



Department
for Culture
Media & Sport

The balance of payments between television platforms and public service broadcasters

Options for deregulation

Consultation Paper

26 March 2015

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Foreword

A complex regulatory framework shapes the relationship between public service broadcasters and the different television platforms. This regulation was introduced for good reason – to ensure that world class content produced by the UK’s public service broadcasters was both prominent and easily accessible to viewers as television moved from analogue to digital broadcasting, and that critical programming such as regional news remained readily available to households across the country.

However, I want to consider whether the existing framework is still necessary to deliver these goals, and whether regulation is now acting as a constraint on content providers and television companies from being free to negotiate the best possible deals for investment in the creative industries sector, to respond to market signals and changing tastes; in short, to deliver the best possible outcome for audiences.

Following the completion of digital television switchover in October 2012, the way viewers access TV and TV-like content continues to change, driven by a wide availability of superfast broadband and a proliferation of new ways of accessing that content. Recent research published by Ofcom show that that three-fifths of people now use the internet or ‘on demand services’ to watch television programmes or films¹, and this is magnified when we look at the viewing habits of the younger generation - only half of viewing by 16-24s is live, linear TV².

It is too early to predict the long-term implication of these trends on existing television viewing habits and there are plenty of reasons why people may continue to prefer watching live TV as they always have. But figures like these do provide a sharp reminder that viewers now have a multitude of ways of accessing TV programmes and the regulatory framework established in the early days of digital television needs to be capable of reflecting this.

In July 2013, the Government committed in the Connectivity, Content and Consumers strategy paper to consult further on the regulatory framework that governs the balance of payments between television channels and platform providers and electronic programme guide (EPG) regulations. This consultation recognises that these are the key elements of the regulatory framework governing the detailed negotiations between public service broadcasters and platforms and, while I welcome evidence on the separate aspects of this framework, I am equally interested in views on the balance of regulation overall. I want to know how the regulatory framework affects the creative industries sector as a whole.

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/psb-review/psb3/psb-review-ipsos-mori.PDF>

² http://stakeholders.ofcom.org.uk/binaries/research/infrastructure/2014/IR_6.pdf

The UK has succeeded in maintaining a public service broadcasting sector that is the envy of the world, which powers exports of UK-made programming across the globe and we continue to support this ambition. But I want to look now at whether we can reduce the role of Government in what should be a commercial matter between negotiating parties.

The Government therefore welcomes views on how this regulatory framework should be reviewed to support the creative industries to continue growing, to allow our public service broadcasters to continue to shine, and to ensure that UK audiences continue to enjoy access to a range of world-class content.

Sajid Javid MP

Secretary of State for Culture, Media and Sport

26 March 2015

Chapter 1: Summary

1. The Government's aims to support a diverse, vibrant and healthy creative sector delivering a range of high quality content that meets the needs and expectations of the span of UK audiences. This includes supporting public service broadcast institutions (PSBs) and non-PSB broadcasters and channels, a range of delivery platforms competing for viewers, and an independent creative sector developing the best original content.
2. Government continues to recognise the high value that PSBs deliver and the scale of the investment these broadcasters make into the market. In the Connectivity, Content and Consumers strategy paper³ (published in July 2013) we underlined this commitment and proposed a further stage of consultation on two key areas: electronic programme guide (EPG) prominence and the balance of payments between platforms and broadcasters.
3. The different platforms provide the means for broadcasters' content to reach viewers, ensuring the commercial viability of investment by delivering content to audiences and generating advertising revenue. Without content, however, platforms have no service to offer their customers. This is, therefore, a mutually beneficial, relationship and it supports a strong, diverse and thriving creative industries sector in the UK. The market in services has changed significantly in recent years – the explosion in multi-channel TV channels, both commercial and PSB; the development of a new PSB sector in Local TV; and the arrival of smart TVs, catch up players like the BBC iPlayer and over-the-top (OTT) services such as Netflix.
4. The basic relationship outlined above is therefore continuing to evolve, and it is important to continue to ensure that the existing regulatory framework that governs this relationship is, as a whole, optimised to deliver the best outcome for viewers and the wider creative industries alike. There are a number of specific areas of regulation, set out below and in more detail in Chapter 2. Together, this regulation forms a wider framework, which impacts the overall balance of negotiations between platforms and PSBs and the experience for viewers, and therefore they should be considered together rather than as unrelated issues.

³ <https://www.gov.uk/government/publications/connectivity-content-and-consumers-britains-digital-platform-for-growth>

5. The main areas of regulation are:

- Must Offer / Must Carry – the Communications Act 2003 requires that PSBs offer their core PSB channels for carriage to all major platforms, and that Electronic Communications Networks (ECNs) must carry them.
- Section 73 (s73) Copyright, Designs and Patents Act 1988 – means that the copyright of PSB programmes re-transmitted via cable is not infringed. This legislation was originally introduced to encourage the roll-out of analogue cable services. That policy rationale for this intervention has now passed and the Government proposes to repeal this provision.
- Technical Platform Services (TPS) rules – require operators of conditional access systems to offer technical platform access services on a cost-recovery basis, where charges must be fair, reasonable and non-discriminatory (FRND). These rules apply to the relevant platform (Sky), and therefore cover all broadcasters not just PSBs.
- EPG prominence – the Communications Act 2003, establishing the Ofcom EPG Code, requires that EPG providers give appropriate prominence to all public service channels.

6. These regulations are intended to achieve a range of objectives, including ensuring services are widely and easily available and discoverable for viewers and providing benefits to PSBs in exchange for meeting their PSB obligations, as well as reflecting historical circumstances or broader objectives. However, taken overall they create a complex web of requirements, which may influence investment in the creative industries sector.

7. The wider context is that while currently the UK's creative industries sector overall is strong and thriving - worth £71.4 billion in 2012, (5.2% of the UK economy) and accounting for 1.71 million jobs in 2013 (5.6% of the total number of UK jobs) – data shows that PSBs' content investment has been in decline for the past five years⁴. It is therefore increasingly important that the regulatory framework is one that supports investment, as well as delivering broader policy aims, though we also note that audience satisfaction with PSB remains high⁵ and spending by non-PSB channels, while a small proportion of total spending, has increased⁶.

8. The Government believes that, in general, competitive markets rather than interventions through regulation tend to encourage greater overall levels of investment. However it is also possible in some circumstances that the stability regulation offers can provide the certainty needed to increase future investment. The complexity of the resulting

⁴ Ofcom's recent publication *Public service content in a connected society* reports that while PSBs continue to account for the bulk of investment in first-run non-sport UK content (around 85% in 2013), investment in new first-run UK originations has declined 17.3% in real terms

⁵ Ofcom, *Public service content in a connected society*

⁶ Ofcom's recent publication *Public service content in a connected society* reports: "Non-PSB channels (the commercial PSB portfolio channels and multi-channels combined) have increased their investment in non-sport first-run originations by 43% since 2008, accounting for 15% of all non-sport investment in first run programmes in 2013, up from 9% in 2008."

commercial negotiations between the parties mean that neither the direction nor the magnitude of a change in the balance of payments that could result from deregulation is necessarily clear cut, nor is the ultimate impact of such a change on net investment levels in the creative industries sector. The intention of this consultation therefore is to help build a stronger evidence base on the potential impact of deregulation, including the wider repercussive impact on other businesses that are affected by the level and type of investment made by PSBs and platforms.

9. At the heart of this debate is what changes to the existing regulatory framework would mean for consumers. The Government's view is that consumers would benefit from increased original content investment by broadcasters and also that their interests may be better served by up-to-date regulation reflecting the range of TV services on offer. However these factors need to be balanced against impacts on pay TV customers, whose subscription costs could be affected by a change in regulation and who might be impacted by the relative inconvenience, or ease, of accessing PSB content. We are seeking to understand better the likely impact on viewers of various policy options, and in particular to build a more comprehensive evidence base on the balance between benefits and risks for viewers' experience.

10. This consultation considers three main areas of regulation and seeks evidence on how they affect content investment, the creative sector and consumers.

