

## **OFCOM'S RESPONSE TO THE COMMISSION'S CONSULTATION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING**

Ofcom is the independent regulator and competition authority for the UK communications industries, with responsibilities across television, radio, telecommunications and wireless communications services.

### **General Comments**

Ofcom welcomes the opportunity to respond to the Commission's consultation on the Communication on the application of state aid rules to public service broadcasting (PSB). While Ofcom does not have any direct responsibilities in the area of state aid, as the UK's independent communications regulator we have specific duties and responsibilities to ensure that the quality of public service broadcasting is maintained and strengthened in the UK. These specific responsibilities are set out in more detail below. In addition, Ofcom licenses and regulates broadcasters with specific public service broadcasting obligations (the commercial PSBs<sup>1</sup>).

Ofcom welcomes the Commission's plans to review, and possibly update, the Communication on the application of state aid rules to public service broadcasting. Fundamental changes have taken place in the broadcasting market and in the media and communications sector more generally since the Communication was first adopted. Most prominently, the move from analogue to digital technologies, the growth of multichannel television, as well the increasing convergence between platforms, networks and services, are fuelling changes in the business models of PSBs, private broadcasters, as well in media consumption patterns. This, in turn, raises challenges regarding the regulatory framework for public service broadcasting.

These challenges, though, are different at the national and the EU level. At the national level, Governments and regulatory authorities need to consider whether existing PSB models can adapt to changing market circumstances while continuing to deliver on what are national public interest goals. The UK is currently considering the future prospects for public service broadcasting as well as the scale and scope of any potential intervention. To contribute to this process, Ofcom will launch in the coming weeks its second statutory PSB Review. In this context, the CEO of Ofcom, Mr Ed Richards, recently stated that:

*"At the time of our last PSB Review, the recommendations we made were aimed at sustaining the existing PSB model into a more challenging period as the pressures in delivering the public purposes became greater. Today the spectrum of options that are open to us in re-casting PSB are much wider".<sup>2</sup>*

At the EU level, and for DG Competition in particular, the question is rather whether the financial support typically granted to public broadcasting service institutions is

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<sup>1</sup> Channel 4, Channel 3 (or ITV 1), Five.

<sup>2</sup> See Speech at the Royal Television Society, 11 March 2008, available at: <http://www.ofcom.org.uk/media/speeches/2008/03/rtspsb>

limited to what is necessary to enable them to perform their tasks, so as to prevent distortions to competition.

In this context, Ofcom believes that the current Communication reflects well the different responsibilities and that it has proved very useful in clarifying the principles under which the Commission interprets Community state aid rules, while respecting the freedom of Member States to define the remit and funding schemes of public service broadcasting activities in accordance with the 1997 Amsterdam Protocol. Although Ofcom recognises the intrinsic linkages between the definition and funding of public service models (which remains a national prerogative), and the possible impact on competition (which is both a national and a European concern), **we would like to underscore the importance of maintaining the current balance in any future Communication.**

In an environment of rapid and constant technological change, it is good practice to review the regulatory framework regularly. However, Ofcom would like to call for caution in deciding whether, and if so to what extent, the current guidelines need to be significantly amended. The fact that existing public service broadcasting models are currently under consideration in various countries should not automatically lead to a review of the Commission's interpretative guidelines. Ofcom would like to stress that in the interests of better regulation, the review of this Communication should be conducted with a view to identifying any gaps or real need for clarity – in an evidence-based way. Finally, any eventual changes should allow for sufficient flexibility at Member State level, making sure that the Communication is future proof and suited for a convergent environment.

As stated above, Ofcom is due to launch a consultation on the future of PSB in the UK in April. This review aims to assess how the provision of PSB will be affected by the challenges and changes to the audiovisual landscape. This is the second review of the PSB ecology that Ofcom has undertaken, in accordance with its statutory duties.

## **The UK audiovisual market**

The UK audiovisual market is today a very competitive one, with high levels of consumer choice thanks to the proliferation of new digital channels and services in a multitude of platforms. On-demand services are now offered alongside scheduled broadcasting, while the rapid growth of broadband is encouraging the development of new platforms and innovative services. Today, UK consumers can receive television and on-demand services (both free to air and pay-TV) over a variety of distribution technologies: cable, digital terrestrial television (DTT), satellite, TV over IP and mobile TV.

Take-up of digital communications technologies in the UK is high. Today, 85.1% of households receive digital television services on their primary set, up 1.1 percentage points since June 2007 (see figure 1). The total number of homes receiving multi-channel television at the end of Q3 2007 has risen to 86.1%. The Government has announced its plans to completely switch off analogue television transmission by 2012, by which time digital television (DTV), which include digital terrestrial (DTT) digital cable and digital satellite should be available to the whole population.

