’s followers. Instead, they show up as sponsored content in the feeds of users you might be specifically targeting. Because these dark ads are not ‘published’ the same way as organic posts, dark posts are more formally known on Facebook as ‘unpublished posts’. This means these ads only exist for the targeted users that see them. Dark ads exist on all major social media platforms; for example, when advertising on Facebook, LinkedIn, Pinterest, and Twitter, the poster can select whether to boost organic content or create a dark post. When it comes to Snapchat and Instagram, all advertising is technically ‘dark posts’ by default.

So, what are the benefit of dark ads on social media? They can boost targeted campaigns and only reach a precise audicen. Here are some reasons for using dark ads:

**1. Precise targeting -** targeted posts on e.g. Facebook can reach users based on several variables, such as age, gender, or areas of interest. The precision factor is much higher since targeted ads use specific keywords.

**2. Optimizing A/B targeting -** targeted headlines for either A or B groups, e.g. a randomly-selected half of the users would see headline A, and the other half would see headline B. A/B testing helps optimize future dark posts based on valuable feedback (by way of maximum clicks to one’s website), thereby improving one’s organic and boosted posts.

**3. Keeping loyal followers’ feeds from looking spammy** – the only people who see your dark ads/ posts are the people you have carefully selected; they, in turn are receiving your tailored ads according to their interests.

## It has become the norm that major tech companies are regulating themselves. However, the challenge for particularly Facebook and YouTube (Google) is the large volume of user-generated content that advertising might be placed against or adjacent to. Facebook has its ‘Community Standards’, setting out what is and is not allowed on Facebook, covering areas such as violence and criminal behaviour, safety, objectionable content, integrity and authenticity and respecting intellectual property. Facebook uses technology and manual review to enforce these standards. Facebook advertisers need to have a Facebook account in order to place ads. Facebook has advertising policies that prohibit certain content (e.g. illegal products, discriminatory practices, tobacco products, and weapons), restrict certain content (e.g. alcohol, dating, gambling) and restrict targeting practices (e.g. discrimination against users, predatory advertising).[[131]](#footnote-131) Facebook uses automated screening involving artificial intelligence (AI) to check compliance with these policies, with escalation to human review. Google Ads takes a similar approach. Snapchat conducts manual checks on ads before these ads are served. Despite these measures, some bad ads are placed in publisher content or fraud takes place. The potential harms can be thought of in terms of three broad categories:

* **Individual harms** – digital advertising fraud and brand risk impacting on individual firms and consumers;
* **Societal harms** - practices which may be detrimental to society, such as non-transparent political advertising or discriminating on the basis of race, gender, religion etc.;
* **Economic harms** - arise from lack of competition or inefficiencies within the sector, such as the dominance of Google Search advertising.

In January 2019 YouTube suspended adverts on the account of former English Defence League leader Tommy Robinson (whose real name is Stephen Yaxley-Lennon; he left the EDL in 2013). Mr Robinson was found to have broken the site’s advertising rules and YouTube found that his channel covered ‘controversial issues and sensitive events’. The decision by the platform meant that the Tommy Robinson channel and account, @TRobinsonNewEra, which had 270,000 subscribers at the time, would no longer earn revenue when people watched his videos. The video posted in January 2019 to the channel showed Mr Robinson punching a migrant on an Italian street and included references to a ‘rape jihad phenomenon’. YouTube said it believed in freedom of expression but also stated its platform had a duty to protect viewers from ‘derogatory and disparaging’ content. The decision came a day after YouTube removed adverts for anti-Islamic group Britain First from its site (16.1.2019), saying they breached its advertising rules prohibiting ‘hatred, intolerance or discrimination’.

Mr Robinson’s account had already been marked as ‘suspended’ by Twitter in March 2018 for four months because he had been judged by the US company of breaching their ‘hateful conduct’ policy when he had posted that ‘90% of grooming gang convictions are Muslims’. Twitter also acted against another account - @tommysnewspage - which had also been associated with Mr Robinson.

As we have seen above in only a brief snapshot of the current advertising market, data is used extensively within the online advertising market to enhance the targeting and measurement of advertising campaigns. Integrated firms and large platforms, such as Amazon, Facebook and Google dominate the market with their ‘walled garden’ approach. This means only they have access to richer and more comprehensive datasets as these platforms operate ‘logged in’ environments for user services, which generates high-quality data on user activity. Smaller, non- integrated firms are unlikely to have access to such data and must therefore rely instead on data from third-party data brokers, which does not perform as well. That said, the new data protection legislation - GDPR and PECR rules - has made access to data more challenging for all players, as they must verify user consent for the usage and sharing of their data.

In February 2019 the House of Commons Digital, Culture, Media and Sport Committee reported to Parliament that the era of internet self-regulation must come to an end, and that the likes of Facebook and Google should face statutory fines for failing to remove harmful content on their UK-based platforms. Further that all tech companies should have a compulsory code of ethics enforced by an independent regulator with statutory powers to launch legal action. The new system of regulation would be funded by a levy on tech companies operating in the UK. Social media companies that breach the code by failing to remove such material would face financial penalties. Jeremy Wright QC[[132]](#footnote-132), Chairman of the Committee proposed these legislative measures:

* **Establishment of an independent regulator** to monitor technology companies for breaches of a new code of ethics, designed to halt the spread of harmful or illegal content.
* **Information Commissioner’s Office (ICO) to investigate** social media platform’s practices surrounding the use of users’ data.
* **Levy on tech companies** to fund the investigative work of a ‘beefed-up’ ICO and new regulatory system.
* **Absolute transparency in online political campaigning**, including clear details on source and funding of all political ads on social media.
* **Electoral Commission’s maximum fine to be increased** from £20,000 to a fixed percentage of a company’s turnover. New powers for the Commission to obtain information from social media companies.[[133]](#footnote-133)

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See below 8.9

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How is gaming and betting advertising regulated? The Football World Cup 2018 in Russia sent Britain into an unprecedented betting frenzy as England’s winning start and a surge of gambling adverts on TV encourage viewers to bet record amounts. Industry figures showed that up to £2.5 billion were wagered on the tournament, an increase of almost 50 per cent on the previous World Cup, with an unprecedented rise in the number of female gamblers. At the previous World Cup only one in ten bets was made by a woman; in 2018 it was one in three. The scale of the increase alarmed anti-gambling campaigners and intensified calls for a crackdown on betting adverts.

About a fifth of adverts shown during ITV’s World Cup coverage were devoted to gambling with many encouraging viewers to bet during matches on their smartphones. Campaigners argued that the adverts normalized betting for young people and encouraged people who have never bet before to start the habit.

While the Gambling Act 2005 was intended to position gambling as an acceptable leisure activity, concern has now been expressed by Gamblers Anonymous that the volume of gambling advertising goes beyond what is socially responsible. Live ‘in play’ betting has become so popular that more than £4,000 is being wagered per second on average during football or cricket matches. Figures from the Gambling Commission show that in 2018 the amount Britons lost gambling online increased by 10 per cent to £4.68 billion. The amount lost online increased by 136 per cent since 2010.

The ASA published new standards and guidelines to protect children and young people from irresponsible gambling ads. The new guidelines came into force on 1 April 2019 and are targeted at advertising gaming and betting and its impact on under-18s. The new standards include:

* prohibit online ads for gambling products being targeted at groups of individuals who are likely to be under 18 based on data about their online interests and browsing behaviour;
* extensively list unacceptable types of content, including certain types of animated characters, licensed characters from movies or TV and sportspeople and celebrities that are likely to be of particular appeal to children, and references to youth culture; and
* prohibit the use in gambling ads of sportspersons, celebrities or other characters who are or appear to be under 25; and
* adds to existing guidance on the responsible targeting of ads, covering all media (including social networks and other online platforms).

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| Untitled-1 copy **FOR THOUGHT** |
| Gambling ads should not be directed to under 18s or vulnerable adults. Consider how you would judge someone as vulnerable? Study the relevant gambling legislation and the CAP Code on the definition of ‘vulnerable’. Draft a letter of complaint to the ASA objecting to the following Facebook advertisement. The text reads: ‘Addicted to slots?’ The Facebook banner ad for a gambling website features a picture of a fruit machine. Further text states: ‘Register now on www.666casino & spin. You get a whole year ABSOLUTELY FREE! Get the chance to win every day. No deposit necessary.’ |

**8.7.5 French Sapin law on digital media advertising**

Why would the author of this text single out French advertising laws? The French digital media and advertising market is most probably the largest in Europe, estimated at more than 4 billion euros in 2017. France is now the market leader in digital advertising, ahead of traditional television advertising.

Following a large-scale sector-specific investigation into online advertising and malpractice, the French Competition Authority (République Française Autorité de la Concurrence - FCA) made public an opinion No. 18-A-03 on 6 March 2018, regarding data exploitation in the online advertising sector. This opinion outlines the necessity to develop a legislative framework that will allow publishers and advertisers to benefit from a high level of transparency in their relations with advertising intermediaries and content distribution platforms.[[134]](#footnote-134) Following the investigation and a finding of a magnitude of abusive practices in the digital advertising sector the French Parliament decided to extend the scope of the Sapin Law (le loi Sapin) to digital media.

The Sapin Decree came into force on 1 January 2018.[[135]](#footnote-135) Loi Sapin is an anti-corruption law that was introduced in France in 1993,[[136]](#footnote-136) in order to make the business of media-buying more transparent. Under the Sapin law, media-buying agencies are not allowed to work as both the buyer and seller of advertising for their client. In other words, it means they cannot bulk-buy media inventory ahead of time and sell it back to their client at a later date. The law also requires that the agency can only be paid by the advertiser, meaning they cannot receive rebates from a publisher or media owner. Sapin law extends the French legislator’s fight against the opaque pricing practices to the various intermediaries providing online advertising services. Sapin constitutes a clear step forward in terms of transparency in the digital advertising sector.

Sellers of advertising space established in France – as well as those established in another EU or EEA Member State - insofar they are not subject to similar obligations - are now subject to a reporting obligation toward advertisers on the global campaign price and on the unitary price of each advertising space, including the date and place of diffusion of the advertisements. The Sapin requirement includes any previously undisclosed rebates or incentives received by media buying agencies that have previously not been disclosed to advertisers. Sapin’s impact has been particularly felt in the interpretation and enforcement of audit clauses in advertiser/media agency agreements requiring transparency across all media platforms. In addition, in case of digital advertising campaigns that rely on real-time services purchasing methods, the sellers of advertising space are required to provide advertisers with information on the actual implementation and the quality of their advertising services, as well as on the ways and means used in order to provide adequate protection of the image of the advertiser.

However, the FCA noted that the new Sapin law gave rise to different interpretations between advertisers, publishers and technical intermediaries. The notion of ‘publisher’ was not clear. Whom did the Sapin decree address, a publisher of a website or an agency? Who – under Sapin - could be considered as a seller of advertising space within the meaning of the decree? If not deemed a ‘seller’, then the law would not apply. There are also a number of intermediaries that are likely to be involved in a digital advertising campaign, such as platforms, trading desks, demand side platforms (DSP), supply side platforms (SSP), etc.. The relations between advertisers and digital media owners are rarely direct, as advertising professionals with varied roles often act as intermediarie.

The qualification of these numerous actors under the Sapin Decree remains uncertain and needs to be clarified. The FCA points out that there is still doubt arising out of the aforementioned gray areas and the law calls for clarification. The French government, fully aware of the difficulties, has indicated a willingness to provide further advice in order to clarify several points of the Sapin Decree and to specify the conditions for its implementation.

**8.7.6 ASA rulings**

Each year, the UK public sees millions of ads, direct marketing and sales promotions about products, services, causes and awareness campaigns. Anyone can complain to the ASA free of charge; its self-regulatory values are founded on the ‘Unfair Commercial Practices Directive’[[137]](#footnote-137) and the Copyright enforcement Directive[[138]](#footnote-138) both relating to misleading and unfair advertising practices.

Adverts featuring a twerking businessman in high heels, a lesbian kissing scene and a mother telling her son about his dead father’s favourite McDonald’s burger angered viewers the most in 2018. The Moneysupermarket ‘dance-off’ ads, featuring a man called Dave wearing denim cutoffs and heels received the most complaints – 455 – of any campaign in any medium, with viewers objecting that it was offensive and overtly sexual, possibly homophobic and having the potential to encourage hate crimes. Match.com’s ad showing a woman removing her partner’s top and passionately kissing her drew the second-highest number of complaints between January and June, at 293.

However, these complaints did not lead to the ASA banning these commercials, ruling that neither was likely to cause serious or widespread offence. McDonald’s swiftly pulled its poorly received campaign featuring a mother helping her son grieve for his father while sitting in one of the chain’s restaurants, but not before viewers lodged 255 complaints that it exploited child bereavement to sell fast food. The ASA decided an investigation was not needed.

The vast majority of ads comply with the advertising rules. In 2018, the ASA dealt with more than 30,000 complaints, investigating concerns about ads which allegedly breached the rules of the CAP or BCAP codes. As a result, some 7,232 ads were changed or withdrawn (4,161 in 2015). The ASA publishes weekly rulings on its website.

Decisions are subject to independent judicial review by the Administrative Division of the High Court (QBD). One such case was that of *ex parte Matthias Rath* (2000),[[139]](#footnote-139) where a local health authority, namely Barking and Havering had made a complaint to the ASA on 8 November 2000 in relation to the contents of a leaflet issued by the company owned by the claimant, Dr Rath, to various promote health products. The complaint was upheld, and the ASA adjudicated[[140]](#footnote-140) that Dr Rath had to withdraw the promotion literature. The claimant sought to halt publication of the adjudication on the grounds that its publication would be contrary to their right to freedom of expression under Article 10(1) ECHR and would damage his and his company’s reputation. Dr Rath further submitted that the adjudication did not fall within the exceptions contained in Article10(2) since it was not ‘prescribed by law’.

The court refused the application and held that the adjudications of the ASA published under the Codes were ‘prescribed by law’ for the purposes of Article 10(2) ECHR. The Control of Misleading Advertisements Regulations 1988 provided statutory recognition of accepted methods for handling complaints. It was therefore apparent that the ASA Codes were recognized within subordinate legislation. They also satisfied the requirements of accessibility and precision set out in Barthold v Germany (1985).[[141]](#footnote-141) Accordingly, whilst not having direct statutory effect, the ASA Codes fell within the meaning of Article 10(2); from this we can deduct that parliamentary delegation is an essential requirement for the ASA rules in question to acquire the force as having been prescribed by law.[[142]](#footnote-142) In summary, in the instant case, the adjudications were, for the purpose of Article 10(2) ECHR ‘necessary for the protection of health’.[[143]](#footnote-143)

The ASA blacklists traders who continue to make claims on their websites that do not comply with the advertising despite repeated requests for changes from the ASA compliance team.[[144]](#footnote-144)

Sexualized imagery remains one of the most complained about areas in advertising, where the brand owners hope to entice consumers to buy their products, such as Wonderbra’s billboard, ‘Hello Boys’ in 1994, voted the most iconic advert image of all time.

Sex sells, such as Calvin Klein’s ad-campaign featuring racy images overlaid with ‘sexting’ messages (#mycalvins). New York shots by Mario Sorrenti feature sultry photos overlaid with sexy text messages about threesomes, nude photos and cheating on one’s partner. The tagline is: ‘Raw texts, real stories’, and fine print says the chats are ‘inspired by actual events and people’. Tweeters commented on the ads more than 122,000 times worldwide in one day in 2015. The infamous Protein World ‘beach body ready’ ads caused public outcries in 2015, but the brand reported £1 million additional revenue over the first four days of the advert going ‘viral’.

