

ITN RESPONSE ON EU CONSULTATION

FUTURE FRAMEWORK FOR STATE FUNDING OF PUBLIC SERVICE BROADCASTING

About ITN

ITN (Independent Television News) is a UK-based, independent news and content provider. ITN was created over 50 years ago to provide news programmes for ITV (Independent Television), which at that time constituted a network of 15 regional licensees. ITV was then the only commercial competitor to the UK's public service, licence fee-funded broadcaster, the BBC. ITN therefore played – and continues to play - a very important role as the BBC's news competitor in terms of providing plurality of news provision for the British public. This role continues today, with Sky News as the third news provider in the UK.

Today ITN is one of the world's leading news and multimedia content companies, creating and supplying content for a range of platforms from TV to radio to broadband to mobile. ITN is a privately-owned company with four major shareholders: ITV, Reuters, Daily Mail and General Trust, and United Business Media. ITN is made up of five key businesses - ITN News, ITN Source, ITN ON, ITN Consulting and our factual production business ITN Factual.

Today, ITN produces news programming for ITV, including national and local London news for ITV1, and news for ITV online (www.itv.com/news). ITN also produces news programming for Channel 4, for one of Channel 4's digital channels, More 4, and for Channel 4 online (www.channel4.co.uk/news). ITN also supplies news to around 270 commercial radio stations through IRN (Independent Radio News). ITN's combined news broadcasts therefore reach a large proportion of the UK population, and ITN has won many international awards for its journalism.

In 2007 ITN's news programmes won Royal Television Society Awards for *News Programme of the Year* (630pm ITV News), *Presenter of the Year* (Jon Snow – Channel 4 News), *Home Story of the Year* (ITV News), *Young Journalist of the Year* (ITV News) and *Specialist Journalism* (Channel 4 News – News from Iran); a Foreign Press Association Award for News Story of the Year (ITV News – John Ray/Chinese Miners) and a New York Festival - *Gold World Medal* for coverage of an *On-going Story* (Channel 4 News – Afghanistan) and a *Bronze World Medal* for *Investigative Reporting* (More4 News – Darfur).

ITN is based in London, with bureaux and offices in Washington, Tokyo, Johannesburg, Jerusalem, Brussels, Paris, Berlin, New York, Beijing and Sydney.

Application of EU law to public service broadcasting

ITN welcomes the initiative taken by the European Commission to review the EU Broadcasting Communication. We believe it would be timely to update it to reflect changes in the legal and the market environment, where broadcasters are no longer offering just linear services, but multimedia services where market competition is fragile, and where the might and funding power of the public service broadcasters can stifle new, emerging markets.

UK context

ITN is the BBC's direct and main competitor in broadcast and multimedia news. As a commercial company, we wholeheartedly support competition between news providers, as this delivers choice and quality for viewers and users, in a highly efficient and cost-effective way.

In recent years, there has been lengthy consultation and public debate in the UK in the context of Charter renewal over the remit and regulation of the BBC resulting in the establishment by the government of the BBC Trust, in November 2006. The BBC Trust is designed to create and deliver greater transparency and scrutiny of the BBC's activities.

In January 2007, the BBC was given a new licence fee settlement, which lasts for six years from April 2007. The corporation also received a 12.5% increase in its borrowing capacity to help deliver digital switchover, including £600m to help the elderly and disabled move to digital TV. The settlement is inflation-linked and lower than the BBC Executive had asked for. Despite this, the BBC still has ample funds not only to maintain its current activities but it also has £1.2bn at its disposal for investment in new activities, thus it has a secure and lengthy planning horizon - a huge advantage compared to commercial operators.

The BBC has to justify and explain its expenditure annually through its Report & Accounts, as well as through a new services approvals process. There is however no obligation to return any licence fee funding to the taxpayer, for example, in the event a service is closed or fundamentally changed in nature, or even at the end of the licence fee settlement period. This means that, despite all the controls, there remains a lack of financial accountability to the licence fee payer, and no penalty for failure.

With regard to budgets, details given in the BBC Service Licences (e.g. the Service Licence of bbc.co.uk) are basic and exclude operational costs and marketing expenditure, including funding for on-air promotions ("trails") of BBC programmes on across all their channels. Frequently only total budgets are given (with the claim that Service Licence budgets are more fully costed than the figures quoted in the Annual Report) rather than a budget for individual activities. This means that assessments become extremely difficult and often meaningless. There are also no future cost projections, and no assessments given of how the service will be different from commercial services in the marketplace therefore it is difficult to evaluate its particular value as a licence fee funded service. Although we appreciate that some figures may be market sensitive, this type of information would be critical to the running of any commercial enterprise.

