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**WHITHER IPSO: Ipso and the Future of Press Regulation**

The demise of the ship-building industry has meant that we have lost the once familiar grey but optimistic images of some imposing vessel being launched down the slipway to the Clyde or the Forth. The great and the good above the dry dock, and the respectful boilermakers and riveters beneath, waving and tossing their cloth caps into the air as the Queen named the ship after herself, called down God's blessing on all who sailed in her, and swung a bottle of Veuve Cliquot, to smash against the bows.

Somehow the launch of Ipso in September 2014 did not quite catch that flavour of universal optimism and good hope. Bottles became brickbats which were more likely to be thrown than swung majestically, and the slipway was indeed a slipway.

And all of this despite the fact that this was the starting point of the very first Press Regulator; the first time that the vast majority of publishers (now some 75 publishers with over 1400 publications, and 1000 websites) had signed up to anything, let alone to an independent Regulator. It is nearly 50 years since Hartley Shawcross had said that no form of regulation or control would ever work, unless the newspapers chose to bind themselves contractually by voluntarily putting themselves under legally enforceable obligation to comply with the rulings of a Regulator. This was the first attempt...ever...to launch a system under which a Regulator had enforceable powers.

The title of the lecture, given me by Tambini, *Ipso and the Future of Press Regulation*, requires me to don the mantle of the prophet Elijah. I believe the key to any accurate prediction lies in understanding why the launch of the new Regulator should meet with such

hostility before anyone had the opportunity to see whether it would float, let alone whether it was possible to steer in any profitable direction.

It is certainly not profitable to suggest in a reply to *When did you last beat your wife* questions from the Select Committee in the House of Commons, that the question assumes the very thing that must be proved. So I did answer the question *Are you surprised that your critics have no faith in you?* and I shall answer it now: I am not surprised, not surprised at all.

I shall seek to demonstrate that until we understand the reasons for pessimism, or even what appears to be a fervent wish to see Ipso fail, we will never know which direction is more likely to lead to any worthwhile achievement.

Post Leveson the attempt to set up a system of regulation of the press is littered with rhetoric which demonstrates nothing more than confusion, profound disagreement as to which way the compass points point and ceaseless ability to exchange insults. In this primitive, ritualistic haka, for every Tom Watson there is a Paul Dacre. Here is Tom Watson:

*they don't want fairness, they don't want change. No catalogue of the wrongdoing they have overseen would be long enough to shame them. They want business as usual, so they want IPSO,*

and here is Paul Dacre:

*we had the appalling spectacle of the three political parties falling over themselves to see who could champion the toughest controls on the press and putting their proposals....shamefully stitched up in a late night session with hacked Off---to baying MPs and shamefully, Lords, thirsty for revenge on newspapers who had dared to expose their crooked expenses..... There may be some who think that in creating the toughest regulator in the free world we have perhaps gone too far. But I believe the industry had to do it and I'm proud we've done it—and now we leave it up to the integrity and sound judgment of ...(no, modesty forbids a direct quote) ..the team at Ipsos.*

Successful regulation requires some common understanding between the regulator and the regulated, those whose behaviour the regulator seeks to modify and those for whose protection that modification of behaviour is necessary. Without common understanding as to the essential features of successful regulation, there will always remain a real threat of failure. And one thing is surely unarguable; the traveller is not likely to find his way by

shouting at someone who is speaking a different language; far better to aim for a common language, or at least use an interpreter. And we have many interpreters here at LSE in the lawyers and political economists who have studied regulation and have explained what is more likely to succeed and what is more likely to fail.

This failure of communication and understanding is, I believe, at the root of the belief that Ipso will fail as a Regulator. Do not take my word for it but consider what those experts from this university and elsewhere have said: *the ultimate goal is to understand the political economy of regulation well enough to generate reliable predictions about the behaviour of Regulatory processes*<sup>1</sup>.

Regulation takes place in the absence of formal legal sanction<sup>2</sup>. It is a *process involving a sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly defined outcome*<sup>3</sup>, suggests Prof Black. Regulation involves the promulgation of rules accompanied by mechanisms for monitoring and enforcement<sup>4</sup>. At the heart of regulation lies the fundamental purpose of altering behaviour.

