

HOUSE OF LORDS

Select Committee on Communications

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2nd Report of Session 2012–13

# **Media convergence**

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References in footnotes to the Report are as follows:

Q refers to a question in oral evidence.

Witness names without a question reference refer to written evidence.

## SUMMARY

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The easiest way to understand media convergence is to think of how separate types of media—such as broadcast, print and online—have merged together. Media previously made distinct by their technology of distribution have converged. Newspapers are no longer just printed on large sheets of thin paper; they also have websites with up to the minute information, including videos which remind you of TV. Broadcasters do not just beam signals to your TV aerial or satellite dish; they have websites with articles published on them which might remind you more of the printed page. Families can still sit down together at a specified time to watch a TV programme, but programmes can also be watched at a later date on the internet, entirely at your own convenience.

The changes brought about by convergence should bring immense benefits for us all: increased competition, innovation and choice; economic opportunities for the UK creative sector; and value to citizens. But convergence brings three key challenges too: potential erosion of trust and confidence in the content we consume; challenges to the future of public service content; and outmoded regulation, which is slow to adapt to changing markets and audience expectations.

Ahead of the Government's White Paper on communications and the communications Bill, promised in this Parliament, we argue that forthcoming legislation must be drafted in such a way as to enable flexibility to adapt to an ever changing media environment. It is our view that new technologies and behaviours are evolving more quickly than regulatory protections and action will be required: to ensure a safer environment for content accessed via the internet; and to ensure that public expectations of content standards are met more broadly. It would be reckless to jettison the current regulatory arrangements which have served us so well; but equally, it would be complacent for the Government and Ofcom not to get ahead of the curve.

This Report makes specific recommendations under three headings:

On content standards, we argue that for the time being broadcast regulation can continue to co-exist with both on demand and press regulation without disrupting audiences' ability to build accurate expectations about the content they encounter. However, the framework within which these regulators fit will need updating, in time, to ensure consumer trust and confidence can be maintained. In our view, this will involve placing much audiovisual content on an equal regulatory footing, and as familiar protections such as the watershed may not apply universally across this content, a system of guidance and age-rating will need to be introduced to ensure audiences can make informed decisions about what it suits them and their families to watch. We also recognise the increasing role played by content accessed over the open internet and the important initiatives voluntarily undertaken to help guide and protect audiences there. This must broadly be the right approach; there should be no appetite to try and shackle the extraordinary opportunities presented by the internet. At present, however, these initiatives are somewhat diffuse and sporadic. We recommend that a more coordinated approach to self-regulation be introduced in which the expectations of the UK public are clearly articulated and digital intermediaries are encouraged to meet them.

On content creation, we argue that in a converged world, public service content will remain very important, if not more so, but will face challenges to its funding and effectiveness. We recommend that in advance of the next BBC Charter Review, the Government should conduct a comprehensive review of public service broadcasting in the round, to include not just the BBC but all other providers. We also propose various more immediate, but potentially valuable, regulatory measures to help support public service broadcasting. In particular, we deem it essential that measures are taken on prominence to ensure that audiences are able to discover and access public service content easily in a converged world.

On competition, we suggest clarifying Ofcom's competition powers in certain areas, but ensuring that high hurdles have to be overcome before intervention is allowed. What is more, we consider the BBC's economic impact and reflect on how this might best promote the public good, whilst reassuring the market, above all the newspaper industry, that it too has a secure foothold in the converged world.

None of this is easy, and predicting the pace of change is in many respects a foolish enterprise, but imaginative thinking is required to ensure that the UK's media remains at the head of the top table.

A very important issue, which we received some evidence on, but were not able to do justice to in this inquiry, is plurality—ensuring a range of viewpoints and that no one voice holds too much influence. This will be the subject of our next inquiry.

# Media convergence

## CHAPTER 1: INTRODUCTION

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1. The easiest way to think about media convergence is as a technological phenomenon whereby the digitisation of content and its distribution have given audiences the ability to access content on multiple platforms or devices.<sup>1</sup> Media previously made distinct by their technology of distribution have converged. This development has prompted changes in: the way audiences access and use content; their expectations across media; and the way in which content producers and distributors make money and operate more generally. The phenomenon was well described in the written evidence of Lara Fielden, Visiting Fellow, Reuters Institute for the Study of Journalism:

“Newspapers are not just printed but online and carry video packages with the look and feel of traditional TV; broadcasters publish websites including text-based articles similar to online print offerings; scheduled programmes are broadcast but also available on-demand, on digital channels and a variety of websites; user-generated material vies for online audiences alongside professionally produced content; professional and amateur bloggers share the same debates.”<sup>2</sup>
2. Converged devices have become a mass market reality, giving people access to types of content, conventionally distributed over different platforms, on one single platform, be it on their desk, table-top or in the palm of their hand. Audiences are increasingly expecting: ‘anything, anytime, anywhere’. The possibilities—from ever more multi-faceted devices to ever greater interactivity—seem limitless. Paradoxically, therefore, convergence is leading to diverging sources of content and means of consumption: in the range of suppliers at one end, and the range of devices and means of accessing content at the other.
3. The pace of media convergence, however, is contested, and it has been put to us repeatedly during the course of this inquiry that traditional services such as linear broadcast TV remain hugely popular and resilient. While this is clearly the case, there are very marked generational differences in the ways younger age groups are using media compared to other age groups (see para 34). Younger age groups are in the vanguard of convergence. So, when considering their behaviour, content accessed via the internet and on new converged devices poses more significant challenges than might first seem apparent from the resilience of conventional linear TV across the population as a whole. It is, of course, impossible to predict with any certainty whether younger generations will continue to consume media as they are doing at present; their media consumption may become more conventional as they get older. However, even if this happens, there is still a cohort of young people currently using media in ways unimaginable to previous generations, and the

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<sup>1</sup> The technical definition: “digitisation of content, internet protocol, and ability to access any content anywhere on any device”—Dr David Levy, Director of the Reuters Institute for the Study of Journalism, Oxford University, Q 409.

<sup>2</sup> Lara Fielden

next generation are likely to be even more radical in their consumption patterns.

4. In the unconverged world, different regulatory models have been applied to each of the different media—broadcast, print and online—encompassing licensed broadcasters at one extreme and the almost completely unregulated internet at the other. In a converged world, this approach faces increasing challenge: the clear boundaries between media are breaking down, new methods of consumption are undermining traditional regulatory approaches, and public expectations are changing. Among some of the questions posed by these changes are:
  - What standards, if any, will the public expect to be applied in future to different media, and what tools are available to ensure they are delivered?
  - How can we continue to secure wide availability of high quality content made in the UK, including accurate and trustworthy news and information?
  - How can we secure healthy and competitive media markets which contribute to the public interest?
  
5. The proposals for responding to media convergence that we heard over the course of this inquiry varied in their radicalism and urgency. These differences emerged particularly strongly in the specific recommendations witnesses made for regulatory reform. Some believed that a sweeping response is required now, some believed that we needed to begin planning for reform, while others believed that we should adopt a ‘wait-and-see’ approach:
 

“A new settlement for media content is required.”<sup>3</sup>

“As media platforms become interchangeable the traditional boundaries between regulatory systems and structures are also breaking down.”<sup>4</sup>

“Planning for a converged future is to be advised.”<sup>5</sup>

“For at least 20 years technology enthusiasts have consistently exaggerated the speed and scale of change, especially in the case of television.”<sup>6</sup>

“It is premature to attempt to put in place a rigid new regulatory structure which would seek to address in a comprehensive way all the issues thrown up by convergence.”<sup>7</sup>

“Convergence is a process that is very much still underway ... so a guiding principle for Government policy must be sufficient flexibility to remain relevant and adaptable to future advances.”<sup>8</sup>
  
6. While it might be tempting to strike a ‘wait and see’ posture, it has become clear to us that whether audiences are aware or not, new technologies and behaviours are evolving more quickly than regulatory protections and than

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<sup>3</sup> Lara Fielden

<sup>4</sup> IPPR

<sup>5</sup> Professor Richard Collins

<sup>6</sup> Q 409 Professor Patrick Barwise

<sup>7</sup> ATVOD

<sup>8</sup> DCMS



many people suggest. To a great extent, different media and media platforms do still exist, and audiences have some cherished expectations linked to them, but there are important changes taking place which require a policy response. At present, we do not see the need for a complete overhaul of the regulatory architecture overnight; indeed, we would counsel against this. But in our view it is imperative that a new, proportionate, approach is fashioned which is capable of gradually responding to this more complex world, which audiences can trust, and which may involve new priorities and changes to the assumptions underpinning the current policy stance. The Government's forthcoming White Paper on communications is an opportunity to start addressing these issues.

7. Over four months, we heard a wide range of evidence and proposals, falling broadly under three themes:
  - Content standards
    - (i) consumer trust and confidence;
    - (ii) access to content via the internet;
  - Content creation
    - (i) safeguarding public service content;
  - Competition
    - (i) an effective competition regime for a converged world.
8. As the inquiry progressed, complex issues around content standards rose to prominence. Nevertheless, we continue to believe that the other two broad issues are of equal relevance. As content regulation becomes more complex, so it will be even more important to design effective 'positive' public service intervention to secure high quality content from the UK's public service providers, which will help set industry-wide standards. Alongside this, well regulated and effective competition—with more open markets and lower barriers to entry—should encourage innovation and deliver value and choice for consumers.
9. This debate is happening at the same time as regulatory fluidity and debate in the media elsewhere, i.e. the ongoing debate around implementation of the recommendations of Lord Justice Leveson. While Lord Justice Leveson has been criticised in some quarters for supposedly 'ignoring the internet,'<sup>9</sup> the evidence we received has rather suggested that his voluntary co-regulatory model may have relevance beyond the press—to a number of sectors in this altogether less predictable converging media environment. In Chapter 3, we explain how we think our proposals for audiovisual media regulation are broadly consistent with, and could sit alongside, the proposals currently emerging for press regulation.
10. Media convergence is an enormous subject and we do not claim that our Report is exhaustive in its analysis, but we hope that it provides a good sense of the necessary direction of travel for key aspects of policy and regulation. We received some evidence on two areas of policy which are clearly of

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<sup>9</sup> *The Guardian*, 'Leveson's distinction between web and print news "will undermine regulation"', 29 November 2012. Available online: <http://www.guardian.co.uk/media/2012/nov/29/leveson-web-print-undermine-regulation>

importance: intellectual property<sup>10</sup> and plurality. Both these topics are worthy of inquiries in their own right and we have not addressed them in this Report. Plurality, ensuring as far as possible an informed citizenry, a media without any single set of views, or individuals wielding too much influence over the political process, is of fundamental importance and will be the topic of our next inquiry.

11. We would like to thank everyone who gave evidence to us, both at oral evidence sessions, which we held between October 2012 and February 2013, and in writing. We also wish to thank our Specialist Adviser, Robin Foster, whose expertise greatly enhanced our work.

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<sup>10</sup> Intellectual property is a substantial part of an inquiry currently being undertaken by the House of Commons Culture, Media and Sport Select Committee into support for the creative economy.

## CHAPTER 2: CONTENT STANDARDS—THE CHALLENGES AHEAD

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12. The UK's content standards framework has to date proven remarkably resilient. Through a complex system of regulation and incentives, publicly accepted standards are, by and large, understood and upheld, and a more or less settled balance between public, legal and regulatory responsibility has been secured.
13. However, meeting the public's expectations, or even being particularly clear about what those expectations are, is becoming increasingly difficult. To a great extent, these difficulties come down to convergence. Its impact is raising a number of challenges for the model on which content standards regulation has been based. This model is shown in Figure 1 below.
14. The issues are complex and diverse, ranging from potential erosion of trust and confidence in some media, and potential harm to children, to outmoded and possibly unnecessary regulation *too slow* to adapt to changing markets and public expectations. In our analysis, however, these issues can be collapsed down to two core challenges which lie ahead:
 

**Challenge 1:** As convergence develops, what changes, if any, are needed to the regulatory framework covering more conventional audio-visual content provision (for example TV and TV-like services),<sup>11</sup> to ensure, above all, that public expectations about content standards for those media continue to be met?