ITN would expect that a publicly-funded broadcaster would put more detail about the cost of its services into the public domain so that so that there is a means of delivering greater

transparency and accountability. In our view the BBC Trust should find a way to demonstrate publicly that it is holding the BBC management to account, both financially and as regards remit in the supervision of its licences. So far this is not happening and areas such as bbc.co.uk, one of the world's largest online resources, continue to grow and are earmarked for huge investment and expansion. This is to the detriment of competitors who can not afford to invest to the same level.

Thus the publicly funded BBC remains anomalous in the UK broadcasting environment, with huge resources at its disposal to forge a dominant presence in the digital media markets. Despite the scrutiny mechanisms now in place with oversight by the BBC Trust, intended to ensure transparency, and with market impact testing to prevent the BBC distorting competition, ITN has yet to see any appreciable changes in the BBC's behaviour, nor any tangible evidence that the new control mechanisms are working to keep the BBC's new media activities in check.

ITN has felt the full brunt of this. ITN has actively been diversifying its business and developing new business opportunities by being at the cutting edge of digital developments. Though investing in new media services is a risky, competitive business, ITN has been able to pioneer new digital media ventures using economies of scale between its news and factual programme businesses and deploying state of the art technology to reduce overheads. ITN's multimedia production business, ITN ON, currently has contracts with most of the mobile phone operators, providing video news for mobile phones and with a number of leading online outlets such as Youtube and Bebo with whom it is developing advertising models

Over the last decade, ITN has been confronted with various examples of anti-competitive behaviour by the BBC and submitted some complaints to the Board of Governors, but there is little evidence that these were considered in any depth. As mentioned, the regulation of the BBC has now changed considerably (via the establishment of the BBC Trust) with new complaints procedures, new service approval procedures, and regular reviews of services. These procedures are all welcome, but have yet to show they are really making an impact in terms of balancing the public purposes of the BBC against any detrimental market impact.

By way of example, in April 2007, ITN wrote formally to the BBC Trust to express concerns about the scope and legitimacy of a year-long BBC "trial" whereby the BBC new media division was syndicating a range of its content, including BBC News 24, to subscribers of 3G mobile phones. Fundamentally, ITN wants to ensure that there is a vibrant, pluralistic and competitive marketplace in all aspects of developing media. In other words, that there is room for commercial operators to provide services as well as the BBC and in this case ITN did not want to see the BBC gradually build up its mobile services without triggering a proper review of their impact on the commercial marketplace.

ITN argued that a trial of one year was far longer than the time necessary to establish the value of a service, and that its impact would therefore be that of a full-scale service. The BBC Trust responded that "*the limits of the trial are clearly defined*". Unfortunately they are not defined in the public domain so competitors are none the wiser as to their motives or resulting data. In our view a commercial operator would not have the resources, or in many cases the patience of shareholders, to sustain a trial of this length without pressure to deliver results. ITN has always had to respond to market changes and developments in a far more fleet of foot way.

The BBC mobile service is also provided for free, without advertising, at a time when ITN, among others, was in the process of developing and trialling a free news service carrying advertising, as opposed to a subscription service. Revenue from this is dependent upon customer views and the BBC's entry could clearly distort the information being gathered by the commercial sector. Furthermore, a free trial of this length would give the BBC considerable time to gather commercial data it could then deploy against its competitors.

The fact that the BBC was launching its year-long "trial" just at this time appeared to be very much like a market spoiler. ITN sought to have the trial limited to a more reasonable length of time (no more than one month) so that a market impact assessment for a variation on a Service Licence could then be applied on the basis of it being a new activity. ITN also suggested it should have to be approved by the BBC Trust before launch; however, the BBC Trust said this was not necessary because it was considered a "Category 2" trial. The BBC could also have postponed its trial to allow commercial operators the time to develop successfully an advertising-funded model.

The trial has now gone ahead, and ITN is counting the cost of its impact; we have lost a contract with one mobile phone operator (who has confidentially indicated that this is a direct result of the BBC's arrival) and we have seen our position on the content ranking drop considerably, with the BBC in prime position as the viewer logs on.

In short, this is but one example of how the BBC continues to dominate the broadcast and digital media landscape, having far more money at its disposal to invest in its new media activities than would be commercially viable for market operators, and it is therefore in a position to dictate the terms on which new media markets are developing.