- Firstly, the Government is clear that the historical policy rationale for section 73 of the Copyright, Designs and Patents Act 1988 is out-dated. The provision was introduced in a different era to support the specific policy objective of supporting the development of analogue cable infrastructure in the 1980s and 1990s. Much has changed now with the development of multi-channel and digital TV on satellite, terrestrial and increasingly on IP platforms, and we believe the case for having differential arrangements for one platform is no longer relevant. We want to examine how best to repeal regulation including how this should be managed. As well as bringing the legislation in line with the current market landscape, the removal of this regulation will also create freer negotiations between PSBs and cable providers on the terms of carriage. We particularly welcome evidence on how the removal of s73 will impact the other policy proposals set out in this consultation.
- Secondly, we want to examine the existing *must offer* and *must carry* rules which are designed to ensure universal access to PSB channels on all platforms. These rules by necessity influence free commercial negotiations between platforms and PSBs by reducing parties' leverage in discussions, as PSBs are not permitted to remove services from pay platforms. By limiting the scope for the optimum commercial outcome, PSBs potentially see less benefit from carriage of their services on pay platforms, which could lead to less investment in content production. Possible options for deregulation are set out in this document; no compelling case has been made for how an increase in regulation in this area would produce better outcomes by making this negotiation more efficient, but Government is happy to receive proposals on this.

- Thirdly, EPG prominence regulation is intended to ensure that PSB content⁷ is easily discoverable for viewers and also forms part of the PSB compact which rewards PSBs for the delivery of the PSB obligations set out in their licences. However, the way in which PSB content is viewed is changing. This paper sets out options for preserving the prominence of PSB services on EPGs by updating the existing framework to take account of technological and other developments, but we also welcome views and detailed evidence on whether deregulating, in order to potentially support competitive markets and encourage greater levels of investment, would be a more productive route to ensuring that the best quality content is easily discoverable for viewers, and indeed whether this regulation is necessary where PSBs have more freedom to negotiate commercial agreements for the carriage of its services.

11 The BBC proves a special case in these discussions. In view of its funding through the licence fee, we believe it is right that there continue to be requirements to ensure that BBC content is always available to the widest possible audience. We are also clear that PSBs should also continue to provide their PSB channels free of charge, on the free to view networks, for example Freeview or Freesat and propose no changes to these arrangements.

12. We do not propose any answers to questions 2 and 3, though in Chapter 4 we illustrate some potential policy options for consideration. This consultation is intended as a call for evidence and will inform future work on these topics.

Impact Assessment

13. An Impact Assessment is being published alongside this consultation.

How to respond

14. Consultation responses should be submitted to the Department for Culture, Media and Sport by **Monday 16 June 2015** by:

email to balanceofpayments@culture.gov.uk

post - Media and Creative Economy Team
 Department for Culture, Media and Sport
 4th Floor
 100 Parliament Street
 London
 SW1A 2BQ

⁷ By this we mean PSB channels and their VOD players

Chapter 2: Background

2.1 The 'Balance of Payments' debate

15. Broadcasters and television platforms co-exist interdependently as part of the value chain that delivers a mix of content, packaged in a range of business models, across various distribution technologies and devices. A regulatory framework, which requires that core PSB channels be available for viewers to watch on all TV platforms, governs these complex commercial arrangements and that those and other designated channels feature prominently on electronic programme guides (EPGs).

16. This chapter sets out the basic structure around the balance of payments debate: the fees paid by platforms and broadcasters for carriage, the regulation that impacts them including the EPG regime, and the PSB compact which underlies the policy rationale for regulation.

Definitions

By **platforms**, we refer to the businesses that deliver TV broadcast content into our homes and to commercial users, using various technologies to do so. The main platforms are:

- Freeview – uses digital terrestrial TV signal (a new Freeview Connected service is expected to be launched in 2015 to carry IP services including online players)
- Sky, Freesat and FreeSat from Sky– use satellite with IP to carry on-demand services
- Virgin – uses the digital cable network to carry a mixture TV, catch up and internet services
- Youview, BT TV, Talk Talk TV – use internet in combination the digital terrestrial signals

By **broadcasters**, we refer to television stations that produce, commission or acquire television who transmit via platforms (i.e. television programmes).

By **public service broadcasters**, we refer to the BBC and other broadcasters who are obliged as part of their licence to broadcast a specific amount of public service broadcasting, including meeting certain production and content obligations. Public service broadcasting refers to TV programmes that are broadcast for the public benefit rather than purely commercial purposes. The PSB institutions are: BBC, Channel 4 Corporation (C4C), Channel 3 licensees (ITV plc, STV Group plc, UTV Media plc), S4C and Channel 5. In addition to delivering PSB channels the commercial PSBs also have portfolio channels, which may deliver PSB like content or e.g. repeat PSB content but which fall outside the definition of PSBs. This includes +1 channels and HD variants⁸.

By **balance of payments**, we refer to the net balance of the payments made between broadcasters and platforms for the mutually beneficial exchange of goods and services made in order to deliver broadcast content into viewers' homes.

⁸ Local TV however has PSB status because of its local and regional content and is granted spectrum and prominence in return. This will be important for the issue on EPG, however it is not subject to the *must offer-must carry* system

17. All broadcasters apart from the BBC derive income from advertising or other commercial revenues, which depends on their content reaching audiences via platforms. Platforms offer their services in a variety of business models and the differences are continually blurred by convergence. However, in general terms the pay TV platforms operate models in which customers pay a fee in order to have equipment installed and to receive a bundle of channels⁹, the value of which therefore depends on the broadcast content available to their customers. The issues this consultation considers relate to the balance of payments made between broadcasters and platforms, where there is a mutual financial benefit from the exchange of goods and services between parties creating a value chain that ensures customers are able to access broadcast content, and how regulation impacts that balance.

18. In addition to the pay platforms, there are also other platforms e.g. Freeview¹⁰ and Freesat¹¹. Both provide subscription-free viewing for customers who choose to pay a one-off cost to a retailer to purchase receiving equipment. Here the financial benefit of audiences accessing content is entirely the broadcasters. These platforms do not charge customers a subscription fee – their role is to provide a means of accessing transmission and other services to PSBs and other broadcasters who want to reach viewers in this way¹². For PSB's, the position with free to view platforms and transmission providers is very different given the varying involvement of the PSBs in the consortia that manage these platforms.

19. We believe that, as a minimum, all PSB channels should remain available free of charges on free to view platforms. Therefore we do not propose removing the regulations that currently require PSBs to make services available and be carried on free to view platforms (namely, “must offer” requirements, and also “must provide” provisions, section 274 and 275 Communications Act 2003, which require that core PSB services are available free of charge to every member of the intended audience).

⁹ Note that the PSB channels can be received via e.g. Sky but are not part of the bundle which is paid for by subscribers. Section 214 and 231 of the Communications Act prohibit the imposition of charges for reception of PSB services

¹⁰ Owned by DTV Services Ltd, a joint venture between the BBC, ITV, Channel 4, BSkyB and transmitter operator Arqiva

¹¹ Freesat is a free-to-air digital satellite television joint venture between the BBC and ITV plc

¹² Other services like Youview offer access to broadcasting channels as part of a bundle of services for internet connection and telephony. A distinction between a pay and a free to air platform is already hard to make and will become harder in the future. However, at the moment we are going to stick with it to describe that there are some platforms where the relations between platform provider and broadcaster is different than on others

Definition - Electronic Programme Guides

Electronic programme guides provide users of television and radio with regularly updated menus displaying broadcast programming or scheduling information for past current and upcoming programming and access to these programmes.

Section 310(8) of the Communications Act 2003 defines an EPG as a service which consists of—

- (a) the listing or promotion, or both the listing and the promotion, of some or all of the programmes included in any one or more programme services the providers of which are or include persons other than the provider of the guide; and,
- (b) a facility for obtaining access, in whole or in part, to the programme service or services listed or promoted in the guide.

The information is transmitted as a broadcast signal, which is then interpreted by either the built in receiver in the television set itself or an adjoining set-top box.

Digital UK, the consortium of PSBs and Arqiva¹³ that is responsible for Freeview, has worked with TV manufacturers, as part of the Digital Television Group, to ensure that the ability to interpret the Freeview data stream has been built-in to all new TVs as standard since 2008. On older TVs, Freeview can still be accessed, but a set top box is required.

Pay TV providers like Sky, Virgin Media, BT and TalkTalk all supply set top boxes which receive the data streams for their TV services and EPGs.

The layout of an EPG, its functionality and the number of channels accessible varies from service to service. For example, at the beginning of October 2012 there were 563 channels listed on the Sky EPG across 17 genre groupings, 261 channels listed on the Virgin Media EPG across 13 genre groupings, and 99 channels listed on the Freeview EPG across 7 genre groupings. While channel rankings and availability do vary across the different EPGs, what all three have in common is that they always have a main section headed¹⁴ by the 5 terrestrial PSBs (BBC1, BBC2, ITV, Channel 4¹⁵ and Channel 5).

For EPG navigation, on Sky and Virgin Media viewers have the option of either accessing the entire channel list, or using one of the genre filtering options to restrict the list to the channels within a specific channel genre section. On the Freeview EPG viewers have to access the entire channel list.

The number of channels listed per EPG page will depend on the equipment used¹⁶.