In August 2018 the confectionery company Mars pulled its advertising from YouTube after one of its brands was shown with a drill rap music video. The move was prompted after an advert for Starburst sweets was put at the start of a video by group Moscow17. One of the group’s members, Siddique Kamara, also known as Incognito and SK, was stabbed to death in south London in August 2018. Drill music has been linked to violence with lyrics by rappers often talking about stabbings and killings, using gang-related symbols, such as wearing balaclavas. It has also been used to fuel rivalries between gangs.

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| **❖ KEY CASE** | ***ASA ruling Amazon Europe Core Sarl* (15 August 2018)**[[145]](#footnote-145) |
| **The advert**Claims on www.amazon.co.uk, promoted their ‘one-day delivery’ service as part of Amazon Prime membership. In the top right-hand corner of the home page of the website, the ad featured the claim ‘One-Day Delivery for Christmas’. Further text on the home page stated, ‘get unlimited One-Day Delivery with Amazon Prime’, with a link to start a 30-day free trial with Amazon Prime. On a web page titled ‘About Amazon Prime’, under the heading ‘Delivery’, text stated ‘Unlimited One-Day Delivery on millions of eligible items at no extra cost. Depending on the time of day that you place your order and your delivery address, if in stock it’ll be dispatched that same day and delivered the next day’. On a separate web page, text stated ‘Start Your Amazon Prime Free Trial Membership. Start a 30-day free trial to also get: Enjoy fast delivery. Unlimited One-Day Delivery on millions of eligible items’. On a product listings page, the web page included a tick-box alongside the text ‘Yes, I want a free trial with FREE One-Day Delivery on this order’.**The issue**280 complaints were received. Complainants reported not receiving their delivery by the following day, challenged whether the ‘one-day delivery’ claims were misleading.**Response by Amazon**Amazon Europe Core Sarl t/a Amazon pointed out that the vast majority of the complaints were received following widespread media coverage of an initial handful of complaints about the issue. Amazon explained that the Prime service included benefits relating to delivery, video and music among other things. They said one of the benefits was the use of the One-Day Delivery service at no additional cost, whereby Prime members were not charged delivery fees when selecting the One-Day Delivery option, whereas non-Prime members had to pay a flat fee.Amazon said that consumers were likely to understand from the ad that they would not have to pay to use the One-Day Delivery option, and that it was available on a selection of items. They said the ads did not promise a particular speed of delivery of a particular product. They believed consumers understood from using the website, that individual delivery dates were displayed for each order and that they would have to check each item they were interested in purchasing to find out whether One-Day Delivery was available, and what the delivery date was with One-Day Delivery at that particular time to the address to which they wanted the item delivered. Amazon explained that for a delivery to be recorded as on-time, the delivery needed to have been received by the customer one day after it was dispatched. They said that late deliveries could occur for a number of reasons that were specific to each order and often outside of their control such as bad weather, carrier failure and human error. They said they received very few customer complaints relating to late deliveries. Amazon said that their Deliveries in the UK Help page of their website, which was two clicks away from the home page, stated that the delivery time for their One-Day Delivery service was one-day after dispatch. They showed that it was also stated on a separate web page ‘About One Day Delivery’. That web page said that the time of day will affect whether or not dispatch occurred on the day of the order.**Assessment*****Upheld***The ASA noted that the home page featured the claim ‘get unlimited One-Day Delivery with Amazon Prime’, with a link to start a 30-day free trial with Amazon Prime. In the absence of information to indicate otherwise, the ASA considered consumers were likely to interpret the claim ‘One-Day Delivery’ in those contexts to mean that all Prime labelled items were available for delivery by the end of the day after the order was placed, so long as the customer did not order too late in the day or for Sunday delivery. The ASA noted that text on one web page in the ‘Help & Customer service’ section of the website stated that the delivery time for One-Day Delivery was ‘1 business day after dispatch’, while another web page in that section included text which stated ‘If you choose One-Day Delivery, your order will be dispatched with the intention that it’s delivered one day after dispatch’. But this information was unlikely to be of use to consumers as it did not inform them how soon after their order they would receive their delivery. In any case, many consumers were unlikely to visit those separate web pages (which in some cases were two clicks away) before deciding to make a decision in relation to purchasing Amazon Prime.The ad breached CAP Code (Edition 12) rules 3.1 (Misleading advertising), 3.7 (Substantiation) and 3.9 (Qualification).**Action**The ad must not appear again in its current form. Amazon had to make it clear that some Prime labelled items were not available to be delivered by the next day. |

The smartphone application (app), ‘Natural Cycles,’ promotes itself as a form of non-hormonal, non-intrusive contraception. The Stockholm-based company, founded by Cern physicist Elina Berglund and her husband, Raoul Scherwitzl, claimed to be 93 per cent effective with typical use – and without the side-effects that many women experience from hormonal birth control. Women input information about their menstrual cycles and body temperature into the app, and it uses algorithms to predict which days they are at risk of getting pregnant in the event of unprotected sex. Natural Cycles’ annual subscription in the UK was £39.99 in 2018. The data from the Swedish technology firm suggests that, if used correctly, this method might be more effective than other methods such as the combined pill (nine in 100) or condoms (18 in 100). But the NHS criticized the study’s research methods, saying it was based on retrospective data and is not impartial, given that it was paid for by the app’s founders. Not only was the Swedish startup company criticized by the ASA in the UK, but Swedish public broadcaster SVT reported in January 2018 that 37 of the 668 women who sought an abortion at one of Stockholm’s largest hospitals from September to December 2017 were relying on Natural Cycles for birth control.[[146]](#footnote-146)

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| **❖ KEY CASE** | *ASA Ruling on* ASA Ruling on NaturalCycles Nordic AB Sweden t/a Natural Cycles (29 August 2018)[[147]](#footnote-147) |
| **The advert**A paid-for post on Facebook for Natural Cycles, seen on 20 July 2017, stated ‘Natural Cycles is a highly accurate, certified, contraceptive app that adapts to every woman’s unique menstrual cycle. Sign up to get to know your body and prevent pregnancies naturally’. A video below the text also stated, ‘Natural Cycles officially offers a new, clinically tested alternative to birth control methods’.**Issue** Five complainants challenged whether the following claims were misleading and could be substantiated:1. ‘Highly accurate contraceptive app’; and2. ‘Clinically tested alternative to birth control methods’.**Response** **from Natural Cycles Nordic AB Sweden**1 & 2: Natural Cycles provided copies of their EC medical device certification; a prospective observational study looking at the efficacy of the app using the Pearl Index (number of pregnancies per 100 woman years); two articles on retrospective studies carried out; and a fact sheet that was available on their website. They said that the app was certified and CE marked and had been marketed as a contraceptive since February 2017. They explained that the certification was based on clinical data which demonstrated the effectiveness of the app as a contraceptive and the clinical claims for the medical device were based on clinical studies that they had carried out. The app was stand-alone software intended to be used for contraception and fertility monitoring and would inform the user whether and when they could get pregnant.They stated that based on their clinical evaluation, claims on contraceptive effectiveness were that the app had a method failure rate of 0.5, which was a measurement as to how often the app incorrectly displayed a green day when the user was actually fertile and got pregnant after having unprotected intercourse on that green day. This meant that 5 out of 1000 women who used the app for one year would become pregnant specifically due to a falsely attributed green day. The app had a perfect-use failure rate of 1.0, which meant that 10 out of 1000 women who used the app for one year and became pregnant would have done so either because (i) they had unprotected intercourse on a green day that was falsely attributed as non-fertile (method failure) or (ii) the user had protected intercourse on a red day but the chosen method of contraception failed. The app had a typical-use failure rate of 6.8, which meant that in total 68 women out of 1000 got pregnant during one year of use due to all possible reasons, including wrongly attributed green days, having unprotected intercourse on red days and failure of contraceptive method used on red days.2. They clarified that the claim ‘Clinically tested alternative to birth control methods’ was a quote from the news site Business Insider which they considered to be correct as Natural Cycles was clinically tested and intended and certified for contraceptive use and could therefore be used as an alternative to other birth control methods. The claims were backed by scientific evidence, including clinical trials.**Assessment*****Upheld***The ASA considered that, in the context of the ad, the claim ‘highly accurate contraceptive app’ would be understood by consumers to mean that the app had a high degree of accuracy and was therefore very reliable in being able to prevent unwanted pregnancies. The ASA further considered that the claim ‘Clinically tested alternative to birth control methods’, presented alongside the ‘Highly accurate’ claim would be understood to mean that the app was a reliable method of contraception which could be used in place of other established birth control methods, including those that were highly reliable in preventing unwanted pregnancies.The ASA noted from the studies that the reporting of intercourse was low with only 32% of cycles inputting such data, and that only 9.6% of cycles were considered as perfect-use, where the app had been used precisely as instructed. Given the very low level of perfect-use by users of the app and the significant difference between the effectiveness of the app when in perfect- and in typical-use, we considered that it would be misleading to base an accuracy claim on the perfect-use results and that the relevant data was the level of effectiveness seen in typical-use. The ASA concluded that the advertisement was misleading to describe the app as ‘highly accurate’.The ad breached CAP Code (Edition 12) rules 3.1 (Misleading advertising), 3.7 (Substantiation), 3.1 (Exaggeration) and 12.1 (Medicines, medical devices, health-related products and beauty products).**Action**The ad must not appear again in the form complained about. Natural Cycles Nordic AB Sweden were told not to state or imply that the app was a highly accurate method of contraception and to take care not to exaggerate the efficacy of the app in preventing pregnancies. |

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| Untitled-1 copy **FOR THOUGHT** |
| A TV ad for *Haertel Beanz*, seen in September 2019, began with two men standing in an office kitchen. One of them, who was wearing gym clothing, said, “I’ve just returned from a high intensity workout. I lifted some seriously heavy weights.” On-screen text stated: “Protein contributes to a growth in muscle mass”. The microwave pinged and the other man took out a tub of baked beans. The first man asked, “What’s that?” to which the other replied, “I’m just having some beans”. On-screen text stated: “High in protein. High in fibre. Low in fat”. The final scene showed a tin of Haertel beans next to a plate of jacket potato and baked beans. Text on the screen stated: “Good for you, without going on about it.” Six complainants challenged whether the ad made an implied health claim, that eating *Haertel Beanz* had similar health benefits to exercise. Their complaint is related to the BCAP Code, stating that Haertel Foods breached rules 13.4 and 13.42 of the code (‘Food, food supplements and associated health or nutrition claims’).You are acting as lawyer for Haertel Foods UK Ltd. Draft a letter to the Advertising Standards Authority (ASA) citing EU legislation in your response (i.e. Regulation (EC) 1924/2006 on nutrition and health claims made on foods), also reflected in the BCAP Code. In your argument you need to make it clear that the advertisement did not imply any equivalence between *Haertel Beanz* and exercise. |

**8.8 Regulating the film and video industry: the British Board of Film Classification**

Deciding where to draw the line when regulating sexually explicit and violent material relates to the degree of control exercised by a society. Film, video and games regulators in each country have to decide where to place restrictions on access to these images, who can watch them and what is appropriate for adults. They can then decide for themselves what is appropriate. The means of regulating sexually explicit and violent material has been debated for decades. Arguments over what denotes a masterpiece or an obscenity in film, image or literature abound.

**8.8.1 Film censorship in the early 20th century: the British Board of Film Censors**

British film censorship goes back to the early nineteen hundreds when the first film regulator, the British Board of Film Censors (BBFC), set up in 1912. It was a self-regulatory body and by the mid-1920s it became general practice for local authorities to accept the decisions of the board.

When T. P. O’Connor was appointed President of the BBFC in 1916,[[148]](#footnote-148) one of his first tasks was to give evidence to the Cinema Commission of Inquiry, set up by the National Council for Public Morals. He summarized the board’s policy by listing 43 grounds for a film’s exclusion or rejection. Some of the topics included:

● the irreverent treatment of sacred subjects;

● drunken scenes carried to excess;

● vulgar accessories;

● the *modus operandi* of criminals;

● nude figures;

● indecorous dancing;

● excessively passionate love scenes;

● realistic horrors of warfare including scenes and incidents calculated to afford information to the enemy;

● subjects dealing with India in which British Officers are seen in an odious light;

● scenes laid in disorderly houses.

Mrs Mary Whitehouse became the first General Secretary of the National Viewers’ and Listeners’ Association in 1965. The prominent campaigner for public morality made it her life’s quest to highlight public decency and the moral decline of television standards – particularly at the BBC. The first chairman of the subsequent BSC (Broadcasting Standards Council), Lord Rees-Mogg, credited Mrs Whitehouse for her influence on the setting-up of the Council in 1988 and for ensuring that the public view was always taken into account. Mrs Whitehouse threatened legal action a number of times against the BBC, including against programmes such as *Monty Python’s Flying Circus, The Kenny Everett Television Show –* with its skimpily clad dance troupe, Hot Gossip, run by Arlene Phillips – and *Doctor Who.* Mrs Whitehouse indirectly influenced the BBFC with her quest for public morals and decency. She also famously took out a private prosecution against the editor of ‘Gay News’, Denis Lemon, which ultimately bankrupted him and the magazine.[[149]](#footnote-149)

The American film director Stanley Kubrick had moved to England in 1962 to film *Lolita,* his motivation being that the UK would prove to have more relaxed censorship laws than the USA. But he fell foul of the Obscene Publications Act 1959 and Mrs Mary Whitehouse. He subsequently made a large number of films including *Dr Strangelove* (with Peter Sellers), *2001: A Space Odyssey* and *Eyes Wide Shut.*

Kubrick’s 1971 film *A Clockwork Orange,* based on an adaptation of Anthony Burgess’s novel of 1962, proved to be another controversial film. It worried the government to such an extent that before the film’s general release in January 1972, Home Secretary Reginald Maudling arranged a private viewing of the film. *A Clockwork Orange* is a dark satirical film depicting Alex (Malcolm McDowell), a charismatic delinquent who engages in ‘ultra-violence’, including rape, performed to Beethoven’s music. The BBFC had passed the film with an ‘X’ rating, requiring no cuts (the age bar for an ‘X’-rated film had just been raised from 16 to 18). With the film’s general release, the BBFC had advised the distributors, Warner Brothers, that the film portrayed ‘an unrelieved diet of vicious violence and hooliganism’.

Kubrick became a target for hate mail and abusive phone calls in the UK after a number of rapes and murders in the early 1970s were linked to the film, including a sex attack in Lancashire carried out by a gang chanting the Gene Kelly song *Singin’ in the Rain.* This resulted in Kubrick secretly withdrawing the film by arranging with Warners that the film would just be allowed to die off quietly, after further allegations that *A Clockwork Orange* was inspiring young people to copy its scenes of violence. Stanley Kubrick died on 7 March 1999, aged 70, and the director’s widow, German-born actress and painter Christiane, retained all consultation rights on the re-released *A Clockwork Orange* in the same year. In the film a large floral oil painting by Christiane can be seen during the famous *Singin’ in the Rain* scene.

When the film *The Exorcist* opened in America on 26 December 1973, the response was immediate and extraordinary. It is based on a book by William Peter Blatty, published in 1971, and depicts a demonic possession and subsequent exorcism of a young girl in Washington DC. Despite much press attention in advance of the film’s release, the ‘Classification and Ratings Administration’ of the Motion Picture Academy of America (MPAA) granted *The Exorcist* an uncut ‘R’ rating (‘for strong language and disturbing images’), allowing minors to view the film if accompanied by an adult. MPAA President Jack Valenti pointed out that *The Exorcist* contained ‘no overt sex’ and ‘no excessive violence’, a conclusion echoed by the generally cautious Catholic Conference, which rated the film ‘A-IV’, an adult classification meaning that the film was ‘moral, but may offend some [adult] viewers’. Yet Washington police barred persons under the age of 17 from showings of the movie in spite of the MPAA’s ‘R’ rating. Eventually, Marvin Goldman, head of the KB Theatre chain, which owned the Cinema Theatre in DC where the movie was first shown, told the *Washington Post* that he would comply with the (MPAA) ruling, stating that the movie should have been rated X (no one under 17 admitted) in the first place.[[150]](#footnote-150) Walter Cronkite devoted a full ten minutes of his legendary CBS news programme to ‘The Exorcist Phenomenon’ and the history of demonic possession.