Conclusions

The UK is considered to have one of the most transparent and well-regulated systems of public service broadcasting in Europe, and the BBC maintains it is subject to full regulatory controls including UK and EU competition rules, as well as market impact evaluations in respect of its services.

Many of the proposals the Commission is intending to add to its Broadcasting Communication have already been implemented in the UK, for example:

- Ex ante evaluation to determine the public service character of new offers,
- Tests to assess the market impact of PSB services and avoid disproportionately damaging competitive effects;
- A definition of PSB obligations
- An overseeing body (the Trust) seemingly independent from the PSB
- Structural separation of commercial from PSB activities
- No dual funding on the BBC's licence fee funded PSB services

However, the new governance system by the BBC Trust is arguably still developing and the system lacks clarity, particularly in relation to new media activities, where, in ITN's view, the first four principles above have yet to be fully applied. The BBC Trust still needs to demonstrate that it is independent from the BBC Executive, and that it can take the tough decisions. The following examples are problematic for transparency and competition and

should be tackled by the Commission in the updating and application of its revised Broadcasting Communication in the UK and elsewhere in Europe:

No separate Service Licence for BBC mobile service content or other digital services

A system of Service Licences has been introduced for each BBC service, to ensure that each service has a clear public service remit, with a budget to service that remit. Service Licences must be awarded by the BBC Trust and this means that in principle there is a transparent and independent approvals procedure, involving third party comment. The BBC is to be held to account through regular evaluations of each service against the Service Licence. However, the BBC still currently envisages rolling mobile and all other media services up into a single Service Licence for bbc.co.uk. This enables the BBC to develop and launch a multiplicity of new services under the one licence umbrella and it means that it is difficult for competitors to be clear about what services the BBC is bringing to market. This affects competitors in a vast range of sectors e.g. news, sport, health, education as bbc.co.uk covers such a multiplicity of subjects. In a recent submission to the Trust, ITN said:

"It is anomalous that BBC TV merits nine separate licences (BBC 1, BBC News 24, CBeebies etc), BBC radio merits a further sixteen licences (Radio 4, BBC 7 etc), yet bbc.co.uk - the most significant area of major expansion over the last decade, only merits two licences. Given the breadth and reach of bbc.co.uk this is inadequate and fails to provide commercial operators with enough certainty as to the services' parameters. It also fails to provide an adequate framework for the Trust to fulfil its supervisory duties to licence fee payers under the terms of the Charter."

And:

"Unless the Trust is prepared to look at changes to the Licence regime it seems clear that the BBC's year-long mobile trial will easily mutate into a permanent service with no public value assessment or test, and therefore no market impact assessment. In effect, then, nothing will have changed from the old regulatory system".

Thus ITN is supportive of the general approach proposed by the Commission (question 2.2.4) to incorporate an ex ante evaluation for new media services into a revised Broadcasting Communication, but (in response to 2.2.3) proposes this needs to be specific so that PSBs are transparent about the different types of new media services.

No feedback on BBC Trust consultations

In line with its mandate, the BBC Trust has issued various consultations about the new procedures for Service Licences, as well as a recent consultation about bbc.co.uk. ITN and other commercial operators have responded to these consultations, but as yet the BBC Trust has not published any results or given any indication of changes as a result of the consultations. Unless the BBC Trust does so, the whole procedure is merely gesture politics.

Thus ITN proposes the Broadcasting Communication should not only require PSBs to consult on new services, but demonstrate how they have reflected on feedback and adjusted their proposals accordingly.

No independent recourse as regards complaints procedures

The BBC has put in place extensive systems to deal with complaints, and in addition, the BBC Trust is supposed to provide an independent recourse for complaints. Whilst the handling of ITN's recent complaint is more transparent than previously, there is no appeal procedure in place as regards decisions of the BBC Trust. So in the case of ITN's complaint about the BBC's mobile content trial, there was no body to which ITN could appeal after receiving final feedback from the BBC Trust.

Yet recourse to independent appeal is a basic human right. ITN believes that, ideally, competition complaints should be referred to a completely separate regulatory body with competition powers, such as Ofcom. In the absence of this, the BBC Trust should at least put in place a model similar to the UK's Advertising Standards Authority's (ASA's) independent reviewer to consider appeals against the BBC Trust decisions on complaints, and ITN would support this being provided for in the EU Broadcasting Communication.