¹³Telecommunications Company, which provides infrastructure and broadcast transmission facilities in the UK and Ireland

¹⁴ On Virgin the “channel” is a portal

¹⁵ Except in Wales, there it is S4C

¹⁶ On Freeview, for example, this can vary from 5 channels per EPG page to as many as 12 channels per page, depending on the type of set-top box or TV with built in Freeview reception being utilised. On Virgin Media the number of channels listed is also likely to range from 6 to 8 channels per EPG page depending on whether one is using an old/basic set-top boxes or one of the later V+ HD or TiVo PVRs. It is a similar situation on the Sky platform, where the older Sky boxes display 10 channels per EPG page, but the EPG displayed by SKY+ HD boxes has fewer channels per page (currently 8 channels per page on the latest version of the EPG, which Sky began rolling out to its Sky+ HD customers in June 2012)

The PSB Compact

20. Public service broadcasting is delivered by the BBC but also by S4C and the commercial public service broadcast institutions (PSBs). These broadcasters contribute to the purposes of public service broadcasting in return for specific benefits. They are guaranteed access to spectrum¹⁷, with reserved capacity on DTT multiplexes, and also they benefit from appropriate prominence given on EPGs, where the platforms respect their historic positions pre-digital broadcasting.

21. In return the PSBs spectrum and EPG prominence benefits is balanced with significant licence obligations – broadly, programme obligations that relate to content, and production obligations that relate to how content is created. These include quotas for original content, independent and out of London production, news and current affairs programming, regional programming, subtitling and audio visual descriptions, specific requirements for Channel 4 programming to be distinctive, educate and appeal to a culturally diverse audience (among others¹⁸), and other licence requirements. Obligations are set out in the commercial PSBs' licences and in the BBC Agreement and Charter.

22. PSBs also have obligations to make their services universally available. Regulation requires that the core PSB channels are offered as available on all the main platforms with a significant number of end users, including pay TV platforms, and that these channels feature prominently in each platform's EPG. Similarly, Ofcom have the power to require Electronic Communications Networks (ECNs) to carry PSB content under s64 of the Communications Act 2003. This is to ensure that PSB channels are as widely available (reach) and prominent (discoverability) to as many members of public as possible.

2.2 Different types of fees paid

23. Fees fall broadly into two categories – those paid by platforms to broadcasters, which relate to the value of the broadcasters' content; and those paid by broadcasters to platforms (and other service providers, such as Eutelsat or Arqiva) related to the costs of transmission.

Payments from platforms to broadcasters for the right to carry their content¹⁹: The PSBs can negotiate these fees with platforms, though their negotiating might be constrained as they are subject to obligations such as 'must-offer' on core-PSB channels. These fees may also include payments for additional services, such as catch-up players. Section 73 (s73) of the Copyright, Designs and Patents Act 1988

¹⁷ For which they nevertheless have to pay

¹⁸ Full obligations are set out in the PSBs' licenses, available on the Ofcom website

¹⁹ The value of content (where financial value will derive primarily from advertising revenue and on impact on subscriptions, but also other factors such as international sales and non TV revenues) will depend primarily on popularity with audiences and other factors, such as exclusivity. PSBs offer commercial value to platforms carrying their content, which is valued by audiences, though their attractiveness (and therefore commercial value) will vary

(CDPA) means cable platforms are exempt from paying a fee to retransmit the core-PSB channels. Content fees are not paid by free-to-view platforms, as these platforms do not derive any specific financial benefit (through subscription charges) from the content itself.

Payments from broadcasters to platforms to secure platform access. Payments are related to the technical costs of transmitting their content and maintaining platforms. Such costs are paid to all platforms including free-to-view platforms; for example on Freeview, this would include broadcasters paying for network access or managed transmission services to Arqiva and contributing to the costs of running the Freeview EPG and other network services provided by Digital UK. In the case of Sky, charges for ‘technical platform services’ (TPS), such as EPG listing services and regionalisation, are governed by EU regulation (see below). The charges also include contribution charges, the element of TPS that relates to common costs recoverable by Sky (related to the building and maintenance of the platform). Related to these fees are distribution and transmission costs - payable by broadcasters for these services to get their content on air and into homes. For example, the broadcasters pay for satellite transponder capacity, playout and DTT transmission services and network access. These fees are usually levied by third parties and therefore largely fall outside the scope of the current balance of payments debate between broadcasters and platforms.

24. It is the balance of these fees that we refer to as the ‘balance of payments’. The final balance of payments between PSBs and pay TV platforms varies considerable and underpinned by complex commercial relationships and includes not only the carriage of core PSB content, which is subject to regulation, but also portfolio channels, high definition (HD) and other services such as video-on-demand (VoD). The outcomes of the commercial negotiations determining the balance of these fees tend to remain confidential.

2.3 Regulatory Framework

25. In the UK, there are specific regulations – namely ‘must offer’, ‘must carry’, TPS (technical platform services) charges, the copyright regime and rules on EPG prominence - which have a bearing on the balance of payments between platforms and PSBs. These are summarised on the next page and detailed further in Annex B

Summary: regulation

Must carry: Ofcom has the power to secure that defined PSB services are broadcast on certain networks. This power was designed to secure and maintain widespread distribution of PSB channels at a time when digital platforms were still new. To date Ofcom have not needed to fully exercise the power.

Section 64 of the Communications Act 2003 implements Article 31 of the Universal Service Directive, which allows Member States to impose *must-carry* obligations. This provision enables Ofcom to set general conditions to secure the broadcast or transmission of the PSB channels on a given network when the network is used by a significant number of end-users as their principal means of receiving television programs.

Ofcom has exercised this power to amend the general conditions to require certain networks to carry PSB channels when directed to by Ofcom. There is no direction currently in place.

Must offer: These obligations require relevant broadcasters to make their PSB channels available to every appropriate network and satellite services. The scope does not extend to PSBs' video-on-demand (VoD) or portfolio services.

Sections 272 and 273 of the Communications Act 2003 enable Ofcom to impose conditions on relevant broadcasters to secure that their PSB channels are offered as available to every appropriate network and satellite television service.

- Section 272 relates to all networks that are used by a significant number of end-users as their principal means of receiving television programmes.
- Section 273 specifically relates to satellite television services and applies insofar as its objectives are not secured by conditions imposed under section 272.

These sections were brought into force in 2010, following which "must-offer" conditions were included in the broadcasting licences for the commercial PSBs.

The BBC is not subject to these provisions but has a similar obligation to do all that is reasonably practicable to make its services widely available to its users – which in practice means that it must offer its services to all significant platforms.²⁰

The requirement to offer is 'subject to the need to agree terms'. However, the PSBs have argued that current regulation denies them the ability to threaten to withdraw a channel, and therefore undermines their ability negotiate effectively with platforms.

Must offer applies to any appropriate network, with a 'significant number of end users', however for the purposes of this consultation we focus on Sky and Virgin. Carriage requirements would continue to apply to Freeview and Freesat.

Section 73, Copyright, Design and Patents Act 1988: This section provides that in certain circumstances the retransmission on cable of certain broadcasts is not an infringement of the copyright in the broadcast itself nor is it an infringement of the underlying copyright in any work included within the broadcast. In other words, cable operators do not have to pay copyright fees to PSBs for content retransmitted via cable. In recent years, online players showing PSB content have emerged that are relying on section 73 to avoid paying copyright arguing that this provisions applies to retransmission via the internet. The Government's view is that section 73 does not apply to content transmitted over the internet.

Technical platform services (TPS)²¹: In general, TV platform operators provide many types of technical services to channels, which are carried over the platform. In the specific case of Sky in the UK, charges for these 'technical platform services' are subject to regulation imposed by Ofcom. The 'TPS' regime in the UK only applies to Sky (specifically Sky Subscriber Services Limited) and is not applicable to any other UK platform.

The technical services which are covered by TPS regulation are:

- Conditional access (CA): services which enable broadcasters to restrict access to their content so that it reaches only subscribers (and not non-subscribers), e.g. encryption technologies;
- EPG listing services: allocation of a slot on the EPG and the provision of a technical interface to enable the broadcaster to deliver schedule information;

²⁰ An Agreement between the Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation, July 2006

²¹ Ofcom's TPS guidelines can be found here:

<http://stakeholders.ofcom.org.uk/binaries/consultations/tpsguidelines/statement/statement.pdf>

- Access Control (AC) services: other services which control access, such as red button services and other interactive services; and
- Geographic masking / regionalisation services: provide for regional versions of channels to be shown in the correct regions or for content to be made available on a UK-only footprint.