The film struck a unique chord with audiences around the world. In Milan, the crowd at a packed news conference refused to leave a museum where the film’s director, William Friedkin, and technical adviser, Father Thomas Bermingham, were answering questions about *The Exorcist.* In Rome, the film made the national news when a sixteenth-century church across the street from a cinema where the film premiered was struck by lightning, causing an ancient cross to plummet from its roof onto the pavement below. At a preview screening in New York, one audience member had to be helped out after becoming dizzy, provoking a wave of press reports of fainting, vomiting and other hysterical reactions. By the time *The Exorcist* came to the UK, rumours of its traumatizing power had grown to such proportions that the St John Ambulance Brigade were standing by for the first showings around London.

But *The Exorcist* was immediately banned by the BBFC, due to Mary Whitehouse’s urging them to prohibit it. She called the film ‘outright nasty – blasphemous and evil’, despite the fact she had never seen a frame of it. She relied purely on adverse media coverage such as Stanley Kaufmann’s comment in *New Republic* : ‘This is the most scary film I’ve seen in years – the only scary film I’ve seen in years . . . If you want to be shaken – and I found out, while the picture was going, that that’s what I wanted – then *The Exorcist* will scare the hell out of you.’[[151]](#footnote-151) The British film board eventually granted an ‘X’ certificate to *The Exorcist* in January 1974, which allowed over-18s to view it without cuts or alterations. At the Golden Globe awards of 1974, *The Exorcist* picked up awards for Best Film, Best Director (William Friedkin), Best Screenplay (William Peter Blatty) and Best Supporting Actress (Linda Blair), while the Oscars that year generated ten nominations including Best Picture, Best Screenplay (Blatty) and Best Sound. In box-office terms, the movie became the biggest-grossing hit in Warner Brothers’ history, nearly trebling the $34 million gross of the studio’s previous record holder, *My Fair Lady.*

Prior to the 1990s it was not an uncommon occurrence that local authorities would ban films in their local cinemas, such as Ken Russell’s *The Devils* and Stanley Kubrick’s *A Clockwork Orange* in 1971[[152]](#footnote-152), and Monty Python’s *Life of Brian* in 1988. In 1996, Westminster Council banned *Crash* by David Cronenberg, a film first premiered at the 1996 London Film Festival. When Westminster Council demanded cuts to certain parts of this sexually violent film – solely for screenings in Westminster – the distributors declined, and the film was therefore banned from screens in the West End, including Leicester Square. However, cinemagoers could easily see the film in neighbouring Camden, where that council allowed the film to play uncut with its BBFC certificate.

Hally (2012) found that more broadminded councils, such as Manchester, were frequently ahead of BBFC policy and practice during the 1950s and 1960s, first in having an adults-only category before the ‘X’ certificate, then in relaxing the strictures against screen nudity (the naturist films) and over artistic sex and ‘bad language’ (e.g. *Ulysses*). Generally Conservative-led councils, such as Sale, continued trying to hold back the tide of ‘X’ films. Manchester tended to be more liberal-minded than the BBFC on matters of nudity, sex and language but less so on issues of violence and disorder.[[153]](#footnote-153)

The Video Recordings Act 1984 was passed by Parliament to regulate and classify video recordings offered for sale or hire commercially in the UK. The President and Vice Presidents of the BBFC were so designated, and charged with applying the new test of ‘suitability for viewing in the home’. At this point the Board’s title was changed to the British Board of Film Classification to reflect the fact that classification plays a far larger part in the BBFC’s work than censorship.

**8.8.2 The British Board of Film Classification and its remit**

The British Board of Film Classification (BBFC) is an independent self-regulator and censor of films, videos, DVDs and video games. Its income is from the fees it charges for its services, calculated by measuring the running time of films or games, submitted for classification. The BBFC consults the Department of Culture, Media and Sport before making any changes to its fees. The BBFC rates about 10,000 pieces a year, though traditional classified film content has been steadily falling.

Since 2017 Video On Demand (VOD) and online video subscription services, such as Netflix, Amazon and NowTV have been included in the BBFC’s remit (though the latter is on a voluntary basis). The BBFC licensing scheme allows Digital Video Services to use existing BBFC home entertainment classifications on their platforms when they make the equivalent digital versions available under the Video Recordings Act 1984. Digital-only classification in 2017 amounted 3,565 works viewed, representing just under 160,000 minutes of content classified, a 25.3 per cent increase from 2016.

Each of these services has taken a different approach to film content. Amazon UK acquires prestige movies to premiere on their service after a traditional theatrical window for films, such as *Moonlight*, *The Handmaiden*, *The Big Sick* and *Manchester By The Sea*. Netflix (USA) streams exclusives on its platform such as *the Crown, House of Cards, The Meyerowitz Stories* and *Mudbound*. NowTV - which does not use BBFC classifications - offers consumers earlier access to cinema films from Sky’s premium movie channels without the need for a 12-month contractual commitment, a dish, or to be tied to linear broadcast schedules.

BARB (Broadcasters Audience Research Board) research showed that in 2017 some 9.5 million UK homes had at least one VOD subscription. Although sales of physical media continued to decline, the growth in digital subscriptions and digital transactions helped the UK video market grow by 7.5 per cent, the third consecutive year of growth. The study found that nearly 50 per cent of children in the UK have access to at least one VOD service, with the number rising to 60 per cent for those aged between 16-24.[[154]](#footnote-154)

On a best practice, voluntary basis, the BBFC also regulates mobile services and content delivered via mobile networks, such as EE, O2, Three and Vodafone. The BBFC’s Classification Guidelines for film and video form the basis of the Mobile Classification Framework, which defines content that is unsuitable for customers under the age of 18. In addition, the BBFC maintains an additional Classification Framework specifically for EE network customers who wish to set filter levels to ‘Strict’. This Framework outlines content that is unsuitable for children under the age of 12 and is based on BBFC Classification Guidelines for PG.

In 2017, the BBFC adjudicated in relation to 21 cases on whether filters had been appropriately applied to websites. These requests came from website owners, members of the public and the Mobile Network Operators (MNOs).

BBFC age ratings are used by VOD platforms, content producers, film studios and airlines. These include:

* Amazon Instant Video/Prime Instant Video
* BFI Player
* British Airways High Life
* BT TV
* Curzon Home Cinema
* DisneyLife
* Find Any Film
* Google - Including Google Play Store, YouTube Movies, Google Web Search
* iTunes Film Store
* Joybear
* Microsoft Film & TV Store
* Netflix
* Rakuten TV
* Sky Store
* Soho Theatre On Demand
* Sony Entertainment Network
* Virgin Media
* British Airways
* Virgin Atlantic

**8.8.3 Legislation covering film, video and games censorship**

The BBFC is governed by several pieces of legislation, the most significant being the Video Recordings Acts (VRA) of 1984 and 2010, which particularly affect classification standards. The 1984 Act requires all ‘video works’ (films, TV programmes, video games, etc.) which are supplied on a disc, tape or any other device capable of storing data electronically, to be classified by the BBFC, unless they fall within the definition of an exempted work.

The Video Recordings Act 2010 repealed and then brought back into force parts of the Video Recordings Act 1984.[[155]](#footnote-155) The reintroduction of the 1984 Act was deemed necessary after Parliament forgot to notify the European Commission in August 2009 of the (original) existence of the 1984 Act.[[156]](#footnote-156) This meant neither the 1984 nor the 2010 VRA were initially in accordance with Directive 98/34/EC.[[157]](#footnote-157)

Section 4A of the 1984 VRA requires ‘special regard’ to be given to the likelihood of video works being viewed in the home and to any harm that may be caused to potential viewers or, through their behaviour, to society by the manner in which the work deals with criminal behaviour, illegal drugs, violent behaviour or incidents, horrific behaviour or incidents, and human sexual activity, particularly when video works deal with:

* + - * + criminal behaviour;
				+ illegal drugs;
				+ violent behaviour or incidents;
				+ horrific behaviour or incidents; or
				+ human sexual activity.

Section 4A(1) of the Video Recordings Act 1984 (VRA) came under judicial review scrutiny when the administrative court was asked to examine the meaning of the phrase ‘harm that may be caused’. In *BBFC v Video Appeals Committee* (2008)[[158]](#footnote-158) the BBFC had declined to classify the video game ‘Manhunt 2’ marketed by Rockstar Games Inc, having described it as depicting brutal and unremitting violence towards humans.

Rockstar appealed to the Video Appeals Committee (VAC) which, in turn allowed Rockstar’s appeal. The committee stated that the game could be classified as one suitable only for those over the age of 18. They made reference to an introductory statement made by a Home Office Minister in respect of section 4A(1) VRA. The statement said that that there might be some works that the BBFC believed would have such a devastating effect on individuals or on society if they were released that there should be the possibility of their being refused classification altogether. The VAC also made clear its interpretation of the reference to the phrase ‘harm that may be caused’ in section 4A(1) of the Act. It held that there must be *actual* harm as opposed to potential harm.

Granting the application, Mr Justice Mitting said that it was not and had never been a legal requirement that the BBFC or the Video Appeals Committee should determine that a video game would have a devastating effect on individuals or on society before refusing certification. The judge then turned to the Committee's interpretation of ‘harm’. The words in section 4A(1) of the Act were plainly directed to harm that *might* be caused. If Parliament had intended it to be necessary to demonstrate that harm had been caused, then the words ‘that may be’ could have been omitted. The judge said that it was self-evident that, in respect of video games that had yet to be released, the Committee would have to judge their impact if they were to be released.

The task of both the BBFC and the VAC was to have special regard to any harm that might, in the future, be caused to potential viewers. If the final conclusions of the committee had stood alone, it would be difficult to challenge them on the ground of legal error. The committee had misinterpreted Parliamentary comments and the interpretation of the words ‘harm that may be caused’. In those circumstances, the only just method of disposing of the case was to quash the committee's decision and to have the matter remitted back to the BBFC for classification of the work.

The Obscene Publications Acts 1959 and 1964 made it illegal to publish a work in the UK which is regarded as ‘obscene’ in content (as a whole). The film, DVD, game, etc. must have the tendency to ‘deprave and corrupt’, unless the ‘publication’ can be justified as being for the ‘public good’ on the grounds that it is in the interests of science, art, literature or learning or other objects of general concern.

Section 22 of the Public Order Act 1986 makes it illegal to distribute or play to the public a recording of images or sounds which are threatening, abusive or insulting if the intention is to stir up racial hatred or hatred on the grounds of sexual orientation.

There are two Acts which cover animal welfare issues in films. The Cinematograph Films (Animals) Act 1937 renders it illegal to show any scene ‘organised or directed’ for the purposes of a film that involves the cruel treatment of any animal. The Animal Welfare Act 2006 makes it illegal to show or publish a recording of an animal fight which has taken place in the UK since 6 April 2007. This is to combat illegal dog fighting and the breeding of dangerous dogs for fights, habitually filmed and uploaded by criminals on to YouTube.

Trading standards and law enforcement officers have the power to seize illegal video works including, but not limited to, DVDs, Blu-rays and video games. The BBFC is designated by the government (the Department of Culture, Media and Sport) to provide evidence to help secure convictions under the terms of the Video Recordings Act (VRA) 1984 for copyright infringement. The BBFC will issue a Certificate of Evidence under the VRA 1984 or the Criminal Procedure (Scotland) Act 1995. This evidence is admissible in court as ‘standalone’ evidence and does not require anyone from the BBFC to attend as a witness.

**8.8.4 BBFC classifications**

In February 2019 new BBFC Classification Guidelines came into force which now cover age-ratings across different platforms. Following a wide consultation of some 10,000 participants (2018), the BBFC found that demand for age classification has never been higher, with 97 per cent of people saying they benefitted from age ratings being in place. 91 per cent of people (and 95 per cent of teenagers) wanted consistent age ratings that they recognized from the cinema and DVD to apply to content accessed through streaming services. The BBFC’s consultation confirmed that people felt a heightened sense of anxiety when it comes to depictions of 'real world' scenarios, in which audiences – especially young people – are likely to be concerned that it could happen to them. For example, realistic contemporary scenarios showing terrorism, self-harm, suicide and discriminatory behavior.

The large-scale research also found that attitudes towards sexual threat and sexual violence had moved on since 2013/14.  Although the BBFC already classifies such content restrictively, the respondents said that certain depictions of rape in particular should receive a higher rating. For this reason, the BBFC adjusted its Classification Guidelines in these areas. Strongest sex references, in particular those that use the language of pornography, are now classified as 18. The survey found that film classification checking is most evident among parents of children under the age of 12, finding that 87 per cent check all or most of the time, and a further 9 per cent check occasionally. Interestingly, there has been a marked increase in the level of claimed classification checking by parents of children aged 12-14 years – up from 90 per cent ever checking in 2013 to 97 per cent in 2018.[[159]](#footnote-159)

The BBFC examines each film (DVD, video, game etc) for its overall tone, making an overall assessment on classification. A ‘U’ (‘Universal’) film should be suitable for audiences aged 4 years and over, allowing very mild bad language, such as ‘damn’ and ‘hell’. The 1964 Walt Disney version of *Mary Poppins,* featuring Julie Andrews and Dick van Dyke, and the 2018 *Mary Poppins Returns*, with Emily Blunt and Ben Whishaw – both received a U-rating, and so does *Peppa Pig: Festival of Fun* (2019).

A ‘PG’ (Parental Guidance) film should not disturb a child aged 8. There may be mild bad language, such as ‘shit’ or ‘son of a bitch’, and violence is only acceptable in a historical or fantasy setting. An example would be the 2007 film, *Mr Bean’s Holiday,* starring Rowan Atkinson, or Michael Jackson’s *This Is It*, released following the legendary pop singer’s death in June 2009, or *The Boy Who Harnessed the Wind* (2019).

The 12A classification requires an adult to accompany any child under 12 seeing a 12A film at the cinema. This ought to be strictly enforced by cinema staff and a cinema may lose its licence if adult accompaniment is not enforced. In 2019 the documentary *Jimi Hendrix: Electric Church*, received a 12A rating. The film is about Jimi Hendrix's historic performance at the 1970 Atlanta Pop Festival. There is infrequent use of strong language ('f\*\*k') as well as uses of 'hell', 'crap', 'screwed' and 'freaking'. There is footage of a stall at a music festival selling marijuana plants, in addition to brief sight of a man smoking hash from a pipe. The film also shows some natural nudity, when men and women take off their clothes at the music festival. Additionally, there are verbal references to campus killings at Kent State University, as well as brief sight of a newspaper featuring a black-and-white photo of a dead body.

No one under 15 is legally allowed to see, buy or rent a certificate ‘15’-rated film, DVD or video games. This classification generally includes strong violence, frequent strong language such as ‘fuck’, and brief scenes of sexual activity or violence are permitted – so are discriminatory language and drug-taking.