**Figure 1: Platform take-up**

	Q2 2007	Q3 2007	Net additions	Growth rate
<b>Pay TV digital subscribers</b>				
Digital cable	3,132,571	3,174,271	41,700	1.3%
Digital satellite (BSkyB) 1	8,085,000	8,152,000	67,000	0.8%
TV over ADSL 2	36,000	36,000	-	-
<b>Total digital pay TV subscribers 3</b>	<b>11,253,571</b>	<b>11,362,271</b>	<b>108,700</b>	<b>1.0%</b>
<b>Free-to-view digital households</b>				
DTT (Freeview) only homes 4	9,139,000	9,332,000	193,000	2.1%
Free-to-view digital satellite 5	945,000	1,005,000	60,000	6.3%
<b>Total Free-to-view households</b>	<b>10,084,000</b>	<b>10,337,000</b>	<b>253,000</b>	<b>2.5%</b>
<b>Total UK digital households</b>	<b>21,337,571</b>	<b>21,699,271</b>	<b>361,700</b>	<b>1.7%</b>
<b>Digital penetration</b>	<b>84.0%</b>	<b>85.1%</b>	<b>1.1 pp 6</b>	
<b>Other multi-channel households</b>				
Analogue cable	272,454	251,154	-21,300	-7.8%
Multi-channel penetration	85.0%	86.1%	1.1pp 6	

Source: Platform operators, GfK research, Ofcom market estimates.

<sup>1</sup> BSkyB subscriber figures include commercial premises and also TV over ADSL households that subscribe to Sky packages. There is therefore an element of overstatement in these areas.

<sup>2</sup> The Q3 figure for TV over ADSL refers to ADSL subscribers from Tiscali's Q3 results in November 2007. ADSL figures do not include BT Vision customers, (60,000 subscribers by Q3 2007), to whom live scheduled programming is delivered via DTT (in Freeview coverage areas) rather than by broadband. The Q2 2007 figure for ADSL has been restated following an update from Tiscali in Q3.

<sup>3</sup> Pay TV households do not include figures for Top Up TV which are not in the public domain. Top Up TV subscribers are therefore counted in free-to-view digital terrestrial homes.

<sup>4</sup> Ofcom uses survey data from GfK for the number of homes where DTT is the only digital platform. The total number of all homes with DTT is therefore higher, as some homes have more than one multichannel platform.

<sup>5</sup> Ofcom estimates the number of viewers using satellite equipment to receive the free-to-view channels.

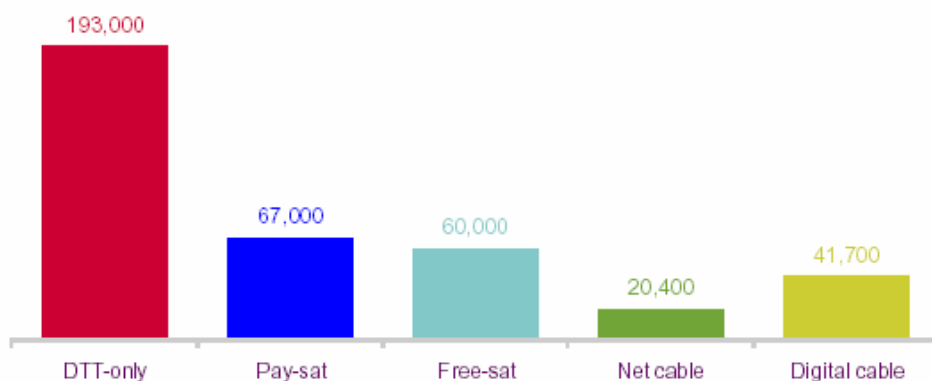
<sup>6</sup> pp = percentage points.

Note: Percentages may be rounded.

The more recent dramatic growth of DTV in the UK has been primarily fuelled by the DTT platform. In the third quarter of 2007, the 193,000 analogue terrestrial households which purchased Freeview equipment for the first time accounted for around 57% of DTV growth (see figure 2)

**Figure 2: Net quarterly DTV growth**

Subscribers / homes added during Q3 (actuals)



Source: Platform operators, GfK research, Ofcom estimates.

The total television industry revenue in 2006 stood at nearly £10.8bn, up 1.4% on 2005. The gap between subscription and advertising revenue widened further during the year; subscriptions rose by 3.5% to over £4bn while advertising fell by 2.2% to £3.5bn (see figure 3). The industry as a whole broadcast 1.8 million hours of output in 2006. Together, hours of output from channels in the genres of Entertainment, Factual, News, Leisure, Children's, Sport and Ethnic output grew to just over one million – 15% of these were first-run originated content.

**Figure 3: UK Television metrics**

UK television industry	2002	2003	2004	2005	2006
Total TV industry revenue (£bn)	8.9	9.3	10.1	10.6	10.8
Proportion of revenue generated by public funds	25%	25%	23%	23%	23%
Proportion of revenue generated by advertising	35%	35%	34%	33%	32%
Proportion of revenue generated by subscriptions	32%	35%	35%	37%	37%
TV advertising spend as a proportion of advertising spend	4.9%	5.3%	5.3%	5.5%	5.7%
Spend on originated output by 5 main networks (£bn)	2.8	2.7	2.7	2.6	2.6
DTV take-up (% of homes in Q1)	38.5%	43.2%	53.0%	61.9%	69.7% (Q1 2007 80.5%)
Proportion of DTV homes paying for TV (Q1)	86.6%	80.2%	71.7%	64.3%	60.0% (Q1 2007 54.6%)
Viewing per head, per day (hours)	3:34	3:44	3:42	3:39	3:36
Share of the five main networks in multichannel homes	77.7%	76.4%	73.8%	70.3%	66.8%
Number of channels broadcasting in the UK	236	294	379	416	433