Services subject to TPS regulation do not include transmission and capacity. In the case of the Sky platform, some channel providers have their own satellite transponder capacity and uplink services, so only make use of Sky's set-top boxes to reach Sky viewers. Although there are separate regulatory conditions for CA, EPG and AC services, the services must all be provided on 'fair reasonable and non-discriminatory' terms and the charges for the services or the methodology for calculating charges must be published.

Ofcom imposes TPS regulation in accordance with the European framework and its powers under the Communications Act 2003 in order to promote competition. It applies to all broadcasters and channels wishing to gain access to the Sky platform and does not follow any public service broadcasting objective. Any change to TPS regulation is currently a matter for Ofcom.

Ofcom's EPG code of practice: Section 310 of the Communications Act 2003 requires Ofcom to draw up a code of practice to be followed in the provision of EPGs

The Code sets out the practices to be followed by EPG providers²²:

- a. to give prominence for public service channels as Ofcom considers appropriate;
- b. to provide the features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both; and
- c. to secure fair and effective competition.

'Prominence on EPGs:' The Code contains guidance on prominence Ofcom considers to be appropriate for the public service channels (BBC TV services, Channels 3, 4 and 5, S4C and Local TV).

Ofcom, rather than Government, determines the appropriate level of prominence for the public service channels. Government only determines which PSB channels should be included in the prominence regime²³. Ofcom's code permits a measure of discrimination in favour of PSB channels, but it is not prescriptive about what appropriate prominence means. It gives EPG providers discretion to determine this. In considering whether the approach is justifiable in terms of securing appropriate prominence, Ofcom has regard to the interest of citizens and the expectations of consumers.

Ofcom's Code requires EPG providers to comply with the following general principles:

- a. EPG providers should ensure that the approach they adopt to the requirement for appropriate prominence is objectively justifiable and should publish a statement setting out their approach;
- b. Ofcom will have regard to the interests of citizens and the expectations of consumers in considering whether a particular approach to listings public service channels constitutes appropriate prominence; and
- c. In giving appropriate prominence to PSB channels, EPGs should enable viewers in a region to select the appropriate regional versions of those channels through the primary listings for those channels provided the PSB in question has secured services that enable this

²² Ofcom, Code of practice on electronic programme guides can be found here:

<http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/epgcode.pdf>

²³ See section 310 (4) of the Communications Act 2003. Local TV has been added by S.I. 2011/3003,

<http://www.legislation.gov.uk/ukSI/2011/3003/article/2/made>

In general, prominence has been construed as how high up a channel is on an EPG: that is how low its channel number (LCN) is. This is because higher EPG positions (lower LCNs) are acknowledged by both public service broadcasters and commercial broadcasters to lead to higher potential audiences²⁴.

EPG providers have taken the view that BBC1 and BBC 2, ITV, Channel 4 and Channel 5 should continue to occupy the top five slots of EPGs. As new PSB services have launched, they have tended to be given some slot available on the EPG on launch, depending on the platform's policy.

26. The impact of these regulations on the outcome of commercial negotiations should be considered in the context of the bargaining power and market position of each player. Therefore the balance of payments today depends on an uncertain mix of past regulation, precedent and confidential bilateral negotiations.

²⁴ The prominence of a particular position in an EPG is thereby understood as the degree to which the share of viewing attained by a channel at that position is attributable to its position as distinct from all other features of the channel such as brand, audience loyalty, quality or appeal of content, cross-promotion or other marketing

Chapter 3: Impact of deregulation

3.1 Why regulate at all?

Audience benefit

27. The PSB system safeguards the production of certain types of programming that is in the public interest. PSB content, from current affairs and regional news to children's programmes, delivers cultural and social benefits that might otherwise be undersupplied. Moreover, consumers value public service content - for example, Ofcom reports that 77% of those who ever watch any PSB channel claim to be satisfied²⁵.

28. This does not mean that public service-like content is not also produced on non-PSB channels, for example, high quality news coverage from Sky News or the educational benefits of channels like National Geographic producing documentaries and factual content. However, commercial broadcasters, unlike PSBs are not required to produce this sort of content, or to comply with requirements such as supporting the UK's independent production sector.

29. Public support received directly by the BBC through the licence fee and indirectly by the commercial PSBs through access to spectrum and EPG prominence has always been predicated on this content being widely available and accessible for the public on a free-to-view basis. We believe that BBC services, which are funded from the licence fee and S4C (which is part funded by a grant from the BBC) should be excluded from the must offer, must carry and EPG deregulatory options which are set out in Chapter 4. We also believe that arrangements guaranteeing the carriage of commercial PSBs on free to view platforms should also be maintained. However, in considering whether there should be changes relating to commercial PSB's and their relations with pay platforms, it is also important to bear in mind that the overall benefits afforded the commercial PSBs mean that viewers do have a reasonable expectation that they should not have to pay additional amounts to access these services again in further payments to platforms owners.

Contributing to the PSB compact

30. One of the PSBs benefits is being easily accessible and prominent for viewers. Platform operators and broadcasters agree that a channel's prominence on an EPG affects the number of viewers who find and watch its content. It is generally agreed that the more prominent the channel is with a low EPG channel number the more likely that a given viewer

²⁵ Ofcom, *Public service content in a connected society*, December 2014

will settle on that channel, because it is easier to find and access²⁶. PSBs clearly benefit from this prominence across all platforms as this enables them to make a unique offer to advertisers and so maximise advertising revenue, which feeds into content investment.

31. Reach and discoverability are therefore benefits not only for audiences, but also for the PSBs, which they receive in exchange for delivery on their PSB programming obligations. This forms a very important element of the ‘PSB compact’ – the balance of obligations and benefits that uphold the current PSB system. It is worth bearing in mind however that platforms also benefit significantly from the must offer requirement, which guarantees their customers will have access to PSB content which forms a significant proportion of pay TV channel viewing.

Other policy objectives

32. Some rules reflect historical circumstances or broader objectives. For example section 73 of the Copyright, Design and Patents Act 1988 was introduced to support the development of analogue cable infrastructure in the 1980s and 1990s.

3.2 A changing landscape for television broadcasting

33. The current regulatory framework was designed to support a linear TV market during the transition from analogue to digital television. However as technology evolves, there have been significant changes in how viewers are able to consume television content.

Internet platforms and OTT services: The arrival of new market players providing over-the-top (OTT) services such as Netflix and Amazon, the increasing role of VOD (including catch-up) services and the increased use of broadband to deliver (both linear and non-linear) content, particularly the arrival of smart TVs, mean that the way we consume content is changing. It is likely that most households will in the future be equipped to view OTT content over their main TV sets. Yet demand for linear viewing remains strong - live linear viewing still represents the significant majority of viewing, at 84% of all viewing among individuals with a DVR²⁷ - and it is possible that it will remain so, for a variety of reasons such as the popularity of event shows which are predominantly viewed live. However as new OTT players offering new ways to access content permeate the market, it is difficult to predict the future direction of travel. For example, recent data from Ofcom²⁸ highlighted that 47% of BBC iPlayer content requests in July 2014 were sent from tablets and mobiles, compared to only 25% in

²⁶ Prominence is conceived as ensuring that the prominent supplier or product is sampled first. More generally, prominence increases the probability that a supplier or product will be considered, see: M. Armstrong, J. Vickers, J. Zhou “Prominence and consumer search” *Department of Economics Discussion Paper Series*, University of Oxford, 2008 <http://economics.ouls.ox.ac.uk/12126/1/paper379.pdf>

²⁷ Ofcom, *Public service content in a connected society*, December 2014

²⁸ Ofcom, *Infrastructure Report*, 2014

October 2012. We believe that policy making for the future needs to take into account a variety of different scenarios where more and more content will be viewed outside traditional, linear delivery but that a significant amount will still be watched live (or time shifted) on television sets that will be larger and support increasing amounts of high definition (HD) and in time ultra high definition (UHD) viewing

Multi-channel TV: the rapid expansion of multi-channel TV has been dramatic in recent years, particularly since digital switchover was completed in October 2012. This is changing the competitive landscape for broadcasters. The five main PSB channels have seen a decline in TV viewing as a result, though their rollout of new digital channels has minimised the impact, with overall PSB viewing (including portfolio channels) remaining strong²⁹. It is worth noting that only the core PSB channels are subject to must offer/must carry and EPG prominence regulation.