No parameters for "compensation"

As stated above, the BBC does not have clear procedures in place as to how much to return to the taxpayer in the event of surpluses, but also in the event of changes or cancellation of a service. ITN would therefore support some parameters being laid down at European level.

QUESTIONS

1. GENERAL

1.1 *How would you describe the current competitive situation? What are the likely future developments and challenges for the sector? Will the current rules remain valid or will adaptations be necessary?*

ITN believes that the Broadcasting Communication should be up-dated in light of legal developments (AVMS, the adoption of the Decision and Framework on compensation payments as well as decision making practice) as broadcasters, including PSBs, are no longer operating solely in a linear environment but their content is competing in digital media. Secondly, a single legal text that captures all EU legal developments in one place will help deliver greater clarity and transparency.

With regard to the current competitive situation of the various players in the audiovisual media sector in the UK, the head-on competition between ITN and the BBC in terms of news provision is described on page 2 and page 3 of this paper. The BBC is the UK's biggest single operator in the audiovisual media sector, with its licence fee funded services including 8 national TV channels, 10 national radio stations, 40 local radio stations, and its online service, bbc.co.uk. The BBC is funded at £3 billion a year, and has a licence fee settlement that runs from April 2007 to 2012-13. The licence fee will increase annually by three per cent for the first two years and two per cent in years three, four and five. There will be an increase in the sixth year (2012-13) of up to two per cent, depending on a further review nearer the time.

<http://www.culture.gov.uk/NR/rdonlyres/CF58FF62-7109-465F-90BF-A663E2C4C1B7/0/licenceFeeSettlementLetter.pdf>

Looking to the future, and bearing in mind the recent pace of change in digital media, developments that require or bring about major challenges are inevitable although difficult to predict. The sector continues to evolve to meet these challenges and will continue to do so but future legal adaptations may be necessary to ensure that the legal framework is robust.

For ITN, one area of credible concern regarding future development relates to plurality of news services in the UK. As previously mentioned, ITN is the main alternative, independent provider of news to the BBC in the UK and following UK digital switchover in 2012, both ITV and Channel 4 may need incentives (e.g. cheaper spectrum or multiplex access, changes to advertising minutage, more prominent positioning on the EPG) to continue investing in news.

This is because comprehensive, high quality UK and international news and original, investigative journalism are expensive to produce and for the broadcaster the cost is not only the production cost but also the opportunity cost of not running a more populist programme which could produce greater advertising revenue. The business models of the UK's commercial broadcasters are already under strain as more channels emerge and advertising revenues are spread across many more outlets than in the past.

Therefore there is a real possibility that following digital switchover in the UK in 2012, one can envisage a situation where commercial pressures mean that only the BBC is able to fund a comprehensive news service for UK audiences. Given the power of broadcast news to influence and inform, ITN does not believe it is healthy in a democracy to have only one broadcast news provider and action should be taken now to avert this situation.

There are other changes on the horizon in the UK which could require both the UK Government and the Commission to review transparency and State Aid requirements, and such changes (which may happen elsewhere in Europe too) indicate that the Broadcasting Communication should be kept under regular review.

In the next few years, Ofcom and the UK government are evaluating how to nurture the delivery of public service broadcasting and content in digital media, as the traditional compact by which the commercial public service broadcasters (ITV, Channel 4 and Five) breaks down. These broadcasters have historically delivered PSB programming in accordance with licence obligations in return for scarce spectrum giving universal coverage, but Ofcom has questioned whether it can hold the broadcasters to these costly obligations after digital switchover. The government and Ofcom have therefore raised the possibility of some public money being made available for the delivery of PSB content by commercial broadcasters and digital media; Channel 4 in particular is a contender for this (see remit on page 10). At this stage it is not clear what form this would take or whether money would be taken from the licence fee. However, EU State Aid rules would then potentially apply to more content providers than just the licence fee funded BBC, and this could have a number of different consequences which would need to be evaluated at that time.

2. COMPATIBILITY ASSESSMENT UNDER ARTICLE 86 (2) EC TREATY, IN COMBINATION WITH THE BROADCASTING COMMUNICATION

2.1 *Coherence with the Commission Decision and Framework on public service compensation*

Defining the PSB remit after wide consultations and a requirement for separate accounting are already in place as regards the BBC.

Distinctions between separate PSB obligations (activities different in nature) are theoretically in place, but insufficient as regards the BBC's digital media activities which are all wrapped into the bbc.co.uk remit (see pages 5 and 6).