Note: Viewing per head includes individuals 4 years and older

A more detailed analysis of the competitive situation in the broadcasting sector, market shares and advertising revenues can be found in our yearly **Communications Market Report**: <http://www.ofcom.org.uk/research/cm/cmr07/>

Information about developments in the digital television market (including specific updates by platforms) can be found in our **Digital TV Quarterly Reports**: <http://www.ofcom.org.uk/research/tv/reports/dtv/>

Further information is also available in our **Digital TV Annual Data Collection**: <http://www.ofcom.org.uk/research/tv/annualdata/>

## Future developments

The Commission has asked for views on likely developments and major challenges for the sector, and particularly for public service broadcasting.

The widespread deployment of new communications technologies has brought about a dramatic change in television consumption patterns and in consumer attitudes towards media more generally. This is fundamentally changing the audiovisual sector. As mobile and internet based technologies move from the world of technical jargon (such as DVB-H, IPTV and W-LANs) into people's homes viewers and listeners are becoming less and less content to be passive recipients of communications services. Our research shows that viewers and consumers are developing a strong appetite for more choice, mobility and personal control of their media. They want to be able to participate and they also generate content themselves. Importantly, users are not just confined to one particular means of consumption, but are using multiple platforms and devices to access content. This is particularly true of the younger population. For example, from the age of 12, two thirds of children use all the main media devices: TV, games console, radio, computer, mobile phone and MP3 player. From the age of seven, over half use PCs, games consoles, television and radio. Almost half of all children are also using the internet to watch and download audiovisual content, including music videos, clips and whole films or TV programmes.

These developments are making the broadcasting market increasingly competitive and the audiovisual sector more complex. Considering these, and particularly the emergence of new platforms, and the existence of a variety of new content providers and originators, **it becomes clear to us that the future development of the audiovisual market cannot simply be projected forward from the past.**

Ofcom has a general duty to promote competition in broadcasting markets in addition to the specific responsibilities to ensure the delivery of PSB and other aspects of content regulation which we expand upon later in this section. Ofcom recognises the challenge of getting the balance right between allowing the market to evolve and to be innovative, whilst ensuring the necessary intervention to safeguard public interest objectives.

Understanding future developments and market dynamics in the communications sector is a constant challenge for regulatory authorities such as Ofcom. The need for extensive monitoring, consultation and in-depth research is paramount and we believe should underpin any regulatory approach. Ofcom's aim has been to take, as far as possible, a forward-looking view of the audiovisual landscape, to ensure that consumers receive the maximum benefit from new forms of competition and that the audiovisual sector continues to thrive in the UK.

Ofcom, within the confines of its remit, seeks to understand this changing audiovisual sector through a variety of means. Some of the current and recent initiatives include:

- A strategic review of public service broadcasting (known as the PSB review);
- A recently launched consultation on the changing dynamics of the Pay-TV market<sup>3</sup>;
- A consultation on the future of DTT<sup>4</sup>;
- A review of the television production sector<sup>5</sup>;
- Several issue specific reviews such as the Future of News and the Future of Children's television programming<sup>6</sup>;
- Regular television market reports.

*[It should be noted that some of these consultations are currently underway or are in the process of being launched].*

For the purposes of this consultation Ofcom proposes to focus in particular on the implications of these changing market dynamics on the public service broadcast sector and the rules that govern it.

### **Implications for public service broadcasting and its policy framework going forward**

As mentioned above public service broadcasters face the challenges that this fast changing market presents. In particular, PSBs are concerned with the need to reach out and maximise their audience impact as well as adapting their business models to address the demands of audiences. Although the reach and impact of public service channels is still high, it is overall in decline, particularly amongst young audiences (viewing of the main Public Service Broadcaster channels is down 14% amongst the 16 to 24s since 2003). Since 2006, the major public broadcasters adopted strategies to develop content provision online (e.g., the BBC iPlayer), although they are at varying stages of development.

However, it should also be noted that there are still a significant amount of viewers who consume television services separately and who tend not to make use of bundled or other services across platforms. In the UK, for example, the main five terrestrial television channels still represent the majority of viewing. Also, and when considering the broadcasting sector in particular, research shows that audience expectations have changed relatively little over the last decade and the expectations by consumers to have quality content, including a good mix of public service content and commercial broadcast, remains high.

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<sup>3</sup> Ofcom has recently launched an investigation into the Pay-TV sector. In this context we consider that Pay TV includes subscription and video-on-demand television services on all platforms: cable, digital terrestrial television (DTT), satellite and IPTV. We have been collecting evidence and carrying out analysis to gain a preliminary understanding of the operation of the pay TV market, and the outcome for consumers. We are currently seeking stakeholders' views on this initial analysis, and on what it implies for the operation of the market. We have not yet reached a conclusion on the existence of competition problems. We will use the responses to the consultation to determine what further steps, if any, should be taken in the investigation. The consultation Document published in december 2007 can be found here. [http://www.ofcom.org.uk/consult/condocs/market\\_invest\\_paytv/summary/](http://www.ofcom.org.uk/consult/condocs/market_invest_paytv/summary/)