*A Northern Soul* is a UK documentary classified 15 for cinema release for around twenty uses of strong language. Prior to its submission to the BBFC in early 2018, Sheffield City Council classified the film 12A, for its premiere, as did Hull City Council. The film's director complained in the media about the BBFC's decision. A letter co-signed by three Hull MPs was sent to the BBFC requesting that the 15 classification be reviewed, to which David Austin, the Chief Executive of the BBFC, responded. The film was re-classified 12A by seven local authorities (Sheffield, Hull, Leeds, Liverpool, Halifax, Southampton and Lambeth). [[160]](#footnote-160)

No one younger than 18 may see an 18-rated film in a cinema, rent or buy an 18 rated video work. Adults should be free to choose their own entertainment, and this includes ‘sex works’, i.e. for the purpose of sexual arousal or stimulation. Sex works containing clear images of real sex, strong fetish material, sexually explicit animated images, or other very strong sexual images are confined to the R18 category. In the 18 category are *Now Apocalypse* and *The Downward Spiral* (both 2019), both containing strong sex and sexual references. A Clockwork Orange remains 18 under the re-release of 2019 (and used to be ann ‘X’ rating under the old categorization in 1971). Classification exceptions in this category include:

* where the material is in breach of the criminal law;
* where material or treatment appears to harm individuals through their behaviour or to society. For example, the detailed portrayal of violent or dangerous acts, or of illegal drug use, which may cause harm to public health or morals. This may include portrayals of sadistic violence, rape or other non-consensual sexually violent behaviour which make this violence look appealing; reinforce the suggestion that victims enjoy rape or other non-consensual sexually violent behaviour; or which invite viewer complicity in rape, other non-consensual sexually violent behaviour or other harmful violent activities;
* where there are more explicit images of sexual activity in the context of a sex work. In the case of video works, which may be more accessible to younger viewers, intervention may be more frequent than for cinema films.

The BBFC has, from time to time, rejected foreign films even though they were openly released in their countries of origin, with sexual topics generally being the norm for rejection.

*Reinventing Marvin* (*Marvin ou la belle éducation*) is a French drama, classified in France for the 15 age group, released in 2017. The film follows a boy's path through an abusive childhood to a theatrical career in Paris. The film contains one scene, featuring the central character being subjected to a sexual assault by an older boy at school. There is use of strong language ('f\*\*k', 'motherf\*\*ker'), as well as milder terms such as 'bitch' and 'Jesus'. There is also use of discriminatory language ('nigger', 'faggot') and there are strong sex scenes with rear nudity.

When the BBFC board viewed the film, the Head of Compliance requested proofs of age for the actors involved, which confirmed the central character was played by an actor who was 15 at the time of filming while the older boy was played by an actor who was 18. The board concluded that the scene included a potentially indecent image of a child within the meaning of the Protection of Children Act 1978. Accordingly, a cut was required.

The company, Peccadillo Pictures, appealed against the proposed cut, submitting documentary proof that included parental consent and information about the child protection steps taken on set. The scene was viewed again by the President, Chief Executive, Head of Compliance and Compliance Manager of the BBFC. However, it was concluded that the fact the film makers did not intend to create an indecent image did not alter the fact of the indecency of the image in question. The cut was upheld and the cut-version received a 15 rating.[[161]](#footnote-161)

**8.8.5 Public complaints and BBFC decisions**

The BBFC generally receives a relatively small number of complaints about its classification decisions, In 2017, for example, there were only 262 complaints received compared to 371 the previous year.[[162]](#footnote-162) Here follow some examples which received public feedback or complaints in 2017-2018:

*Logan* generated the largest amount of public feedback in 2017, with 20 complaints received. It is a superhero film in the X-Men series, starring Hugh Jackman as Wolverine. The number of complaints was relatively small, compared with previous years, some of which attracted between 40 and 50 complaints. This time complainants felt that the film’s violence was too strong for a 15 classification and would have been more appropriately placed at 18. However, the BBFC Classification Guidelines permit strong violence at 15 provided it does not dwell on the infliction of pain or injury. The Board expressed the view, while the violence in *Logan*is strong and frequently bloody, it is also rapidly edited with a focus on action rather than sadism. The film’s fantastical setting and super-powered central character further distances the violence from reality, allowing the issue to be acceptable at 15.

*Padmaavat* is a Hindi-language epic period drama in which a Sultan leads an invasion to capture a Rajput queen, directed by Sanjay Leela Bhansali. With a production budget of ₹2.15 billion (US$30 million), *Padmaavat* is one of the most expensive Indian films ever made. Initially scheduled for release on 1 December 2017, *Padmaavat* faced numerous controversies in the UK and India. It received the 12A classification. Amid violent protests, its release was indefinitely delayed. Following media and public feedback to the distributor of the film, a new version was submitted for classification in January 2018, also classified 12A. Ten people complained to the BBFC that the film misrepresented a revered figure in ancient India, namely Padmavati, a 13th century Indian queen (Rani) (the original title of the film was to be Padmavati). The film was regarded as potentially harmful to a young audience since it promotes the ‘walking into fire’ by women whose husbands die. The film ends with the Khilji army succeeding in defeating the Rajputs but are unable to capture the Rajput women who perform the ancient Hindi custom of *jauhar* (mass self-immolation) by walking into a large fire to avoid capture, enslavementand rape by the foreign invading army. In spite of the complaints the BBFC kept the 12A category finding that there was nothing in *Padmaavat*that was unacceptable.

*Atomic Blonde*attracted 8 complaints highlighting the film’s violence and to a lesser extent its sexual content and language. *Atomic Blonde*, an American action thriller revolves around a spy who has to find a list of double agents who are being smuggled into the West, on the eve of the collapse of the Berlin Wall in 1989. The film, directed by David Leitch, starring Charlize Theron, James McAvoy and Til Schweiger was given a 15 rating. The board concluded that the film rating should remain at the lower end of the 15 classification, though there are frequent scenes of strong violence in the film, including people being shot, resulting in large spurts of blood into the air or onto walls, and gruelling fist fights. However, the violence is presented in a stylised manner, without dwelling on the infliction of pain or violence in a manner that would demand an 18 classification. Very strong language is permitted at 15 depending on the manner in which it is used, who is using the language, its frequency within the work as a whole, and any special contextual justification. Very strong language (‘c\*\*t’) is used just once in *Atomic Blonde*, and it was therefore held acceptable at 15.

*Kingsman: The Golden Circle*attracted 8 complaints in 2017, most focused on the film’s sexual content. The film classified as 15 is an action spy comedy film, a sequel to Kingsman: The Secret Service (2014). The film features Colin Firth, Julianne Moore, Halle Berry, Elton John amongst others and was premiered in London on 18 September 2017. Complainants thought the sexual behaviour in the film breached the BBFC guidelines for a 15 rated film, since there were very strong verbal references to sexual behaviour and one complainant took issue with a scene of cannibalism in which a man is required to eat a burger as part of an initiation. Before he does so the camera pans to a pair of clothed legs sticking out from the top of a mincing machine, and then to a pile of minced meat. The board felt that this content was acceptable at 15.

|  |
| --- |
| Untitled-1 copy **FOR THOUGHT** |
| How far should film, games and music DVD censorship go – given the fact that anything can now be viewed in private by video on demand and streaming services? Discuss with reference to BBFC adjudications in the light of statutory legislation.  |

**8.9 Party political, elections and referendum broadcast legislation and regulation**

All broadcasts must observe the law already mentioned in this book, such as libel, privacy, contempt, obscenity, incitement to violence or to racial or religious hatred and copyright.

<sn>



See Chapter 9

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Whilst political parties are responsible for the content of their own broadcasts, they are required to observe strict broadcasting legislation and guidelines, designed to cover compliance issues and production requirements agreed by all public service broadcasters, equally to all parties.

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See above 8.3

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All broadcasts must comply with the Ofcom Broadcasting Code, in particular in relation to harm and offence (Section 2) and to fairness and privacy (Sections 7 & 8).

<sn>



See above 8.4.1

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Parties should also refer to the BBC Editorial Guidelines that relate to harm and offence (Chapter 5) and fairness and privacy (Chapters 6 & 7).[[163]](#footnote-163) Impartiality on the part of the broadcaster is achieved by the allocation of broadcasts or a series of broadcasts to different parties. Broadcasters may inform parties if they reasonably believe any content in the broadcast does not comply with the law, the Ofcom Broadcasting Code or in respect of the BBC, its Editorial Guidelines.

It is the responsibility of the political party to ensure that all permissions and third party rights (such as for music and archive footage) required for broadcast and online publication have been secured prior to transmission. Broadcasters may seek written confirmation of these rights clearances before transmission, following the delivery of the broadcast.

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See Chapter 10

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**8.9.1 History of party political broadcast legislation**

Sir John (later Lord) Reith (1889-1971), founder and first general manager of the BBC in 1922, envisaged that part of the public broadcaster’s remit ought to be that broadcasting time should be offered to qualified political parties. Reith fought off the politicians' attempts to influence the BBC, while offering the British people programmes to educate, inform and entertain. The principle that political parties should be able to freely publicize their platforms and policies to voters, and that voters should be able to receive such information, was extended to the broadcast media as their audience and influence developed.

Following the reconstitution of the BBC in 1926 under a Royal Charter, arrangements for the future allocation of broadcasting time between the parties were left solely to the BBC. In May 1926, Conservative Party Prime Minister, Stanley Baldwin, made the first prime ministerial broadcast outside a general election, addressing the nation during the general strike. At the 1929 general election the parties could not agree about party political broadcasting time and ‘order of play’, and Reith himself allocated broadcasting time on behalf of the BBC. The government was given the same number of broadcasts as the opposition parties combined and was given the first broadcast, while an opposition party was given the final broadcast. Minor parties were given access dependent on the number of candidates they fielded at the election. From 1947 the process of allocating party political broadcasts became more structured. A Committee on Party Political Broadcasting was established as an informal body to facilitate discussion between the BBC and the political parties (Conservative, Labour and Liberal), and to help secure agreement on allocation arrangements.

The first election-night television broadcast in the UK was the BBC’s 1950 Election Results (including a black, white and grey electoral map). The first televised Party Election Broadcasts (PEBs) went out in 1951 during the General Election campaign. The Conservative, Labour and Liberal parties each made a 15-minute broadcast, which was transmitted in addition to their radio broadcasts.

Clement Attlee's Labour Government was on its last legs. Most of the promises set out by the Labour Party in its 1945 manifesto had been put into practice, leaving the party directionless. The General Election of 1950 had slashed Attlee's majority to just five seats. Attlee's Cabinet was also suffering from long years in office. Sir Stafford Cripps, the Chancellor, resigned due to illness in 1950 and Ernest Bevin, the Foreign Secretary, died in 1951. This left the ageing Conservative leader Winston Churchill to win the 1951 election with a comfortable majority. The Conservatives were back in power once more, but they did little to alter the welfare state created by the previous Labour government. [[164]](#footnote-164)

In 1955, Richard Dimbleby hosted a more ambitious Election Results programme. Constituencies rushed to get their results out, and 357 (out of 630) declared on the night. But concerns about the Representation of the People Act 1948 meant coverage was sober, with little commentary.

ITV (Independent Television) and therein ITN (Independent Television News) came on air in 1955, and in 1956 began simultaneous transmission of party political broadcasts. Broadcasts on commercial television were, and have since been, scheduled within programming time rather than advertising time. The arrival of ITN and the spread of television ownership spurred the BBC into a more user-friendly approach for the 1959 election. Around 13 million viewers watched the BBC’s election night coverage that year.

Debates on how party finance and campaign spending should be regulated recurred through the 1970s and 80s following the Houghton Report (1976).[[165]](#footnote-165)

Election broadcast legislation developed slowly and piecemeal. For example, section 93 of the Representation of the People Act 1983 prohibited broadcasting about a parliamentary or local election where one or more of the candidates did not give his or her consent. This section still applies at constituency level for parliamentary elections but does not affect coverage of elections nationally. If the candidate participates and consents, there are further restrictions. The programme cannot be aired until nominations have closed, and even then, all the candidates must consent to the programme. Originally, the provision was conceived as an attempt to protect the rights of minority candidates, but effectively, this means that every candidate for a particular constituency can insist on taking part and so has a veto on the broadcast. For parliamentary elections the restrictions come into force when the intention to dissolve Parliament was announced. This provision was seen as unnecessarily inhibiting coverage of local issues and was opposed by a number of broadcasters. The case of *Marshall v BBC* (1979)[[166]](#footnote-166) is relevant in this context. Here the court held that a candidate, James Marshall, had not ’taken part’ since there had only been pictures of his canvassing. The programme did not, therefore, require consent before being broadcast.

**8.9.2 Broadcasting legislation from 1990 to date: party political and election broadcasts**

The principles of fairness and due impartiality are enshrined in various pieces of legislation and broadcasting rules, covering all party political and party election broadcasts in the UK (e.g. s. 333 Communications Act 2003 regarding party election broadcasts (PEBs), party political broadcasts (PPBs) and referendum campaign broadcasts). The statutory prosisions then regulate the special responsibility to audiences who are about to and entitled to vote. The closer to the election or referendum date, the greater the need for care not to appear biased towards one particular party or forum.

The 1990 Broadcasting Act put party political broadcasting on a statutory footing for the first time. Section 36 of the Act requires that holders of any Channel 3, 4 or 5 television licence must include party political broadcasting in the service and must observe the rules devised by the Independent Television Commission (ITC)[[167]](#footnote-167) in relation to the allocation of PPBs and PEBs. The 1990 ITC programme code (revised in 1998 and 1999) provided that airtime on ITV would be made available each year to UK parties represented in the House of Commons and to the SNP in Scotland and Plaid Cymru in Wales. The unofficial formula for the allocation of PPBs agreed by the Committee on Party Political Broadcasting was formalized in the ITC code. When Channel 5 came on air in March 1997, it was required by the ITC code to carry general election and European election broadcasts.

Similarly, section 107 of the 1990 Act required national radio licence holders to observe rules determined by the ‘Radio Authority’ (established in 1991) in relation to PPBs and PEBs. Licences for the national commercial radio stations, Classic FM, Talk Radio (now TalkSport) and Virgin Radio, were awarded in 1997, and all three stations carried PPBs and PEBs from September 1997. The Radio Authority’s programme code provided similar rules for the allocation of PPBs and PEBs to those set out in the ITC programme code.[[168]](#footnote-168) These requirements of the 1990 Act did not affect the BBC, which continued to operate under its own Charter and Licence until 2017 (now also regulated under the Ofcom Code on elections).

The Broadcasting Act 1990 banned any paid political advertising. Any body whose objects were wholly or mainly of a political nature was not permitted to advertise on radio or television.[[169]](#footnote-169) The Neill Committee’s Report on Standards in Public Life (1998) included detailed discussion regarding the extent to which this ban constituted a restriction on the right of free expression under Article 10(1) ECHR. While the Neill Committee recommended that the ban on political advertising should be maintained, it acknowledged that the legal position had not been properly tested in the European Court of Human Rights and that the introduction of the Human Rights Act 1998 would open up the possibility for direct challenge in the UK courts.[[170]](#footnote-170) The Neill Report noted that ‘the advent of satellite and cable television and of digital broadcasting means that the current arrangements governing political broadcasting may soon no longer be relevant’. It soon became clear that the broadcasting industry soon expanded and would enter extraordinary times of change as it entered the digital age.

