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Dear Lord Justice Leveson,

In answer to your call for evidence for module 4 I attach a note in response to your specific questions and two recent publications of the LSE Media Policy Project. These have been prepared with the Leveson Inquiry in mind and I hope they can be of assistance in answering the questions you set out in your call for evidence. I send this material in my capacity as an academic expert on media policy who acted as an advisor to the previous government (on the Communications White Paper 2000) and has led a large EU-funded Study on Media Self-Regulationⁱ.

The policy recommendations of your inquiry should cover both reform of self-regulation and structural reform of the media market. The attached **policy brief on journalism self-regulation** draws on international experience of press councils to understand what the defects of the UK model might be. It recommends that reform of self-regulation should involve a wider group of stakeholders, and learn from international experience.

The freedoms and privileges afforded to journalism (including the right to self-regulate) will depend in part on their size and influence, and the overall structure of the media market. Therefore the terms of reference of your Inquiry rightly require you to make recommendations on “the plurality of the media, and its independence, ... media policy, regulation and cross-media ownership”. The attached **policy brief on media pluralism** shows how media merger controls and also behavioural rules have been and may be developed in ways that place checks on the media power that has led to the crisis your Inquiry seeks to address.

The Policy Briefs attached have been authored in collaboration with Professor Manuel Puppis University of Zurich; Professor Rachael Craufurd-Smith (University of Edinburgh), Sally Broughton Micova (London School of Economics) and Davide Morisi (European Commission/ European University Institute).

Yours sincerely

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1. How would you describe the public interest in a free press? 2. How would you describe the public interest in freedom of expression? To what extent does that public interest coincide with, or diverge from, the public interest in a free press?

As I cover media pluralism and media self-regulation in more detail in the attached papers, I will devote most of my attention in this note to these questions.

You are entirely correct to single out these notions for close scrutiny. The terms ‘free press’ and ‘press freedom’ are subject to considerable semantic confusion, and this undermines attempts to articulate the public interest in a free press. The term ‘press’ has been the main source of the confusion. It is sometimes taken to refer to the news media in general, but is also taken to mean newspapers in contrast to other media and in some cases a more literal meaning of printing presses (or the news delivery technologies) is intendedⁱⁱ. It has often for example been remarked that “freedom of the press is guaranteed only to those who own one”.ⁱⁱⁱ Whilst we all have rights of free expression, the question of whether we have rights to mass communication using the means owned by others is more controversial.

In the contemporary context of convergence, press freedom as a legal and policy principle faces a further, fundamental challenge. The press –as newspapers or printing presses- is a means of delivery of news and other information. Digital delivery of journalism is no longer bounded by distinctions between different media of delivery. A term that exists to delineate one form of delivery from another should be re-evaluated in such a context.

There are other reasons that the notion of press freedom is contested that have more to do with the term ‘freedom’: Should we see press freedom as a negative freedom (freedom from the state) or as a positive right (rights or freedoms to do specific things). What does it mean for ‘the press’ to be free? Is this a freedom of journalists, editors or owners of printing presses? These terminological challenges have been well discussed in the relevant literature, and they help explain why the term ‘press freedom’ tends to be used as a slogan to defend ‘press interests’ rather than as an analytical term, or as a term that delineates a specific legal right.

Depending on which of the above meanings is paramount, and assumptions made about the role of news and journalism in society, the public interest in a free press may be construed in a variety of ways. It may be argued for example that the press as ‘news journalism’ should be afforded a range of privileges and immunities (such as source protection or immunity from various forms of licensing and statutory regulation) in the light of the ‘watchdog’ role that it serves. It may be argued that the news media in general should be free of detailed content regulation for example, or pre-publication restraint in order to maintain the free circulation of ideas. There may even be a public interest in the existence of an autonomous self-regulating ‘Fourth Estate’ of ‘free’ media able to operate as a specific and separate site of power in society. There is therefore an important distinction also between theories of press freedom that stress that the press should be able to act freely as a

collective agent – to hold other centres of social power in check – and those theories of press freedom that stress the ability of individual newspapers, editors or journalists to act freely.

In regulatory design press freedom is often shorthand for the idea that newspapers, in contrast to other media – should be free of any form of ‘statutory’ regulation. This position is peculiar to the UK and to a certain extent the US.

In practice, how these broader questions of press freedom should be addressed depends on a variety of factors: It depends on the degree of ‘professionalization’ of journalists: the development of a strong sense of professional public interest oriented ethics, and the existing regulatory framework for the media – in particular for ‘media pluralism’. ‘The press’ in each of the three formulations indicated above should be free to pursue public interest goals, not free to do whatever it likes, so this freedom is not absolute. Conversely the public interest in press freedom may be undermined if the press misbehave, if the market structure permits unacceptable concentrations of power, or if they themselves demonstrably fail to act in the interests of the public. If journalists themselves fail to pursue the public interest and ethical restraint, -conditions that arguably have been described in the evidence heard by the Leveson Inquiry, then it is self-evident that arguments that they should be more free, or that their freedoms should somehow be absolute or unchecked are wrong-headed.