<sup>4</sup> See the Future of Digital Terrestrial Television at: <http://www.ofcom.org.uk/consult/condocs/dttfuture/?lang=cy>

<sup>5</sup> See a Review of the Television Production Sector at: <http://www.ofcom.org.uk/consult/condocs/tps/>

<sup>6</sup> See the Future of Children's Television Programming at: <http://www.ofcom.org.uk/consult/condocs/kidstv/> and The Future of News at: <http://www.ofcom.org.uk/research/tv/reports/newnews/newnews.pdf>

How these developments will affect the delivery of public interest goals through public service broadcasting needs to be carefully assessed particularly since the rate of audience fragmentation, the speed of take up of new platforms and services, and the future growth of television advertising revenues remains uncertain. These developments place traditional linear public service broadcasting under renewed pressure, but at the same time they create significant new opportunities to serve public purposes in new, potentially more effective ways.

The Communications Act 2003 (the Act) requires Ofcom to carry out, at least once every five years, a review of public service broadcasting with two main objectives: First, to assess the effectiveness of the designated public service broadcasters (BBC, Channel 3, Channel 4, Five, S4C and Teletext), taken together, in fulfilling the purposes of public service broadcasting in the UK. Secondly, we are required to make recommendations on how the quality of public service broadcasting can be maintained and strengthened in future. Importantly, in order to carry out any meaningful assessment of how best to maintain and strengthen PSB going forward, Ofcom needs to consider the wider picture of content provision, taking stock not only of the whole broadcasting scene – including cable and satellite – but also the online world, other platforms and the context provided by established media, such as radio and print.

These reviews give Ofcom the opportunity to be at the forefront of the debate about the future of public service broadcasting, leading discussion and thinking creatively about how to tackle the challenges ahead. It gives us the opportunity to look at the long-term problems facing PSB and suggest options for addressing them. In this context Ofcom has explored the case for identifying new models for public service broadcasting which may be better adapted to this changing environment.

Ofcom conducted a first review in 2005 and concluded that, although there was continued demand for consumers and citizens for PSB content, the provision from commercially-funded organisations beyond switchover was under potential threat due to the increased audience base fragmentation. Furthermore, Ofcom's analysis showed that the cost of meeting PSB obligations was likely to exceed the value of the benefits the broadcasters derived from access to scarce analogue broadcasting spectrum, making the continuation of such obligations unsustainable.

**While it was clear from the research that the public purposes of PSB content remained valid, the review concluded that the market (alone) was unlikely to meet all PSB purposes. As it is emerging that public purposes may be delivered in new ways through online and interactive services there may be a need to consider different forms of intervention to both address the deficits in the existing linear model and to serve public purposes in online and interactive media. In other words, it may no longer be appropriate to continue to focus exclusively on traditional television platforms.**

Ofcom has recently initiated its second review and we plan to publish an initial consultation document, alongside a significant body of research, in April. This will assess current delivery and set out a broad analysis of the future development of public service broadcasting to stimulate debate on the major choices the UK faces in maintaining and strengthening public service broadcasting. Ofcom's preliminary assessment is that:

- Public service broadcasting remains important to UK citizens and consumers, with UK origination being a central element

- There are new opportunities for audiences through increased choice, mobility and personal control of their media
- It is no longer appropriate to associate the delivery of public service objectives with linear television solely. In an essentially converged and multiplatform environment, opportunities are emerging to deliver on those objectives in different ways.
- The commercial public service broadcasters' contribution to public purposes, while significant, is likely to continue to decline, leaving the BBC as sole provider of UK originated content in some areas.
- The non-public service broadcasting market will contribute to the overall public value mix significantly, but won't be able to deliver the majority of public service needs.
- Pressures on the reach and impact of programmes provide by all the public service broadcasters are likely to persist.

**In this context, the main challenge, as Ofcom sees it, is to ensure that high quality public service content continues to be widely available to all UK citizens and consumers in this evolving market landscape in a way that achieve reach and impact.** In the future, approaches to public service broadcasting may need to be more creative in finding new ways of leading audiences to interesting and challenging material. We would like to invite the Commission as well as other interested parties to refer to our upcoming consultation for a detailed analysis of Ofcom's views on this question.

Inevitable these debates will continue over the coming years, not least because many of the key market developments involve new technologies and services which have not yet achieved their full market potential. This context is addressed, or envisaged in various UK reviews of the sector including:

- BBC Charter Review (2006)
- Government Review of PSB Funding (2008)
- Ofcom Funding Review of Channel 4 and ITV licence review (2008/2009)
- Ofcom's Review of Public Service Broadcasting (April 2008)

The Commission is asking more specifically whether the current rules (i.e., the Commission's Communication) remain valid in the light of these developments. In understanding what the Commission is referring to when it refers to '*current rules*', Ofcom suggests that a distinction needs to be made between the need to review the achievement of public service goals at the national level (as outlined above), and their compatibility with Community competition law rules. The Communication is meant to serve as an interpretative guidance for Member States in the application of such rules. From this perspective, Ofcom believes that the current Communication remains broadly valid in so far as the core principles are concerned. We recognise, however, that there is some scope for greater clarification and adaptation to what is, essentially, a convergent and multiplatform environment, something that is not explicitly recognised in the current rules.