Trends in content investment: Growth in the multi-channel sector should also be considered in the wider context of sector growth and investment. While investment in PSB channels and services remain responsible for the lion's share of investment in UK content – £2.75 billion in 2013³⁰ - this figure has been the subject a declining trend over the past five years. At the same time, COBA's (the Commercial Broadcasters' Association) 2014 census³¹, which examines investment made by the multi-channel sector, reports that investment in UK content by their members has increased significantly in recent years from £487m in 2009 to £725m in 2013; and Ofcom report an increase in multi-channel spend on first run commissions from £441m in 2009 to £597m in 2013 in real terms, compared to a decline in comparable PSB spend from £2,456m to £2,188m over the same period³². Excluding sport completely, Ofcom report that spend by the multi-channel sector and PSB portfolio channels combined rose from £242m in 2008 to £345m in real terms at 2013 prices, a 43% increase. Multi-channel investment in original content production still represents a small proportion of overall spend, in relation to PSB spend on content. However, we welcome views on whether this indicates there is the potential for greater growth in the creative sector driven by multi-channel sector. It is also worth noting that, although the multi-channel sector has seen impressive growth in spend, 93% of first-run UK originated content produced in 2013 was news and sport output³³, which indicates there remains a significant role for PSB in producing original content of other genres.

Local TV: the launch of Local TV in November 2013 has introduced a completely new tier of local services and creates a number of challenges in ensuring the regulation remains fit for purpose in continuing to deliver prominence for PSB services.

²⁹ Ofcom, *Public service content in a connected society*, December 2014

³⁰ *Ibid*

³¹ <http://coba.org.uk/positions-and-reports/positions-and-reports/coba-2014-census>

³² Ofcom broadcaster returns, COBA, Oliver & Ohlbaum Associates analysis: figures, expressed in 2013 prices, include news and sport production but exclude sports rights

³³ Ofcom, *Public service content in a connected society*, December 2014

34. The legislative regime established by the Communications Act 2003 to secure accessibility and appropriate prominence for the PSBs has been successful in supporting the development of digital television services and ensuring that the migration of television from analogue to digital has not undermined the important role that PSB content continues to play. However, the longer-term effectiveness of the regime depends on the extent to which it continues to support the creation of quality content valued by viewers. The changes to how we are watching TV – anytime, anywhere, via smartphones, tablets and connected TVs – raise fundamental questions about whether the existing framework of regulation is still functioning effectively in delivering the Government’s policy objectives.

3.3 Possible areas for deregulation

35. Prominence and carriage of PSB services are important in delivering public policy objectives, but we believe that their delivery should also support the Government’s overarching policy objective - a diverse, vibrant and healthy creative sector, delivering a range of high quality content to UK audiences.

36. Our starting point is that generally speaking, competitive markets rather than interventions through regulation tend to encourage greater overall levels of investment. However it is also possible in some circumstances that the stability regulation offers can provide the certainty needed to support investment. Moreover, it is hard to predict, following a change in regulation, how the flow of funds between parties would change and what the net impact of any change would be. For example, increased funding that was translated into content investment could have a larger net impact on overall investment in the creative industries sector (such as through increased demand for related products and services, or spillover effects, such as on skills), than funds that were converted into shareholder dividends.

37. With so much uncertainty about the full effect of this regulatory framework, the Government is seeking views in order to build a more substantive evidence base and better understand the overall impact of regulation on investment. We are also seeking views on the impact of deregulation on the PSB compact; with a special view to the investment in regional news and other high opportunity cost genres.

Section 73, Copyright, Design and Patents Act 1988

38. One area where the policy rationale has clearly expired is Section 73 (CDPA 1988), which provides that in certain circumstances the retransmission on cable of certain broadcasts is not an infringement of the copyright in the broadcast itself. Its purpose was to support the development of analogue cable infrastructure in the 1980s and 1990s. Much has changed now with the development of multi-channel and digital TV on satellite, terrestrial and increasingly on IP platforms and the massive increase in capacity supported by the cable networks. The Government believes the case for having differential arrangements for one platform is no longer relevant, and if not dealt with could affect the future prospects for the commercial PSBs. Indeed, new online providers have sought to rely on the provisions of s73 to permit the streaming of PSB content over the internet

without seeking permission (or paying any fees to) either to the broadcast owners or the underlying content copyright owners.

39. The Government is therefore committed to the removal of s73 and to legislate on s73 to this effect at the earliest opportunity. This consultation seeks views on potential implications; in particular how the removal of s73 will impact the other policy options under discussion, and what, if any, transitional arrangements should be considered.

Must offer and must carry

40. The must offer and must carry obligations set out in the Communications Act 2003 were introduced to support the public policy objective of universal access to PSB content both in the period before and after digital switchover. The Secretary of State has a general duty under s64 (7) of the Communications Act to review—“(i) the list of must-carry services and (ii) any requirements for the time being in force under this section with respect to the terms on which services must be broadcast or otherwise transmitted”. The purpose of this is to allow a periodic review of the way the provisions are working and whether the requirements are still needed to guarantee wide and easy access to PSB services.

41. There are two broad reasons why the relevance and efficiency of must offer and must carry regulation deserve to be examined.

42. Firstly, the policy ambition of must offer/must carry regulation as set out in the Communications Act 2003 is to ensure that all PSB content is widely available and easy to access without payment or subscription or access charges, or the need to have different equipment to view BBC or commercial PSB content. When the provisions were developed, the scope and coverage of the different platforms and how viewers would choose to go digital were unclear. However, the completion of the expanded DTT for digital TV switchover provides all PSB and other services to a minimum of 98.5% of UK households on Freeview, and PSB services are also available unencrypted on free-to-view satellite, covering the vast majority of areas not served by DTT. There has also been a rapid growth in online viewing and the increased availability of PSB content online.

43. With this increased availability of means to access free-to-view services, the question arises whether the must carry and must offer requirements still need to continue to apply to pay platforms in order to ensure PSB content is widely available and easy to access. Therefore it is worth examining whether ‘availability’ should mean ‘availability in all homes’ – in which case the statutory requirement to carry this content on all platforms could be considered unnecessary; or ‘availability on all main (linear TV) platforms’ – in which case must offer/must carry continue to play an important role. Indeed there could be an argument to extend regulation to cover other forms of content consumption, such as VoD services and emerging platforms, in order to ensure universal reach to audiences consuming content in different ways.

44. Secondly, the commercial PSBs have argued that this regulation is impacting investment in new content and in UK generated content. They have argued that the

presence of must offer in PSB licences, and the power for Ofcom (though never yet invoked) to require carriage of must carry channels on pay platforms influences the freedom of broadcasters and platforms to negotiate the balance of payments made between them. As a result, the commercial agreements reached between PSBs and platforms may not best reflect the underlying value of the products and services exchanged, which could potentially therefore be impacting investment in the creative industries sector.

Impacts of deregulating must carry/must offer

45. Removing must offer/must carry would immediately introduce a risk for consumers of commercial PSB channel withdrawal from a pay platform³⁴ – a risk which does not currently exist. This would be to the detriment of the consumer experience and more generally to the public detriment if PSB programming, as required by the PSB licences, were less easily accessible to a proportion of the population. The concept of ‘availability’ may therefore depend on the practical question about the ease with which viewers could switch between platforms to access different content.

46. The commercial PSBs have conditions in their licences that require them to provide the services to the relevant Mux for broadcast via DTT. This is a separate obligation from the must offer obligation imposed under section 214 of the Communications Act. Consequently broadcast on DTT is secured by the regulatory obligations regardless whether must offer is removed. We do not intend to make any changes that affect obligations to carry services on the free to view platforms.

47. The vast majority of television sets sold since 2008 have come with installed Freeview tuners, which will receive terrestrial services as well as satellite, cable or IP services provided they are connected to suitable reception equipment (ideally an external aerial). Consequently pay TV customers could access services via DTT or Freesat even if it were not available via the pay TV EPG. They could also access it via PSBs’ online VoD services, meaning there would be options to access this content for a significant proportion of viewers affected. However, some viewers may no longer have working external aerials. It may also be possible that a small number of viewers struggle to access this content at all. We want to understand in much more detail the potential impact on viewers and welcome evidence on the practicality for pay TV consumers of switching between signals/EPGs in the event that a PSB was not available on their preferred platform.

48. The inconvenience, were services withdrawn, would only arrive in a situation where commercial PSBs could not agree terms. This risk may well be outweighed for consumers by the benefits of increased content investment, if this were the outcome of freer market negotiations. However, the impact on investment is inherently uncertain and, due to the

³⁴ Freesat is in the same position as Sky and Virgin in that PSBs are required to offer the channels as a result of Must Offer. Therefore it is conceivable that a PSB could choose not to supply its service to Freesat although commercial incentives may mean this is unlikely however we want to maintain requirements here to protect the 6% of households that receive FreeSat services

confidential nature of these commercial negotiations, evidence for assessment is more limited.