Press freedom also needs to be discussed in relation to press independence: the notion reflects, and has always reflected, an awareness that government regulation of the press is subject to deep and endemic conflict of interest. As long as the press are the key gateway in the representation of the government to those that elect it, then direct control of the press by the government should be avoided. The principle of independence is not a feature of the press per-se, however, but of all media.

But it is worth noting that not all of these justifications of press freedom can be derived from the broader public interest in *freedom of expression*. The classical defence of freedom of expression, deriving from the work of Milton, JS Mill, and early judgements of the US Supreme Court, derives from three main arguments: the argument from Truth, the argument from Democracy and the argument from Autonomy or self-expression. None of these makes a primary distinction between print and other media of delivery, nor are they particularly interested in the agency of the press as a self-regulating autonomous sphere. The concern rather is with (i) the primary value of the effective working of the democratic form of government, in which informed deliberation of policy, and informed selection of representatives can occur; (ii) the circulation of ideas, often referred to in US jurisprudence as the ‘free marketplace of ideas’ which will permit competition among them; (iii) self-expression as itself a justification of free expression that is independent of the other arguments about the social function of expression.

Discussions of press freedom and freedom of expression are often confused and conflicting and the further complication is that there has been an historical shift in terminology: historically, the terms press freedom and freedom of expression have been used interchangeably which was reasonable when it was the case that the technological means of mass communication tended to be printing presses. This is no longer the case.

The principle of press freedom often conflicts with freedom of expression. Freedom of expression under the European convention involves both the right to impart and receive ideas. In an environment in which the printing presses and newspapers constitute the major bottleneck in the distribution of ideas, control of such gateways can engage speech rights. Though case law on the 'horizontal effect' of ECHR speech protection is ambivalent on the extent to which private bodies such as newspapers or media companies can be expected to offer access, in several countries positive obligations to promote access to speech rights have resulted in rights for example to access radio, or to more affordable community radio licenses, or in relation to the right to reply.

For much of our modern history, some conflation of press freedom and freedom of expression was inevitable. Before the advent of broadcasting, printing presses constituted a means of distribution that would be necessary for expression, and when powerful interests wished to suppress information they tended to focus their energies on the reproduction of printed materials. Broadcasting has eroded this value of press freedom to an extent, but it has been the mass access to internet delivery of information that has fundamentally altered the nature and value of press freedom. This is for a variety of reasons but principally because the suppression of a fact, idea or view is demonstrably much more difficult when new platforms that enable imparting and receiving ideas, and conversely the use of the gatekeeper power - that is associated with the operation of a delivery mechanism that requires huge capital investment - to influence the distribution of ideas whilst it remains important is less so.

The press in practice has historically been treated as a special case for secondary reasons: for example the appropriate regulatory systems for broadcasters have struck an entirely different balance as regards content regulation and free expression due to scarcity of channels and spectrum. In broadcasting, the notion that regulation and public interest regulation can be applied because of the size and influence of broadcasters has been non-controversial in Europe, though much more controversial in the United States.

The press historically (as newspapers, or a printing presses) therefore have been 'more free' than broadcasters. In a world divided between mass media of broadcasting and the press there has been a clear public interest in a distinct approach to 'press freedom'. In practice the 'mixed system of print and broadcast media has served the public well in the UK. The press have been more robust and less regulated: research has shown that they have broken more stories that tend to be taken up by the broadcasters.

Freedoms are of course not absolute. They are relative, and qualified. Press journalists in the UK are not subject to any form of licensing regime; however they are subject to the Editorial Code of the Press Complaints Commission.

Whilst the notion of freedom of the press is less used than the term freedom of expression in the context of constitutional protections, the notion is widely used in policy and political contexts as shorthand to indicate. In this sense the term freedom of the press has acted as a brake on debate and – ironically – has in fact constrained sensible public discussion of the matter. Freedom of the press has been used as a founding principle in regulatory design, used for example to veto journalistic registration or newspaper licensing. Whilst this author in no way condones anything resembling journalist or newspaper licensing, a notion of press freedom that is ultimately based on

the definition of a means of delivery is becoming increasingly obsolescent, and for the reasons illustrated above, it needs to be redefined.

In terms of regulatory design and how it impacts our media system in the UK, the balance between a free and robust press and a regulated broadcasting system has in the twentieth century functioned rather well. The press has historically been permitted to be more opinionated and has also pursued newsgathering more aggressively. In practice the distinction has worked rather well. The broadcasters have acted as a filter: they tend to be more trusted by the public but they are somewhat reliant on the newspapers who break more stories. But this historical role is not necessarily linked to paper as a delivery medium and arguably it has already been supplanted by the internet.