**Challenge 2:** What is the best way to provide a safer environment for content of all types accessed via the internet, especially where likely to be harmful to children or where other threats to society are posed?
15. Underpinning the debate in both cases is a broad question about the philosophy of media regulation, particularly given the changes brought about by convergence: should we adopt a more libertarian approach, in which the public is expected to make its own choices about which media and content to use, informed by appropriate information; or a more paternalistic approach, in which regulators impose certain standards and help make those choices on behalf of the public? As a starting point, this chapter sets out the challenges which any new approach to content standards must address. The following two chapters will elaborate on our own view of the right way to proceed and the balance to be struck between these two different schools of thought.

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<sup>11</sup> For a definition of TV-like, see Box 1 on p 14.



### Challenge 1: The content standards framework

16. Until recently, separate media industries were distinguishable by the way they delivered their content. To a great extent, for example, newspaper businesses *were* newspaper businesses because their content reached audiences on large sheets of thin paper, rather than over electromagnetic spectrum or through the flickering light of a projector at the cinema.
17. By and large, the regulators of each of these industries continue to be distinguishable as if this were still the case; their standards codes generally hold sway over a single technology, or rather the content providers who happen to use it.
 

“Standards are linked to an accident of delivery platform,” as Lara Fielden put it.<sup>13</sup>
18. Technology, however, provides a decreasingly reliable way of defining the boundaries of separate media industries. Alongside their unique historical delivery mechanism, content providers increasingly make use of internet protocol (IP). Conveyed via IP, content reduced down to packets of data can be assembled as text, image, video, sound or however else technology allows, and can do so on a growing range of devices, fixed and mobile.
19. Consequently, not only are the technologically defined crosshairs in regulators’ sights proving increasingly off-target over time, but the sharp boundaries between separate media industries are starting to fade, perhaps along with the public’s sense that each one should be expected to obey a distinct code of standards.
20. Certainly in the short term, convergence has put the logic of the ‘one delivery mechanism—one industry—one regulator’ model under strain. The longer-term prospect, though, as IPPR, the Institute for Public Policy Research, wrote in evidence is that “if these trends continue, as most analysts expect, the distinctions between our current regulators could soon become as meaningless as the distinctions between the media they seek to regulate.”<sup>14</sup>
21. We have heard proposals for far-reaching reform which would tidy up the regulatory structure and address the emerging tensions. In particular, models put forward by Tim Suter,<sup>15</sup> IPPR<sup>16</sup> and Lara Fielden<sup>17</sup> acted as a useful catalyst for our thinking. It is a truism in the media, however, that the future is impossible to predict and major structural changes may have countless unforeseen effects. In considering the various proposals for overhaul to the framework, we were aware that what appears consistent and tidy today could potentially leave us in unexpected difficulty tomorrow. We came to the view, therefore, that consistency and tidiness are not to be prized for their own sake. In considering reform to the content standards framework, we should not try to set a course for the promised land. Rather, we should look more simply for a framework which enables audiences to make good decisions about the content which suits them and their families. The framework will need updating to the extent that it fails to facilitate their ability to do this, and fails by extension to earn or deserve their trust.

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<sup>13</sup> Lara Fielden

<sup>14</sup> IPPR

<sup>15</sup> Tim Suter, an expert in media policy and regulation.

<sup>16</sup> IPPR

<sup>17</sup> Lara Fielden

22. Whether audience trust is already at risk is a matter of debate,<sup>18</sup> but the fluidity of change is uncontested; dramatic developments in media industries and audience behaviour will continue to run on in the wake of convergence; and the coherence of the content standards framework and audiences' confidence in it, left as it is, will likely erode over time.
23. These risks exist across all the media encompassed by the content standards framework: broadcast TV, radio, premium rate phone services and more. However, evidence to this inquiry has shown these effects to be most in need of attention in two areas: 'TV-like' content (see Box 1 below); and the provision of news. Our focus, therefore, has been on those.

### BOX 1

#### TV-like content

'TV-like' is a useful concept established in the European Commission's AVMS (Audiovisual Media Services) Directive,<sup>19</sup> but not one which is easy to summarise. The purpose of the concept, however, is relatively straightforward: to create a shorthand for a category of audiovisual content which is neither broadcast on a linear channel, and therefore currently expected by audiences and obliged by regulators to comply with a comprehensive standards code, nor barely watched user-generated content which is neither expected nor obliged to comply with any national regulatory code. It establishes a useful category in between the two, albeit one which is difficult in its own terms to define. Examples include content on YouTube channels such as 'Jamie Oliver's Food Tube' and 'Bad Teeth'; channels made available through special interest websites such as 'Motorcycle News TV' and 'Manchester United TV'; but also other examples of audiovisual services which could fall into the definition of TV-like but which may not yet have been developed.

Audiences do have reasonable expectations of the standards upheld by providers of TV-like content but, as Ofcom noted in their evidence to us, it "is seen to be different from broadcasting content and people have generally lower expectations about regulation in this area."<sup>20</sup> For the purposes of the framework for content standards regulation, therefore, TV-like as an intermediate category must be defined; and this has left regulators, the world over, grappling for neat, practical wording.<sup>21</sup> The AVMS Directive itself defines it across 9 recitals (21–29), not particularly neatly, but given the evolving nature of the boundaries of this category, in a way which is suitably open to interpretation over time. In its terms TV-like providers are defined by the fact: "that they compete for the same audience as TV broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive."<sup>22</sup>

<sup>18</sup> Indeed, our Report was triggered, in part, by a desire to help reach one.

<sup>19</sup> Directive 2010/13/EU of the European Parliament and of the Council. Available online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

<sup>20</sup> Ofcom

<sup>21</sup> Taking a unique approach, the Australian Convergence Review, for example, identifies the crucial feature of content in which audiences expect standards to be upheld as 'professional media content' provided by 'significant media enterprises.' Its report is available online (March 2012): [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0007/147733/Convergence\\_Review\\_Final\\_Report.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf)

<sup>22</sup> Directive 2010/13/EU of the European Parliament and of the Council. Available online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

24. Starting with converging audiovisual (TV-like) content, the most thorough recent research into UK audiences provides a salutary reminder that the public are, generally speaking, not regulatory experts. To say the least, “few were well-versed in the details of how regulation works in practice.”<sup>23</sup> Certainly, there is no evidence to show that audiences pause to consider the way content happened to reach their screens, asking themselves which regulatory authority and code applies.
25. Instead, the public’s expectations of standards are generally based on relatively informal inferences drawn from a feature of the environment, the content provider’s brand or from an aspect of the interface. For example,
- “when introduced to the concept of a converged device such as a connected TV ... their expectations for regulation were ... partly determined by the screen used, such as a large shared screen in [the] living room versus personal PC or device, but also by the comparative ease of access to audio-visual content through a one-touch button or seamless link to VoD, compared to searching and choosing content via a web browser.”<sup>24</sup>
26. In an era when all audiovisual content on the TV set was broadcast, basing expectations of content standards on these rules of thumb was relatively unproblematic; they provided intuitive shortcuts likely to lead to the correct expectation. In the converged era, the reliability of audiences’ inferences will diminish, leading to potential confusion and erosion of trust.
- “Accessed via a PC, smart phone, and tablet devices, regulated and unregulated content, licensed and unlicensed services, are becoming impossible to differentiate. With the advent of internet-connected TVs they sit side by side on the living room TV, fuelling the potential for consumer confusion over whether the content with which they engage is regulated and, if so, to what extent and by whom.”<sup>25</sup>
27. A similar risk may emerge in the area of news provision. Broadcast news is required to adhere to the Broadcasting Code with its full range of protections relating to accuracy, fairness as well as an obligation to uphold due impartiality. While the successor to the PCC (Press Complaints Commission) with oversight of participating newspapers and news websites, may well include some of these protections in its code, it will certainly not include an obligation to uphold due impartiality.
28. The abiding difference between the balanced, impartial news provided by the broadcasters and the vigorous partisan news provided by the press has helped to create a valuable mixed ecology.<sup>26</sup> However, the impact of convergence means that the providers of each will become increasingly difficult to distinguish from each other. The binary distinction between impartial and partisan news will no longer be mirrored in the difference between news which UK audiences watch, and news which they read.

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<sup>23</sup> Ipsos MORI, *Protecting Audiences in a Converged World*, January 2012. Available online: <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/946687/Protecting-audiences.pdf>

<sup>24</sup> *ibid.*

<sup>25</sup> Lara Fielden

<sup>26</sup> *The Guardian*, ‘Leveson debate: TV-style regulation is not going to screen out all the problems’, 3 February 2013. Available online: <http://www.guardian.co.uk/media/2013/feb/03/leveson-debate-tv-style-regulation>



## 29. As IPPR put to us:

“Consumers are switching between different types of content from different sources on the same device and will increasingly be unaware that even though the content looks the same, different standards of regulation apply. For example, a broadcast news service delivered to a television and a video-based online news service delivered to a television may come (in time) to look the same, but different standards of regulation—for example over accuracy and impartiality—will apply. This raises the potential for consumers to be confused and for their expectations of the standards that apply to the content they are viewing to be frustrated.”<sup>27</sup>

30. In sum, convergence raises challenges for the sustainability of the UK’s framework of content standards. In particular, it brings into question the sense in distinguishing between broadcast TV and non-broadcast, TV-like content on the basis of the different technologies used to distribute them. The direction of travel clearly points to a world in which these differences become very difficult to discern and may in fact become irrelevant in UK audiences’ decisions about what to watch. To this extent, under a framework based on these distinctions, audiences will face increased confusion about the standards they can expect when accessing content, with a risk to the trust and confidence they have more generally in the media they use.

### **Challenge 2: Standards for content available over the internet**

31. A second set of challenges to the content standards framework arises from content available over the internet which some have described as the ‘wild west’. While conventional audio-visual content is required to meet agreed standards in areas such as harm, offence, fair treatment or protection of children, much content delivered over the internet faces no such constraint. Regulatory bodies with responsibility for content standards in the UK gain their ultimate leverage over content providers and distributors from a source of authority grounded in, but limited by jurisdiction.<sup>28</sup> The concerns arise, therefore, because convergence is increasingly exposing ways in which jurisdictional controls are possible to bypass.
32. As an example, a UK-based provider of legal adult video on demand content would be obliged to put that content behind access controls, restricting it from audiences unable to verify their age as appropriate. However, the UK regulator of on demand video content, ATVOD (Authority for Television on Demand), told us:
- “The problem ... is that most of the hardcore porn that can be seen by children is not regulated within our jurisdiction ... The provider of one of the services that was fined before Christmas ... sold that service ... and it is now being provided from America.”<sup>29</sup>
33. Concerns about content accessed online are not limited to its potential harm to children, or its detriment to adults’ ability to bring accurate expectations to content. For example, the promotion of terrorism is also a concern, particularly in languages unfamiliar to those who might report it to the

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<sup>27</sup> IPPR

<sup>28</sup> See Appendix 1

<sup>29</sup> QQ 617 and 623



authorities. Equally, the promotion of terrorism by individuals beyond jurisdictional reach may increasingly require Governments to cooperate across borders in the enforcement of their respective criminal law. Altogether, this is an area that deserves careful consideration and we note that a number of potentially useful recommendations were made in a recent report published under the auspices of the Clean IT project and the European Commission.<sup>30</sup>

34. More broadly, that content available over the open internet is an important issue is underlined by Ofcom's 2012 *Children and Parents: Media Use and Attitudes Report*<sup>31</sup> which shows the extent to which younger cohorts are consuming content over the internet, and the trend lines point in only one direction:

“While children aged 5–15 continue to spend most time watching TV, children aged 12–15 are spending more time online (rising from 14.9 hours a week in 2011 to 17.1 in 2012) and now spend as much time in a week using the internet as they do watching television. They are also more likely than they were in 2011 to mostly use the internet in their bedrooms (43% in 2012 vs. 34% in 2011). Children who use the internet mostly alone comprise one in seven internet users aged 5–7 (14%), one in four aged 8–11 (24%) and over half of those aged 12–15 (55%).”