49. PSBs believe that must offer requirements prevent them from achieving a fair price for the value of their content. They argue that under a different regulatory framework, such as one in which they could credibly threaten to withhold their channel (and in particular, where a backstop of carriage for zero net fees was guaranteed) money could flow positively to them. Conversely, Sky has argued that it is charging only legitimate operational costs with TPS charges required by Ofcom to be fair, reasonable and non-discriminatory, and we understand that there are currently zero net fees transferred between Virgin and PSBs. Research commissioned by the Department for Culture Media and Sport from Mediatique³⁵ analyses the potential impact of deregulating must offer and must carry. Overall the Mediatique report concludes that a 'carriage consent regime'³⁶ is more likely to result in a flow of payments to PSBs, and hence potentially more investment in PSB content creation.

50. However it also notes that "different assumptions on consumer behaviour would generate different outcomes, including scenarios where payments would flow even more significantly in the opposite direction (i.e. from channels to platforms)". We also note, importantly, that it is not necessarily the case that additional funding flowing to the commercial PSBs (or to platforms) would be translated into content (or other) investment, with associated spill over impacts on the wider creative industries sector.

51. In the event that funds were simply shifted along the supply chain, either to PSBs or to platforms, and translated into dividends, there would be no net investment benefits for the sector, and may even be disbenefits if investment were reduced. Moreover, an increased flow of funds from platforms to PSBs may be at the expense of funds flowing to other content creators, namely, commercial broadcasters negotiating with platforms, with potential implications for investment and content creation.

52. The impact on investment is further complicated by the fact that must offer/must carry only applies to core PSB channels, whereas negotiations between PSBs and platforms capture a much broader package (including portfolio channels, VoD players etc). It is therefore possible that introducing the risks of deregulation for consumers could result in no net increase in investment if changes in fees for core PSB content are simply negated elsewhere in commercial contracts.

53. There is also a risk that must offer requirements mean commercial PSBs may seek increasingly to maximise returns for more expensive new run programming on pay rather than free-to-view channels. The launch of ITV Encore to showcase drama is an example. Options for deregulation of must offer/must carry are explored in Chapter 4. These reflect

³⁵ http://www.mediatique.co.uk/sitedata/Reports/120709_DCMS_Carriage_Conse.pdf

³⁶ The hypothetical model tested in the Mediatique report assumes the removal of PSB-specific must offer and must carry provisions, the removal of the TPS pricing regime and the enablement of market-based mechanisms of price discovery through the introduction of blocking mechanisms such as copyright protection and/or conditional access [P18]

the fact that no compelling case has been made for how an increase in regulation in the UK market could in practice to make this negotiation more efficient, but Government is also happy to receive proposals on this.

54. Finally, we need to understand the impact of changes in term of competition between pay platforms. This includes understanding the position of the hybrid YouView/BT Vision service where PSB services are carried as Freeview services not across the IP network used for linear services (including pay services) or OTT services and whether changes affecting other platforms has any impact on competition between them and YouView/BT.

Electronic Programme Guides

55. The statutory code of practice requires that EPG providers offer 'appropriate prominence' to PSB core channels, in order ensure that this content is easily discoverable for viewers. There are two broad reasons why EPG regulation needs to be examined.

56. Firstly, significant technical innovations in TV services in recent years mean that current regulation may not still be fit for purpose. The arrival of connected TVs (also called smart TVs or hybrid TVs) is changing the way some of us access TV content. A connected TV does not only contain a receiver for broadcast programmes but also contains an internet connection which makes browsing the web and accessing internet services, e.g. the iPlayer or ITVPlayer, possible, and through which built-in or downloaded applications may be accessed.

57. Maintaining the current system of EPG prominence may require amendments to the current framework to create a technologically neutral EPG definition. We would also like to include PSB VoD content in the prominence regime and extend the current licensing system to cover all EPGs, including those on smart TVs. Similarly, higher quality broadcast is now available to many consumers who are able to access HD (or in the future, UHD, 3D or other technologies yet to be developed) content, yet higher quality version of PSB content can be hard to discover because the current framework was developed for a world in which HD, or UHD, content was not available to most consumers.

58. Secondly, we want to understand better what impact EPG regulation has on investment in the sector. While discoverability remains an important policy principle, we want to better understand whether this is at the expense of other potential benefits for viewers, such as content investment. One argument is that the requirement for EPG providers to offer appropriate prominence to PSBs precludes free negotiations between channels and platforms (including the non-core PSB and purely commercial channels that fall outside the prominence regime), for example by impacting competition for audience share.

59. Conversely, the stability and certainty regarding a PSB's EPG slot may in fact support greater levels of investment. Prominence is also a key PSB benefit, which supports a system in which the PSBs are able to make significant levels of investment, for example in content, digital innovation and skills.

Impacts of updating or deregulating EPG prominence rules

60. The potential impact of amending EPG rules to maintain the current regime would primarily be a benefit for consumers, by ensuring that the PSB content remained easily discoverable, whatever technology they were using to access programmes, and that this is the highest quality version of that content.

61. Envisaging a future where consumers access content from a variety of sources, deregulation of EPGs might also stimulate plurality in broadcasting. However the impact on future innovation or investment is less clear. Updating the existing regime to reflect technical innovations would entrench PSBs' prominence, retaining their unique position in the TV advertising market and supporting investment both now and in the future. However, it is possible that a free market for the top EPG positions, with associated advertising revenue benefits, could encourage greater levels of competition between channels, potentially with better outcome for viewers in terms of accessibility of high quality content and funds available for content investment.

62. While EPG prominence provides the certainty for PSBs and advertisers that may encourage longer-term investment, there is less evidence on what the investment impact of removing this privilege would be. For example, the instability created by an uncertain EPG market may reduce broadcasters' willingness to make commitments to invest in content that could end up being aired on a lower EPG slot than envisaged.

63. The available evidence from research on this question suggests that the relation between EPG position and value is not necessarily straightforward³⁷, and is difficult to quantify³⁸, although Ofcom has now published financial terms for Channel 4 and Channel 5 giving value to prominence³⁹. However, this valuation has been done in a certain way specifically for the purpose of setting financial terms of the licence within the bounds of the "hypothetical new entrant" approach. This does not mean that the value is appropriate in reflecting the real world value of the prominence regime.

64. Increased competition for audiences and the opportunity for other commercial channels to bid for top EPG slots could potentially open up a new incentive for content investment. However, the steps from a world in which PSBs were simply required to pay higher fees to platforms to retain their prominent EPG slot, shifting funds along the value

³⁷ Technologia, "The value and optimal management of channel position and prominence on electronic programme guides", 2012, p. 29 http://dcmscommsreview.readandcomment.com/wp-content/uploads/2012/07/The_value_and_optimal_management_of_channel_position_and_prominence_on_electronic_programme_guides.pdf

The topic was covered to a limited extent in the 2010 Shott Review for DCMS
http://www.culture.gov.uk/images/publications/Local-TV-Report-Dec10_FullReport.pdf.

³⁸ N. Shott, "The prospects for commercially viable local television in the UK", 2010, p 24
http://www.culture.gov.uk/images/publications/Local-TV-Report-Dec10_FullReport.pdf.

³⁹ <http://stakeholders.ofcom.org.uk/binaries/consultations/c3-c5-finance/statement/statement.pdf>

chain but with no net benefit for creative sector investment (and potentially inducing a net decline in UK content investment), to one in which commercial broadcasters were able to take advantage of this opportunity and compete effectively with PSBs for top slots, are less clear and we welcome evidence on how such a shift could occur.

65. Finally, we are aware that the current regime, even if updated, may not continue to deliver the public policy goals it aims to achieve if viewers move to different methods of content navigation. Services and devices are evolving such that traditional EPGs may become less relevant over time. We therefore also welcome views on whether EPGs may become less relevant in the future and whether deregulating the EPG would be a more productive route to ensuring that the best quality content is easily discoverable for viewers than updating the existing regime.

66. We made clear in the Connectivity, Content and Consumers paper (July 2013) that our ambition is to support investment by our PSBs by maintaining their prominence in EPGs, and as well as views on the options proposed, to update the existing framework, we welcome views on whether deregulation would result in an outcome whereby the best quality content is easily discoverable for viewers while also allowing broadcasters to negotiate freely concerning the balance of payments for carriage and transmissions, which could support higher levels of investment.

67. We would also welcome views on how the arrangements are working for local TV services and the impact of different outcomes for local TV's EPG's position on DTT, satellite and cable and in different parts of the UK have on investment in local TV services.

3.4 Conclusion

68. There is a balance of commercial and public policy goals the Government must consider throughout this debate.

69. A fully deregulatory regime has some advantages but may not continue to provide the well-established public policy goals that exist in this area already – such as the wide availability of PSB content on a plurality of platforms (reach) and appropriate prominence on these platforms (discoverability).