To sum up, the historical significance of 'press freedom' have been undermined by semantic confusion and sectoral self-interest. Freedom of speech and freedom of expression, and freedom of communication are rights of individuals, rather than of 'the press' or the owners of the press and these rights are a more useful orientation in designing a new policy settlement.

3. In order to maximise the overall public interest, with what other aspects of the public interest would freedom of expression, or freedom of the press, have to be balanced or limited? The Inquiry is particularly interested in the following, but there may be others:

a. the interest of the public as a whole in good political governance, for example in areas such as

- national security, public order and economic wellbeing,

- the rule of law, the proper independence and accountability of law enforcement agencies, and access to justice, and

- the democratic accountability of government for the formation and implementation of policy;

b. the public interest in individual self-determination and the protection and enforcement of private interests, for example

- privacy, including (but not necessarily limited to) the rights to privacy specified in general in Article 8 of the European Convention on Human Rights and in European and national legislation on the protection of personal data,

- confidentiality, the protection of reputation, and intellectual and other property rights, and

- individual freedom of expression and rights to receive and impart information where those interests and rights are not identical to the interests and rights of the press.

The media and journalism are arguably one of the key guarantors of good political governance in serving a key accountability and watchdog role. But they can also undermine it. The Leveson Inquiry has heard allegations from politicians that the demands of media management have undermined good governance by making demands on their time and resources. It has heard evidence that suggest that policies in relation to each of the areas listed has been traded for, or adjusted in return for favourable coverage. And it has also heard evidence that media have abused the privileges available to them in pursuit of stories that have no public interest and that do not serve good governance.

A new policy settlement on media freedom in the UK should be balanced with these other interests, but degree of professionalization (adherence to professional ethics) and the power of media organisations and plurality of the media system must also be recognised by the regulatory system.

The key questions in relation to these balancing rights are who does the balancing and whether that balancing is effective in establishing an effective ethical system so that the standards established by courts and self-regulatory bodies are effectively deployed across the media system. It has been demonstrated in the case of the UK newspapers that (i) the role played by self-regulation in balancing freedom of expression of newspapers and the rights of others has been seen as inadequate and (ii) the PCC has not acted as an effective form of redress that has established standards that are effectively then observed across the industry. The PCC has failed to incentivise industry to effectively balance these rights in their everyday practices, and this is the fundamental failure.

4. What are your views on the extent to which the overall public interest is currently well served, both in principle and in practice, by the current balance between the public interest in the freedom of the press and free expression on the one hand, and competing aspects of the public interest on the other? In your opinion, what changes if any would be desirable in this respect, in order to maximise the overall public interest? If relevant, please state whether those changes should be voluntary or obligatory.

The press are therefore not free in any absolute sense – their freedoms are subject to all sorts of testing and balancing in law and in self-regulated ethics. But newspaper journalists have been free in the sense that the sector specific regulator for the press has not been imposed from outside the industry (or at least not directly). The press are free from external regulation, because they regulate themselves.

The UK has been well served by the media historically and in comparison to other developed democracies the UK has an enviable media system. However, the public interest could be much better served by a reformed regulatory system. Just as it did for print, the UK needs to be at the cutting edge of regulatory innovation to ensure that freedom of expression is appropriately balanced in this century. The events uncovered in the Leveson Inquiry have shown that the operation of law, self-regulation and statutory regulation needs fundamental reform to restore public trust. The

existence of a 'media-politics complex' of reciprocities and 'understandings' undermines the legitimacy of democracy and trust in the political process.

Media ownership rules place a permanent check on media power. They do so through limiting the size of media companies or the amount of the total market that they can control. However media ownership rules have been problematic in practice. In part, as we saw in the involvement both of Jeremy Hunt and Vince Cable as Secretaries of State with responsibility for approving media mergers the involvement of elected politicians leads to a case of endemic and fundamental conflict of interest. Whilst as the Leveson Inquiry as found it is near impossible to ascertain the existence of any implied or express 'deal' in which media policy decisions are traded for favourable coverage, the perception among the public is that such a reciprocity exists at least potentially. Because the potential of endemic conflict of interest is so great, it is not necessary for your inquiry to identify a 'smoking gun' of an 'implied or explicit deal' in order to justify policy action in this respect.

In establishing a new system for ensuring media plurality [See LSE Media Policy Project Brief #7] reforms could deal with the structural problems that underlie the fundamental problem: the issue of media power over opinion formation. Because elected politicians are vulnerable to media pressure, clear guidance on reform of media ownership, pluralism and the merger regime is crucial.

5. What would be the distinguishing features of the conduct and practices of a media industry, or any organisation which was a part of that industry, which would make it an 'ethical' one?