In *Verein gegen Tierfabriken v Switzerland* (2001)[[171]](#footnote-171) (the applicant being an animal rights pressure group), the ECtHR held that a blanket prohibition on political advertising does constitute an interference with the right to freedom of expression under Article 10(1) of the Convention. While the Court stated that it ‘cannot exclude that a prohibition of political advertising may be compatible with the requirements of Article 10 of the Convention in certain situations’, any interference has to be ‘necessary in a democratic society’ which means that there has to be a ‘pressing social need’. Significantly, the Court did not see how that test could be applied only to one form of media and not to others. However, the full implications of this judgment for the current prohibition on paid political advertising in the UK broadcast media never became clear.[[172]](#footnote-172)

The Broadcasting Act 1996 set up the Broadcasting Standards Commission (BSC). Under section 108 the BSC had a duty to draw up a code giving guidance as to the portrayal of sex and violence and ‘standards of taste and decency for such programmes generally’. It was then the duty of each broadcasting or regulatory body (including the BBC), when drawing up any code relating to ‘standards and practice for programmes’ to reflect the general effect of the BSC's code. The ITC Programme Codeand the BBC Producers' Guidelines were revised to comply with this requirement.

A further revision to the broadcasters’ allocation arrangements for elections was made for the 2001 General Election PEBs. Wherever it was possible to split broadcasts, PEBs were allocated to parties in each of the four nations on the basis of those parties fielding candidates in one-sixth of the seats in each nation, rather than applying the threshold across the UK as a whole. In addition to the main political parties with Parliamentary representation, eight minor parties were allocated one or more broadcasts on television or radio in England, Scotland or Wales, while a further two parties were allocated broadcasts in Northern Ireland. The major parties were allocated separate series of broadcasts in each nation. The numbers of broadcasts allocated to the major parties were determined, for England, in line with the allocations made at the previous general and local elections, and for Wales and Scotland, in line with allocations made in those nations for devolved elections and the previous European Parliamentary elections.

Prior to the general election, the *Pro-Life Alliance* launched a High Court action against the BBC.[[173]](#footnote-173) In May 2001 ProLife Alliance had fielded enough candidates for the June 2001 general election to entitle it to make one PEB in Wales. The BBC Wales transmission was scheduled for a little under five minutes. The major part of the proposed programme was devoted to explaining the processes involved in different forms of abortion, with prolonged and graphic images of the product of suction abortion: aborted foetuses in a mangled and mutilated state, tiny limbs, a separated head, and the like. The BBC declined to show the PEB in full on the grounds that it would breach its own codes on taste and decency.[[174]](#footnote-174) The Alliance applied for judicial review of the decision not to broadcast. The application was dismissed at first instance, but the Alliance was successful in the Court of Appeal. The BBC appealed to the HL. The majority of the House of Lords criticized the CA for failing to recognize the legislative framework and the ITC Code. The CA had essentially suggested the the BBC should simply have ignored their obligations under the legislative codes and have permitted the broadcast. The Broadcasting Act 1990 required broadcasters to consider whether the proposed PPB complied with the relevant codes for taste and decency set by the ITC.[[175]](#footnote-175) The HL held that the broadcaster’s application of the statutory criteria could not be faulted, and the Alliance had not made out a case for interfering with the decision. The BBC’s appeal was allowed.

**8.9.3 Why do we need so much legislation to regulate election and campaign broadcasts?**

Under electoral legislation, television and radio broadcasters have to follow legislation and various codes of practice in their coverage of candidates during election periods. Ofcom is responsible for the code regulating independent broadcasters; the BBC and S4C have to draw up (and observe) their own. Though broadcasters should achieve an appropriate balance they are not required to give exactly the same amount of coverage to each candidate but are required to have regard to the relative electoral strength of the candidates and their parties.

If it is considered that a programme could have an undue and unfair influence on an election or referendum, then it is up to the Electoral Commission to either ask the broadcast to delay transmission until after polling or to prosecute a party or broadcaster (together with Ofcom) if the law has been breached. Furthermore Article 10 ECHR enshrines freedom of expression relevant to party political and referendum broadcasts and further rules are enshrined in the Ofcom Rules on Party Political and Referendum Broadcasts*.*

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See below 8.9.8

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Section 333 of the Communications Act 2003[[176]](#footnote-176) requires Ofcom to ensure that Party Political Broadcasts (PPBs), Party Election Broadcasts (PEBs) and Referendum Campaign Broadcasts (RCBs) on behalf of registered political parties and designated referendum organisations[[177]](#footnote-177) are included in every licensed public service television channel (regional Channel 33 , Channel 4, Channel 5), every local digital television programme service, and every national (i.e. UK-wide, commercial) analogue radio service, and their digital simulcast services (Classic FM, Talksport and Absolute Radio AM).[[178]](#footnote-178) The BBC Agreement requires Ofcom to ensure that PPBs and RCBs are included in such of the BBC’s UK Public Services as Ofcom consider appropriate.[[179]](#footnote-179)

Section Six of Ofcom’s Broadcasting Code provides that broadcasts under these Rules are required to comply with the relevant provisions of the Code (for example, the provisions regarding harm and offence) notwithstanding that the content of broadcasts is normally the responsibility of the relevant political parties (or designated referendum organisations). Licensees should apply these Rules in accordance with relevant provisions of the Code.

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See above 8.4.1

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Extracts in sound or vision featuring members not of the party making the broadcast require the consent of the member and the other party concerned. Wide shots of the chambers of the National Assembly of Wales, Scottish Parliament and Northern Ireland Assembly are allowed, but wide shots of Westminster chambers during sittings are not. Extracts from party conference speeches of the party allocated the broadcast may be used, and can be licensed in the normal way from broadcasters.

News footage featuring the party's own leader and politicians can also be licensed from broadcasters. But clips that identify the programme source (via on screen logos, theme music or the inclusion of presenters or reporters) will not be allowed. Visual and audio material (eg archive and news clips) of political figures from other UK political parties should not be included without the consent of the individual concerned. Undistorted stills that have been lawfully published previously can normally be used without the individuals’ or their party’s consent. Archive footage or undistorted stills of international public figures can normally be used without such individuals’ consent, where such use does not imply the support of that figure for the party making the broadcast. Written consent from a parent or guardian must be obtained for the appearance of any child (i.e. someone under the age of 16).

Candidates can take part in party election broadcasts, but there should be no explicit visual or verbal reference to the candidate’s own constituency, ward or electoral area, such as a clearly identifiable landmark. This does not apply in the European elections to images or general references to Scotland, Wales and Northern Ireland, or, similarly, in the GLA election to the London-wide list. It also does not apply to images of the Houses of Parliament, the Scottish Parliament, the Senedd, or Stormont, which can be used in broadcasts featuring candidates for the constituencies in which those buildings are located, provided there is no reference to issues within the constituency or electoral area.

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See below 8.9.6

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Direct appeals for funds are not allowed, and no revenue-generating telephone or text numbers can be used in political broadcasts. Appeals for members of the audience to contact the party are allowed at the end of the broadcast via nonrevenue generating telephone or text numbers, e-mail, website or social media addresses.

The length of broadcasts is precisely measured by stop watch. Parties and designated organisations may choose a length of 2’40”, 3’40” or 4’40” on TV. For BBC Radio, broadcasts should be 1’30”. For commercial radio, broadcasts can be any duration up to 2’30”, but the preferred length is 1’00”. Broadcasters should be informed of the selected duration at least 14 days prior to the transmission date. Party broadcasts will not be transmitted unless a form of words agreed with the broadcaster is used.

Delivery Broadcasts should be delivered via digital file using common technical standards agreed by the BBC, Channel 4, Channel 5, STV and ITV. Delivery to S4C should be on HDCam. Broadcasts should be in widescreen format (16x9 full height anamorphic). The sound can be in mono or stereo. The broadcast master material should be delivered together with two DVD copies to each broadcaster carrying the broadcast. Details of delivery requirements and addresses should be checked directly with each of the broadcasters individually. The digital files or tapes, transcripts and details of any music used must be delivered by 10 am at least 3 working days before the date of transmission.[[180]](#footnote-180)

Broadcasters reserve the right to cancel and reschedule the broadcast of any material that is not delivered on time, or where compliance issues are identified by the broadcaster on delivery, requiring amendments prior to broadcast. Broadcasters reserve the right to charge for any costs incurred due to late delivery.

**8.9.4 European elections**

Since 1999, Members of the European Parliament for England, Scotland and Wales (MEPs) were elected using a regional list system. The three members for the Northern Ireland region are elected using the STV system. At the 1999 election, PEBs were offered to Labour, Conservatives and Liberal Democrats, and also to SNP in Scotland and Plaid Cymru in Wales. Other parties which put forward a full list of candidates in each of the regions in any nation were offered one broadcast in that nation. Six other parties qualified for a single broadcast in England, four in Wales and five in Scotland. Of those broadcasters unable to split their signal between nations, Channel 4 did not carry any PEBs, while Channel 5 allocated UK-wide broadcasts to Labour, Conservatives, Liberal Democrats, Plaid Cymru and SNP. Under revised allocation arrangements, any party fielding one or more candidates which could point to prior electoral support – defined as either gaining more than 2.5 per cent of first preference votes at the previous European election, or sufficient support at the most recent election (the Assembly elections in 1998) to gain one or more seats – would be offered a broadcast. Two other parties qualified for a single broadcast in Northern Ireland on this basis.

New election and party political guidance was issued by Ofcom ahead of the local and EU elections in May 2019 as Brexit uncertainty continued.[[181]](#footnote-181)

**8.9.5 Devolution**

With the establishment of devolved legislatures in Northern Ireland in 1998 and in Scotland and Wales the following year, arrangements were established for the allocation of PEBs to contesting parties. Members of both the Scottish Parliament and the Welsh Assembly were elected by the Additional Member System (AMS), with a top-up vote from a regional party list in addition to single-member constituencies. While the larger parties fielded candidates in both the constituency seats and regional top-up lists, smaller parties concentrated their efforts on the regional lists alone, and some parties fielded only the number of candidates realistically electable on each regional list, rather than the maximum possible.

In each nation of the UK, parties are offered one or more PPBs over a 12-month period if:

* a party holds one seat or more in that nation in any relevant parliament or assembly; and
* evidence of their past electoral support and/or current support at a particular election or in that nation means it would be appropriate to do so.

Parties in Great Britain are offered one PPB in season: autumn, winter and spring. Parties in Northern Ireland are offered one or two PPBs in the period 1 September to 30 March (excluding December). No PPBs should be broadcast during election or referendum periods. Each designated referendum organization is allocated a series of RCBs before each referendum. The allocation should be equal for each referendum organization.

At the Scottish Parliament and Welsh Assembly elections in 1999, PEBs were allocated to Labour, Conservatives and Liberal Democrats, and also to SNP in Scotland and Plaid Cymru in Wales. Parties fielding a slate of sufficient candidates to match the number of seats available on half or more of the regional top-up lists were also offered one PEB on this basis. A further five parties qualified for a broadcast in Scotland, while four qualified in Wales.

Members of the Northern Ireland Assembly were elected by the STV system. The first elections to the Assembly were held in 1998, following the broadcasters’ decision formally to allocate a series of PEBs to parties in Northern Ireland. Five parties – the Alliance Party, Democratic Unionist Party, Sinn Fein, Social Democratic and Labour Party and the Ulster Unionists – were each offered two TV and two radio broadcasts. Other parties fielding one or more candidates in at least one-sixth of the constituencies contested (in practice, a minimum total of three candidates across three different constituencies) qualified for a single broadcast. Six other parties qualified on this basis.

**8.9.6 Greater London elections**

The first contests for a directly-elected Mayor of London and the Greater London Assembly were held in May 2000. The broadcasting authorities faced some difficulty in allocating PEBs for the mayoral election in which 11 candidates stood for one post. The qualifying criteria determined by the broadcasters stated that candidates must demonstrate both previous electoral support (in the three most recent elections in London: the 1999 European election, 1998 borough elections and the 1997 general election), and current electoral support, taking into account opinion polls or other evidence of widespread support.

Of the 11 mayoral candidates, five were offered PEBs: Frank Dobson (Labour), Steven Norris (Conservative), Susan Kramer (Liberal Democrat), Darren Johnson (Green Party) and Ken Livingstone the independent candidate. The Mayoral and Assembly contests were held at the same time as local elections elsewhere in England, and no separate broadcasts for the Assembly elections were allocated in addition to the series of local government broadcasts.

**8.9.7 Referendums**

Under the provisions of the Political Parties, Elections and Referendums Act 2000 (PPERA), referendum campaign broadcasts at a UK-wide, national or regional referendum are allocated to each of the umbrella campaign organizations designated by the Electoral Commission. Detailed allocation arrangements are made by the broadcasters at the time of any referendum, and the Commission must be formally consulted on any such rules before they are adopted.

**8.9.8 The Electoral Commission**

The Electoral Commission is the regulator overseeing elections in the UK and ensuring that UK laws on spending by political parties are followed. The Commission was established under the Political Parties, Elections and Referendums Act 2000 (PPERA) (section1). Sections 5 – 13A PPERA set out the general functions of the Commission in overseeing elections and referendum. The main functions include:

* make sure people understand the rules and try to prevent people breaking the rules;
* investigate and impose sanctions when people do break the rules;
* publish data on political funding and spending by political parties;
* ensure how much parties can spend on campaigning at certain elections;
* ensure transparency in our political system;
* receiving, analysing and publishing information about party donations and campaign spending and monitoring how well the rules are being followed (Part IV and Chapter II);
* advising governments on changes to the rules and making recommendations for change;
* investigating malpractice and asking companies to disclose party funding (Schedule 19B ‘investigatory powers of the commission’).
* dealing with possible breaches of the rules (civil monetary penalties Schedule 19C; criminal penalties and fines Schedule 20)

There are limits on candidate spending at elections and controls on the sources of funding for that spending. After the election, candidates’ agents must account for the costs of campaigning and donations to the campaign in a spending return. Returning Officers must receive spending returns from all candidates by a certain date, which varies depending on the election. The Returning Officer is then responsible for making the returns available for public inspection.

**8.9.9 The Brexit Referendum and election fraud**

On 23 June 2016 a referendum was held across the United Kingdom and Gibraltar about whether the UK should remain a member of the European Union or leave the European Union. This became known as ‘Brexit’ (or ‘Britain exiting the European Union’). The UK Government was responsible for the detailed legislation for this referendum. The European Union Referendum Bill was introduced to Parliament on 28 May 2015 and passed into law on 17 December 2015.[[182]](#footnote-182)

The Electoral Commission had a number of specific responsibilities and functions in relation to the Brexit referendum (under secondary legislation), which included former Chairman, Jenny Watson, acting as Chief Counting Officer (CCO) with overall responsibility for the administration of the poll. The Commission was also responsible for overseeing and accounting to the UK Parliament for the payment of fees to RCOs and COs for running the referendum and the reimbursement of the costs they incurred in doing so. The total cost of the conduct of the Brexit referendum was £129.128m.[[183]](#footnote-183)

The Vote Leave campaign, fronted by Conservative MPs, Boris Johnson and Michael Gove, won the contest to be the official ‘Leave Campaign’ in the 2016 referendum on whether Britain should stay in the European Union. The result of the referendum is by now well known, namely 51.9 per cent of the population voted ‘Leave’ and 48.1 per cent voted ‘Remain’. A number of companies and individuals have been referred to the National Crime Agency for suspected criminal offences committed during the EU referendum.

In 2017 the Electoral Commission began an investigation into the funding and possible breaches of electoral legislation in relation to the Vote Leave campaign. Bob Posner, legal counsel for the regulator, said on 1 November in a press release: ‘We have reasonable grounds to suspect a number of offences under electoral law may have been committed. Further offences are not within the regulatory remit of the Commission. For those offences where we may impose civil sanctions, our sanctions are limited at £20,000.’ [[184]](#footnote-184) Because of limitations in the law, the regulator referred a number of companies supporting the EU ‘Leave’ Brexit referendum campaign to the UK National Crime Agency.[[185]](#footnote-185) The Electoral Commission’s investigation focused specifically on £2m reported to have been loaned to the Vote Leave organization by Arron Banks, a British businessman and political donor and co-founder of the ‘Leave.EU’ campaign, to whom he had donated a further reported £6m (his organization ‘Better for the Country’ ran the ‘Leave.EU’ referendum campaign).