70. On the other hand, targeted deregulation allowing more leeway to all parties could increase investment in UK original content, with knock on effects for the creative industries more widely. Deregulation may also be one route to better reflecting the changing technical landscape of TV services, if technological innovation is reducing the importance of traditional ways of accessing and discovering content. However for some aspects of the framework, the balance of public policy goals and creative sector investment may be better served by amending current rules.

71. At the heart of this debate is the question of what changes to the existing regulatory framework would mean for viewers. The Government's view is that viewers will benefit both from regulation that better reflects the range and choice of TV services that are on offer and

from creating the right environment for continued content investment by PSB and non PSB broadcasters.

72. Viewers benefit from platform choice, and from the investment and innovation in new services pioneered in particular by the pay platforms. At the same time, viewers believe PSB remains important⁴⁰ and the relative ease of accessing this content is therefore an important issue.

73. It is therefore important to ensure that the regulatory framework is delivering for viewers and the creative sector alike, both of which benefit from investment in content, innovation in new TV services and viewers' ability to access content and services easily, as well as contributing to the success of the UK economy.

⁴⁰ Ofcom Public service content in a connected society: "Overall audience satisfaction with the PSB system remains high, and people believe that the PSB system broadly continues to deliver the purposes and characteristics"

Chapter 4: Policy options for consideration

4.1 Approach to consultation options

74. The Government's overarching policy objective is a diverse, vibrant and healthy creative sector delivering a range of high quality content that meets the needs and expectations of the span of UK audiences.

75. This is a complex area of regulation and moreover, the commercial nature of the broadcasting sector makes the outcome of deregulation inherently uncertain. This consultation is therefore genuinely open in seeking evidence on a range of deregulatory options that together form the balance of payments regulatory framework.

There are two central themes this consultation seeks evidence on:

- How well is the current regulatory framework delivering, and how could it be improved to deliver, against our dual policy objectives of:
 - (i) Supporting investment and growth in the creative industries sector
 - (ii) Supporting reach and discoverability of PSB content for viewers
- In a converging media landscape where significant technical innovations are changing how we access broadcast content, do current regulations remain fit-for-purpose, best supporting the needs of consumers; and if not, how could they be improved to be so?

76. In addition to views on the options set out, we welcome views on alternative deregulatory approaches not identified here and on the general policy approach of deregulation in this market. We are also open to suggestions of how additional regulation could help achieve the range of commercial and public policy goals set out in this document.

Q1. What are your views on the overall balance of the regulatory framework, and how do you think the balance changes under the different options we have discussed?

Q2. How far does the current PSB compact regulatory framework deliver for the consumer? How would the policy options discussed in this consultation impact the balance of benefits and obligations that accompany the PSB licences?

Q3. Do you think that the changing technical landscape and changes in the market for TV services since the Communications Act 2003 mean elements of regulation may

no longer be fit for purpose and should be reviewed (including the EPG regulation)?

Q4. What are your views on recent trends in UK original content investment and how regulation is impacting, or could impact, these?

4.2 Section 73 of the Copyright, Patents and Designs Act (1988)

77. The Government is clear that the policy rationale for Section 73 is out dated, as set out in Chapter 3, and proposes to repeal this legislation. It's removal may result in a flow of payments from cable to PSBs, however in view of the complexity and breadth of these commercial negotiations, and in particular if must offer requirements are retained, this is not certain. We welcome views on the potential impact of removing section 73 and in particular how the removal of S73 will impact the other policy options discussed in this chapter. We also welcome views on any appropriate transitional arrangements that should be considered.

Q5. What do you think the impacts of removing section 73 (CDPA 1988) will be?

Q6. What transitional arrangements, if any, would be needed to accompany removing s73, what form might these take and how long would they be needed for to allow the cable platforms and Commercial PSBs to reorder their commercial relationships?

4.3 Must offer and must carry

78. Must offer / must carry could be amended or removed to create more free negotiations between PSBs and platforms. Options here include the removal of regulation requiring commercial PSBs to offer their content to platforms (must offer) and the power for Ofcom to compel platforms to carry PSB content (must carry). The commercial PSBs and pay TV platforms would therefore be free to negotiate a deal for content carriage, without being subject to any obligation to reach a deal.

79. We expect that, even with the removal of must offer / must carry, it would be in the interests of both parties to find a resolution for the carriage of PSB content on pay TV platforms. However, this option would introduce the potential for permanent non-carriage of core PSB content on certain platforms. We welcome evidence of the potential impact of this approach on both the public policy goals of reach and discoverability of PSB content; and on the Government's overarching goal to encourage investment in the creative industries sector.

80. An alternative approach would be to encourage a 'free market-like' solution, within regulation. Current must offer legislation requires that PSBs offer their channels "subject to the need to agree terms". One option to encourage commercial negotiations without creating a carriage risk for consumers would be to amend this legislation to make clear that must offer and must carry obligations are only applicable where a 'reasonable' offer has been made, and the second party refuses to accept this proposal. This would require the specification of a form of arbitration administered or overseen by Ofcom in the case that agreement over what constituted a 'reasonable' offer could not be reached.

81. The benefit of this alternative approach is that the universal availability of PSB channels on pay TV platforms would be guaranteed. The risk is that Ofcom may face a large number of arbitral cases to decide. Further, while this option moves negotiating outcomes closer to those of a free market, it would potentially increase the level of intervention by requiring a more active role for the regulator.

Q7. What would the practical implications be for viewers, including vulnerable viewers, if commercial PSB content were only available on free-to-view platforms?

Q8. What would be the impact of removing must offer/must carry provisions on:

- a. The universal availability (reach) of PSB content on pay platforms?
- b. The PSB compact?
- c. Overall audience experience?
- d. The net flow of funds between PSBs and pay platforms (including negotiations for other portfolio channels and other services)?
- e. Investment in PSB content?
- f. Investment in the creative industries sector more widely?
- g. Competition between PSB and non-PSB channels?
- h. Pay-TV subscription prices for consumers?
- i. or can the policy objective of freer market negotiations be achieved in the existing system?

Q9. What would the impacts be if the regulatory framework was amended to make the requirement to agree terms stronger?

Q10. We welcome evidence on how changes to the existing regulatory framework would impact other parties in the sector, such as independent production companies, free-to-view platforms or other technical service providers. We also welcome views on other options not discussed here. What evidence is there that a change in a flow of funds would be translated into higher levels of investment?

4.4 EPG

82. The current EPG framework may not adequately reflect the current landscape of TV services, nor be sufficiently adaptable for the future. We have identified three areas where amendments could be made if we were to maintain the current policy ambition:

- amending the existing framework to be technology neutral,
- including VOD content where this is part of a package offered alongside broadcast content, and;
- integrating technologically advanced service (e.g. HD services) into the existing framework.

83. In making these changes, we would need to retain a licencing system for EPG providers; we do not however propose adding to existing legislation by further defining

‘appropriate prominence’⁴¹. The detailed options are discussed in more detail in Annex A, these reflect discussions with stakeholders subsequent to the publication of the Connectivity, Content and Consumers strategy paper.

84. An alternative view is that deregulation would provide a productive route to ensure the best quality content is/remains easily discoverable for viewers while also maximising investment and supporting a diverse, vibrant and healthy creative sector. It is possible that audience expectation and commercial benefit are sufficient to ensure high quality PSB programming remains easily discoverable on platforms, without the need for prominence regulation.

85. Moreover, in the long-term, it is not clear whether traditional EPGs listing information about linear TV broadcasts will remain relevant, for example if audiences use alternative means to search for content or increasingly choose to consume content outside the linear schedule. Rather than updating the existing regime for technical innovation, deregulating would recognise that the importance of traditional EPGs may be declining as TV viewing habits change, and that discoverability may be being unnecessarily maintained at the cost of a more dynamic market in which non-PSB channels could more effectively compete with the commercial PSBs for audience share and PSBs and platforms could negotiate more freely. We welcome evidence on what the impact of deregulating EPG would mean in practice for PSB discoverability for audiences, the ability of PSBs and platforms to negotiate effectively on carriage deals and on the PSB compact. In particular, we welcome views on the impact deregulation could have on channels’ incentives and ability to compete more effectively for audience share, and therefore potentially on net investment in the creative industries sector overall.

Q11. Do you think that updating the existing regime to reflect technical innovations and entrenching the PSBs’ prominent position would encourage more long term investment in content and services and if so how might this impact be quantified?

Q12. What steps would have to occur to translate the removal of appropriate prominence requirements into more effective competition between broadcasters for audience share and content investment benefits for viewers?