The BBC has external auditing of its accounts and full systems of scrutiny but we are not aware that it has in place regular checks on over-compensation, nor does it provide the possibility to re-fund tax-payers for PSB services not delivered (this is addressed on page 2).

All these requirements laid down in the Decision and Framework on public service compensation are absolutely necessary and fundamental to a competitive and pluralistic media marketplace.

2.2 *Definition of the public service remit (in particular as regards new media activities.)*

Should the distinction between public service and other activities be further clarified? Should there be further clarification of the PSB remit? Should there be ex ante evaluation for new media services, and should this be defined in the Broadcasting Communication? Which services should be defined, and should procedural principles be defined?

In the UK, public service broadcasting (PSB) refers to content that is intended for the widest public benefit and interest rather than content that is produced for purely commercial reasons. PSB genres include news, current affairs, arts and religious programming, but also home (or European) originated quality drama and entertainment.

Public service broadcasting is delivered by the licence fee funded BBC, and also by advertising-funded broadcasters – ITV, Channel 4 and Five. The commercial broadcasters currently obtain no public funding to deliver their PSB obligations – in the analogue era, they did so in return for free universal and scarce spectrum. As described later in this paper, this “compact” is breaking down and there is a debate about whether some commercial broadcasters (in particular Channel 4) should have some sort of public intervention, whether in kind (e.g. prominence on the EPG), or through money from the BBC’s licence fee funding.

The wider PSB ecology in the UK

The UK’s communications regulator, Ofcom (<http://www.ofcom.org.uk>) requires that certain television and radio broadcasters deliver PSB programmes at specific times (e.g. in peak viewing) as part of their broadcast licences. The BBC’s remit is to deliver public service broadcasting via television, radio and multimedia outlets. Also, all broadcasters on terrestrial analogue television – ITV, GMTV, Channel 4, S4C in Wales and Five are obliged to provide certain levels of PSB programming. Commercial radio stations also have public service obligations – typically a minimum level of news.

ITV, with its local franchises, launched in 1955, was the UK’s first commercial broadcaster, and it was mandated by government to deliver a certain level of news coverage (supplied by ITN), arts and religious programming, in return for the right to broadcast.

In 1981 the UK’s next commercial television broadcasters, Channel 4 and S4C were set up. Both Channel 4 and S4C are publicly owned and provide different levels and types of PSB content. In Channel 4’s case it is required to provide a public service alternative to the BBC and specifically to be innovative, diverse and creative, sourcing content from the UK’s independent creative production companies and with an emphasis on serving minorities. S4C is a mainly Welsh language broadcaster.

Neither Channel 4 nor S4C were initially required to be commercially successful (Channel 4 was subsidised by the ITV network and S4C received a grant from central government). However, under the Broadcasting Act 1990 Channel 4 was restructured to be a state owned corporation, that continues to play a key role as an alternative provider of public service broadcasting to the BBC but which is self-financing.

In 1997, Five, the UK’s last analogue terrestrial broadcaster, was launched. Five also assumed certain PSB requirements such as broadcasting programming originally commissioned by Five and of European origin, and setting a maximum number of repeats.

By contrast, the BBC, established in 1922, is funded by the public via a licence fee and it does not sell advertising. Its six public purposes are:

- sustaining citizenship and civil society
- promoting education and learning
- stimulating creativity and cultural excellence
- representing the UK, its nations, regions and communities
- bringing the UK to the world and the world to the UK
- in promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television

ITN believes that the concept of PSB in the UK is sufficiently defined and understood by stakeholders, though the current Broadcasting Communication is inadequately detailed at European level.

ITN is also confident in Ofcom's ability to enforce and police PSB regulations in terms of when and how PSB obligations are being delivered by commercial operators. However, where a further distinction between PSB and other activities may be necessary is in relation to BBC activities that continue to increase and expand.

The BBC's new media activities

The BBC has defined its PSB remit to be available to anybody in the UK, at any time, anywhere. This means it believes its services should be distributed via any platform (from TV and radio, to the internet and mobile). In addition, it has always argued that, to deliver the widest reach possible, it must have a wide selection of programming within its public service remit, including entertainment, as well as education, sport, news, etc. The result of this interpretation of public service broadcasting is that, despite detailed definitions of what the BBC should deliver in terms of public purposes, it has very wide scope in terms of the services it provides in digital as well as traditional linear broadcasting markets, and this means (as outlined elsewhere in this paper) that it continually has a tendency to trample on the commercial competition.