35. These challenges, however, should not be assumed automatically to require some form of regulatory approach. First, for some, the lack of regulatory influence is a defining, and altogether positive characteristic of the open internet, establishing previously unknown opportunities for free speech. Indeed, research suggests that UK audiences are aware of the need to strike a balance between regulation and free speech, and would certainly not want to see standards upheld at any cost. This research conducted for Ofcom in 2012 shows that they:

“were less concerned that the open internet should be regulated in the future ... on the basis that people should be allowed the freedom to produce and choose to view all different types of content, and the responsibility of sourcing content from the internet lies with the individual.”<sup>32</sup>

36. Second, characterisations of the internet as a lawless ‘wild west’ are not entirely accurate. So long as there is a jurisdictional handle, content providers in breach of UK criminal and civil law are subject to their provisions, however they distribute their material. Hence it follows that those writing and publishing online who fall within jurisdictional reach must recognise their responsibilities and liabilities. Indeed, action is currently being taken in cases involving individuals having made allegedly defamatory remarks on social media;<sup>33</sup> and the Director of Public Prosecutions has just

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<sup>30</sup> Clean IT Project, *Reducing terrorist use of the Internet*, January 2013. Available online: <http://95.211.138.23/wp-content/uploads/2013/01/Reducing-terrorist-use-of-the-internet.pdf>

<sup>31</sup> Ofcom, *Children and Parents: Media Use and Attitudes Report*, October 2012. Available online: <http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/oct2012/main.pdf>

<sup>32</sup> Ipsos MORI, *Protecting Audiences in a Converged World*. January 2012. Available online: <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/946687/Protecting-audiences.pdf>

<sup>33</sup> *BBC Online News*, ‘Twitter users: A guide to the law,’ 26 February 2013. Available online: <http://www.bbc.co.uk/news/magazine-20782257>

closed his consultation on guidance to prosecutors in such cases.<sup>34</sup> His final guidance document will clarify the balance between freedom of expression and the need to uphold the law, and the need to strike a balance must not be understated, but it will not alter the fact that, so long as there is a jurisdictional handle, the criminal and civil law can be brought to bear on those who break it when communicating over the open internet.

37. Third, while illegal content provided by those beyond UK or European jurisdictional reach is accessible, UK audiences often do not have great interest in it. As Ed Richards, Ofcom CEO, told us, of all content currently consumed by UK audiences, the material beyond all UK or European jurisdictional controls represents perhaps:

“a couple of percent and, frankly, my view of that is you do not need a sledgehammer to crack a nut ... do not create an architecture, which is a big cost, a big overhead, which is going to struggle with jurisdictional issues because some of them will be being run from God knows where. Just accept what it is, which is a minority pursuit ... help parents take responsibility for it, make sure that in extreme cases, like child pornography, you can deal with it ... but otherwise let it be.”<sup>35</sup>

38. Given these factors, it seems to us that the set of challenges generated by content distributed over the open internet arise not only from concerns expressed by some about exposure to unwelcome or harmful content (and the weakening jurisdictional leverage which allows this to happen), but also from the competing pressures to be taken into account in addressing such concerns, including for example:

- Variations in public expectations;
- Striking the right balance between regulation and free speech;
- The public’s appetite for personal responsibility;
- The reach of existing UK law;
- Proportionality;
- Practicalities and costs.

39. Taking these difficult competing pressures into account does not amount to an excuse for inaction. This is an undeniably contentious area and legitimate concerns should not be ignored, particularly when they are only likely to grow.

40. We will elaborate on our response in Chapter 4.

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<sup>34</sup> Crown Prosecution Service, ‘DPP launches public consultation on prosecutions involving social media communications,’ 19 December 2012. Available online: [http://www.cps.gov.uk/news/press\\_releases/dpp\\_launches\\_public\\_consultation\\_on\\_prosecutions\\_involving\\_social\\_media\\_communications/](http://www.cps.gov.uk/news/press_releases/dpp_launches_public_consultation_on_prosecutions_involving_social_media_communications/)

<sup>35</sup> Q 609

### CHAPTER 3: A NEW CONTENT STANDARDS FRAMEWORK

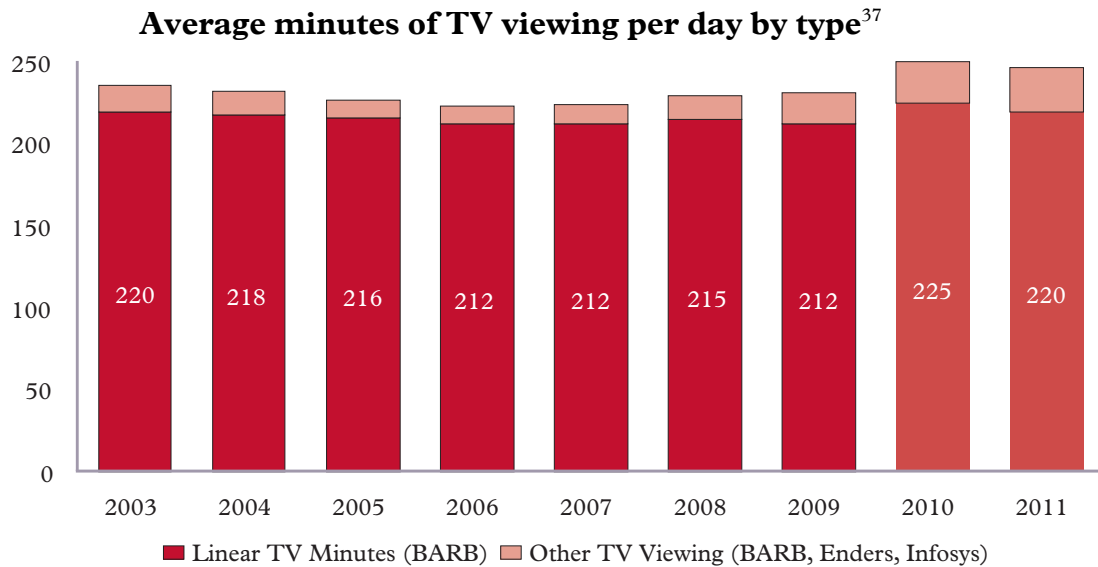
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41. We set out in Chapter 2 our view that the impact of convergence is raising two core challenges for the model on which content standards regulation has been based. The first of these, which we address in this chapter, comes down to the collision of two phenomena:
- A framework of standards for broadcast TV and for non-broadcast, TV-like content, made distinct on the basis of the different technologies used to distribute them
  - The emergence of a world in which these differences become very difficult to discern and may in fact become irrelevant in UK audiences' decisions about what to watch.
42. While the trend towards greater consumer confusion at the hands of convergence points in only one direction, the evidence to us has been persuasive that the existing framework has not yet reached breaking point. This evidence comes down to:
- an acknowledgement that the emerging incoherencies are yet significantly to disrupt audiences' ability to form accurate expectations of content standards across different media;
  - the fact of continuing public value in retaining certain elements of the existing content standards framework;
  - a pragmatic acceptance that the regulatory settlement for the print media is so much in flux that further recommendations for change in the immediate future would probably be unhelpful.
43. To elaborate just on the first of these points, Ofcom's evidence, for example, emphasised that:
- “Traditional TV viewing (also referred to as live or linear viewing) remains strong ... On average in 2011 viewers watched 4 hours of TV per day. At present, linear viewing still dominates, with less than 10% of viewing being on-demand across all homes ... Even homes with access to a multitude of on-demand content do not use these services as the main mechanism for watching TV.”<sup>36</sup>
44. The growing but still relatively small proportion of viewing which counts as TV-like rather than TV content itself is shown in Figure 2 below.

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<sup>36</sup> Ofcom

FIGURE 2



45. Moreover, the great majority of TV-like content they do see is currently previously broadcast material, specifically made available to allow audiences to catch up with the linear schedule. As a result, it will in all likelihood comply with the comprehensive standards contained in Ofcom's Broadcasting Code even though, strictly speaking, it is not under that obligation.
46. Of course, as penetration of connected TVs grows and the TV-like content industry matures, content subject to lighter and even no real regulation will be increasingly available alongside catch up services. While linear viewing will retain the largest share of total viewing for some time to come, the reach of TV-like content will continue to extend; and it is likely that, soon, most viewers will use both TV and TV-like services in a typical week, just as the reliability of their rules of thumb for distinguishing between the two starts to decline. This raises the prospect that confusion will become a more pressing issue.
47. At present, this is only a medium term prospect. For the time being, broadcast regulation can continue to co-exist with both on demand and press regulation without disrupting audiences' ability to build accurate expectations about the content they encounter
48. In a nutshell, therefore, our view is that the need for the framework as a whole to undergo a redesign is not immediate. However, it remains likely that this need will become more pressing in the medium term and what is more, a great deal of consensus already exists about the direction of travel and, on that basis, what the redesign will necessarily involve.
49. With this in mind, we put forward a two-stage approach, reflecting that:
- There is a role for some sensible but relatively modest changes to be made immediately, while keeping the core of the current content standards framework, and its legislative foundation, intact;
  - Looking further into the future, provision also needs to be made for the regulatory framework to evolve and adapt in response to the issues likely

<sup>37</sup> Ofcom. NB. New BARB panel introduced in 2010. As a result, pre- and post-panel change data must be compared with caution.

to be aggravated by convergence, in particular the ability of audiences to build accurate expectations of content and the trust they place in the content standards framework they rely on to do so.

### Stage 1

50. While keeping the core of current content standards regulation in place, however, there is a role for some sensible clarification within the existing framework in the short term. Two relatively modest changes would include the following:

51. First:

**Broadcast licences should be amended to ensure that standards similar to those set out in the Ofcom Broadcasting Code, amended for the relevant environment, would apply to any service using the same channel name or brand as a licensed broadcast service.**

52. This clarifies a minor anomaly in current standards regulation: the website, mobile and video on demand content provided by broadcasters is not subject to the Broadcasting Code. In practice, because broadcasters know that audiences expect “a consistent level of regulation for the same branded services across [different] ways of accessing content,”<sup>38</sup> they generally ensure that all of their content is Broadcasting Code compliant. In addition, because most of their on demand content is made available so that audiences can ‘catch up’ with the linear broadcast schedule, it is generally compliant with the Code as a matter of course. An argument can be made, however, particularly as broadcasters begin to premiere content through their on demand platforms,<sup>39</sup> that it would be sensible to ensure compliance with the Code is guaranteed through regulation rather than left up to the coincidence of on demand and catch up, or to the strength of broadcasters’ respect for brand consistency.

