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FREE SPEECH UNION

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Dame Melanie Dawes
Chief Executive
Ofcom
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By email to chiefexecutive@ofcom.org.uk and by post

Dear Dame Melanie,

Eamonn Holmes and David Icke

I write in relation to the adjudications recently issued by Ofcom in relation to, respectively:

1. Eamonn Holmes as regards a programme broadcast by ITV; and
2. David Icke as regards a programme broadcast by ESTV.

In both cases, Ofcom found that material broadcast by these individuals “had the potential to cause harm to the audience” within the meaning of clause 2.1 of the Ofcom Broadcasting Code (the “Ofcom Code”). In the case relating to Mr Holmes, Ofcom determined that the overall presentation of the programme was such as not to constitute a breach of clause 2.1. In the case relating to Mr Icke, Ofcom determined that the programme did constitute a breach of clause 2.1.

As you may know, the Free Speech Union (the “FSU”) has recently been established to uphold the right to freedom of expression, which we see as increasingly under attack. We consider that the approach adopted by Ofcom in these cases in relation to the expression of unconventional viewpoints and the understanding of “harm” under clause 2.1 is highly inimical to that right.

I would note at the outset two matters which appear to be common to both broadcasts.

Firstly, neither broadcast contained anything which could remotely be characterised as a solicitation to viewers either to behave or not to behave in a particular way. In particular, neither broadcast in any way suggested that audience members should disregard the advice of the Government on social distancing.

Secondly, both broadcasts were at pains properly to put in context the views expressed. The preponderance of the broadcast with Mr Holmes constitutes (in forceful terms) the conventional view. The broadcast with Mr Icke included a reference to the Government’s advice, with the appropriate website flagged up, and Mr Icke was vigorously challenged by a presenter expressing the conventional view.

Notwithstanding these matters, Ofcom concluded that both broadcasts had the potential to cause harm to the audience. There is no justification for this conclusion as set out in the adjudications, but one must assume that Ofcom are proceeding on the basis that viewers (or at least some viewers) would, on hearing these views, have in some way changed their behaviour. If that is the basis on which Ofcom are proceeding then:

1. it is wholly unsupported with any evidence or reasoning;
2. it is wholly speculative; and
3. it is in any event no basis whatsoever for impinging on freedom of expression.

In particular, if that approach were adopted generally it would lead to a wide-ranging interference with freedom of expression. I shall confine myself to two recent examples:

- There have been a number of reports recently, including in broadcast media, of persons in public positions allegedly breaching the Government advice on social distancing, including: Dr Catherine Calderwood, the former Chief Medical Officer in Scotland; Robert Jenrick MP, the Secretary of State for Housing, and Stephen Kinnock MP. All of those stories may well encourage individuals to lose faith in, and themselves to breach, the official advice. But it would be absurd to suggest that publicising these stories on the airwaves should be prohibited because they may cause harm to viewers.
- Equally, it was reported just yesterday (including on the BBC) that some 25 doctors have written to the Health Secretary expressing concerns about the Government's current advice on self-isolation. Again, this story may well encourage individuals to breach the advice. But again, it would be absurd to suggest that giving publicity to these views should therefore be prohibited.

I appreciate that Ofcom may contend that in those two examples the views being reported on enjoy greater legitimacy than those of David Icke or Eamonn Holmes. If so, that approach has two difficulties.

Firstly, there was no analysis whatsoever in either of the adjudications of the legitimacy of the views expressed other than noting that they were unconventional. Secondly, it leads to Ofcom making value judgements as between two points of view, which is undesirable. In particular, such an approach would mean that restrictions on freedom of expression would not be "prescribed by law" as required under Article 10 of the European Convention on Human Rights. As Lord Sumption stated in *Re Gallagher* [2019] UKSC 3 (at para 17):

... For a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible.
... The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice.

The arbitrary approach applied by Ofcom does not conform to this requirement.

Secondly, it is the prohibitions on public debate effectively being put in place by Ofcom in these adjudications which will undermine public confidence in the official advice and could lead to the adverse consequences envisaged by Ofcom. Put simply, if broadcasters aren't given an opportunity to challenge those making a connection between 5G masts and the symptoms associated with COVID-19, and present them with evidence to the contrary, people are more likely to believe there is a connection, not less. Banning David Icke from

appearing on platforms regulated by Ofcom, which your adjudications effectively will do, may simply persuade those who are already inclined to take him seriously that his views are unassailable.

That is not just my view, nor that of the FSU: these were principles settled and enshrined in Article 10 of the European Convention on Human Rights, the adoption of the Convention into domestic law under the Human Rights Act 1998 and by countless judicial decisions. These hold that it is the free flow of the discussion of ideas and points of views – not the prohibition of dissenting viewpoints – which upholds public trust.

As the European Court of Human Rights noted in *Handyside v United Kingdom* [1979–80] 1 EHRR 737:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. This means, amongst other things, that every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.

As noted by Ofcom in the adjudications, Article 10 is binding on it. For these reasons, the adjudications are almost certainly unlawful.

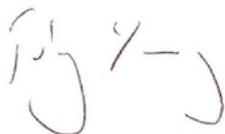
The approach adopted by Ofcom in these cases is deeply concerning. It is true, as Ofcom notes, that this is a time of significantly heightened public sensitivity. It is also a time of substantially increased state powers and restrictions on long-established liberties. However, no such restrictions have been placed by the Government on the right to free speech. In fact, it is vital that this right should be upheld so that the Government’s decision to impose wide-ranging restrictions can be challenged by broadcasters and others. This means that any regulator charged with upholding freedom of expression – as is the case with Ofcom – should proceed to restrict that freedom only on a closely-reasoned basis. That is something Ofcom has manifestly failed to do.

In light of these matters, I would ask you to do two things:

1. Review the two cases and affirm that (absent any evidence or reasoned basis for concluding otherwise) there was no potential to cause harm to the audience within the meaning of clause 2.1 of the Ofcom Code arising from the broadcasts in question.
2. Issue a press release affirming the importance of freedom of expression, including particularly at this time views that dissent from the official orthodoxy, and provide assurances that, in future, Ofcom will not seek to stifle the expression of dissenting views without strong and compelling reasons for concluding that such expression will cause harm.

I look forward to receiving your response.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'J. Y.', written in a cursive style.

Toby Young
General Secretary
The Free Speech Union
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cc: Julian Knight, Chair, The Digital, Culture, Media and Sport Select Committee, the House of Commons
Dame Carolyn McCall, Chief Executive, ITV plc
Manish Malhotra, Chief Executive, ESTV