The Electoral Commission’s investigations found that financial transactions for ‘Vote Leave’ were complex and complicated, including offshore companies incorporated in Gibraltar and the Isle of Man. These jurisdictions were beyond the reach of the Electoral Commission’s legal remit and the sums of money involved were significant: electoral funding amounting to approximately £8m, which included loans of £6m to Leave.EU and Arron Banks, a registered campaigner in the EU Referendum.[[186]](#footnote-186)

In July 2018, ‘Vote Leave’ was fined £61,000 for breaching electoral law. The Electoral Commission announced that Vote Leave had exceeded its £7m spending limit in 2016 by funnelling £675,315 through pro-Brexit youth group ‘BeLeave’ during the Brexit Campain in advance of the referendum on 23 June 2016. The founder of BeLeave, Darren Grimes, was also fined £20,000 and referred to the Metropolitan Police, along with Vote Leave official David Halsall. The regulator’s findings were that Mr Grimes had ‘wrongly’ reported the electoral spending as his own. This meant that, including this amount, the Electoral Commission found that Vote Leave spent £7,449,079, breaching its £7m spending limit.

In March 2019 the Electoral Commission announced its intention that it would like a change in legislation in order to prosecute political parties and referendum campaign groups itself in future, rather than having to pass on all potentially criminal cases to the police of the NCA. The watchdog urged ministers to advance legislation, by altering its enforcement policy in the face of another EU referendum in case parliament could not agree on a suitable Brexit strategy (i.e. ‘hard Brexit’ or another referendum).

In February 2019 the House of Commons Digital, Culture, Media and Sport Committee (DCMSC) published its report on disinformation, 'fake news' and breaches of electoral law.[[187]](#footnote-187) The report concluded inter alia that ex-UKIP funder Arron Banks and his associate Andy Wigmore had shown complete disregard and disdain for the parliamentary process, when they appeared as witnesses before the committee in 2017. The DCMS report (2019) recommended that the National Crime Agency (NCA) should investigate election fraud and urged a review of self-regulation for the strategic communications industry on whether new regulation is necessary to curb bad behaviour in the industry when it comes to dark ads during elections and referendums.

The report concluded that current electoral laws are not fit for the digital age, stating that ‘gone are the days of billboard advertising and leaflet-dropping during election campaigns.’ Now all parties micro-targeted online campaigning. The report called for absolute transparency of political campaigning, with clear banners on all paid-for political advertisements and videos, identifying the source and the advertiser. There should be statutory definition of digital campaigning and online political advertising. New laws should take the impact of social media into account when it comes to elections or referendums.

**8.9.10 Are broadcasting laws sufficient to control social media campaigning? Discussion and analysis**

A significant proportion of political campaigning has now moved online. The June 2017 General Election was largely conducted online by the opposition Labour Party which not only outspent but also outscored Theresa May’s Conservative Party with a strategy that harnessed Facebook and YouTube to bolster the opposition Labour Leader, Jeremy Corbyn’s, immense support. The Conservatives’ digital campaign was described by media commentators as unprepared and unresponsive. On polling day, 8 June, Labour spent considerably more than the Conservatives promoting its hashtag #forthemany on Twitter. Twitter has since been considered Labour’s online stronghold and while buying the rights to promote a single hashtag can cost as much as £50,000, the expense may have been worth it to rally the younger vote, which appears to have played a significant role in Labour’s performance.

Whilst traditional party election or political broadcasts are fast becoming out of date, campaigners now largely use digital platforms to campaign during an election or referendum, such as the United States, France, Germany, the UK, Ireland etc.. Legislators are trying to keep in step with fast evolving unregulated platforms as campaigners range from registered political parties to individual campaigners to non-registered campaigners. In the UK, non-party campaigners must register with the Electoral Commission if they intend to spend more than £20,000 in England or £10,000 in Scotland, Wales or Northern Ireland at a UK parliamentary General Election. Campaigners at the 2016 EU referendum had to register if they wanted to spend more than £10,000. Political parties must register with with the regulator to stand candidates in any elections.

The rise of digital campaigning raises important issues for a number of regulators and organisations. The UK Information Commissioner has been investigating the use of personal data and analytics by political campaigns, parties, social media companies and other commercial organizations since the Brexit Referendum in June 2016.

Academic researchers are increasingly concerned about a number of problems that have emerged as a result, which could undermine democratic processes. Key problems include the fact that the impact of broadcasting regulation is lessened and campaigning is carried out on platforms that are closed and – for the most part – beyond scrutiny. As a result, it is becoming difficult to ensure fairness, transparency and guard against corruption. Online and social media also undermine the spending regime. Invoices do not detail how and where money is being spent, so it is hard to track how much is being spent on what, where, and by whom. Major pre-campaign expenses, such as the development of detailed databases of voters, may not be included, even though they have a substantive impact during the campaign itself. Digital campaigns can also target voters far more precisely compared with analogue campaigns, which raises questions about transparency, privacy and equal access to information. Commentators have raised concerns about the impact of targeting on the integrity and honesty of campaigns. It is also increasingly difficult to monitor spending and support-in-kind from third parties and unofficial media.

The last decade has seen an explosion in the use of digital tools in political campaigning. Perceptions have also changed in that time. The use of social media was first heralded as a positive revolution in the mass engagement of voters. More recently we have seen serious allegations of misinformation, misuse of personal data, and overseas interference. Concerns that our democracy may be under threat have emerged. Currently with the British electoral laws very much out of date and the power of law enforcement and fines by the Electoral Commission relatively weak, it can be argued that democracy is at risk from the malicious and relentless targeting of British and EU citizens with disinformation and personalized 'dark adverts' from unidentifiable sources, delivered through the major social media platforms used everyday. Much of this is directed from agencies working in foreign countries, including Russia. The big tech companies are failing in the duty of care they owe to their users to act against harmful content, and to respect their data privacy rights. It is clear that self-regulation is not working and there needs to be statutory intervention which requires the tech companies to adhere to electoral codes of conduct, possibly overseen by an independent regulator.

If it is accepted that British electoral regulations and legislation are out of date and not fit for the digital age, there should be legislation which requires major donors to clearly establish the source of their funds. The Electoral Commission conducted its own research into digital campaigning and the future of election broadcasting. The Commission’s recommendations are summarized below:

* Each of the UK’s governments and legislatures should change the law so that digital material must have an imprint saying who is behind the campaign and who created it.
* Each of the UK’s governments and legislatures should amend the rules for reporting spending. They should make campaigners sub-divide their spending returns into different types of spending. These categories should give more information about the money spent on digital campaigns.
* Campaigners should be required to provide more detailed and meaningful invoices from their digital suppliers to improve transparency.
* Social media companies should work with the Electoral Commission to improve their policies on campaign material and advertising for elections and referendums in the UK.
* UK election and referendum adverts on social media platforms should be labelled to make the source clear. Their online databases of political adverts should follow the UK’s rules for elections and referendums.
* Each of the UK’s governments and legislatures should clarify that spending on election or referendum campaigns by foreign organisations or individuals is not allowed. They would need to consider how it could be enforced and the impact on free speech.
* Each of the UK’s governments and legislatures should increase the maximum fine the Commission can sanction campaigners for breaking the rules, and strengthen the regulator’s powers to obtain information outside of an investigation.[[188]](#footnote-188)

The House of Commons Digital, Culture, Media and Sport Committee called on the Government to launch an independent investigation in 2019. One of the recommendations included an independent review of campaign regulation and possibly a new regulator altogether with enhanced statutory powers to ‘punish’ and issue more wide-ranging fines. It is a modern-day fact that digital campaign tools can make it easier and cheaper for legitimate campaigners to communicate with voters. It is a sign of a healthy democracy when campaigners tell voters about their policies and political views via Facebook or Twitter.

However, these (new) techniques for reaching voters may well reduce confidence in the integrity of elections and referendums if they are not regulated and conducted properly. Broadcasting and spending regulation need to be investigated including the impact of disinformation and fake news on voter manipulation.

**8.10 Further reading**

**Barwise, T. P. and Watkins, L. (2018) ‘The evolution of digital dominance: how and why we got to GAFA [Google, Apple, Facebook, Amazon]’. In: Moore, M. and Tambini, D. (2018) *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple*. Oxford University Press, New York, NY at pp. 21-49:** [**https://lbsresearch.london.edu/914/1/9780190845124\_Barwise\_Chapter%201.pdf**](https://lbsresearch.london.edu/914/1/9780190845124_Barwise_Chapter%201.pdf)

Google, Apple, Facebook and Amazon (GAFA) are now the most valuable public companies in the world by market capitalization. The authors argue that these tech companies have dominated the stock market since the mid-1990s’ and dominate our daily lives. They wield enormous power, raising difficult questions about their governance, regulation, and accountability. Increasingly, these companies also operate in multiple product markets, often with products and services offered free or below cost as part of a wider strategy to protect and extend. Examples include Amazon’s Kindle and Google’s Maps and Gmail. Barwise and Watkins discuss these distinctive winner-take-all characteristics of digital markets under four headings: direct network effects; indirect network effects (‘multisided markets’); big data and machine learning; and switching costs and lock-in. The authors conclude that GAFA’s market dominance brings many benefits to consumers and other businesses. Current competition regulation is designed to prevent firms from using their market power to charge higher prices, or offer lower quality, than would prevail in a competitive market. It is unsuited to a platform context where, in Google’s case, consumers pay nothing, and advertisers have a highly effective tool that did not exist 20 years ago and for which they pay a competitive, auction-based market price. Of course, incumbent industries disrupted by tech-based platforms (hotels by Airbnb, taxis by Uber, etc.) complain and highlight their real and imagined negative impacts. But much of this is just a normal part of disruptive innovation: the victims of creative destruction do not like it. On this basis, the authors advance some positive arguments for light-touch, perhaps technology-specific, regulation of platform businesses but not, in their view, for no regulation at all.

**Mueller, B. (2017) *Dynamics of international advertising: theoretical and practical perspectives*. 3rd edition. New York. Peter Lang.**

Barbara Mueller’s textbook provides provides excellent and comprehensive coverage of current issues affecting global advertisers. The book provides rich conceptual frameworks and detailed, relevant examples. It is exceptionally strong in providing deep cultural insights for the reader. The book takes a holistic corporate view, making it appropriate for those working in advertising, marketing and international legal practices in this field.

**Stanford, B. (2018) ‘Compulsory voter identification, disenfranchisement and human rights: electoral reform in Great Britain.’ In: European Human Rights Law Review. E.H.R.L.R. 2018, 1, 57-66.**

Ben Stanford examines the human rights implications of the British Government’s proposals to reform the electoral process in Great Britain. The author looks particular at pilot study of May 2018 during the local elections in England, which required eligible voters to produce some form of identification when voting in polling stations. Whilst the European Court of Human Rights has granted a wide margin of appreciation to states when it comes to the organizing and running of electoral systems, the Court has made it clear that any conditions that restrict the right to vote must satisfy a number of requirements, not least that the free expression of the people to choose the legislature must not be thwarted. In contrast, Stanford looks at the compulsory identification laws in Northern Ireland which have been received relatively well. He proposes that any electoral reform iin the UK ought to take into account and comply with the requirements of Article 3 of the First Protocol to the ECHR. Stanford notes of importance that voters in Great Britain should be allowed to cast a provisional vote, subject to verification, should they forget to bring an acceptable form of identification on the day of the election. Ultimately, at a time when voter apathy amongst the electorate is consistently highlighted as a real cause for concern, the author recommends that the British Government should not be considering such fundamental reforms, however well-intentioned the rationale may be, in response to what is a relatively insignificant problem and in a way that may in fact discourage or even thwart the free expression of the people to choose the legislature.

**Wring, D., Mortimore, R. and Atkinson, S. (eds) (2016) *Political Communication in Britain: Polling, Campaigning and Media in the 2015 General Election*. London: Palgrave Macmillan**

This book offers a unique exploration of the 2015 UK General Election from the perspectives of those most intimately involved as strategists, journalists and analysts. It features contributions from the rival parties, news and polling organizations as well as academic experts who examine all aspects of the campaign.  A common theme that emerges is the increasing complexity of the democratic process given the development of a more multifaceted party system and a growing fragmentation in mass media audiences. The UK electoral landscape has changed: in 2015 six parties received more than a million votes whereas in the 2010 General Election it was only three. This book provides invaluable insights into contemporary British politics and its relation with the media through analysis of an election whose outcome, an outright Conservative victory, surprised many commentators. The various authors explain, inter alia, electoral regulation, media and communication legislation and appeals to a wider readership – not just lawyers.

1. House of Commons (2018) Digital, Culture, Media and Sport Committee, ‘Investigation into the use of data analytics for political purposes’, paras. 31 – 50. [↑](#footnote-ref-1)
2. Illegal and Corrupt Practices (Prevention) Act 1883. [↑](#footnote-ref-2)
3. *Commission v Kingdom of Spain (supported by United Kingdom of Great Britain and Northern Ireland)* (2011) (Case C-281/09) Judgment of the Court (First Chamber) of 24 November 2011. The case concerned ‘advertising spots’ and transmission times on Spanish national TV and the state’s failure to fulfil obligations under Directive 89/552/EEC. [↑](#footnote-ref-3)
4. For further discussion see: Gibbons, T. (2018). [↑](#footnote-ref-4)
5. The new BBC TV channel commenced broadcasting on 24 February 2019. Ofcom granted the licence in June 2018. Director General of the BBC, Tony Hall said he wanted the channel to reflect modern Scotland. BBC Scotland airs about 50% original content and 50% repeats. [↑](#footnote-ref-5)
6. Ofcom (2017). [↑](#footnote-ref-6)
7. Ofcom (2018). [↑](#footnote-ref-7)
8. Crawford Committee Report of the Broadcasting Committee (1925). [↑](#footnote-ref-8)
9. A Royal Charter is an instrument of incorporation, granted by The Queen, which confers independent legal personality on an organization and defines its objectives, constitution and powers to govern its own affairs. Incorporation by Charter is a prestigious way of acquiring legal personality and reflects the high status of that body. The authority for the grant of a Charter comes from the Royal Prerogative, that is to say, the grant is made by the Sovereign on the advice of the Privy Council. [↑](#footnote-ref-9)
10. House of Commons (2004) The Hutton Report. [↑](#footnote-ref-10)
11. [2013] EWHC 1342 (QB). [↑](#footnote-ref-11)
12. ##  National Audit Office (2013) ‘Severance and wider benefits for senior BBC managers’. 1 July 2013.