**Ofcom would suggest that the best way to ensure that these guidelines remain valid, and to mitigate against regular future adaptations being necessary, is to**

**aim to have a framework that is as flexible, future proof and principles-based as possible.**

## **The PSB system in the UK**

The system of PSB in UK television has evolved over the course of more than 70 years. The main institution tasked with the delivery of public service broadcasting is the British Broadcasting Corporation (the BBC), which was granted its first Royal Charter in 1927.<sup>7</sup> The BBC is not regulated by statute, but under the terms of its Royal Charter and its Agreement with the Secretary of State.

Some years after the BBC was established, the view was taken that a high quality and competitive broadcasting landscape would be better served if the BBC's position as the UK's only broadcaster was opened up to competition. Over the years this led to there being a number of PSB providers (15 regional broadcasters and a national breakfast time broadcaster providing the Channel 3 network, Channel 4, Five, the Welsh broadcaster S4C and the commercial text service, Teletext). This is normally referred to in the UK as **plurality of PSB provision**. Plurality in public service broadcasting can be broadly defined as the provision by a range of producers, broadcasters and distributors of content which meets public service purposes and characteristics, and the ability of people to choose between different broadcasters and distributors for any particular kind of content.

In this spirit the Channel 3 network (more commonly known as ITV) was granted access to analogue spectrum in 1955 in return for the delivery of public service programming, though it was free to operate commercially and is for this reason generally described as a "commercial PSB". Importantly, ITV was required to give sufficient time to high quality news and current affairs programmes, as well as UK originated programmes. A second commercial PSB (Channel 4) was launched in 1982. Its specific remit was to bring innovative challenging programming to UK citizens operating as a publicly owned body with a commercial commissioning remit and financed through advertising. Finally, Channel 5 (later rebranded as 'Five') was launched in 1997, also carrying a specific set of PSB obligations, though less demanding and more broadly phrased to include a service of high quality and diversity. In addition, there are a number of other broadcasters who contribute to PSB's purposes and characteristics in a range of ways

Thus, an important feature of British broadcasting is that public service broadcasting obligations are not confined to the BBC. The UK PSB model is typically characterised by the existence of a plurality and complex set of institutions, funding models and accountability arrangements. The assumption is that this plurality creates competition for quality in the provision of PSB helping to ensure quality and innovation in programming. Recent research shows that plurality is valued by audiences and enhances the reach and impact of public service programming. This "plurality" remains a fundamental and quite unique characteristic of the UK's PSB ecology and it is Ofcom's view that it remains highly desirable that it should continue to be at the core of any future regulatory model for broadcasting.

However, Ofcom's ongoing analysis of PSB provision in the UK suggests that the ways in which plurality is ensured might need to change in an all-digital multiplatform environment. As digital television take-up continues, the economics underpinning the

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<sup>7</sup> See BBC's Royal Charter at: <http://www.bbc.co.uk/info/policies/charter/>

commercial public service broadcasters are becoming increasingly under pressure – owing in part to the declining value of gifted analogue spectrum and flat or declining advertising revenues. This creates a risk to plural UK provision in some genres which are central to public service broadcasting content (for example children’s programming), and suggests an associated decline in overall levels of investment in UK originated content.

Ofcom believes that in order to maintain plurality in and within genres whose economics are becoming less attractive, some sort of public intervention might be required. For example, intervention in interactive media public service content could help meet public purposes in new, more effective and efficient ways, particularly through helping audiences find public purpose content. In addition, there are significant benefits in encouraging innovative activity by the market that meets public purposes. New funding arrangements might be required and these could take different forms, including direct funding or industry funding.

### **The public service remit**

The Commission asks for information on the definition of the public service remit, which, as stated in the Amsterdam Protocol, is the exclusive competence of Member States, who can define it in broad terms as long as this is done in a clear and precise manner.

In the UK, as elsewhere, television broadcasting historically been perceived as ‘special’ and as having a particular role in shaping, reflecting and contributing to society’s cultural, democratic and social needs. With the passing of the Communications Act in 2003, the opportunity was taken to spell out more clearly what was the remit of public service broadcasting in the UK. The Act requires the main terrestrial TV channels - BBC One, BBC Two, ITV1, Channel 4, S4C and Five - to deliver programmes and services which cover a wide range of subject matters and which meet the needs and interests of many different audiences. Among other aims, they are expected to meet high standards, to educate, to inform, to entertain, and to reflect, support and stimulate cultural activity in the UK. They should reflect the lives and concerns of different communities in the UK and ensure that a well informed debate on public affairs is facilitated. The definition and supervision aspects of PSB can be found in the Sections 264 to 270. In summary this comprises:

- The BBC (with a clear remit as defined in the Royal Charter and Agreement).
- ITV1 delivering public service purposes across a range of genres including drama, children, arts religion and particularly with a strong role in the nations and regions supervised by Ofcom.
- Channel 4 (as with ITV above)
- Five (as above)
- S4C (Welsh language channel)
- The Gaelic Media Service (Gaelic language).