Professor Black has, as a law professor here, understood the mechanisms and the motivations involved in regulation: there is a need to look, she says, at features of regulation from the perspective of *those on whom the demands of regulation are made*.

The study and history of regulation teaches that successful regulation relies to an important extent on the regulated having the will and capacity to modify their behaviour; to recognize that it is in their own self-interest to submit to regulation. This means that Ipso should encourage an appreciation that it is in the interests of the press itself to submit to regulation.

Regulation requires understanding as to how people react to regulation, how they respond, and what motivates them to change, how they will react to threats and to rewards..... what the Law Department here calls their *motivational posture*: a Regulator needs to understand

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<sup>1</sup> *Dean and Professor of Management Studies in Yale*

<sup>2</sup> Dec 110

<sup>3</sup> Dec 142

<sup>4</sup> Dec 129

this so that it can foresee the extent to which it can expect compliance. Expert observers of regulation argue for the need to take into account the culture and understandings which operate within the regulated organisations. Ipso should learn what those who know about regulation teach: it must understand and be sympathetic to all the pressures a modern press must withstand, the difficulties it must overcome. That does not mean overlooking breaches, abuse and lies but it does mean that if it does no more than vilify and confront it will never succeed.

The one thing on which all who have studied and observed are agreed, is that if any form of regulation is to succeed in modifying behaviour there needs to be responsive regulation; a dialogue or dialectical relationship in which all take part, the regulator and regulated, those who demand protection from unacceptable behaviour and those whose behaviour should be modified and controlled.

Without such dialogue there is a substantial risk of what *Teubner* described as the Regulatory trilemma: when organisations are asked to respond to standards or norms imposed by others they are either *ignored, co-opted or destroyed*<sup>5</sup>, a shorthand for the motivational responses of organisations when standards are imposed: *avoidance, defiance, manipulation compromise or acquiescence*.

There is a human and organisational tendency *for those who are being watched* to hide away from being held to account... Organisations tend to adopt strategies and techniques to avoid attracting blame...this encourages what the economist and sociologist call *gaming tendencies to avoid blame*. Regulation requires monitoring and monitoring requires information. *Avoidance* has the effect of reducing rather than advancing the overall flow and standard of information...government affords an excellent example...government response to Freedom of Information legislation has shown a tendency to hide the real decisions away from official minutes.

The task of a regulator is to encourage acquiescence and acceptance by instilling and stimulating the belief of the regulated that it is in their best interests to acquiesce...a failure to do so will run the risk of avoidance, defiance and manipulation... Do not think the problem is new or confined to press regulation...consider only the failures of regulation in

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<sup>5</sup> Legit and Account 5

relation to the city and finance, where there was statutory backing, or in relation to chemical pollution...all teach that without responsive co-operation, understanding regulation will not work. As Professor Murray points out in his study of the regulation of cyberspace<sup>6</sup> *the Regulatory process is in the nature of a dialogue not an externally imposed set of constraints*. Or as Dr Lodge of the Institute of Government LSE has remarked, *it is a well-established truth that institutions do not respond in a weathervane but in biased ways to external pressures* (Lodge keeping a watchful eye).

Professor Black has argued therefore for the need for regulatory organisations to be *actively supported*, in circumstances where they are trying to promote changes in behaviour in those who are under no legal compulsion to change. To motivate it is necessary to gain acceptance of *the regulatory agenda and the way in which the Regulator functions*.<sup>7</sup> This requires, she argues, as in all regulation, dialogue, a relationship, communication or, as she and others put it, a responsive regulation. Ipso is independent and it does not sacrifice its independence by working and co-operating with those it regulates. Co-operation is not collusion; regulation will not work if co-operation is condemned as collusion.

One of the barriers to successful dialogue is an absence of standard vocabulary, there is a multitude of terminology, and what is described as definitional chaos.