53. Second, there is a case for positively encouraging other (non-broadcast) providers to join in this framework:

**Ofcom should investigate the option of non-broadcast providers of TV-like services, such as Netflix and the content providers mentioned in Box 1, being invited to comply with an appropriate set of standards (the Broadcasting Code suitably amended for their environment) in return for some form of public recognition or kitemark.**

54. Of course, broadcasters are not the only players in the audiovisual sector. Although non-broadcasters have no obligation to adhere to the Broadcasting Code, they may uphold high standards in order to gain audiences’ trust and build a competitive advantage on that basis. There may be mutual advantage, therefore, in the UK content standards regime providing them with an incentive to adhere voluntarily to standards in the Broadcasting Code, suitably adapted for their environment, such as on demand. A kitemark, for example, might be of value to non-broadcast audiovisual content providers, particularly those seeking to establish their credentials with UK audiences.

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<sup>38</sup> Ipsos MORI, *Protecting Audiences in a Converged World*. January 2012. Available online: <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/946687/Protecting-audiences.pdf>

<sup>39</sup> *The Guardian*, ‘BBC to premiere up to 40 hours of new content on the iPlayer this year,’ 8 February 2013. Available online: <http://www.guardian.co.uk/media/2013/feb/08/bbc-iplayer-premiere-content>

## Stage 2

55. In the longer term, the pressure for changes to be made to the content standards framework will gather momentum. As Ofcom CEO, Ed Richards, told us in his evidence:

“We do have to accept that over 5, 10, 20 years there is going to be a radical change. I would anticipate all the traditional boundaries and delineations that we have all grown up with and are comfortable with between broadcasting, newspapers, radio and so on ... Those distinctions are going to become more and more blurred; indeed, they will gradually dissolve away.”<sup>40</sup>

56. A significant degree of consensus appears to exist over the broad outline of a future framework. Building on this consensus, we will present our own model. As we set out above, this does not aim for consistency or tidiness for its own sake. Instead our intention is to set out the next evolutionary stage of the content standards framework as we see it, responding to the challenges described in Chapter 2, and in particular to highlight some of the changes ahead which can only be enabled through legislation.
57. Our proposed framework consists of four separate regulatory ‘areas’, delineating different regions of the UK’s future converged media landscape as we see it.

### Area 1: Public Service Broadcasters (PSBs)

58. The most straightforward area in the framework requires no regulatory or legislative change. It contains the public service broadcasters. In this area we suggest that comprehensive regulation and enforcement of the Broadcasting Code should be retained.
59. No evidence we have received during this inquiry has dissented from the view that, as an absolute imperative, a group of major content providers such as the PSBs should continue to uphold a very high and comprehensive set of standards. In doing so, they play a fundamental role in the broader UK content standards landscape, providing the assurance of trusted content as well as setting a benchmark to which other content providers can aspire, and against which consumers can compare them. Public service content provides a clear reference point, ranging across children’s content, drama and entertainment and extending all the way to the provision of balanced and impartial news.
60. Admittedly, there was some discussion during the inquiry about whether regulation was itself the guarantee of high content standards or whether the PSBs’ motivating force came from elsewhere. For example, Tim Suter, put it to us that:

“I do not think that the BBC aspires to the programme heights that it does because it is regulated. I do not think that ITV produces the kinds of programmes that it does because it is regulated. The BBC does that and ITV does that because of the way it wants to attract an audience and the way that works for it both commercially and publicly.”<sup>41</sup>

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<sup>40</sup> Q 600

<sup>41</sup> Q 47



61. However, while this proposition might be correct (and one day might be proved to be so), there is little real argument for gambling on it now. The number and range of PSBs could conceivably change over time, but the existence of a category of providers of public service content is reasonably assured; and these providers will continue to receive funding, guaranteed prominence or other forms of public support, on which certain obligations can continue to be made conditional. As the impact of convergence works its way across the media landscape, this will mean, as we discuss later, that the role played by the PSBs will in some aspects grow rather than decline in importance. This is not a time to gamble. As IPPR put to us:

“In a converged world which may see the rise of opinionated video news services and a vast wealth of on-demand content of varying quality and reliability, citizens in the UK will benefit from having a strong core of brands and services with which they are familiar and in which they can continue to trust.”<sup>42</sup>

62. Even as other areas may inevitably undergo a certain amount of steady, managed deregulation, PSBs, supported by their stricter regulatory code, should be expected to guarantee high and comprehensive standards in the converging media mix.

#### **Area 2: TV and TV-like content (non-news)**

63. The second category in our suggested framework establishes a new regulatory area. Overseen by a single body, this area would contain TV-like content providers irrespective of their platform as well broadcasters without PSB status.
64. There are three principal reasons for establishing this second regulatory area:
- To respond to convergence, and remove scope for confusion between different regulatory approaches for similar content available on the same platforms and devices
  - To remove barriers to innovation and growth
  - More broadly, to reflect changes in the role played by audio visual content as part of the overall media ecology
65. First, this area responds directly to trends set in motion by convergence. As TV and TV-like content merge within audiences’ decision making, the confusion generated by their obligatory adherence to different standards codes will reach a point at which the disparity must be addressed. In the absence of change, there will be a detriment to audiences’ ability to form expectations of the content standards they can rely on. For example, a viewer switching with ease from a linear broadcast programme on their living room screen to on demand or other TV-like content available at the click of a button will be unlikely to differentiate greatly between these services, although the standards they have to adhere to may be greatly different. This could easily result in undesired content appearing on the screen unexpectedly, and as such serve to undermine the audience’s trust in the framework they may believe protects them. Accordingly, at a certain point, the sensible course of action will be to establish a regulatory area for content inherently similar from the perspective of the audience, and to move the relevant providers into it. This will include

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<sup>42</sup> IPPR

TV-like providers and those TV broadcasters not captured by the first regulatory area by virtue of their PSB status.

66. Second, establishing this area responds to the risk that the existing framework might inhibit content providers from exploiting the opportunities for innovation and growth brought about by convergence. Under our proposed framework, they would be able to develop new services to meet changing audience needs without worrying about compliance with different regulatory regimes. Hybrid on-demand and linear services, interactive TV services such as Sesame Street Kinect available over internet-connected Xbox consoles, streamed hyper-local news services, next generation YouTube services: all and more would be covered by the new content framework. Bringing providers of all these services into a single regulatory area and establishing over time parity between their standards codes will help remove barriers to innovation and the development of services with potentially significant benefit to UK citizens.
67. Third, this new regulatory area responds to the changing role of audiovisual content. This is very different from the one it played when extensive standards regulation was warranted on the basis of the scarcity of spectrum, the resulting power of broadcasters and the special influence of their TV content. Audio-visual content in a more converged world will in time move closer in nature to all other published media content, and the standards framework should adjust to reflect this change.
68. Last but not least, an important aim of establishing this regulatory area, in line with Ofcom's duties as set out in the Communications Act 2003, would be to reduce regulatory costs.
69. While the detail of the establishment of this part of the framework would need to be considered carefully in the coming years, there are a number of important questions which might already be answered at least in outline. For example:
  - How should it be implemented?
  - What broad approach to standards and consumer protection would it be expected to take?
  - When should the change take place, and how should it be brought into effect?

*How should it be implemented?*

70. Regarding implementation, we think that there is a clear case for co-regulation rather than statutory regulation, perhaps with a role for Ofcom as backstop for appeals, monitoring performance of the regulatory body and setting overarching principles for the code. We attach in Appendix 5 a summary of self-, co- and statutory regulatory structures.
71. Establishing an effective approach to standards in this converging market will be a difficult process, with the need to balance audience expectations with the provision of sufficient room for fast paced and ongoing innovation. The need to strike this balance has been underlined consistently in evidence alongside the view that the best guarantee of achieving it is to ensure significant industry involvement, and little direct, statutory control. This points squarely at a co-regulatory system, requiring service providers to play



a role in developing their own content code and compliance systems in collaboration with the regulator, allowing flexibility for the code to evolve over time with consumer expectations and technological change.

72. Existing co-regulatory structures along these lines have proven such systems to be effective in balancing these goals. As the ASA (Advertising Standards Authority) put to us, capturing a significant degree of consensus, co-regulation “has proven, time and again, that it is capable of adapting its regulation in line with wider business, technical and societal need.”<sup>43</sup>

*What broad approach to standards and consumer protection would the new co-regulator be expected to take?*

73. Once a new co-regulator has been established, it will certainly be desirable to move the broadcasters and TV-like providers within this area to a single, new standards code. Ofcom might be asked to set out some general principles which it would expect the new code to cover, but it would be for the industry to draw up the detailed code. It is not sensible to speculate on the detail of that code here, as much would depend on the state of media convergence and audience expectations at the time it is introduced. However, it is likely that it will ultimately be less detailed than Ofcom’s Broadcasting Code, but may be greater in scope than ATVOD’s current rules for on demand services.
74. To a significant extent, the leverage for this regulatory area is already provided through the AVMS Directive and its transposition into UK statute. This creates formal authority for a regulator to oversee both broadcast TV as well as TV-like content providers, and with a jurisdictional reach which stretches as far as the borders of the European Union.<sup>44</sup> There are two potential sticking points, however:
- Statutory authority to establish the new regulator, although a co-regulatory framework overseen by Ofcom would appear to be acceptable within the terms of AVMS
  - The jurisdictional reach of its code in the event that this goes beyond the provisions of the AVMS Directive

*When should the change take place, and how should it be brought into effect?*

75. Statutory authority would be required to establish this regulatory area. In particular, the new communications Bill would need to make provision for, at some stage:
- A move from broadcast licensing (except for PSBs) to a system based on notification, as currently used for on demand TV services;
  - Scope for Ofcom to introduce a common regulatory framework for TV and TV-like content;
  - Possible amendments to the standards requirements set out in the current Communications Act 2003.
76. It is impossible to forecast the right moment to introduce these changes. However, pressure to do so will grow and possibly reach a critical moment in

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<sup>43</sup> ASA

<sup>44</sup> Outside the UK this is in partnership with regulators in other Member States.

the lifetime of the next communications Act.<sup>45</sup> This places a responsibility on the Government to find a sensible way to proceed, avoiding unnecessary disruption in the immediate future (at Stage 1 as we have described it) while achieving the flexibility to make further-reaching changes in the medium term (at Stage 2).

77. We have considered a number of the procedures available for introducing flexibility into the new Bill, from sunset clauses to conventional forms of delegated powers subject either to affirmative or negative resolution. None of these seem adequate, creating either a potentially unnecessary drain on Parliamentary time and resources, or the opposite: insufficient opportunity—given the likely very high degree of interest in these changes across both Houses—for Parliamentary scrutiny and for amendments to be made. The two principal options, therefore, and the only two which provide the democratic safeguard of in-depth Parliamentary scrutiny, are:

- Making no provision in the forthcoming communications Bill for change to the content standards framework. Should statutory authority be required to enable reform in the lifetime of the next communications Act, additional primary legislation can be introduced to amend it;
- Making provision in the forthcoming communications Bill for evolutionary change to the content standards framework. Specifically, introduce a clause to the new Bill giving a power to the Secretary of State to make an order amending the Bill along the lines we describe below, ensuring any such orders are subject to super-affirmative procedure, described in Box 2 below.

## BOX 2

### Super-affirmative procedure

The “super-affirmative procedure” is the form of strengthened affirmative procedure provided for in Part 1 of the Legislative and Regulatory Reform Act 2006. Other forms of strengthened affirmative procedure are provided for in a number of other Acts (for instance the Public Bodies Act 2011). In summary, the super-affirmative procedure under the 2006 Act is broadly as follows:<sup>46</sup>

A minister wishing to make an order must first consult on his or her proposals (section 13) and must lay before Parliament a draft of the order along with an explanatory document which includes, among other things, details of the consultation (section 14).