The BBC's remit for its new media activities is set out in the bbc.co.uk Service Licence. The BBC Trust has recently been consulting on this and has not yet published the results of the consultation. However, ITN's response said that the proposed Service Licence was far too general and that services such as the BBC providing free content to mobile should be subject to separate approval as the public value versus the market impact of such services has not been properly evaluated ITN said:

"It is anomalous that BBC TV merits nine separate licences (BBC 1, BBC News 24, CBeebies etc), BBC radio merits a further sixteen licences (Radio 4, BBC 7 etc), yet bbc.co.uk - the most significant area of major expansion over the last decade, only merits two licences. Given the breadth and reach of bbc.co.uk this is inadequate and fails to provide commercial operators with enough certainty as to the services' parameters. It also fails to provide an adequate framework for the Trust to fulfil its supervisory duties to licence fee payers under the terms of the Charter.

“Consequently ITN believes the Trust should split the BBC’s online activities into separate, measurable licences, with remits and budgets against each, in order to capture fully the activities and effects of bbc.co.uk in a range of different sectors.

“In addition, we believe that there should be a separate Service Licence for mobile to reflect the significant difference between mobile and broadband platforms. Mobile users pay for content whereas online the same content, especially in the area of news, is generally free to the end user, funded either via the licence fee in the case of the BBC or via advertising revenues.”

ITN therefore believes that, to ensure competition, the EU Broadcasting Communication should:

- Set out with clarity the PSB remit for publicly-funded public service content in digital media
- Ensure ex ante evaluation of PSB new media services provided by PSBs on a publicly-funded basis

In the UK, commercial broadcasters are continually addressing the BBC Trust asking them to examine the expansionist and pioneering fashion in which the BBC says it is delivering its public purposes, in the public interest. For example, as previously cited, the BBC’s content trials on mobile phones, did not, despite our logical appeals, take into any account nascent market factors. This was despite the fact that the BBC Trust is supposed to demonstrate clear regard for the competitive marketplace and be mindful of the BBC’s capacity to distort the marketplace.

Commercial operators in the UK recognise the BBC’s desire to provide new services that are relevant in the digital age, but the BBC does not need to be first to market, as in being so, the BBC can distort or destroys the market opportunities for commercial operators who by their very nature have to deliver a commercial return.

For example, the BBC website, publicly funded, we believe has an overall budget that exceeds the budget that ITN has to deliver annual news programming to both ITV and Channel 4. ITN previously had its own news website and it produced a 24-hour news channel for ITV, however the funding both required to compete seriously, head to head, with bbc.co.uk and BBC News 24 was of such a scale that it was not sustainable for ITN or ITV, despite ITN being the UK’s second provider of independent, impartial news and therefore having a strong brand to attract viewers.

Therefore, rather than the Member State establish an illustrative list of commercial activities not covered by the public service remit, it may be preferable to:

- Define the PSB requirements (which are reasonably clear in the UK) applicable to publicly-funded PSB and new media services, but also
- Put in place mechanisms that ensure proper recourse is available to those who believe that competitors are acting outside of these parameters.

2.3 *Entrustment and supervision*

Is entrustment of PSB remit subject to public consultation? Are there sufficient possibilities for third parties to take action against alleged infringements/non-fulfilment of PSB? Are there advantages/drawbacks with independent regulation of PSB? Should there be specific complaints procedures at national level?

Entrustment and supervision of PSB obligations in the UK is assigned in different ways and is detailed below.

For the commercial broadcasters entrustment and supervision of PSB programming is defined and then regulated by the UK communications regulator, Ofcom. Details of Ofcom's role are outlined earlier in this document on pages 7, 8 and 9 ([Television Broadcast Licensing | Ofcom](#))

For the BBC, entrustment and supervision of its PSB remit, in return for receiving the licence fee, is now regulated by the BBC Trust, which is supposed to provide independent regulatory scrutiny over the BBC and is separately established to provide "clear blue water" between the regulator and the BBC Executive (<http://www.bbctrust.co.uk/>).

ITN has set out many of the issues that exist relating to governance of the BBC earlier in this paper on pages 2, 3 and 4. There are systems in place to ensure public consultation and ex ante approval processes, though it is unclear whether there are sufficient possibilities for third parties to take action. The BBC Trust has now been in operation for close to 18 months and what ITN would like to see is the BBC Trust demonstrate its ability to hold the BBC to account in terms of delivering greater transparency and monitoring the BBC impact on the commercial market place, as is their mandate. ITN has set out specific areas where it believes change is required on page 5 and 6 of this document.