For example, a source of conflict and derision, is the confusion as to what is meant by self-regulation. There is no universally agreed definition of self-regulation. However, it seems to be acceptable to define self-regulation as any system of regulation in which the regulated entity imposes commands and consequences upon itself... True self-regulation occurs where a Regulator issues commands to itself rather than when an outside agency is a Regulator. And it is worth pausing to consider how self-regulation may come about...it occurs in response to damage which the industry in question perceives will occur to its reputation and its own interests in the absence of taking steps to regulate itself... It is a response taken in the own interests of the regulated; it arises out of an awareness of interdependence and collective interest in the industry behaving responsibly. Its hallmark is the voluntary choice of an industry to protect its own interests in the face of a perceived threat to those interests. Ipso was created, after all because the press conceived it to be in

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<sup>6</sup> Nodes and Gravity in Virtual Space

<sup>7</sup> Legit and Account 33

its own interest to create this independent regulator.

And what is more, self-regulation is most effective where the outside threat reinforces voluntary collective efforts at self-control. If an outsider wishes to create the circumstances in which an industry will voluntarily choose to regulate itself it must devise a system of incentives which propel the target into an appreciation that it is in its own best interests to regulate itself. Steering, not rowing...the governance of nudge.

It follows therefore that the greater the realisation that it is in one's own interest to regulate oneself the more likely it is to take place and be effective. The challenge is to persuade and incentivise the group or industry effectively to regulate itself, to harness the self-regulating capacity for public policy ends<sup>8</sup>.

There are important advantages, acknowledged by those who have studied regulation and compliance, to self-regulation. The advantage of self-regulation is that the regulated entity, will have far greater knowledge and information about their own operations. They will have a much better appreciation of the potential for harm and the probability of it occurring.

Moreover, there is a much greater likelihood of compliance; the self-regulated will see that the rules they devise and impose on themselves to control their own practices are more reasonable than those imposed from outside and they are therefore more likely to comply with them. Contrast the reaction to rules imposed from the outside where the response may well be only a sulky and secretive half-hearted submission to an outsider's rules. The typical and observed response to imposed rules is secrecy, a failure to provide information, all in an attempt to avoid detection and compliance. We know and can already observe the secrecy with which the press meets any attack on its behaviour: the *omerta* between rival publications is only rarely broken, except by the Guardian and Independent who cast light on practices others conceal. The press need, on the contrary to be involved in regulation in an active not defensive way. That is why it is not conducive to successful regulation to prevent the engagement of the press in setting the standards in the Editor's Code: no-one should own it to the exclusion of others involved in press regulation.

But there is a natural suspicion of those who are left to regulate in their own self-interest.

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<sup>8</sup> Decent 126

Do not for one minute think that the problem of what is meant by self-regulation or lack of trust in its efficacy is a new problem. Fourteen years ago, in 2001, Professor Black made an observation in *Current Legal Problems* which sounds, in the context of press regulation, all too familiar. *Self regulation is a loaded term...for some it denotes regulation that is responsive, flexible, informed, targeted, which prompts greater compliance and which at once stimulates and draws on the internal morality of the sector or the organization being regulated. For others it is self-serving, self-interested, lacking in sanctions, beset with free rider problems and ....simply a sham...*and where have we have heard those words before?

The rival arguments as to the best way to achieve modification and control of behaviour has led to a compromise between the extremes of pure self-regulation on the one hand and direct control by government on the other...it is what the regulatory lawyers call meta-regulation or mandated regulation: a system whereby the Regulator is itself regulated, overseen within a framework set by government.

It is plain that Leveson did not recommend self-regulation in the strict meaning of the expression; but it is important, I believe, to recognise that his recommendations sought to build upon and exploit certain features of self-regulation. What I suggest Leveson recommended in the language of regulatory lawyers is meta regulation...the process of the regulation of one institution by another so that the process of regulation becomes itself regulated. The importance of this process is that it is not a conventional system of regulation, it is not a system whereby the regulated entity is told directly what it must do or must not do. It seeks to avoid the disadvantage of imposed regulation, of secretive disobedience. On the contrary, it seeks to build on the merits of self-regulation: under a process of meta-regulation the targets are encouraged to develop their own internal system of regulation, and in the belief that it is in their own self-interest to be regulated. By that means the meta-Regulator provides incentives to the regulated to develop their own system for controlling and modifying their practices, securing the advantage of more likely compliance and acceptance and preventing secrecy and avoidance. The combination of the process of meta-regulation and self regulation avoids the difficulty and disadvantage of direct control or regulation, and at the same time the danger that, left to itself, the regulated cannot be trusted to modify its own practices. It recognises that some oversight is required.