 [↑](#footnote-ref-12)
13. Clementi, Sir David (2016) ‘A Review of the Governance and Regulation of the BBC’. Presented to Parliament by the Secretary of State for Culture, Media and Sport by Command of Her Majesty. March 2016. Cm 9209 (‘The Clementi Report’). Sir David Cecil Clementi was former chairman of Virgin Money and Prudential and previously Deputy Governor of the Bank of England. [↑](#footnote-ref-13)
14. The Ofcom Broadcasting Code (2017) with the Cross-promotion Code and the On-Demand Programme Service Rules. [↑](#footnote-ref-14)
15. In the case of the BBC, Ofcom’s power to impose sanctions is set out in the BBC Charter (2017). [↑](#footnote-ref-15)
16. ss 3(1)(a) and (b), (2)(e) and (f) and (4)(b)(g)(h)(j)(k) and (l), 319, 320, 321, 325, 326 and Schedule 11A of the Communications Act 2003 and sections 107(1) of the Broadcasting Act 1996. [↑](#footnote-ref-16)
17. Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audio-Visual Media Services Directive). [↑](#footnote-ref-17)
18. Relevant legislation includes ss. 3(4)(h) and 319(2)(a) and (f) of the Communications Act 2003, Article 27 of the Audiovisual Media Services Directive, Article 10 ECHR and the BBC Charter and Agreement of November 2016 between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation (as may be amended from time to time). [↑](#footnote-ref-18)
19. Meaning of ‘children’ under 15. [↑](#footnote-ref-19)
20. Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes). [↑](#footnote-ref-20)
21. The watershed only applies to television. The watershed is at 2100. Material unsuitable for children should not, in general, be shown before 2100 or after 0530. [↑](#footnote-ref-21)
22. This phrase particularly refers to the school run and breakfast time. [↑](#footnote-ref-22)
23. Relevant legislation includes ss. 3(4)(g) and 319(2)(a),(f) and (I) of the Communications Act 2003, Articles 10 and 14 ECHR, and the BBC Charter and Agreement. [↑](#footnote-ref-23)
24. As defined in s. 1 of the Terrorism Act 2000. [↑](#footnote-ref-24)
25. Meaning all forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, gender, gender reassignment, nationality, race, religion, or sexual orientation. [↑](#footnote-ref-25)
26. Meaning any offence under law that is punishable by imprisonment or by a fine. [↑](#footnote-ref-26)
27. Relevant legislation includes ss. 319(2)(c) and (d), 319(8) and section 320 of the Communications Act 2003, the BBC Charter and Agreement, and Article 10 ECHR. [↑](#footnote-ref-27)
28. Matters of political or industrial controversy are political or industrial issues on which politicians, industry and/or the media are in debate. Matters relating to current public policy need not be the subject of debate but relate to a policy under discussion or already decided by a local, regional or national government or by bodies mandated by those public bodies to make policy on their behalf, for example non-governmental organisations, relevant European institutions, etc. [↑](#footnote-ref-28)
29. Rule 5.13 applies to local radio services (including community radio services), local digital sound programme services (including community digital sound programme services) and radio licensable content services. For the avoidance of doubt, it does not apply to any BBC services.) [↑](#footnote-ref-29)
30. Relevant legislation includes ss. 319(2)(c) and 320 of the Communications Act 2003, the BBC Charter and Agreement, and Article 10 ECHR; the Representation of the People Act 1983 (as amended), in particular sections 66A, 92 and 93 (which is amended by section 144 of the Political Parties, Elections and Referendums Act 2000. [↑](#footnote-ref-30)
31. A referendum held under the Northern Ireland Act 1998 (as amended) begins when the draft of an Order is laid before Parliament for approval by each House. [↑](#footnote-ref-31)
32. This section only applies during the actual election or referendum period. [↑](#footnote-ref-32)
33. Relevant legislation includes ss. 3(2)(f) and 326 of the Communications Act 2003 and sections 107(1) and 130 of the Broadcasting Act 1996 (as amended), Article 28 of the Audiovisual Media Services Directive, Article 10 ECHR and the BBC Charter and Agreement. [↑](#footnote-ref-33)
34. Relevant legislation includes ss. 3(2)(f) and 326 of the Communications Act 2003, ss. 107(1) and 130 of the Broadcasting Act 1996 (as amended), Articles 8 and 10 ECHR and the BBC Charter and Agreement. [↑](#footnote-ref-34)
35. Doorstepping is the filming or recording of an interview or attempted interview with someone, or announcing that a call is being filmed or recorded for broadcast purposes, without any prior warning. It does not, however, include vox-pops (sampling the views of random members of the public). [↑](#footnote-ref-35)
36. Surreptitious filming or recording includes 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. [↑](#footnote-ref-36)
37. Relevant legislation includes ss. 319(2)(fa), (i) and (j) and 319(4) (a), (c), (e) and (f), section 321(1) and (4) and section 324(3) of the Communications Act 2003; section 202 of the Broadcasting Act 1990 (paragraph 3 in Part 1 of Schedule 2), Articles 9, 10, 11, and Chapter VII (Articles 19 to 26) of the Audiovisual Media Services Directive; regulation 3(4)(d) of the Consumer Protection From Unfair Trading Regulations 2008; section 21(1) of the Financial Services and Markets Act 2000; paragraph 3 of the Investment Recommendation (Media) Regulations Act 2005; Article 10 ECHR and the BBC Charter and Agreement [↑](#footnote-ref-37)
38. The inclusion in a programme of, or of a reference to, a product, service or trade mark where the inclusion is for a commercial purpose, and is in return for the making of any payment, or the giving of other valuable consideration, to any relevant provider or any person connected with a relevant provider, and is not prop placement. [↑](#footnote-ref-38)
39. The inclusion in a programme of, or of a reference to, a product, service or trade mark where the provision of the product, service or trade mark has no significant value, and no relevant provider, or person connected with a relevant provider, has received any payment or other valuable consideration in relation to its inclusion in, or the reference to it in, the programme, disregarding the costs saved by including the product, service or trade mark, or a reference to it, in the programme. [↑](#footnote-ref-39)
40. Controlled Premium Rate Services are a subset of Premium Rate Services which are regulated by PhonepayPlus. [↑](#footnote-ref-40)
41. Relevant legislation includes ss. 319(2)(f), (i) and (j), 319(4)(e) and (f) and 321 of the Communications Act 2003, regulation 3(4)(d) of the Consumer Protection From Unfair Trading Regulations 2008, section 21(1) of the Financial Services and Markets Act 2000, paragraph 3 of the Investment Recommendation (Media) Regulations Act 2005, Article 10 ECHR and the BBC Charter and Agreement. [↑](#footnote-ref-41)
42. Section 2, Memorandum of Understanding between the Office of Communications (Ofcom) and the BBC Trust, March 2007. [↑](#footnote-ref-42)
43. Directive 2007/65/EC on the Audiovisual Media Services Directive amended EU Directive 89/552/EEC Television Without Frontiers Directive *Directive 1989* (89/552/EEC) and includes the all TV-like and video-on-demand services (VOD). [↑](#footnote-ref-43)
44. Source: ‘EE fined £1m by Ofcom for misleading customers’, by Sean Farrell, *The Guardian,* 3 July 2015. [↑](#footnote-ref-44)
45. #  Ofcom News Update ‘Most complained about TV programmes of 2018’, 27 December 2018: <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2018/most-complained-about-tv-programmes-of-2018>

 [↑](#footnote-ref-45)
46. Note: these are not legally reported cases (i.e. law reports) but are to be found on the Ofcom website under its adjudications. [↑](#footnote-ref-46)
47. Issue 369 of Ofcom’s Broadcast and On Demand Bulletin 20 December 2018. [↑](#footnote-ref-47)
48. (1986) 8 EHRR 407 (EctHR). [↑](#footnote-ref-48)
49. 12 EHRR 485 (ECtHR). [↑](#footnote-ref-49)
50. Ofcom’s Code (2017) explains that ‘significant views’ can include the viewpoint of nation states whose policies are considered to be ‘major matters’. [↑](#footnote-ref-50)
51. *Jeremy Vine*, Channel 5, 24 October 2018, 09:15,Issue 371 of Ofcom’s Broadcast and On Demand Bulletin 28 January 2019. [↑](#footnote-ref-51)
52. On 30 September 2016, Ofcom published updated research in this area : ‘*Attitudes to potentially offensive language and gestures on television and on radio’* at: <https://www.ofcom.org.uk/__data/assets/pdf_file/0022/91624/OfcomOffensiveLanguage.pdf> [↑](#footnote-ref-52)
53. *Lokkho Praner Sur*, TV ONE, 11 July 2018, 13:00, Issue 371 of Ofcom’s Broadcast and On Demand Bulletin 28 January 2019. [↑](#footnote-ref-53)
54. Shezan International Ltd. is a Pakistani beverage manufacturer based in Lahore. It is the largest beverage company in Pakistan, part of Shahnawaz Group.  [↑](#footnote-ref-54)
55. *Ali (Shakir) and Aslam (Shahida) v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch). [↑](#footnote-ref-55)
56. Ibid., at para 210 (Arnold J). [↑](#footnote-ref-56)
57. Ibid., at para 207. [↑](#footnote-ref-57)
58. [2015] EWHC 406 (Admin). [↑](#footnote-ref-58)
59. Section 319(2) Broadcasting Act 2003. [↑](#footnote-ref-59)
60. *Livingstone v Adjudication Panel for England* [2006] HRLR 45. [↑](#footnote-ref-60)
61. See: *Gaunt and Liberty v Ofcom* [2010] EWHC 1756 (QBD). [↑](#footnote-ref-61)
62. Rule 2.1 of the Code provides that generally accepted standards must be applied to the contents 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 materials. Rule 2.3 provides that, in applying generally accepted standards, broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, among other material, offensive language. [↑](#footnote-ref-62)
63. [2010] EWHC 1756 at para. 17. [↑](#footnote-ref-63)
64. [2003] 1 AC 247 at para. 23 (Lord Bingham) and para. 61 (Lord Hope). [↑](#footnote-ref-64)
65. [2007] 1 AC 100. [↑](#footnote-ref-65)
66. [2007] 1 WLR 1420. [↑](#footnote-ref-66)
67. (1976) 1 EHRR 737 at para. 59 (ECHR). [↑](#footnote-ref-67)
68. *Vice News* is American and was created in December 2013 as a division of Vice Media and primarily consists of documentaries. *Vice*’s investors have been Rupert Murdoch’s 21st Century Fox, investing some $70 million in Vice Media in 2013 with a 5% stake; A & E Networks, in a joint venture with Hearst Corporation and the Walt Disney Company, acquired a 10% share in *Vice* in 2014 for $250 million. **According to the Wall Street Journal, *Vice* was in the** process of trimming its 3,000-person global headcount by 15%, reporting Vice’s losses at more than $50 million in 2018. Source: ‘Vice Media to Shrink Workforce by as Much as 15% as Growth Stalls’, by Keach Hagey, Benjamin Mullin and Alexandra Bruell, *Wall Street Journal* 7 November 2018. [↑](#footnote-ref-68)
69. *BuzzFeed* was founded in 2006 in New York by Jonah Peretti and John S. Johnson III as a ‘viral lab’. BuzzFeed’s **Jonah Peretti** told the New York Times that there might be a multi-company merger between BuzzFeed, Vice, Vox Media, Group Nine Media, and Refinery29, as a means to rival the Facebook-Google ad duopoly. Source: ‘Founder’s Big Idea to Revive BuzzFeed’s Fortunes? A merger with rivals Jonah Peretti, the chief executive, says his company could eventually merge with other online publishers in order to negotiate better terms with tech platforms like Facebook’, by Edmund Lee, *New York Times*, 19 November 2018. [↑](#footnote-ref-69)
70. See: Ofcom Determination of 21 July 2015 ‘Appeal by Vice UK Ltd against a Notice of Determination that the provider of the service ‘Vice (Video)’ (www.vice.com/en\_uk/video) has contravened ss 368BA (‘requirement to notify on-demand programme service’) and 368D(3)(ZA) (‘requirement to pay a fee’) of the Communications Act 2003. [↑](#footnote-ref-70)
71. This decision overturned the previous determination made by ATVOD on 14 August 2013, which judged the video tab made available on the Vice website to be an ODPS. [↑](#footnote-ref-71)
72. See: Ofcom Determination of 21 July 2015 ‘Appeal by Vice UK Ltd’, paras 101–102. [↑](#footnote-ref-72)
73. The 20-year low is for spend on network first-run originations by BBC1, BBC2, ITV, C4, C5 and the BBC portfolio channels combined, in real terms. This figure does not include S4C, BBC Alba and nations and regions original programming spend. Source: Ofcom (2018). [↑](#footnote-ref-73)
74. Despite this decline, pay TV revenue remains significantly higher than revenue generated via subscription video-on-demand subscriptions (£6.4bn versus £895m). Source: Ofcom (2018). [↑](#footnote-ref-74)
75. This figure includes subscriptions to multiple subscription VOD services within one household: 11.1 million households (39.3%) have at least one of either Netflix, Amazon or Now TV. Source: Ofcom (2018). [↑](#footnote-ref-75)
76. Source: Ofcom (2018). [↑](#footnote-ref-76)
77. Source: Ofcom (2018). [↑](#footnote-ref-77)
78. See: Google Privacy Policy of 22 January 2019. [↑](#footnote-ref-78)
79. See: Articles 16 and 17 of Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audio-Visual Media Services Directive - AVMS). [↑](#footnote-ref-79)
80. Article 33 AVMS. [↑](#footnote-ref-80)
81. Part 4A of the Communications Act 2003 makes provision for the regulation of ODPS. Section 368C of the Act imposes various duties on the ‘appropriate regulatory authority’ which, in the absence of another body being designated under section 368B in relation to programme content, is Ofcom. These include a duty to take steps to secure that every provider of an ODPS complies with requirements in section 368D. [↑](#footnote-ref-81)
82. See: House of Commons (2019c). [↑](#footnote-ref-82)
83. #  Source: ‘Instagram 'helped kill my daughter' a video account by Molly Russell’s father Ian Russell, BBC online 22 January 2019: <https://www.bbc.co.uk/news/av/uk-46966009/instagram-helped-kill-my-daughter>

 [↑](#footnote-ref-83)
84. #  Source: ‘Our commitment to protect the most vulnerable on Instagram’, by Adam Mosseri, 4 February 2019, *Daily Telegraph*.

 [↑](#footnote-ref-84)
85. #  Source: Margot James speech on Safer Internet Day. Minister for Digital outlines plans to make the UK the safest place on the world to be online. 5 February 2019: <https://www.gov.uk/government/speeches/margot-james-speech-on-safer-internet-day>

 [↑](#footnote-ref-85)
86. Source: Letter to the *Sunday Times*, 17 February 2019 by Children’s Commissioner, Anne Longfield. See also her paper ‘Growing up Digital’ at: <https://www.childrenscommissioner.gov.uk/publication/growing-up-digital/> [↑](#footnote-ref-86)
87. Source: Health Secretary vows to get specialists to ‘clean up social media for children’ and oversee the removal of self-harm pictures online’, by David Wooding, *The Sun on Sunday* 10 February 2019. [↑](#footnote-ref-87)
88. #  Network Enforcement Act (Netzdurchsetzunggesetz, NetzDG).

 [↑](#footnote-ref-88)
89. Article 1(1) NetzDG. [↑](#footnote-ref-89)
90. ###  The Federal Ministry of Justice and Consumer Protection, in agreement with the Federal Ministry of the Interior and the Federal Ministry for Economic Affairs and Energy has issued general administrative guidelines on the exercise of discretion by the regulatory fine authority in initiating regulatory fine proceedings and in calculating the fine. See Art. 4(4) NetzDG (‘Provisions on regulatory fines’).