Q13. In order to maintain the current policy objective of PSB discoverability in view of technical developments, do you believe that the current EPG framework would require updating in order to remain fit-for-purpose?

...

⁴¹ Discoverability can be achieved in a range of ways, such as being at the top of a genre listing within an EPG, being near a popular channel, or having a memorable channel number. We believe that Ofcom remains best placed to give EPG providers clarity on the application of “appropriate prominence”. Ofcom is currently reviewing their EPG code in order to clarify the assessment process of appropriate prominence

...

Q14. If so, do you agree with the three areas we have highlighted for review:

Making the existing framework technology neutral;

- a. Including VoD content, and;
- b. Integrating technologically advanced service (e.g. HD services) into the existing framework? (Detailed options are discussed in the Appendix)

Q15. Alternatively, do you believe that deregulation would provide a productive route to ensure the best quality content is easily discoverable for viewers while also maximising investment?

Q16. What would be the impact of removing the requirement for EPG providers to offer commercial PSBs appropriate prominence on:

- a. Discoverability of PSB content including Local TV ?
- b. The PSB compact?
- c. Net investment in the creative industries sector overall, including investment in content?
- d. The ability of commercial PSBs and non-PSB channels to make medium/long-term investment commitments?
- e. The ability of non-PSB channels to compete more effectively with commercial PSB channels?

Appendix A: Options to update the EPG framework

Detailed options to update the existing EPG framework

(Option 1) Create a technology neutral framework

1. At present we capture only EPGs which take their information from a broadcast data stream, but in the converged media environment we are aware that some services providing materially the same function as broadcast EPGs, are underpinned partly or completely by data transmitted via the internet (e.g. on the Virgin TiVo EPG or TV-CatchUp).
2. While services that provide an EPG over the Internet require an Ofcom licence, TV sets with inbuilt software that takes an EPG data stream and turns it into a list of recommendations or reorders the channels is not subject to an EPG licence. In order to remain technology neutral, this option would extend prominence to apply regardless of how the information underpinning an EPG services is communicated.

(Option 2) Include video-on-demand content

3. Currently, the EPG definition only extends to live broadcast content. It is possible that content transmitted via the Internet on-demand e.g. through services like iPlayer might not be as easily discoverable in the future. Currently, the PSB players (e.g. iPlayer) which distribute VoD content are prominent on the EPG-like listings of VoD players on the major platforms, this option would ensure this continues.

Delivering options 1 and 2

Legislation

4. To create a technologically neutral EPG definition and to include video-on-demand-content one option would be to amend the EPG statutory framework in sections 310 and 311 of the Communication Act 2003 (see Annex A). This would confer a power on the Secretary of State to set out the definition of an EPG in secondary legislation, i.e. to specify the types of services that are subject to the prominence regime. This enabling power would be broad enough to include EPGs for current linear programme services, on-demand programme services and other types of interfaces by which consumers are able to access public service content. The secondary legislation would set out the specific definition of EPG services covered at any particular time and would be made following consultation with Ofcom and the industry.

5. These changes would give sufficient flexibility to ensure that the definition of EPGs could be updated in light of future demands. For example, at this stage we would not consider it appropriate to capture:

- Video-on-Demand (VoD) only services (e.g. Lovefilm or Netflix) where broadcast content is available alongside other content, such as film.
- Platforms that are very small in scale, where we want to encourage technological innovations like Beamyly⁴² which are opening new ways for consumers to find and access content.
- Services where their core offer to consumers is the ability to list content on the basis of social recommendation, where the consumer communication is the basis of the EPG.

6. However, in view of constantly evolving technology, the aim of this approach would be to allow Government to respond flexibly to new circumstances.

Licensing system

7. At present, EPG service providers need to obtain a licence to operate under the Broadcasting Acts if they are made available for reception by members of the public and are broadcast from a satellite, or distributed by any means using an electronic communications network. VoD content is not broadcast and would not be covered by this definition.

8. If we include VoD content in the prominence regime one option would be to regulate the EPG listing of VoD players via a notification system similar to that applying to providers of VoD services under section 368BA of the Communications Act 2003. However, we think it would be undesirable to have two different systems – one for broadcast EPGs and one for VoD listings.

9. In terms of simplicity and ease of understanding, we think it would be preferable to extend the current licensing system to cover this and all the EPGs proposed under the new definition. However, this would only be allowable under EU law if the relevant EPG service is not an information society service⁴³. We do not believe that an EPG listing VoD services would be an information society service as the EPG would be a point to multipoint service (e.g. the Sky listing of VoD players is communicated to all households with a Sky set top box in parallel), as opposed to a point to point service (i.e. provided at the individual request of the viewer). However, it is possible that new services could develop in the future that might fall within the definition of an information society service. As a consequence, we would be interested in views on the merits of moving to a notification system to cover all the

⁴² Beamyly is a social networking and social television platform available for mobile devices, providing an EPG and contextual information second-by-second as people watch TV

⁴³ As in Article 1 of the Directive 98/48/EC 'amending Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services' <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:217:0018:0026:EN:PDF>

EPGs proposed under a new, technology neutral definition, so as to further future proof the prominence regime. For example, this could be similar to the notification system applying to providers of VoD services under section 368BA of the Communications Act 2003.

10. Providers of EPG services would continue to be required to comply with the EPG Code of Practice and Ofcom would retain the same enforcement powers as now to deal with breaches of this condition.

Integrating technologically advanced services

11. High definition (HD) channels can either be accessed from within the main EPG menu, or from within an HD submenu. The prominence of PSB HD channels in both menus is variable, despite the fact that, for example, BBC 2 SD and BBC 2 HD are perfect simulcasts in offering exactly the same programmes. We are under the impression that the consumer take-up of these services is not as high as might be expected given sales of HD enabled TV-sets. For example BBC 1 HD is only at 141 in the main menu after SKY 1 HD (106), SKY Living HD (107) and SKY Atlantic HD (108) but also after BBC 2 HD (102) and BBC 3 HD (115), placing BBC 1 only on the second page of the HD sub-menu. We are concerned that the lack of visibility of HD services in EPGs is holding up take up, and that for those households that use the HD menu as their main menu, PSB content is less prominent⁴⁴. Today most programmes are offered as a SD and as a HD service. We do not think that SD and HD services should be listed next to each other on the EPG but we do think that there should be a consumer friendly way of accessing PSB programmes in the best quality that the consumer's TV-set can receive.

12. We understand that there are different technological solutions: HD channels can swap into SD slots where a broadcaster offers their content in HD and the consumer has the technology to enjoy it. Where the consumer's TV set only receives content in SD quality that is what they will access from the same EPG listing. We believe EPG providers should ensure that the highest quality version of PSB content that the consumer can access – whether that's HD or in future UHD - is available from the most prominent listing. Government is aware that there are some services, such as BBC1, which are not perfect simulcasts in SD and HD as they offer local news and local TV. If there is no feasible technological solution for accessing these channels or programmes in HD and SD from the same slot by the consumer an alternative solution is that Ofcom has the discretion to determine what appropriate prominence is in this case. The Government wants to see EPGs listing the best quality version of content is offered to viewers, and welcomes view on whether legislation is necessary to achieve this outcome for viewers. We particularly welcome views on how technically feasible the former option is, and whether the latter would be sufficient to ensure HD content is as prominent as its SD counterpart.

⁴⁴ The UK average of HD-ready TV homes is 73%, and nearly half (49%) of households claim to have HDTV channels. Ofcom, "Communications Market Report: Scotland", 2013, pp 45 – 46
http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/2013_CMRS_Scotland.pdf

Consultation questions (Appendix A):

Q17. Do you agree with our proposals to amend the EPG definition in law to make it:

- i) technologically neutral - so that so regardless of how the information on the content is communicated to the EPG service it will be within scope of regulation;**
- ii) include video-on-demand content?**
- iii) if not, why not?**

Q18. Do you agree that it is preferable to have the same regulatory system for EPGs for broadcast and VoD services or do you think it is better to introduce a separate regulatory system for VoD EPGs? If the latter, what should that look like?

Q19. Do you think a change from the current licencing system to a notification system is necessary or preferable? What impact is to be expected from a change from a licencing to a notification system?

Q20. Do you agree that there is a technologically feasible solution to create a system that would enable EPG providers to substitute in the highest quality PSB content that each consumer can access (depending on their TV) from the same slot? Does this solution only cover perfect simulcasts in HD and SD? If not, is it for Ofcom to determine what appropriate prominence is if the channel or programme is not an SD – HD perfect simulcast?

Q21. If there is no technologically feasible solution, do you think the EPG prominence regulation should be extended to HD sub-genre menus?