If the protagonists are talking about different things or not talking at all the dialogue

essential for the effective modification of behaviour is unlikely to be meaningful. Amongst the requirements for a fruitful dialogue is clarity of objective, of the goal.

Success in all regulation, particularly voluntary regulation depends on a set of properly defined objectives. In such circumstances (the Professor of Law at Hull Michael Feintuck suggests) that substantive values and principles are essential to effective regulation...how else is one to know what it is designed to achieve? How else is one to know what the Regulator should look for, where to concentrate its resources...identify the risks and how else to judge whether regulation is working or not? How is one to judge success in press regulation? Above all, Feintuck underlines, a vague objective couched in general terms is a fool's errand and dooms regulation to failure.

You might have thought that there should be no difficulty in indentifying the objective: to modify the behaviour of those portions of the press who have indulged in abuse, intrusion, distortion and lies, the cruelty and brutality which led to the Leveson Inquiry. What we are really after is modification of behaviour for the protection of the public and how best it is to be achieved. Yet if the public exhibits a traditional but persistent ambivalence, the objective becomes more difficult to identify. The difficulty lies in the uncomfortable reality that the public appears to abhor the methods used but approve the outcome: intrusion is reviled unless it leads to the exposure of corruption or, even better, some sexual wandering by the wayside. How do you establish a coherent and effective system of regulation which seeks to modify and control the processes of journalism when so often the outcome of a reprobate process is met with approbation and applause? Of course the PCC condemned the subterfuge used by those posing as Cable's constituents, but did it not rightly lead to his rejection as a judge of the Murdoch acquisition of BSkyB? Does anyone care about lies and distortion spread, even before a man is charged, if he is later found guilty? Does anyone care about illegal or unjustified subterfuge if it exposes wrongdoing? If, as Onora O'Neill argued<sup>9</sup> regulation is all about controlling media process and not media content, the justification of unacceptable methods by reliance on the public interest in the *outcome* of that process is not conducive to the recognition of an identifiable goal.

If readership is anything to go by, and it must be some reflection of public acceptability of standards in the press, prurience is regarded as a public principle...freedom of the press

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<sup>9</sup> Reuters Memorial Lecture 2011



seems to be freedom to learn of the product of intrusion and subterfuge. The rival claims as to what is meant by freedom demonstrate the confusion and incoherence...to some, freedom means the absence of any control, to others it acknowledges the Rousseau Social Contract that it is necessary to restrain man for him to be free. People do not agree as to what they want to read, hence so diverse and different a press. But if success is to be measured by readership you have to look no further than those newspapers most singled out for derision and disapproval...the successful newspapers are those whose methods are most vigorously deplored.

Contrast this absence of a common objective with the regulation of the professions. Regulation of a professional service illustrates the importance of a common objective, accepted by both the regulator, regulated and the public. Regulation of the professions, medicine or the law, for example, satisfies the needs both of the regulated and those who depend on their professional skill and judgment. From the point of view of the regulated professional the regulator acts as a gateway, preventing, at least in theory, the shyster and the snake-oil salesman from entry, and with the ability to expel those who have revealed such characteristics in their practice. Regulation enhances the reputation of the professional in restricting entry to those who are qualified, disqualifying those who have shown themselves not to be worthy of the name of barrister, solicitor or physician. The patient or client who seeks their professional services has no means of knowing whose abilities are most appropriate to their needs, who is best qualified. Regulation provides protection.

The aims and purposes are clear; a reliable skilled service in which at least in theory the desire to deploy professional skill for the service of the weak and needy is as strong a motive as prosperity. Self-Regulatory measures are thus in the interests of the professional and the Regulatory measures they impose reflect the collective *expertise of the members as how to meet the risks and problems they foresee* both for their profession and for their public. If regulation preserves and *reinforces the gateway*. Self-regulation is easier where it operates through the mechanism of licensing, where the cost of being allowed to enter the market is compliance with a set of standards commonly accepted to be necessary to protect the public.

Press regulation is not regulation of a profession; however much the Editor's Code may speak of raising professional standards, however fine and proud some journalists undoubtedly are, it is inescapable, if trite, to observe that journalism is not a profession in a

Regulatory sense. You cannot be admitted or expelled by a Regulator, however grievous your behaviour. There is no statute or regulation which provides that you may not call yourself a journalist unless you comply with the entry standards imposed by a regulator approved by statute.