Importantly, the public service remit in the UK goes beyond what could be described as a “market failure”, and is served by more than one PSB player though the BBC remains the main beneficiary of direct public funding (as explained, the UK system relies on mixed funding models which include, for example indirect funding through such mechanisms as gifted analogue spectrum and digital terrestrial capacity). Ofcom’s first PSB review, elaborated on this remit and provided further clarity on the objectives and definition of public service broadcasting, capturing its essence in terms of its **purposes and its characteristics** rather than by specific types of

programme. The purposes of public service broadcasting lie in an informed society, reflecting and strengthening its cultural identity, stimulating appetite for knowledge, and building a tolerant society. In addition, public service programmes have specific and distinct characteristics. These include programmes of quality, new ideas, originality, challenge and wide availability.

For a more detailed elaboration on Ofcom's definition of public service broadcasting in terms of its purposes and its characteristics please refer to our first PSB Review at: [http://www.ofcom.org.uk/tv/psb\\_review/](http://www.ofcom.org.uk/tv/psb_review/)

## **The distinction between public service and other activities**

The Commission is asking for views on whether the distinction between public service and other activities should be further clarified, and suggests the possibility of introducing an illustrative list of commercial activities not covered by the public service remit.

Ofcom would caution against attempts to define at the European level, public activities as opposed to other activities that are commercial, since this question is intrinsically linked to the definition of the public service remit, which remains the exclusive competence of the Member States. As the current Communication recognises, the definition of the public service remit would be in "manifest error" if it included activities which could not reasonably be considered to meet democratic, social and cultural needs of each society". It is against these criteria that the distinction between what is public (and therefore falls within the remit) and what is not should be made.

For this reason, we believe that, for example, the introduction of a list of activities that are not considered to be appropriate, as part of the remit, falls clearly outside the scope of a revised Communication. More generally, Ofcom believes that attempts to arrive at an exhaustive list of activities or services would soon become outdated, and be overly restrictive. Ofcom would expect that, at the national level, the definition of the remit should provide for sufficient clarity about what activities reasonably fall within it and against which criteria these are judged, without the need to specifically and exhaustively listing them.

It is also important to emphasise that the separation between public and commercial activities does not preclude the possibility of mixed funding models. As our own system in the UK suggests each national PSB system is likely to have its own remit and associated funding structure, which can include a combination of revenue sources depending on the specificities of the public service goals. This is also recognised in the current Communication (para. 4.5) when it is noted that the revenues generated from commercial activities such as the sale of advertising can be used to fund the delivery of public service broadcasting.

This notwithstanding, Ofcom agrees that for the purposes of transparency and accountability, there should be **clarity about the level and use of commercial revenues in the fulfilment of the remit**. This is achieved through the existence of reporting mechanisms, such as Annual Reports, the provision of evidence before Parliament, as well as national audits and regulatory reviews. Ensuring that there is a high degree of transparency at the national level in this respect would assist both Member States and the Commission in the assessment of the appropriateness and proportionality of any state aid.

## **Assessment of “manifest error” in the definition of the public service remit**

The Commission is also seeking views on whether it is possible to include in the Communication clearer guidance on how to assess the existence of “manifest error” in the definition of the public service remit. For this purpose, the Commission asks specifically, whether clarification needs to be given on which activities, other than TV programmes in the traditional sense, can be seen as serving the same social and democratic needs.

Ofcom interprets this question as being raised in the context of the evolution from a traditionally linear TV paradigm to a digital ecology of content delivery, which combines linear and on-demand content over multiple platforms and the diversification of public service broadcasting activities (for example through their presence online) in an attempt to adapt to new market circumstances. It is increasingly the case that PSBs across Europe have been making their content available - reaching out to existing and new audiences – across a variety of platforms and not confined to the delivery of a linear traditional TV service.

**While we recognise that the language used in the Communication and indeed in much of Member States legislation still characterises public service primarily in the traditional sense of television (linear) and while we accept that this does not fully reflect the way in which content is today delivered, raising challenges in terms of determining the exact boundaries of the public service remit, we see no reason why these challenges need to be addressed through greater clarification on the permissible scope of the public service remit at the EU level in this Communication.**

As explained above, the PSB remit in the UK is defined in a combination of legislation (the Communications Act), the BBC Charter (recently updated in 2006) and Ofcom’s first PSB review, which considered the wider context. In the case of the BBC Charter 2006 the activities of the BBC remit explicitly extends beyond linear services. We believe that an approach that focuses on the core public purposes (including, for example, the need to inform, educate, reflect cultural identity and represent diversity) rather than on the means of delivery, or the specific technologies or services, is better suited for today’s environment. Crucially, this approach takes better account of the fact that a wide range of commercial, civic and community services have already emerged to serve public purposes online, including in areas where the economics of linear television are challenging, like the arts or local issues. However, these exist outside the current scope of PSB provision as defined in UK legislation.

While we recognise that the Commission has addressed this issue in a number of decisions on complaints in recent years, we are unclear whether any general principles on the scope of PSB in new media can effectively be extracted from individual cases. Furthermore, and even if that were indeed the case, we believe that to include these in a revised Communication would be unhelpful, and could preclude Member States from designing the models that most appropriately meet their cultural, social and democratic needs in accordance with the various degrees of market developments.