The draft order lies before both Houses for 60 days, not including periods when either House is adjourned for more than 4 days, during which time either House may make resolutions, and a Committee of either House charged with reporting on the draft order may make recommendations. The minister must have regard to any such resolutions and recommendations, and any other representations, made during the 60 days (section 18).

<sup>45</sup> DCMS, ‘First step to Communications Bill,’ 28 June 2012. Available online: [http://www.culture.gov.uk/news/news\\_stories/8121.aspx](http://www.culture.gov.uk/news/news_stories/8121.aspx)

<sup>46</sup> Sources: *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords 2013*. Available online:

<http://www.publications.parliament.uk/pa/ld/ldcomp/composo2013/2013co02.htm>

and Joint Committee on the Draft Communications Data Bill, Report (2012–13): *Draft Communications Data Bill (HL Paper 79)*. Available online:

<http://www.publications.parliament.uk/pa/jt/201213/jtselect/jtdraftcomuni/79/7902.htm>

After the 60 days have elapsed, the Minister can either proceed with the draft order without amendment, or lay a revised draft order, in effect subject to the normal affirmative procedure.

In either case, the minister must lay before Parliament a statement about any representations received; and, in the case of a revised draft order, the statement must also give details of the proposed revisions. Between the laying of the statement (or the revised draft and the statement) and the approval of the draft, the designated scrutiny committee of either House may recommend that the order should not proceed, in which case it may not then proceed unless the relevant House rejects the recommendation, by resolution, in the same session.

78. On balance our preference is for the latter option described above on at least three grounds.
79. First, flexibility. Amending the next communications Act through the introduction of additional primary legislation is likely only to achieve the first of the following two sensible goals:
- Providing statutory authority to enable modernisation of the content standards framework;
  - Providing that authority quickly and deftly in order that the content standards framework is flexible and able to adapt to fast-changing circumstances.

This second goal, however, is important. Just as we have set out above, the Government has also made clear:

“We cannot be certain what the future holds, or of the pace of change, and so a guiding principle for Government policy must be sufficient flexibility to remain relevant and adaptable to future advances.”<sup>47</sup>

“We need ... the flexibility to respond to ... challenges as they emerge, rather than all at once every ten years.”<sup>48</sup>

80. Second, certainty. There is an opportunity in the next communications Bill to provide industry with a clear picture of the broad direction of travel in the regulatory framework; doing so would not only allow all those involved to prepare but more importantly, to discuss in concrete terms the merits and permutations of the ways in which change may proceed. By contrast, certainty is unlikely to be created by leaving future regulatory changes hostage to an amending Bill’s passage through Parliament.
81. Third, efficiency. Why waste Parliamentary and Government time and resource doing twice what the Government can introduce the flexibility to achieve in one go?
82. We note that some aspects of the changes such as the move from licensing to notification could be introduced at an earlier date, possibly at the same time as a new Act, if thought desirable.
83. In order to ensure the Secretary of State is able to lay an order making the changes we set out above with reasonable assurance that he/she is doing so at

<sup>47</sup> DCMS

<sup>48</sup> DCMS, ‘Speech to the Oxford Media Convention,’ 23 January 2013. Available online: [http://www.culture.gov.uk/news/ministers\\_speeches/9683.aspx](http://www.culture.gov.uk/news/ministers_speeches/9683.aspx)

the appropriate moment, he/she could act on advice from Ofcom. The Government would, therefore, as a priority, need to establish an acceptable basis on which Ofcom would give such advice, which might, for example, include a review of:

- the demonstrable convergence in the markets for TV and TV-like content;
- the extent to which disparity in the content standards codes for each is detrimental to audiences and to innovation;
- the scope for reducing the burden of statutory regulations which are or have become unnecessary;<sup>49</sup>
- the prospects of establishing adequate alternative arrangements which would secure effective co- or self-regulation.

**84. The Government should introduce a new power in the next communications Bill for the Secretary of State to lay an order subject to super-affirmative procedure which would amend that Act by:**

- **establishing scope for Ofcom to introduce a common regulatory framework for TV and TV-like content and giving Ofcom authority to designate a co-regulator for that purpose;**
- **moving non-PSB broadcasters from a licence based to a notification-based regulatory system and altering, where appropriate, any detailed content standards requirements set out in the Act for those non-PSB broadcasters.**

**In this way the Government can make good on its commitment to develop a policy with sufficient flexibility to remain relevant and adaptable to future advances, while being mindful of the need for the exercise of such flexibility to be suitably overseen by Parliament.**

**85. The Bill should establish a duty for Ofcom to advise the Secretary of State on a regular basis (eg. once every four years) about the timing of laying such an order, with the first such review to be conducted no later than 2016 (coinciding with BBC Charter renewal).**

**86. The Government should set out, after consultation, clear guidance to Ofcom on the considerations for Ofcom to take into account in giving advice regarding the establishment of a new system of co-regulation for all (non-PSB) TV and TV-like audiovisual services, whether broadcast or not. These considerations might, for example, include:**

- **the demonstrable convergence in the markets for TV and TV-like content;**
- **the extent to which disparity in the content standards codes for each is detrimental to audiences and to innovation;**
- **the scope for reducing the burden of statutory regulations which are or have become unnecessary;<sup>50</sup>**

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<sup>49</sup> This could be based on Ofcom's existing duties to review regulatory burdens which are currently set out in section 6 of the 2003 Communications Act

<sup>50</sup> This could be based on Ofcom's existing duties to review regulatory burdens which are currently set out in section 6 of the 2003 Communications Act.

- **the prospects of establishing adequate alternative arrangements which would secure effective co-or self regulation.**
87. **On each occasion in this Report where a recommendation is made to the Government regarding the next communications Bill, these recommendations should be taken equally to apply to the forthcoming White Paper on communications as far as time allows.**
  88. It was mentioned above that there are two potential sticking points to the establishment of this regulatory area. The first is the provision of statutory authority for relevant changes to be made. The second is the jurisdictional reach of the code of the body overseeing this area.
  89. Clearly the AVMS Directive is an important part of the context to this jurisdictional reach, which could in some circumstances constrain the effectiveness of any new UK-only regulation. The Government would also need to work in Europe to influence future changes to AVMS consistent with these proposals.
  90. Given the length of time taken to establish a new Directive, there would be value in best practice and thinking to be shared and harmonisation to be actively introduced voluntarily where possible in the interim.
  91. **Once the regulatory area for TV and TV-like content has been established, the Government should press for provisions made in its code, as appropriate, to be incorporated into an amended AVMS Directive or its successor.**
  92. **Given the infrequency and pace of reviews of the AVMS Directive, the Government should also press the Commission to ensure a mechanism or forum is in place through which the relevant national regulators and co-regulators overseeing the fusing category of TV and TV-like content can share best practice and work towards voluntary harmonisation of their codes as far as possible.**
  93. Further, we note in this context, that there is some prospect for cooperation along these lines between the EU and the US. Talks are due to begin on a free-trade agreement, establishing a very significant area of cooperation across the Atlantic,<sup>51</sup> and we note that media and audiovisual services would fall within the terms of these discussions.
  94. **We urge the Government to ensure that cooperation on the regulation of converging media content, such as the category of TV and TV-like material, is included as part of the discussions between the EU and the US about the establishment of a free trade agreement.**

#### *Sign-posting content standards*

95. In our proposed new framework, the PSBs' brands will continue to act as a trusted signal to audiences that high and comprehensive standards have been respected across all the content bearing their name. The brands of content providers, at least the familiar ones, in this second regulatory area will equally provide strong clues to audiences about the standards they can expect providers to uphold.

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<sup>51</sup> European Commission, 'European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership,' 12 March 2013. Available online: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=877>

96. In addition, as a highly recognised way of distinguishing between content suitable and not suitable for children, the watershed has been and will remain important for some time.
97. However, linear broadcast content will increasingly appear seamlessly alongside on demand content and other material delivered by providers beyond jurisdictional reach. When the joins between these types of content really do become seamless, applying a watershed to one while it cannot be to others will be unlikely to serve the purpose of providing clear guidance for audiences navigating the media.<sup>52</sup>
98. This is indicative of the fact that, beyond that upheld by clearly recognised brands such as the PSBs, the conventional linear broadcast watershed will be decreasingly able to act as a cornerstone of a clear standards framework.
99. A diminishing role for the watershed is not a design feature of our model. The trends set in motion by convergence lead us naturally towards a shift in the balance from a more paternalistic approach, in which regulators impose certain standards and help make choices on behalf of the public about which media and content to use, to a more libertarian one, in which the public will be expected to make its own choices, informed by appropriate information.
100. This raises two related matters. First, as this shift continues to unfold, the Government will need to consider carefully the role of media literacy and education to ensure that audiences understand the extent and implications of their personal responsibility when navigating the media. Second, as part of our framework, it is essential that additional information about the nature of individual programmes is provided in order to enable users to decide which content is suitable for themselves and their families to watch.
101. To be clear, we do not suggest that guidance should replace protections provided in law against the exposure of children to adult content. At present, it is illegal for both broadcasters and TV-like providers to provide access to content only suitable for audiences aged over 18 without placing that content behind a robust system of age-verification, linked for example to ownership of a credit card. Instead, we suggest that guidance about the nature of content should be introduced as a matter of course for legal TV and TV-like content which, for whatever reason, individuals and in particular adults supervising children may not feel is suitable to watch.
102. At present, some guidance is made available about content which legally can be viewed by audiences of any age, but which it may be inappropriate for them to see. However, there is a variability of approaches, which in our view will prove inadequate.
103. On demand content inappropriate for audiences under 16 is currently marked 'G' for guidance by some broadcasters and is placed behind an age-verification system, albeit one which relies on audiences honestly declaring their age. Other providers such as BSkyB place such content behind a system of pin-control and use an age-rating scheme familiar to UK audiences from cinema and video game content. In a nutshell, there is variability among TV and TV-like providers in the extent to which they provide guidance on content at all; and there is also variability among those providing guidance in the way in which they do so. If we are to look for a framework which enables

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<sup>52</sup> This is true even of the watershed which Lara Fielden told us applies to on demand content in France (Q 510).



audiences to make informed decisions about the content which suits them and their families across converging media, it seems unlikely that it will fulfil this purpose if they have to deal with proliferating and varying approaches to guidance.

104. Of course, an inevitable challenge for any guidance scheme arises from the volume of content involved. There is little prospect of a regulator or co-regulator being able to age-rate all of the content they oversee. Instead, it will be necessary for providers themselves to age-rate their own content.
105. In order to ensure, as far as possible, this is done in a coherent and consistent manner, and that audiences are provided with a clear basis on which to make informed decisions, it would be desirable for a single ratings system for TV and TV-like content to be in place. The authority behind this single, platform-neutral ratings system can then act as a body of appeal should audiences feel that a particular provider has inaccurately self-certified their content. A good model for such a system, in our view, is the BBFC's certification regime already in place for cinema content. We are aware that this age-rating scheme is expanding beyond the cinema and the BBFC has in development a self-certifying tool for user-generated content. It would appear, therefore, to provide a potential model for the self-administered age-rating scheme we propose. Overseen by a body setting broad principles for each age classification bracket, a single age-rating scheme across TV and TV-like content would ensure that audiences can build an intuitive familiarity with it and use it to form accurate expectations of the content with which they might engage.
106. **As part of a new system of co-regulation for all (non-PSB) TV and TV-like services, the relevant industry players should adopt a standard age-based classification system to be used by the content providers under the purview of the co-regulator described above.**
107. **Further, given the pivotal role this is likely to play under the new framework, and given that audiences will need to adjust to this new way of prejudging (non-PSB) TV and TV-like content, the TV and TV-like industry should introduce a self-administered age-rating scheme sooner rather than later across (non-PSB) broadcast and TV-like services. While it would initially provide, to a certain degree, a redundant layer of protection for (non-PSB) broadcast TV already subject to the watershed, this redundancy in itself has value, as it will help to habituate audiences to the signals they will need to rely on in the new framework once some of the current protections they are used to, such as the watershed, are no longer in place.**
108. **The Government should seek to influence amendment to the AVMS Directive to ensure that such an age-rating scheme is adopted by TV and TV-like providers across the European Union.**
109. **While the use of an age-rating system would be required of (non-PSB) broadcasters and TV-like providers, PSBs could also be invited to use the new system, especially for their on demand content, so that it is applied consistently across the board.**

### **Area 3: News and current affairs**

110. Under our proposed framework, the Broadcasting Code would remain in place for all PSB news and current affairs provision with its full range of

protections relating to accuracy, fairness as well as an obligation to uphold due impartiality. Just as is the case in other areas, this creates a safeguard for audiences, guaranteeing the provision of trusted content, against which they can compare what they see, read and hear elsewhere.