In terms of delivering increased effectiveness of supervision of public service broadcasters, ITN believes that there is an opportunity for the Broadcasting Commission to ensure the principle of independent recourse for third parties as regards complaints procedures, though this also needs to be put in place at national level.

The Broadcasting Commission should ensure that publicly-funded PSBs have independent regulatory authorities to oversee fulfilment of the remit and to hold the PSB to account.

The Commission should also require that there are transparent procedures for programme complaints and competition complaints.

In the case of the BBC, although it is in principle answerable to UK competition authorities (OFT and Ofcom) and to the EU competition authorities, in practice, the BBC Trust deals with all complaints on anti-competitive behaviour and to date there is no evidence of the BBC Trust delivering on this remit.

Whilst the handling of complaints by the BBC is more transparent than previously (e.g. new systems to deal with complaints) there remains no independent recourse or appeal procedure in place regarding decisions made by the BBC Trust. There was no body to which ITN could appeal after receiving final feedback from the BBC Trust on its complaint about the BBC's mobile content trial. Yet recourse to independent appeal is a basic human right. ITN believes that parties with competition-based complaints should be able to have recourse to Ofcom, or that at least there should be an independent review system put in

place at the BBC Trust (as there is at the UK's Advertising Standards Authority (ASA) to consider appeals against the BBC Trust decisions on complaints, and ITN would support the concept being provided for in the EU Broadcasting Communication.

2.4 Dual Funding of public service broadcasters

It is difficult to envisage a situation in which a publicly-funded broadcaster could provide pay services, even if these had a defined public service remit. Pay services should remain commercial activities.

ITN also believes that the UK broadcasting ecology has always benefited from the BBC's licence fee funded services NOT being permitted to carry advertising. This has allowed broadcasters to compete for viewers, not advertising revenues, with beneficial results for the viewer in terms of quality programming.

Despite this, "creep" can occur. An area which has recently come to light that illustrates the blurring of lines between the BBC's commercial and non-commercial activities relates to advertising. As stated, the BBC is not entitled to carry advertising as it is funded by a licence fee. Yet, it has recently begun to offer sponsorship companies of 'live events' which it broadcasts. These so-called 'live events' fall broadly into PSB programming for instance *Sports Personality of the Year* and the *BBC Proms*. The BBC was offering sponsorship opportunities via a bespoke website called www.bbceventsponsorship.com. The BBC has now closed this sponsorship website following complaints, though it is unclear whether this is a permanent arrangement or how much money it generated from sponsorship. The website dated back to 2004. This is a flagrant abuse of their position and removes revenue that may otherwise have gone to commercial operators.

2.5 Transparency requirements

To what extent are commercial activities carried out by the public service broadcaster? Is there structural separation? Should the Broadcasting Communication rules for cost allocation be improved, and should it contain further clarifications of transparency requirements?

The BBC is the single UK broadcaster that does not carry advertising as it is funded by the public via a licence fee. The BBC also has a commercial division, BBC Worldwide, which is separate and distinct from the licence fee funded part of the BBC. BBC Worldwide's (<http://www.bbcworldwide.com>) mission is to exploit the BBC's content and to generate a profit from this exploitation so that the profit can be delivered back to the BBC and therefore supplement the BBC's licence fee funding. During 2006/07 BBC Worldwide delivered sales of £810 million, up 8% year on year.

In principle this is a reasonable approach. A commercial content business such as ITV or ITN, would seek to do the same. However, in the case of the BBC and BBC Worldwide ITN would sound a word of caution as while there appears to be a degree of financial separation (NB Earlier in this paper ITN outlined the financial transparency issues relating to the accounting and detail of BBC activities - see page 2), a conflict of interest arises when there is insufficient transparency about functional separation and the activities of either side.

Despite procedures being in place to ensure that BBC Worldwide acquires BBC content at market prices, it has first option and does not compete in the marketplace for the content

on the same basis as commercial operators. Thus we believe that BBC Worldwide benefits from preferred partner status with the BBC, shared facilities and valuable commercial information about new developments and programme commissioning. In news, the BBC operates commercial news channel worldwide and there is no separation, functional or otherwise, so the news channel gets a direct benefit and subsidy from the BBC's PSB news resources. In this case, in particular, the lack of functional separation increases the risk of anti competitive behaviour through benefits of vertical integration, cross-subsidy, discrimination and market distortion.