 [↑](#footnote-ref-90)
91. The National Society for the Prevention of Cruelty to Children is a charity campaigning and working in child protection in the United Kingdom and the Channel Islands. [↑](#footnote-ref-91)
92. Ofcom (2016) [↑](#footnote-ref-92)
93. Ofcom (2018) Daytime PIN Research, page 8. Kantar Media, 20th February 2018. [↑](#footnote-ref-93)
94. Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (AVMS). [↑](#footnote-ref-94)
95. European Convention on Transfrontier Television (ETS No. 132). Strasbourg, 05/05/1989 – Treaty open for signature by the Cultural Convention and by the European Union. [↑](#footnote-ref-95)
96. For further discussion see: Barwise, T. P. and Watkins, L. (2018) at pp. 21-49. [↑](#footnote-ref-96)
97. Frances Cairncross is the former Rector of Exeter College, Oxford University. Prior to her decade at Oxford, she was a journalist, spending 13 years on *The Guardian* as an economic columnist and 20 years at *The Economist* magazine as a senior editor. [↑](#footnote-ref-97)
98. The Cairncross Review (2019) Exectuive Summary pp. 5 – 12: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778021/021119_THE_CAIRNCROSS_REVIEW_A_sustainable_future_for_journalism.pdf> [↑](#footnote-ref-98)
99. Source: IMPRESS News 12 February 2019: <https://impress.press/news/impress-welcomes-milestone-report-press-sustainability.html> [↑](#footnote-ref-99)
100. House of Commons (2019c). [↑](#footnote-ref-100)
101. Ibid., at p. 6. [↑](#footnote-ref-101)
102. Source: ICO launches consultation on Code of Practice to help protect children online 12 April 2019: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/04/ico-launches-consultation-on-code-of-practice-to-help-protect-children-online/> [↑](#footnote-ref-102)
103. [2008] 1 AC 1312 at para. 27 (Lord Bingham). [↑](#footnote-ref-103)
104. (2002) (Application No 29271/95) of 26 February 2002 (ECtHR). [↑](#footnote-ref-104)
105. (2006) (Application No 73604/01) of 21 September 2006 (ECtHR). [↑](#footnote-ref-105)
106. (1999) 163 JP 789. [↑](#footnote-ref-106)
107. [1994] ECtHR 26 at para. 49 (ECHR). [↑](#footnote-ref-107)
108. See: *R (on the application of Gaunt) v Ofcom* [2011] EWCA Civ 692. [↑](#footnote-ref-108)
109. The relevant legislation was the Electronic Commerce (EC Directive) Regulations 2002 and the Protection from Harassment (Northern Ireland) Order 1997 (NI 1997/1180). [↑](#footnote-ref-109)
110. [2015] NIQB 11 at 74. [↑](#footnote-ref-110)
111. Ibid., at 35. [↑](#footnote-ref-111)
112. Regulation 22 sets out the particular matters that the court shall have regard to in determining whether a service provider has been placed on notice and can therefore be held liable. These include ‘details of the location of the information’ and ‘details of the unlawful nature of the activity or information in question’. [↑](#footnote-ref-112)
113. [2015] NIQB 11 at 102. [↑](#footnote-ref-113)
114. Ibid., at 95. [↑](#footnote-ref-114)
115. Ibid., at 105. [↑](#footnote-ref-115)
116. [2013] NIQB 14 QBD (NI) 06 February 2013. [↑](#footnote-ref-116)
117. [2012] NIQB 96 QBD (NI) 30 November 2012. [↑](#footnote-ref-117)
118. *TV Vest AS & Rogaland Pensjonistparti v Norway* (2008) (Application No 21132/05) Judgment of the 11 December 2008 (ECtHR) (the *Norwegian Pensioner* case). [↑](#footnote-ref-118)
119. Under s 10(3) of the Norwegian Broadcasting Act 1992 and reg. 10(2) of the Norwegian Broadcasting Regulations. [↑](#footnote-ref-119)
120. *Rogaland Pensjonistparti v Norway* (2008) at para. 78 (Christos Rozakis, President, ECHR). [↑](#footnote-ref-120)
121. The Digital Millennium Copyright Act (‘the Copyright Act’) (Title 17 of the US Code) to provide in part certain limitations on the liability of online service providers (OSPs) for copyright infringement. Section 512(c) of the Copyright Act provides limitations on service provider liability for storage, at the direction of a user, of copyrighted material residing on a system or network controlled or operated by or for the service provider, if, among other things, the service provider has designated an agent to receive notifications of claimed infringement by providing contact information to the Copyright Office and by posting such information on the service provider’s website in a location accessible to the public. [↑](#footnote-ref-121)
122. House of Commons (2019) The Plum Report. [↑](#footnote-ref-122)
123. Guy Parker has been CEO of the ASA since 2009. From 2013 to 2016, Mr Parker chaired the European Advertising Standards Alliance, he is an Executive Committee member of the International Council for Advertising Standards, a member of the Fundraising Regulator’s Standards Committee, a member of the UK government’s Consumer Protection Partnership Strategic Group, a member of the International Chamber of Commerce’s UK Marketing and Advertising Committee and a Fellow of the Institute of Promotional Marketing. [↑](#footnote-ref-123)
124. Lord Currie of Marylebone is a cross-bencher in the House of Lords. David Currie is an economist and professor at the University of London, Deputy Dean at London Business School and Dean of Cass Business School. He was the founding Chair of Ofcom and also a member of the Competition and Markets Authority. [↑](#footnote-ref-124)
125. For further discussion on country-specific advertising regulation see: Jordan, P. (2014). [↑](#footnote-ref-125)
126. #  CAP Code Edition 12 of 2014. UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code) is the rule book for non-broadcast advertisements, sales promotions and direct marketing communications (marketing communications): <https://www.asa.org.uk/uploads/assets/uploaded/7c856612-4a2b-4c89-bd294ab8ff4de0a7.pdf>

 [↑](#footnote-ref-126)
127. See: The BCAP Code: The UK Code of Broadcast Advertising, 2010: <https://www.asa.org.uk/uploads/assets/uploaded/73f1188d-d40a-4453-92c3a6988caa69b1.pdf> [↑](#footnote-ref-127)
128. The Plum Report (2019) pp. 15-16. [↑](#footnote-ref-128)
129. The Privacy and Electronic Communications (EC Directive) Regulations 2003 (No. 2426). [↑](#footnote-ref-129)
130. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications – ‘ePrivacy Directive’). [↑](#footnote-ref-130)
131. Facebook policies on advertising: <https://www.facebook.com/policies/ads> [↑](#footnote-ref-131)
132. The Rt Hon Jeremy Wright QC MP was appointed Secretary of State for Digital, Culture, Media and Sport on 9 July 2018. He was Attorney General from 15 July 2014 to 9 July 2018. He was elected the Conservative MP for Kenilworth and Southam in 2010. [↑](#footnote-ref-132)
133. The Rt Hon Jeremy Wright QC MP, Secretary of State for Digital, Culture, Media and Sport spoke at the ISPA UK Parliament and Internet Conference, 20 November 2018; extracts of which were repeated in Parliament on 18 February 2019: <https://www.gov.uk/government/speeches/jeremy-wrights-speech-at-the-parliament-and-internet-conference> [↑](#footnote-ref-133)
134. Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector. The Autorité de la concurrence (plenary hearing) (translation into English): <http://www.autoritedelaconcurrence.fr/doc/avis18a03_en_.pdf> [↑](#footnote-ref-134)
135. Sapin Decree (loi Sapin) no. 2017-159 of 9 février 2017, on digital advertising services (‘the Sapin Decree’) came into force on 1 janvier 2018 (loi Macron no. 2015-990 of 6 aôut 2015). [↑](#footnote-ref-135)
136. The Sapin Decree adapts the rules of the French Sapin law of 29 January 1993, originally introduced for traditional media, i.e., television, radio and press, to digital media. [↑](#footnote-ref-136)
137. Directive 2005/29/EC Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market of 11 May 2005 (‘The Unfair Commercial Practices Directive’). [↑](#footnote-ref-137)
138. Directive 2006/11/EC On the Term of Protection of Copyright and Certain Related Rights of Enforcement. [↑](#footnote-ref-138)
139. *R v Advertising Standards Authority Ltd ex parte Matthias Rath BV*[2000] 12 WLUK 122; [2001] EMLR 22 (Also known as: *R (on the application of Matthias Rath BV) v Advertising Standards Authority Ltd***)**. [↑](#footnote-ref-139)
140. Pursuant to the ‘British Codes of Advertising and Sales Promotion’, 10th edition 1999. [↑](#footnote-ref-140)
141. (1985) 7 EHRR 383 (ECtHR). [↑](#footnote-ref-141)
142. Ibid., at paras. 45, 46 and 47. [↑](#footnote-ref-142)
143. *ex parte Matthias Rath* (2000) at paras. 28 – 30 (Turner J). [↑](#footnote-ref-143)
144. For a list of non-compliant advertisers in 2019 see: <https://www.asa.org.uk/codes-and-rulings/non-compliant-online-advertisers.html> [↑](#footnote-ref-144)
145. Amazon Europe Core Sarl, 5 Rue Plaetis, L-2338 Luxembourg, 15 August 2018. Complaint Ref: **A17-408329.**  [↑](#footnote-ref-145)
146. #  Source: ”P-app” anmäls till Läkemedelsverket’. Svt Nyheter, Publicerad 11 januari 2018.

 [↑](#footnote-ref-146)
147. NaturalCycles Nordic AB Sweden**,** Luntmakargatan 26, 111 37 Stockholm, Sweden. 29 August 2018. Complaint Ref: **A17-393896.** [↑](#footnote-ref-147)
148. President from 11 December 1916 to 18 November 1929. Thomas Power O’Connor (1848–1929), known as T. P. O’Connor, was a journalist and Irish nationalist, as well as a Member of Parliament at Westminster for nearly 50 years. [↑](#footnote-ref-148)
149. *R v Lemon (Denis); R v Gay News Ltd* [1979] AC 617 (‘Gay News case’). The indictment described the offending publication as "a blasphemous libel concerning the Christian religion, namely an obscene poem and illustration vilifying Christ in his life and in his crucifixion". [↑](#footnote-ref-149)
150. Source: ‘Exorcist: No one under 17 admitted’, by Tom Shales, *Washington Post,* 4 January 1974. [↑](#footnote-ref-150)
151. Kaufmann’s quote in *New Republic*, as quoted in Travers, P. and Reiff, S. (1974), pp. 152–154. [↑](#footnote-ref-151)
152. *A Clockwork Orange* was re-released uncut and passed by the BBFC on 13 February 2019. [↑](#footnote-ref-152)
153. Hally, M. (2012). [↑](#footnote-ref-153)
154. Source: ‘Netflix UK subs rate slows as Now TV gains – BARB’, by Jesse Whittock, 9 January 2018: <https://tbivision.com/2018/01/09/netflix-uk-subs-rate-slows-as-now-tv-gains-barb/> [↑](#footnote-ref-154)
155. Section 1 VRA 2010 (‘Repeal and revival of provisions of the Video Recordings Act 1984’): ss 1 to 17, 19, 21 and 22 of the VRA 1984 ceased to be in force. [↑](#footnote-ref-155)
156. House of Commons, Parliamentary debate of 6 January 2010, Hansard, cc 181–209. [↑](#footnote-ref-156)
157. EC Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services of 22 June 1998. [↑](#footnote-ref-157)
158. #  *R (on the application of British Board of Film Classification) v Video Appeals Committee* [2008] EWHC 203 (Admin); [2008] 1 WLR 1658 (sub nom ‘BBFC v Video Appeals Committee’).

 [↑](#footnote-ref-158)
159. Source: BBFC Press release 16 January 2019: <http://www.bbfc.co.uk/about-bbfc/media-centre/bbfc-launches-new-classification-guidelines-and-calls-greater-age-rating> [↑](#footnote-ref-159)
160. Source: Minutes of the BBFC Board meeting No. 204 Classification Meeting. Friday 14 September 2018. [↑](#footnote-ref-160)
161. Ibid. [↑](#footnote-ref-161)
162. BBFC Annual Report 2017. [↑](#footnote-ref-162)
163. BBC Editorial Guidelines: <https://www.bbc.co.uk/editorialguidelines/guidelines> [↑](#footnote-ref-163)
164. For further discussion see: Freedman, D. (2003). [↑](#footnote-ref-164)
165. Houghton Committee on Financial Aid to Political Parties (1976). [↑](#footnote-ref-165)
166. [1979] 3 All ER 80. [↑](#footnote-ref-166)
167. The Independent Television Commission (ITC) licensed and regulated commercial [television](https://en.wikipedia.org/wiki/Television) services in the UK (except [S4C](https://en.wikipedia.org/wiki/S4C) in [Wales](https://en.wikipedia.org/wiki/Wales)) between 1 January 1991 and 28 December 2003. It was then replaced by Ofcom. [↑](#footnote-ref-167)
168. The Radio Authority subsumed into Ofcom in 2003. [↑](#footnote-ref-168)
169. ss 8(2)(a) and s92(2)(a) Broadcasting Act 1990. [↑](#footnote-ref-169)
170. The Neill Report (1998) pp174-6, sections 13.8-13.11. [↑](#footnote-ref-170)
171. *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No.2)* **(**Application no. 32772/02) [2009] ECHR (ECtHR)**.** [↑](#footnote-ref-171)
172. For further discussion see: Holtz-Bacha, C. and Kaid, L. L. (2006). [↑](#footnote-ref-172)
173. #  *R (on the application of Pro-Life Alliance) v BBC & Others* [2004] 1 AC 185 (HL).

 [↑](#footnote-ref-173)
174. s 6(1)(a) Broadcasting Act 1990. The BBC was subject to a comparable, non-statutory obligation under paragraph 5.1(d) of its agreement with the Secretary of State for National Heritage under Royal Charter. [↑](#footnote-ref-174)
175. The ITC published a *Programme Code* (revised from time to time) and made it a condition of every licence that the broadcaster must comply with the Code. Section 1 dealt with, among other things, offence to good taste and decency. [↑](#footnote-ref-175)
176. Under Schedule 12, paragraph 18 of the Act, the Welsh Authority must prepare and publish a policy with respect to party political and referendum broadcasts and their inclusion in S4C. In doing so it must have regard to (a) any views expressed by the Electoral Commission, and (b) any rules made by Ofcom with respect to party political and referendum broadcasts. [↑](#footnote-ref-176)
177. s 333(3) of the Act, and ss. 37 and 127 of the Political Parties, Elections and Referendums Act 2000. [↑](#footnote-ref-177)
178. This section does not apply to the Channel Islands. [↑](#footnote-ref-178)
179. These rules also apply to the following BBC services in accordance with the BBC Agreement: BBC One; BBC Two; BBC Radio Two; BBC Radio Four; BBC London Radio; BBC Radio Scotland; BBC Radio Nan Gaidheal; BBC ALBA; BBC Radio Wales; BBC Radio Cymru; BBC Radio Foyle; and BBC Radio Ulster. [↑](#footnote-ref-179)
180. BBC Editorial Guidelines Section 10: Politics, Public Policy and Polls: <https://www.bbc.co.uk/editorialguidelines/guidelines/politics/political-broadcasts> [↑](#footnote-ref-180)
181. Ofcom (2019) Evidence of past electoral support and evidence of current support ahead of the various elections taking place on 2 May 2019: <https://www.ofcom.org.uk/__data/assets/pdf_file/0017/112094/evidence-past-current-electoral-support-may-elections-2019.pdf> [↑](#footnote-ref-181)
182. European Referendum Act 2015. [↑](#footnote-ref-182)
183. Electoral Commission (2017). [↑](#footnote-ref-183)
184. ##  Source: Electoral Commission statement regarding ‘Better for the Country Limited and Mr Arron Banks’, 1 November 2017: <https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/party-and-election-finance-to-keep/electoral-commission-statement-regarding-better-for-the-country-limited-and-mr-arron-banks>

 [↑](#footnote-ref-184)
185. s 123(4) of the Political Parties, Elections and Referendums Act 2000. [↑](#footnote-ref-185)
186. ##  Source: Electoral Commission statement regarding ‘Better for the Country Limited and Mr Arron Banks’, 1 November 2017: <https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/party-and-election-finance-to-keep/electoral-commission-statement-regarding-better-for-the-country-limited-and-mr-arron-banks>

 [↑](#footnote-ref-186)
187. House of Commons (2019b). [↑](#footnote-ref-187)
188. Electoral Commission (2018). [↑](#footnote-ref-188)