111. While this much of the standards framework for news and current affairs provision is clear, the regulatory settlement for the printed news media and their online counterparts is at the time of writing still in flux since the publication of Lord Justice Leveson's report. However, certain features of its structure are probable, and perhaps relatively uncontentious at this stage. For example, it seems likely that it will consist of a voluntary self-regulator overseen by a backstop body of some description, and its code, although insisting on accuracy and fair treatment, is unlikely to include any obligation to due impartiality.
112. The converging media mix for news and current affairs provision, therefore, will under the new framework continue to maintain the valuable mixed ecology of balanced, impartial news providers and vigorous partisan news providers.
113. Convergence does pose a key challenge, however. As noted earlier, the binary distinction between impartial and partisan news is decreasingly reflected in the difference between news which UK audiences watch and hear, and news which they read.
114. This raises the issue of how far news impartiality requirements should extend across news and current affairs services in future. In future, we think that non-PSB broadcast news and current affairs should be treated in the same way as non-broadcast news and current affairs as far as impartiality is concerned. Audiences can decreasingly rely on their old rules of thumb to guide their expectations of balance in the news and current affairs services with which they engage; certainly the fact that they happen to watch it, whether on their laptops or on their TV screens, or read it will become increasingly irrelevant. As such, they will have to base their expectations on something else, and this perhaps argues for a new mechanism to be put in place; we discuss provision to be made for this below, perhaps via a kitemark, in paras 121–122 of this chapter.
115. The important point is that medium will cease to be the primary clue used by audiences in prejudging the balance they can expect from news and current affairs services. Ensuring there is a more reliable alternative will be a smarter way of helping audiences build accurate expectations, than simply holding onto an increasingly untenable link between impartial news and a particular medium. In addition, breaking this link would also help reduce barriers to innovation. Much as is the case with non-news content, it would create opportunities for established news and current affairs providers to introduce new converged services and brands without worrying about regulatory hurdles which might currently act as disincentives to their development.
116. Making this change, however, does raises the important question of how and by whom the news and current affairs content of non-PSB TV and TV-like providers should be overseen, at least in terms of monitoring their provision of other more general protections specific to news and current affairs such as those relating to fairness, accuracy, invasions of privacy and so on.
117. One possibility, of course, would be to incorporate this competence within the second regulatory area (TV and TV-like content) itself. However, this



approach would lead to the establishment of four distinct regulators of news and current affairs content across the converging media landscape (Ofcom, BBC Trust, the press regulator, and an additional news and current affairs regulator for other non-PSB TV and TV-like content). This would not be prone to provide a great deal of clarity to audiences on the receiving end.

118. A more straightforward approach would be for the news and current affairs content provided by all non-PSB providers to be overseen by the regulator currently being established following the publication of Lord Justice Leveson's report. While very little else has been uncontentious in the debates surrounding the Leveson inquiry, the Editors' Code written by the PCC's Code Committee has generally been considered a sensible document with a great degree of overlap (barring obligations to due impartiality) with the protections specific to news and current affairs provision contained in the Broadcasting Code. Beyond this distinction, however, a requirement under the new framework for non-PSB TV and TV-like news and current affairs providers to adhere to the future code of the regulator emerging from the post-Leveson discussions, should not create any great difference to the standards they currently uphold. Of course, in order to ensure there is flexibility to incorporate TV and TV-like news and current affairs providers within the purview of the emerging system of regulation, it is essential for the wording of any new arrangements to be such that it can embrace them. In addition, although current indications suggest this will not come to pass,<sup>53</sup> if a separate regulatory system for the press were to emerge in Scotland (as this is a matter devolved to the Scottish Government), consideration would need to be given to the most appropriate body to oversee TV and TV-like news provision there.
119. **As part of a proposed co-regulatory model for TV and TV-like content providers, Ofcom and the Government should consider, in consultation with the future press regulator, the implications of incorporating regulation of all non-PSB news and current affairs content into its remit, and removal of the impartiality requirement from those providers.**
120. **Ofcom should at the same time consider arrangements for providers who combine news and general entertainment in a single TV or TV-like service.**
121. While it might be assumed that the opportunity to transition out of compliance with Ofcom's Broadcasting Code would be seized by non-PSB news providers, this is not necessarily the case. It is conceivable that one or more may find value in voluntary compliance with the Code, perhaps to maintain or establish their credentials with UK audiences. Voluntary compliance with the Broadcasting Code might be signalled, for example, by a kitemark for news providers much as it could be for non-news providers, as suggested in paras 53–54 of this chapter.
122. **In establishing a co-regulator for TV and TV-like content providers, Ofcom should investigate the option of non-PSB providers of news services, such as Sky News, being invited to comply with the**

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<sup>53</sup> *The Daily Telegraph*, 'Alex Salmond considers Westminster press regulator for Scotland,' 18 March 2013. Available online: <http://www.telegraph.co.uk/news/uknews/scotland/9938709/Alex-Salmond-considers-Westminster-press-regulator-for-Scotland.html>

**Broadcasting Code (suitably amended for their environment if TV-like) in return for some form of public recognition or kitemark.**

**Area 4: The open internet**

123. The fourth area in the new framework contains the sphere of the open internet. The principal challenges this generates for the content standards framework were set out in Chapter 2. We consider them in their own right in the following chapter, Chapter 4, below.

**The model as a whole**

124. **While we have made a number of specific recommendations for action on the part of both the Government and Ofcom, we also invite them to respond critically to the new framework as set out above in overview.**
125. Recasting Figure 1, the new framework we have set out would assume an overall form along the lines illustrated below in Figure 3 (see p 41).<sup>54</sup>

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<sup>54</sup> NB. Figure 3 also incorporates changes proposed for the framework in the following chapter, Chapter 4.

## CHAPTER 4: A SAFER INTERNET

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126. We set out in Chapter 2 our view that the impact of convergence is raising two core challenges for the model on which content standards regulation has been based. The second of these comes down to a concern about weakening jurisdictional leverage but also from the competing pressures to be taken into account in addressing that, including:
- Variations in public expectations;
  - Striking the right balance between regulation and free speech;
  - The public's appetite for personal responsibility;
  - The reach of existing UK law;
  - Proportionality;
  - Practicalities and costs.
127. A unique aspect of internet content is that, while it may be difficult to extend regulatory jurisdiction to the many (often small and hard to track down) providers of content, access to that content is organised by a relatively small number of intermediary companies—principally the ISPs (Internet Service Providers) and major gateways to internet content such as Google and Apple. While such organisations do not necessarily exercise editorial control over the content to which they provide access, they do help users find and sort that content, and their commercial models depend on their success in so doing. They already adopt certain practices and rules themselves about the nature of the content they are prepared to carry or provide access to, but such codes are not necessarily reflective of UK social norms and expectations. We think, therefore, that they have an important responsibility to work with government and regulators here to help achieve our wider societal goals as far as the internet and access to its content are concerned, especially in creating a safer environment for children using the internet.
128. The UK, with the help of these intermediaries and other players, will have to think creatively about possible solutions. Certainly, a whole range of ideas have been put to us during this inquiry. For example, a number of players are exploring opportunities to cooperate with credit card companies and payment infrastructure providers to restrict flows of money to providers in breach of the law or regulatory codes.<sup>55</sup> However, with such well-established difficulties engaging comprehensively with content suppliers themselves, one consistent theme has emerged: the UK will have increasingly to seek cooperation from the larger and easier to identify intermediaries who make their money from offering access to content provided by third parties—in other words: the ISPs, search engines and other digital gatekeepers.
129. Of course, that is not the end of the story. In developing cooperative relationships with these players, it will be necessary to accept that conventional regulatory approaches are unlikely to work; it is not possible to licence intermediaries and impose detailed codes even if it were desirable to do so. However, this might not be a reason for despondency.

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<sup>55</sup> *The Daily Telegraph*, 'Google looks to cut funds to illegal sites,' 16 February 2013. Available online: <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/9875339/Google-looks-to-cut-funds-to-illegal-sites.html>

130. Major providers in competitive markets are often willing to cooperate voluntarily with open standards codes because they have the most at stake when their brands fail to meet the UK public's expectations. As Google put to us:

“what is interesting about the internet is that it is such a competitive marketplace ... there is always someone else offering an alternative search service or an alternative social network. One of the strongest things we have is our trust with our users. The brand really has to be something that users trust. We hold their data; it is a really very personal thing. With that trustworthiness and responsibility, the internet does somehow create that incentive for big companies like us to behave as the good guys.”<sup>56</sup>

131. It must be remembered, therefore, that even if only major digital intermediaries are willing to uphold publicly-accepted standards, the concentration currently characteristic of the industries in which they operate means that in practice most UK consumers will benefit from the protections they introduce. According to Ofcom's most recent *Communications Market Report*, the four major UK ISPs account for over 85% of its market share,<sup>57</sup> and Google hit the headlines late last year when its share of UK search dipped to 89%, the first time it had been below 90% in five years.<sup>58</sup> If common, publicly-accepted standards will only be upheld by major digital intermediaries, protections for UK audiences will not be comprehensive, but they will not be far off.
132. In addition, while direct intervention in the standards they uphold might be possible in the case of some, if not all, of these intermediaries, it is not clear, at this stage at least, that it would be desirable or lead to the best outcomes. As Sarah Hunter, Head of UK Public Policy for Google, put to us:
- “The temptation is to say, ‘Well, let us apply all the old network's regulation into this one thing.’ Actually ... Maybe we should look instead and see what ... tools this new network provides us with that can achieve these public policy goals ... —things like community guidelines. Do you remember email spam? ... Technology has evolved in such a way to deal with it and I think that is the interesting question for policy makers.”<sup>59</sup>
133. As set out at the beginning of this chapter, the strong implication is that addressing the legitimate and growing concerns raised by content accessed over the open internet will require a host of competing pressures to be taken into account as set out above in para 126.
134. Meeting all of these challenges, in cooperation with digital intermediaries, will require a range of approaches to be developed and care to be taken in their implementation. There is unlikely to be a ‘silver bullet’. Some helpful examples of initiatives taken up by digital intermediaries show progress has already been made:

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<sup>56</sup> Q 465

<sup>57</sup> Ofcom, *Communications Market Report 2012*, July 2012. Available online: [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR\\_UK\\_2012.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf)

<sup>58</sup> *BBC News Online*, ‘Google's market share ‘dips below 90%’ in UK,’ 6 November 2012. Available online: <http://www.bbc.co.uk/news/technology-2022085>

<sup>59</sup> Q 457

- Content featuring child sexual abuse, for example, is black-listed by the Internet Watch Foundation (IWF) and voluntarily put beyond all our reach by internet service providers and other intermediaries;<sup>60</sup>
- The UK’s four major ISPs (BT, Sky, TalkTalk and Virgin Media) have published a voluntary Code of Practice on parental controls and filters;
- Establishment and support for the UK Council for Child Internet Safety (UKCCIS).