Consequently ITN believes that regulations should be improved to ensure effective functional separation and proper scrutiny as existing methods are insufficient to eliminate discrimination and cross-subsidy.

2.6 Proportionality Test – Exclusion of over compensation.

Should the Broadcasting Communication require parameters for determining the compensation amount? Do current requirements allow sufficient stability for the PSB? Under what circumstances should they be allowed to keep a surplus? What should be the safeguards/limits to avoid possible distortions of competition? Should there be incentives to achieve efficiency gains? Under what circumstances should PSBs be allowed to keep a profit margin?

ITN does not consider it appropriate that the publicly-funded public service broadcaster in the UK, the BBC, should keep any surplus at the end of a financial year in terms of profits, though we accept that some buffer is needed from year to year which can only be used to cover operational costs for public service purposes.

In principle, publicly-funded PSBs should be required by the Member State to make efficiency savings where possible, and these should be transparently declared and ploughed back into the PSB services, or returned to the licence fee payer or public purse.

The BBC is already amply resourced with a pluri-annual licence fee settlement, and through its reach and range of activities it is well known to distort and dictate media markets and their development. ITN's most recent experience of this is illustrated on pages 3 and 4. In addition, it is difficult to ascertain the efficacy or value for money that BBC services deliver to the taxpayer as the BBC is frequently not transparent in its financial disclosure. This is evidenced by ITN on pages 2 and 3. Consequently it is difficult clearly to assess what the BBC's levels of efficiency (and in turn surplus) might be. The current system means that the BBC has financial security and no limits on its ambitions.

By contrast other broadcasters who supply PSB content to UK audiences are under considerable financial pressure from a range of sources, as outlined on page 9, in spite of self help measures.

In principle a surplus or profit indicates that the original budget and remit did not match and therefore the budget should be revised down accordingly. For any surplus that does become available, there is an argument that it could be given to services that are under threat or returned to the taxpayer.

Unfortunately, there is currently no obligation to return any licence fee funding to the taxpayer, for example, in the event a service is closed or fundamentally changed in nature,

or even at the end of the licence fee settlement period. This means that, despite all the controls, there remains a lack of financial accountability to the licence fee payer, and no penalty for failure.

2.7 Proportionality test – exclusion of market distortions unnecessary to the fulfilment of the public service mission.

What are the available mechanisms at national level to challenge alleged anti-competitive behaviour? Should the Broadcasting Communication include requirements for PSBs to respect market conditions as regards their commercial activities, including appropriate control mechanisms? Should there be clarification of the methodology as regards allegations of price fixing? Should the Communication clarify the public funding of premium sports rights?

ITN has had occasion to challenge the BBC's anti-competitive behaviour, and we certainly believe that the EU Broadcasting Communication should include requirements for PSBs to respect market conditions and prevent market distortion as regards their publicly-funded services, as well as their commercial services.

In the UK, the BBC Trust was created to deliver greater transparency and scrutiny of the BBC's licence fee funded activities. Since its creation the BBC Trust has established services such as new complaints procedures, new service approval procedures, and regular reviews of services. These procedures are all welcome, but have yet to show they are really making an impact in terms of balancing the public purposes of the BBC against any detrimental market impact. This is despite the fact that the BBC Trust is supposed to demonstrate clear regard for the competitive marketplace and be mindful of the BBC's capacity to distort the marketplace.

As discussed above, Ofcom and the OFT have a limited competition remit over the BBC, but in practice issues are normally resolved by the BBC Trust.

Ofcom does now submit a market impact assessment in relation to new services that are being evaluated for a Service Licence, though changes to existing services do not necessarily have to go through this full procedure.

ITN has no comment to make on the public funding of premium sports rights.

FINAL REMARKS

As PSBs develop digital media ventures, they are coming more and more into conflict with commercial competitors, and the old rather general PSB remit that currently exists in the EU Broadcasting Communication is inadequate for the competitive media environment of today.

ITN believes, that the EU Broadcasting Communication needs to be more detailed than it currently is in order to ensure that publicly-funded broadcasters throughout the EU are operating their ever-widening activities in a transparent and efficient manner that minimises market distortion and maximises competition.

The UK has probably the best established and most transparent regulation of publicly-funded and commercially-funded public service broadcasting in the EU, and has already put

in place systems to ensure all the principles being suggested in the Broadcasting Communication.

Yet what ITN has sought to show in this paper is that even in a very rigorous and well-thought out regulatory framework, there is room for improvement in order to guarantee competition and media pluralism.