Regulation of the professions poses no problem of legitimacy and fewer problems of the accountability on which legitimacy is dependant. Because it exists in a statutory framework it derives its authority from the authority of the state. But contrast that situation with that in which the legitimacy and accountability on which regulatory authority depends are not derived from statute.

Where there is no statutory framework then authority is mistrusted and the cry goes up for greater accountability or transparency. *Trust in mechanisms of accountability is a central precondition for the legitimate delegation of authority from the state.* (Scott of LSE in Account in Reg. State.). But it is simply not sufficient to demand greater accountability and transparency without any clear understanding of how it operates in the world of non-governmental regulation.

*Accountability and its improvement* depends on linking the different aspirations of those involved in the Regulatory activity...it is *about understanding and managing different competing objectives and interpretations*. The problems of legitimacy and accountability are a reflection of the problems of regulation itself.; they stem from a failure to understand the way that organizations behave in response to regulation and a failure to harness what they believe to be in their own self-interest.

Both Scott and Black demonstrate the interdependence of all participants in the regulatory community for there to be successful accountability and, accordingly, legitimacy. There is, as Black points out, *a fragmentation of power and knowledge between different participants, the Regulator and the regulated, they are both autonomous and dependant.*<sup>10</sup> There are multiple and conflicting demands for legitimacy... What an organisation needs to do to achieve legitimacy may be accepted by some of those concerned but rejected by others...*forming one set of accountability relationships can preclude forming others*, says Professor Black, so that whilst an organization may be accepted by those who desire

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<sup>10</sup> Black: Legit and Accountability

protection, their legitimacy may be rejected by those it seeks to regulate as over bureaucratised, or distant and out of touch. Just like regulation itself, of which it is an essential feature, legitimacy is most likely to be accepted where the organisation perceives it to be in its own interest to accept it, and rejected where it is perceived as adverse to those interests.

And thus the need for accountability and the need for legitimacy depend not on confrontation, not on the recitation of slogans, but on an understanding of the interdependence of all those involved, regulated, regulator and those on behalf of whom the regulatory system is put in place.

And I suppose that we can at least agree that what has not taken place since Leveson are actions taken in a spirit of accord, agreement and unanimity. Soon after Leveson was published it became apparent that there was little if any prospect that the protagonists might communicate.

It is at this point I should be conscious of the need to avoid heresy...any time anyone dares to venture to discuss or to debate these matters they are likely to be met by a vigorous if not deafening cry of Leveson: what need have we of any further debate or discussion when you can find it all in that holy writ? Those who seek to discuss and debate are met with a reply echoing from the Ptolemaic library in Alexandria... the centre of *the civilized world*. The librarians commanded that there should be no more books...if they contained anything new they would be heresy and if nothing new they would be unnecessary. Post Leveson, any further debate is either unnecessary or heresy.

But the Leveson report appreciated that it was necessary for the press to understand that it was in its own interest to submit to a system of regulation which involved both self and meta-regulation without any form of compulsion, statutory or otherwise. It was for that very reason he devised a system of incentives which would persuade the press that it was to their advantage to sign up to the system he recommended and to their disadvantage if they did not. He decided that he would not require them to do so: he left the press to choose how to regulate themselves. What he wanted was effective self-regulation by which he meant a combination of self-regulation and meta-regulation that the Regulator should be overseen and regulated itself. Regulation was to be voluntary and those who submitted themselves to regulation had to choose to do so because it was in their own interests.

What has happened since is that the press has not been persuaded; offered a choice, it has not followed Leveson's recommendations. But it is, as it seems to me, a complete misunderstanding of what he envisaged to condemn them at this stage for failing to appreciate that it is in their best interests to do so. Part of the accusation rests on what is described as the refusal to follow Leveson or, as it is put by those who wish to be more high-faluting *defying the will of Parliament* (years in the courts have taught me to be suspicious of those who dress up their disappointment in the sonorous tones of high principle...it is an expression often used by government when they lose a judicial review).