135. These initiatives demonstrate real progress, albeit that a great deal of debate has emerged, particularly over parental filters and controls, over whether these measures go far enough and are sufficiently likely to be taken up by users. In addition, there is no consensus about mechanisms to remove criminal, defamatory and breach of copyright material. Without getting into the detail of these debates, it is our view that there is room for a more coordinated approach. Of course, we recognise the need for caution; involuntary regulation of young and dynamic markets risks stifling the creative and innovative services they might develop; and there was a strong, evident consensus around the view that self-regulation, therefore, represents the right way to proceed:

“As the ASA’s experience has shown, the advantage of self-regulation is that it can be adapted to deal with changes in the marketplace more quickly and flexibly than it would have done if changes to laws were required.”<sup>61</sup>

“I think you try to let the market get there by itself with a little bit of nudging and encouragement ... I do not think it is the right thing to say, “You haven’t done it yet, therefore, we are going to intervene on day one.”<sup>62</sup>

“whilst for companies historically covered by statutory regulation co-regulation feels like a lighter-touch, in the case of businesses used to no formal sectoral regulation it can often feel heavyhanded and potentially alienating. This would suggest that where possible in emerging markets genuine self-regulation should be encouraged as a first step.”<sup>63</sup>

136. The validity of these perspectives is borne out to a great extent by important protections which a number of private enterprises have already introduced for their users without formal intervention. For example we heard from Google about the ‘flagging’ and review mechanism they have put in place on YouTube and from Facebook about the standards and processes they have introduced, including the innovative Social Reporting tool:

“that enables you to report a piece of content to somebody outside of Facebook, which works particularly well in situations where somebody is, perhaps, feeling bullied and they want to report something to a teacher. They can do that using Facebook tools—the teacher does not have to be on Facebook—and that teacher receives that message: ‘Johnny Smith wants you to help them with a problem they have got on Facebook. Here is the piece of content. Here are our terms about the

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<sup>60</sup> IWF, ‘Current Members’ Available online: <http://www.iwf.org.uk/members/current-members>

<sup>61</sup> ASA

<sup>62</sup> Q 482

<sup>63</sup> Channel 4

bullying and what we do allow and do not allow.’ Then that individual can take charge of that situation and deal with it.”<sup>64</sup>

137. These developments are not isolated and clearly demonstrate that self-regulatory approaches to content standards can offer consumers’ real protections online, and do so in ways which are both flexible and innovative. To date, however, self-regulation has mostly consisted of diffuse voluntary initiatives by individual private enterprises, not as concerted or coordinated action. In addition, they have generally focussed, understandably, on harm to children. However, while YouTube’s terms, for example, include guidelines about inciting terrorism, across the range of digital intermediaries this is perhaps a less well developed area than it ought to be; and a coordinated approach should prompt more focus.
138. To date, Ofcom has not devoted a great deal of its attention or resources to the standards upheld by digital intermediaries or content providers on the internet more generally, nor has it had any statutory duty to do so. As a result its approach has been ‘hands-off’, suggesting in evidence that:
- “it must be hoped that industry players across the value chain can come together to build effective models of self regulation, not least because of the potential practical difficulties of building new models of national regulation which effectively meet the demands of global content provision.”<sup>65</sup>
139. We recognise these difficulties but given that legitimate concerns associated with content accessed over the internet are pressing and only likely to grow, we suggest that a new approach could produce more effective results. This new approach would not involve regulation as we traditionally understand it (with statutes, rules and detailed external oversight), but would involve a more coordinated form of self-regulation of digital intermediaries—and where relevant the device manufacturers associated with them—to help ensure:
- progress continues to be made and at an acceptable pace;
  - real accountability to the UK public in setting standards, and provision of a mechanism for their views and expectations to be heard;
  - consistency, as far as possible, in implementation across the various providers.
- As part of this new direction, Ofcom would be required to exercise a very different and more creative role than that of its traditional regulatory function: providing intellectual leadership, influence and coordination, rather than relying on detailed codes and rules. This new role should be reflected in Ofcom’s general duties, supported by requirements to monitor the sector’s progress in introducing effective self-regulation to cover key areas of concern.
140. **The next communications Bill should establish a more pro-active role for Ofcom regarding the internet than has been the case to date, to be reflected in Ofcom’s general duties.**
141. **Specifically, Ofcom should be required, in dialogue with UK citizens and key industry players, to establish and publish on a regular basis**

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<sup>64</sup> Q 456

<sup>65</sup> Ofcom

**the UK public's expectations of major digital intermediaries such as ISPs and other digital gateways, specifically with regard to protecting UK audiences and their families when accessing content through digital intermediaries' services, covering for example:**

- **The scope of their responsibilities (given they are not always in direct control of the content to which they provide access);**
- **Appropriate processes for receiving complaints and subsequent redress;**
- **Any specific measures, such as access controls, content classification systems, or other actions which the UK public might expect them to take in protecting children from harmful material.**

142. Creating a point of focus in the UK for a coordinated voice expressing the UK public's expectations of digital intermediaries will bring the various players and consumers together in a way which avoids the risks of the current approach which may result in individual initiatives with considerable merit but which as a whole might be rather sporadic, diffuse and most importantly unaccountable to the UK public at large.

143. **In publishing the UK public's expectations of major digital intermediaries, Ofcom should also carry out periodic reviews to establish their current performance against them. Ofcom should have no sanction or reward for successful or insufficient action, not least because of jurisdictional problems of enforcement. Should these reviews reveal a major concern on the part of the UK public, which the industry repeatedly and without reason fails to respond to, Ofcom would then be required to advise the Secretary of State.**

144. As Robert Madelin, DG Connect, European Commission put to us:

“if the big players have a view as to how much regulation they would like, they ought to embrace the opportunity to take responsibility. It is then up to us; it is up to legislators and societies around the world to decide whether that is good enough.”<sup>66</sup>

145. Taken together, the new framework we have set out in the last two chapters would assume an overall form along the lines illustrated below in Figure 3. We note that this visual representation of the framework may not seem simpler or more straightforward than the existing one it would substitute. In part this is right; we have not aimed for consistency or tidiness for their own sake. Instead we have tried to set out the next evolutionary stage of the content standards framework as we see it, responding to the most pressing challenges raised by convergence. We hope we have explained that these changes would have a significant impact in time on the ability of UK audiences to build expectations of the content they consume, and by extension on their ability to continue to place their trust in the framework that makes that possible.

146. Further, while our focus has been on the core challenges raised by convergence for the framework's treatment of TV and TV-like services and for content delivered over the internet, we are aware that its impact goes wider, in ways not reflected in our model or in Figure 3. In particular, we

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<sup>66</sup> Q 471

heard from RadioCentre that the radio licensing regime may not be sufficiently flexible to accommodate future changes, and creates barriers to the on-going success of the UK radio sector. While these considerations have not been our focus, it is likely that a more flexible co-regulatory structure such as the one we propose for TV and TV-like content could have wider application and should be considered elsewhere.

147. In concluding this chapter, we should make clear that we welcome criticism of the framework. In taking such a wide look at convergence and its impact on content standards, we have been able to see that some changes to the 'super structure' of the framework are, or will come to be, desirable. Great structural shifts, however, are bound to require further consideration, mindful of their logical implication and the knock-on effects they may have at a lower level in the framework.





## CHAPTER 5: CONTENT CREATION

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### Public Service Broadcasting and convergence

148. Media convergence is bringing many benefits to UK audiences in terms of increased innovation, competition, consumer choice and value—from the impact of social media and the advances in interactivity to the availability of a huge range of information and other content over the internet. It has, however, become clear to us that convergence is putting some strain on content creation in two areas: the role, effectiveness and funding of public service content, and investment more generally in UK originated content. As convergence continues apace, measures to address these potential risks will assume greater importance.
149. It has been put to us that the narrow economic ‘market failure’ argument for PSB may weaken in a converged world. Some witnesses explained that in the past, the (economic) case for PSB rested on the fact that broadcasting was a ‘public good’ (a non-excludable good, with zero marginal cost for each extra consumer) and also, in some forms, created wider social benefits beyond its value to individual consumers. Left to itself, the broadcasting market would result in an under-supply of this type of content. On account of new technologies, however, audiences can increasingly pay for content on a pay-per-view/subscription basis and many new providers of ‘public service’ type content have emerged and prospered. It is therefore suggested that such a functioning market for content diminishes the (economic) case for PSB.<sup>67</sup>
150. In isolation, the economic argument may have weakened the case for PSB, but in our view this is too reductive. As Professor Tommaso Valletti put it to us:
- “This [economic] case, which was the past case for having PSBs, has diminished precisely because people can pay for what they want ... Having said that ... You have the BBC, which is something that the entire world envies. Why break it?”<sup>68</sup>
151. James Heath, Controller of Public Policy, BBC, reflected on the continuing importance of the role of PSB:
- “The central public policy question is whether this new world will deliver a range and breadth of content, with social, cultural and demographic values to meet everyone’s expectations without intervention. I struggle to understand why that would be the case in the new world when it is not the case in this world. With the public policy, social and culture argument, it is difficult to see how market forces alone will deliver all that the research tells us everyone wants, despite convergence.”<sup>69</sup>
152. We endorse this argument. It is our view that while PSB may need to change in some respects, the importance of a public contribution will not decline: creating quality benchmarks, setting standards, ensuring (internal and external) plurality and investing in high quality content and culture for a

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<sup>67</sup> Q 89

<sup>68</sup> Q 89

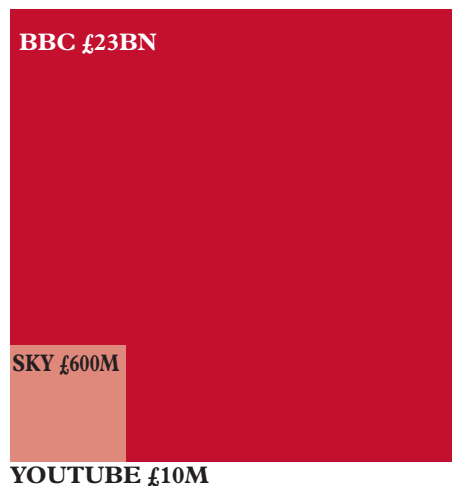
<sup>69</sup> Q 390

wide variety of UK audiences. PSB facilitates a nationwide discussion; it supports our democratic processes, and its universal provision is of great enduring importance. So, the values of PSB and the importance of its universality will remain undiminished and absolutely central to the success of the UK in maintaining a rich and healthy media ecology. In fact, in these respects, the contribution of PSB is likely to become, if anything, more important. This is not to say that more PSB is necessarily required, or that it does not need to change or adapt, only that its broad role may be more important than ever. As IPPR suggested:

“In a converged world which may see the rise of opinionated video news services and a vast wealth of on-demand content of varying quality and reliability, citizens in the UK will benefit from having a strong core of brands and services with which they are familiar and in which they can continue to trust.”<sup>70</sup>

153. As well as its social and cultural contribution, PSB plays, and will continue to play, a key economic role in supporting a high level of investment in UK content—both directly, and by setting market benchmarks for high production values. The five public service broadcasters and their spin-off channels currently represent 90% of UK broadcaster spend on first-run originated output despite welcome new investment in UK content from commercial providers such as Sky and Discovery. New players have entered the market—and though their contribution is increasing, it is still relatively small, as illustrated in the figure below.