In practice, commercial imperatives always combine and conflict with ethical or public interest oriented imperatives in journalistic organisations. At times the incentives line up: the public demand public interest journalism and the market provides a self-regulating ethical profession capable of delivering it. At other times they do not: either profit oriented organisations fail to deliver what the public demand, or the sum total of individual consumers do not together generate sufficient demand to fund it. And ethical questions of how to balance the various constituencies involved in publication are never satisfactorily answered. The public's right to know may be paramount, but the public also has an interest in accuracy that might demand investment in professional journalism, and the rights of subjects of stories, such as individual privacy and reputation come into play. And in some cases the business model of delivering news (the commercial value for example of revealing secrets or revealing photographs) can conflict with individual rights. An ethical media industry is one in which organisations that take ethical conflicts seriously can thrive, and those that disregard them do not.

6. In particular, to whom might the press be considered to owe ethical duties, and why? What might be the content of such duties? To what extent might such duties come into conflict, and how should any such conflicts be resolved? The Inquiry is particularly interested in the following as potentially owed ethical duties, but there may be others:

- a. readers and consumers of the media**
- b. persons who are the subject matter of stories and other media products**
- c. the wider public**

d. employees, journalists and other producers of the media

e. shareholders, investors, advertisers and others with an economic interest in the media.

The Inquiry is correct to identify these as the principle 'stakeholders' in media ethics, and to acknowledge that there is an inevitable, permanent conflict between them. The management and control of self-regulatory bodies in this context is a challenging issue. How to mediate between these conflicting interests, particularly in the context of a rapidly changing technological and market context is extremely difficult.

A practical way of ensuring better representation of the broad range of bodies that are involved in the media is to involve them in constituting, managing, funding, staffing and overseeing the self regulatory body for the press. The attached policy brief #6 outlines the range of approaches to involving the various constituencies (journalists, readers, publishers) in the management of self regulatory institutions.

7. What role might reasonably be expected to be played by a code of conduct in encouraging, inculcating or enforcing ethical behaviour by the press? What would be the distinguishing principles and features of any code of ethical conduct with universal application to the media industry?

Codes of conduct are fundamental to ensuring ethical behaviour. Such a code should however not be 'owned' by any one group of stakeholders as it currently is (the publishers) and the entire process of constitution, communication and compliance of a code should be overseen by representatives of all the groups you identify at point 6. The attached policy brief outlines options based on regulatory experience abroad, and the Leveson Inquiry should make clear recommendations for reform in this area. In particular: There should be a single code of conduct for professional journalists; Bloggers should be able to adhere to such a code; The self-regulatory body should provide a kitemark; there should be an obligation for the large players to take part and there should be incentives to take part.

8. To what extent does the media industry's Code of Practice meet the needs of an ethical code?

The attached policy brief #6 gives an assessment of the PCC in general terms. The consensus is that with the exception of the vagueness of the Public Interest test, the code is not a bad start. But an adequate assessment of self-regulation should also look at the constitution, coverage, content, and co-regulatory framework of the code.

9. What approach would you recommend to the consideration of improvement to the nature, status, content and enforceability of the current Code? Are there changes to either content or enforceability of the current Code you would wish to see? Please explain your thinking.

The priority should be designing a structure that involves journalists, readers/viewers and their representatives more centrally in the design and application of the code. [See attached].

10. What other changes would you consider desirable in order to encourage or constrain the press to improved standards of ethical conduct and practice? Your answer should explain the standards you consider appropriate and why, whether conformity should be encouraged or constrained, and how.

[See attached policy briefs.]

Conclusion

Confusion about principles and objectives; in particular the objectives of press freedom, freedom of expression, and media plurality has undermined the development of public policy, and the protection of the public interest in the UK in recent decades. The Leveson Inquiry is entirely correct to raise these as the key issues on which it should make recommendations. The Inquiry is not expected to pronounce on the exact levels of media concentration or the content of codes. However it can, and must issue clear and unambiguous recommendations if it is to adequately reflect the high degree of public and stakeholder input into the process, and reflect the gravity of the concerns that led to the setting up of the Inquiry.

The Leveson Inquiry can protect and promote the public interest by setting out some clear principles and objectives that public policy should set out to achieve and by clarifying the key terms of the debate, notably the notion of press freedom and its relationship to freedom of expression.

ⁱ The results of the study were published as 'Codifying Cyberspace: Communications Self-Regulation in the age of Internet Convergence. Tambini, Leonardi and Marsden. Routledge 2008.

ⁱⁱⁱ Liebling, *The Press*. (New York: Ballantine Books, 1964). Cit. Lichtenberg, Judith: *Foundations and Limits of Freedom of the Press*. From Lichtenberg, Judith. *Democracy and the Mass Media*. Cambridge University Press.