It is incoherent to talk of defying the will of parliament when parliament has left them to make their own choice. Leveson feared that left to its own devices there would be no effective regulation, there had to be oversight. But the press had to be left to choose whether to submit to regulation and whether to choose to submit to regulation of the Regulator. That was the whole point of the incentives.

While the press do not believe that there *is* any incentive to follow the recommendations of Leveson or submit to the charter system, it is futile and I believe counter-productive merely to abuse them. No effective regulation can be achieved by shouting or jeering. There is no advantage to be gained.

Nor does it seem to me to add to the cause of effective regulation to complain that the press has set its face against the Charter. All that has happened is that the press has failed to perceive a benefit outweighing its objections to that system. This is not wholly surprising since no-one now suggests sensibly that the prospect of exemplary damages is a threat to be feared, and the prospect of shifting costs so that the winner pays, where it has refused to sign up to a regulated regulator, remains distant until such a regulator is formed, and seeks and obtains recognition. IMPRESS, as yet unformed, will not commit itself to doing so...understanding as it does the importance of obtaining the agreement of those it signs up. And until the newly recruited and yet to be recruited recognition panel has somebody to recognise, it must bask in all the advantages acknowledged by Sir Humphrey of the St Edwards hospital staffed only by 500 administrators, and untainted by the tiresome presence of patients, doctors or nurses.

And since the press do not know what the terms of further rules the recognition panel has announced it will adopt for recognition, since they have not yet been devised or

promulgated, it is not to be wondered at that those asked to choose whether to sign up to a Regulator seeking recognition from the recognition panel would rather wait and see.

Of course any regulator can only profit by listening to and heeding the criticism of those concerned to protect the public from the abuses of the past. The close analysis of the Media Standards Trust as to the differences between the system of regulation devised by the press and the requirements of Leveson is a useful guide to some of the problems of a system of rules and regulations devised only by the regulated without any input from the regulator, indeed before the regulator ever came into existence. But now that we are involved, we are making good progress in altering the rules as to the resolution of complaints, as to investigation and inquiry absent any complaint, and as to the grounds and procedures for imposing sanctions where there have been deliberate or repeated breaches. We were told that we would never be permitted to change....co-operation is, to the annoyance of those who wish to see us fail, taking place at regular meetings, and *will* lead to change. But no-one with any experience of regulation believes that it can be effective by a process of ticking boxes...have we got the 38 distinctions between what we do and what Leveson recommended down to 35, 34 or 5? Success requires the continuing dynamic of dialogue and of persuasion.

So what is to be gained by vituperation, by condemnation of any attempt by a Regulator to regulate? What service is provided for the protection of the public to revile an IPSO that is up and running, from new premises, that is providing a daily service to members of the public which seeks to protect them from intrusion and abuse by harassment notices, with a complaints service that is up and running and which has successfully seen that newspapers are dealing with complaints far more speedily than before, that will ensure the provision of speedy correction in a place and in terms it dictates, that will monitor standards and report on them, who will investigate and punish deliberate or repeated breaches of the code, who will devise a system of compulsory redress to avoid the expense of going to court?

Don't let it be said that such vituperation is pointless. It does have a point, and that is, the destruction of such a service and the removal of any prospect of achieving the hallmark of successful regulation. If your aim is to see that the Regulator fails, why then you need to ensure that there is no dialogue, no recognition of interdependence, no appreciation of what motivates organisations to understand that it is in their own interests to reform.

There has been and continues to be a unanimous rejection of direct statutory control. Accordingly, I suggest there is nothing else sensible to do other than persuasion and motivation if you want regulation, be it self or meta, to succeed. The realization that it is in the interests of the press to be regulated is already there to be built upon and encouraged: *In the end, what newspapers find most marketable is credibility. You may ignore a story on Twitter. It only really matters when it is published on a trusted site.*

said the Managing Editor of the Sun. (Abell Sept 2011 BJR) And of one thing there can be little doubt: abuse and condemnation are unlikely to advance any system of protection from those who need and deserve protection from bullying intrusion and lies.

We at Ipso believe that is the reality: the history of regulation teaches that harnessing the positive features of self-regulation for the public good by co-operation and dialogue affords the best prospect of modifying the behaviour of the regulated. Such an insight may not be novel, but it is, I believe, the truth; no-one has ever promised that the truth would be interesting...and is not that where the problems all began?

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