That said, Ofcom sees no reason why the Commission could not in the context of this consultation encourage Member States to ensure that their respective models for

PSB are sufficiently clear, while adequately reflecting the changing nature of broadcast content consumption and distribution as well as the underlying values of PSB.

### **Ex-ante evaluation of new PSB offers**

The question of whether and how new media can best be harnessed for the provision of public service content appears to be a central question in this Consultation. In the questionnaire the Commission explores, in various ways, whether there needs to be some agreed process for evaluating the role and scope for new media in order to assist in determining the public service character of a new offer as well as to avoid having disproportionate effects on competition.

Ofcom agrees with the need for careful evaluation of services in order to ensure their alignment with the public service remit and proportionality - in terms of their impact on the market. However as the system and the means of delivering public purposes is likely to become even more dynamic in the future, there is a need to strike a balance between ensuring the delivery of public purposes is assessed through appropriate competition regulation, whilst ensuring that the mechanisms are sufficiently flexible to adapt to this dynamic.

The UK already pursues a practice of this kind with regard, for example, to the BBC, in the form of the public value test (PVT) which is undertaken by the BBC Trust (independent supervisory body for the BBC's activities) with respect to any additional services of the BBC, regardless of their "new media" character. This comprises an internal process known as a public value assessment (PVA) which evaluates the proposed service in terms of its contribution to the BBC's public purposes, as defined in the Charter, and an external evaluation by Ofcom (the Market Impact Assessment) which considers the competitive effect of the proposed service on other services in the market. Ofcom and the Trust coordinate closely to ensure that the evaluation exercise is comprehensive, coherent and consistent. Further information about the PVT can be found on the BBC Trust website: [http://www.bbc.co.uk/bbctrust/framework/public\\_value\\_test/index.html](http://www.bbc.co.uk/bbctrust/framework/public_value_test/index.html)

The aim of Ofcom's MIA<sup>8</sup> is to identify the significant market impacts arising from the proposed service or activity. We seek to identify the effects on consumers and producers of other services, including those that compete with the proposed service as well as those in related upstream (e.g. suppliers), downstream (e.g. buyers) or two-sided (e.g. advertising) markets. These MIAs assess the extent to which the proposed service might deter innovation and investment by the commercial sector, and potentially in the longer term by the BBC itself, if the market fails to grow as it otherwise might. Were commercial providers to be deterred from seeking to offer competing services, this could ultimately lead to the reduction in choice for viewers and listeners to the detriment of the public interest as a whole. Where any inefficiency, such as crowding out is identified, Ofcom can propose modifications to the service in order to prevent a detrimental impact. We also ask what these impacts mean for consumers and citizens. In conducting our analysis, we rely, as far as possible, on empirical evidence and expert opinion, relying on a combination of market and desk research, BBC information and interviews with stakeholders and submissions.

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<sup>8</sup> <http://www.ofcom.org.uk/research/tv/bbcmias/>

In its Explanatory Memorandum the Commission refers to its decision making practice which favours ex-ante evaluation for the determination of the public service character of new offers in order to avoid disproportionate effects on competition. Ofcom, however, remains unclear about what the Commission is proposing and what it considers to be their “general approach” in this area i.e. whether the intention is to encourage Member States to conduct ex ante evaluation or whether the Commission has in mind the idea of defining and imposing a particular model for evaluation and including it in the Communication.

**While Ofcom generally believes that evaluation exercises are important, we have reservations about the proposal to include any specificities of an ex ante evaluation mechanism in this revised Communication.** We believe that it would be impractical to attempt to identify a ‘one size fits all model’ for evaluation at EU level given the distinct nature of PSB systems across EU Member States. Indeed to do so may create greater uncertainty as to where the boundaries of responsibilities lie. In addition, it would be difficult to take account of future developments if the Commission were to consider which services should be subject to ex ante evaluation.

**However we consider that it might be appropriate for the Commission to emphasise the value, at least in principle, of prior consultation and evaluation. We would support efforts by the Commission to encourage Member States to consider this as good practice and to identify their own mechanisms for ex ante evaluation, in the light of their national circumstances.**

### **Dual Funding of public service broadcasters**

The Commission asks about the expected impact of (partly) state funded services on competition.

The current Communication refers specifically to two modes of funding: single funding schemes (through a licence fee) and dual funding schemes (through a combination of State funds and revenues from commercial activities, primarily through the sale of advertising). In the Explanatory Memorandum the Commission states that the question of the acceptability or otherwise of the inclusion of certain pay services forming part of delivery of the PSB remit has been raised by some broadcasters.

Ofcom would observe that some elements of public purposes are already being served by channels available on subscription (without any PSB remit and associated public funding) but it is also clear that there are underlying goals such as universality and access in delivering the broad range of quality public service content which underpins the case for intervention in this regard. To a degree this ‘tension’ already exists today.

Rigid distinctions between free and paid-for models are increasingly becoming artificial. One could argue that to some extent, citizens are already paying for some public service content, even if indirectly. Although the establishment of pay-services as part of the PSB remit could be seen to conflict with the principles of universality, accessibility and maximum reach, which are the very pillars on which publicly funded broadcasting was built.

Ofcom as part of its second PSB review will explore future models for PSB. This will undoubtedly lead to some debate about appropriate funding mechanisms, though

ultimately this is a matter for the UK Government to decide. As mentioned above the UK Government will be conducting a review of PSB funding in the next year.

## **Entrustment and Supervision**

The Commission asks about the existing mechanisms for entrustment and supervision and asks whether the Communication should contain further clarifications about the circumstances in which an additional act of entrustment (in addition to the general provisions laid down by law) is necessary or whether the current rules are sufficient.

Ofcom is not the responsible body for the entrustment of public service broadcasters, and we would like to refer back to the UK Government's response to this consultation, which sets out in detail the framework for entrustment and supervision that has been set up in the UK.

Within this framework in the UK, a number of independent authorities/institutions have supervisory responsibilities. The BBC Trust, for example, is responsible for oversight of the BBC's activities and fulfilment of its remit. As regards the scope of the BBC's public service activities Ofcom's role is limited to assessment of the market impact of any new services. This is a relatively recent responsibility conferred on Ofcom but establishes clearly the principle that the relevant authorities examine carefully the potential impact that public service activities, in particular any new or additional activities could have on market conditions. We suggest that any future consideration of partly or wholly state funded content be assessed in terms of relevance to the defined public service remit and impact on the market and on competition.

### **Overview of Ofcom's supervisory functions:**

Ofcom as the licensing body for the commercial PSBs supervises their performance against public service objectives. Each broadcaster is required to report on its performance and to produce an **Annual Statement of Programme Policy**. The statements of programming policies and self-assessment review of the licensed public service broadcasters are available here:

[http://www.ofcom.org.uk/tv/psb\\_review/annrep/policy/](http://www.ofcom.org.uk/tv/psb_review/annrep/policy/)

In addition, Ofcom produces an **Annual Report** on public service broadcasting which gives objective evidence as context for licensees' annual statements of programming policies and self assessment reviews. The 2007 PSB Annual Report can be found here: [http://www.ofcom.org.uk/tv/psb\\_review/annrep/psb07/](http://www.ofcom.org.uk/tv/psb_review/annrep/psb07/)

Should Ofcom consider that a public service broadcaster (other than the BBC) has either failed to meet its remit or has failed to make an adequate contribution to public service broadcasting purposes as set out in the Act for reasons other than the economic and market conditions, it can give directions to remedy the failure. Ultimately, it can also amend the broadcaster's license to impose more detailed regulation.

In addition, and as mentioned above, the Communications Act 2003 requires Ofcom to carry out, at least once every five years, a review of public service broadcasting with two main objectives: (i) to assess the effectiveness of the designated public service broadcasters, taken together, in fulfilling the purposes of public service

television broadcasting; and (ii) to make recommendations on how the quality of public service broadcasting can be maintained and strengthened in future

The first Public Service Broadcasting review was completed in 2005 and represented the first systematic review of PSB as a whole in the UK. It was mainly concerned with assessing the case for continued major intervention in PSB, and the sustainability of the current model for delivering PSB. The review was conducted alongside the UK's Government review of the BBC Charter and carried out in three phases. The final report, which draws together our findings and recommendations, was published in February 2005 and is available here:

<http://www.ofcom.org.uk/consult/condocs/psb3/psb3.pdf>

As part of these exercises, Ofcom has undertaken significant work on specific areas which have deepened our understanding on core aspects of the PSB remit and which assist us in the performance of our supervisory duties under the Act. In particular, we have looked at:

- The Future of News:  
<http://www.ofcom.org.uk/research/tv/reports/newnews/newnews.pdf>
- The Future of Children's Television Programming:  
<http://www.ofcom.org.uk/consult/condocs/kidstv/>
- Channel 4 Financial Review:  
[http://www.ofcom.org.uk/tv/psb\\_review/c4review/c4review/](http://www.ofcom.org.uk/tv/psb_review/c4review/c4review/)

As mentioned above, Ofcom has recently initiated its second Review of Public Service Television Broadcasting. Our main objectives for this review are:

- To evaluate how effectively the public service broadcasters are delivering the purposes and characteristics of PSB, particularly in the light of changes in the way TV content is distributed and consumed;
- To assess the case for continued intervention in the delivery of TV content to secure public service purposes;
- To consider whether and how the growth of new ways of delivering content to consumers and citizens might create new opportunities for achieving the goals of public service broadcasting, as well as posing new challenges; and
- To assess future options for funding, delivering and regulating public service broadcasting, in light of these challenges and opportunities, and uncertainty about the sustainability of existing funding models.

We expect to publish an initial consultation document in April, setting out the current landscape and exploring possible models for PSB in the future. A further consultation firming up options will take place in the autumn, with a view to a final statement being issued early in 2009 in which we will be finalising those areas in which Ofcom can move ahead by itself, within its existing powers, along with our recommendations for actions by others, notably government. The terms of reference for our second PSB review are available here:

[http://www.ofcom.org.uk/tv/psb\\_review/psb\\_2review/summary/](http://www.ofcom.org.uk/tv/psb_review/psb_2review/summary/) .

**While it is too early to comment on the likely direction that this PSB review may take, Ofcom is clear that any exploration of future models for PSB would need to be considered in the context of an appropriate, and independent, framework for supervision, with substantial evaluation, effectiveness and governance tests.**