**FIGURE 4**  
**UK spend on content<sup>71</sup>**



154. In this context, it is important to understand the ‘virtuous circle’ of content investment. Ofcom explained it in the following terms:

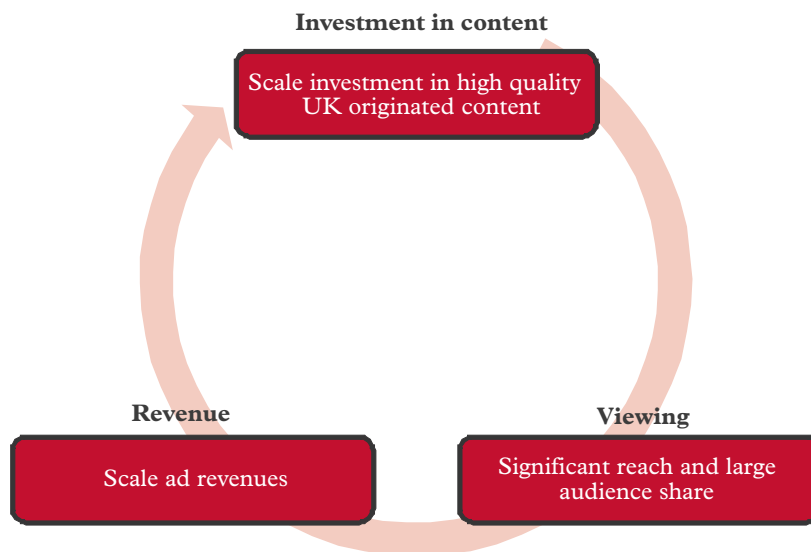
“To understand the impact that convergence has and may have on the creation of UK content, it is worth exploring how the system has historically operated. Incentives to invest in content are based on a ‘virtuous circle’ that was originally rooted in an analogue environment. In the past, significant reach and large audience share drove scale

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<sup>70</sup> IPPR  
<sup>71</sup> PACT

advertising revenue which in turn produced scale investment in high quality UK content.”<sup>72</sup>

**FIGURE 5**  
**Virtuous circle of content investment**<sup>73</sup>



155. A risk of convergence is that it is leading to fragmentation of audiences and revenues, which could impact adversely on investment in high production value content. Ofcom also noted that, while linear viewing still predominates, new ‘non-linear’ ways of finding content (searching, time-shifting), may gradually reduce the significance of the linear EPG (Electronic Programme Guide), whose code currently gives prominence to PSBs—the most significant investors in UK originated content. This creates a possible threat to investment in UK originated content:

“If consumers do begin to discover content in different ways en masse, the consequential fragmentation of audience could in turn impact on the prominence of UK content and the virtuous circle of commercial content investment.”<sup>74</sup>

156. So, PSB is of paramount importance, both socially and economically, and must remain at the heart of the nation’s media. However, the changing media environment will raise questions about the nature, scope, organisation and funding of PSB. Exactly how PSB is provided, by whom, and how contestable the process of allocating public money is, deserve further debate. As Professor Tommaso Valletti explained:

while “you may want still to subsidise some type of programming. The next question is how to do it. Do you just want to give it to the BBC or do you want to introduce more contestability in order to provide such programming?”<sup>75</sup>

157. In particular, we believe that plurality of supply of PSB is an important feature of the UK PSB ecology, and should as far as possible be preserved in

<sup>72</sup> Ofcom

<sup>73</sup> Ofcom

<sup>74</sup> Ofcom

<sup>75</sup> Q 90

the future. This is especially important for the provision of news and current affairs. We will consider these matters as part of our next inquiry. Any future consideration of PSB needs to take into account the various means by which it can be delivered, and the role of all the PSB players in delivering overall PSB goals.

158. To date, decisions about each type of PSB (BBC, Channel 4, channels 3 and 5) have largely been made independently of each other. In future, given the paramount importance of sustainable and sensible funding in order to safeguard PSB as the new converged world unfolds, we think it is crucial that the future of PSB is now considered in the round by the Government so as to secure a stable future for the system as a whole, not just for each individual player within that system. Such a review would include, in advance of the next BBC Charter Review, consideration of the position of Channel 4, the longer term role of other public service broadcasters like ITV, and any other potential providers, as well as the BBC itself. The Government would be well-advised to get ahead of the curve, rather than waiting for difficulties to arise.
159. **We recommend that as preparation for the next BBC Charter Review, the Government consider fundamental strategic questions surrounding the PSB system as an interconnected whole and the potential impact of convergence: what is the right scale and scope of PSB, what purposes should it serve and how can it be best sustained in a converged world? Such consideration could be informed by the work of Ofcom's periodic reviews of the current state of PSB, and should include the role not just of the BBC but of other providers such as Channel 4.**
160. In addition to recommending this broad, over-arching look at PSB, a number of more immediate, but very important, specific issues have come to our attention. Incremental interventions in these areas could be of value in supporting the overall PSB ecology as it faces market challenges ahead. We shall take these in turn.

#### Visibility of PSB content: Prominence

161. One of the conventional privileges for all providers of PSB, electronic programming guide (EPG) prominence, may become less effective in the digital on demand world and it has been suggested to us that new forms of prominence regulation may be required. Research carried out for the BBC reveals that the EPG is currently the most common way for people to find out what they want to watch; PSBs typically hold the slots at the beginning of the EPG and audiences frequently access them first when deciding what to watch.<sup>76</sup> If viewers, however, move towards different methods of consumption and navigation, a public policy goal must be to ensure that public service content can still be easily discovered and accessed by viewers.
162. A number of submissions we received underlined the enduring importance of EPG prominence for PSB. Channel 4 suggested that:
- “... the Government and Ofcom should also consider ways of securing prominence for public service content in non-linear environments such

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<sup>76</sup> Robin Foster and Tom Broughton, *PSB prominence in a converged media world*, December 2012. Available online: [http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/bbc\\_psb\\_prominence.pdf](http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/bbc_psb_prominence.pdf)

as connected devices, video on-demand, catch-up services, or non-TV devices such as mobile . For example, in YouView’s published User Interface plans, the on-demand services of existing PSBs are given prominence, and Channel 4 believes that this could be an instructive example for how to ensure prominence in future. A new method for ensuring prominence for public service content provided online or accessed via connected devices would ensure that this content reaches a wide audience, thus generating revenues that could be re-invested in original UK content.”<sup>77</sup>

163. Simon Pitts, Director of Strategy and Transformation, ITV, reinforced this analysis and alluded to the way in which manufacturers of connected TV sets can control what appears on the home screen of connected TVs:

“We can will the means necessary to maintain a large investment in UK-originated content but if, for whatever reason, we are relegated to a second or third screen on a connected television because those providers are unregulated, the regime guaranteeing investment in UK production is rendered almost futile. With reference to the global electronics fair that goes on every year in Vegas and finished just last week, there are large television manufacturers out there with the latest connected televisions on which the screen that a viewer will be pointed to first is not an electronic programme guide but a home screen controlled by the television manufacturer that gives access to a range of content, gaming and other services—not necessarily long-form PSB content but deals that they may have struck with global video-on-demand aggregators that could have the effect of relegating strong content from national broadcasters to the second tier.”<sup>78</sup>

164. The Committee also received evidence about whether there may be an argument for regulatory intervention to ensure online delivery of content providing a specific public purpose. Public service broadcasters are currently able to ensure delivery of their content over traditional TV platforms, through provision of ‘must carry’ obligations placed on some platforms. In their publication, *Ofcom’s approach to net neutrality*, the regulator considered whether there might be a case for similar provisions to be applied to public service content delivered online.<sup>79</sup> Ofcom regard this ultimately as a matter of public policy to be decided by the Government. We endorse this view.
165. **We recommend that the Government consider the implications of changes in the way that public service content will be discovered and accessed by viewers on new connected TVs and other converged devices, and specifically what interventions on prominence and ‘must carry online’ obligations may be appropriate in non-linear environments.**
166. **We recommend that existing prominence regulation is updated, to include these new forms of access, and their electronic guides, and to ensure in particular, as far as possible, that the on demand services offered by PSBs gain due prominence on any relevant “home” screen or guide used by those devices to direct users to content.**

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<sup>77</sup> Channel 4

<sup>78</sup> Q 539

<sup>79</sup> Ofcom, *Ofcom’s approach to net neutrality*, November 2011, para 4.51. Available online: <http://stakeholders.ofcom.org.uk/binaries/consultations/net-neutrality/statement/statement.pdf>

167. Deploying these interventions immediately may prove to be unnecessary, but it would be wise to prepare possible interventions such that a policy response may be ready if required.

### Broadcast spectrum and Administered Incentive Pricing (AIP)

168. The importance of broadcast spectrum policy was also brought to our attention during this inquiry. To date, spectrum has been provided free of charge to PSBs. For commercial PSBs in particular, this has effectively been granted in return for a commitment to meet public service obligations. As such, free spectrum can be seen as a means of supporting PSBs and reducing the need for other funding streams. However, spectrum is a resource which can support many types of wireless communications, and as new technologies and applications emerge, so the squeeze on spectrum increases and the efficient use of spectrum becomes ever more important.
169. Ofcom is currently consulting on the long-term future of the UHF (ultra high frequency) spectrum used to deliver Digital Terrestrial Television (DTT). In short, the proposal is to shift the DTT content previously carried in the 700 MHz band to the 600 MHz band—freed up following analogue switch-off—in order to support mobile broadband. However this is unlikely to be a quick process and may not begin until 2018. We heard strong calls from the PSBs that the Government and Ofcom should ensure that spectrum allocation for DTT takes into account “the significant competitive, social and cultural value the platform delivers for consumers.”<sup>80</sup> More specifically, concern has been expressed about such a move to the extent that it might impose costs on viewers and broadcasters, or result in an insufficient amount of spectrum for a sustainable DTT platform in future:

“Clearance would involve significant costs and disruption for the DTT platform and for the millions of UK households who have selected it to access digital television services, often as a direct result of the Government’s switchover programme ...

In the event that it is decided to transfer the 700 MHz band to mobile, it is vital to ensure that the consumer and public benefits delivered by Freeview are maintained for the long term—in a way which means that all Freeview viewers continue to receive the range of services they can access today, and also are able to receive more HD services over time.”<sup>81</sup>

170. Securing the future of DTT is of paramount importance and it must be a key policy goal that all citizens can access public service content on the DTT platform. If this were not to be the case, then a key element of PSB—universality—would be undermined. It also occurs to us that it may well be the case that what might be termed the second digital switch-over is endured with far less equanimity by the public than was broadly the case the first time around.
171. **We recommend that, as part of its current work in re-planning the UHF spectrum, Ofcom helps secure the future of DTT by making available sufficient spectrum to support a sustainable DTT platform for the future, capable of delivering a sufficient range of services to remain attractive to audiences, and provide a competitive broadcast**

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<sup>80</sup> Channel 4

<sup>81</sup> BBC



**platform. The Government and Ofcom should also consider how best to manage the costs of any transition to the new spectrum, especially those costs which might be incurred by audiences if they need to acquire new receivers and antenna as part of the change.**

172. Consideration is also being given by Ofcom to the introduction of Administered Incentive Pricing (AIP) for broadcasting. It was put to us that the planned introduction of AIP should be waived for public service broadcasters as a means of supporting public service provision in the future.<sup>82</sup>

173. Ofcom CEO, Ed Richards, discussed the reasons for spectrum for broadcasters to be priced in the following terms.

“To broadcast, you need an office, you need electricity, you need people and you need spectrum. You pay for the first three, and the reason you pay for the first three is because, if they were free, you would just consume as much as you want. It [spectrum] is an input and, therefore, it is important in principle to have a price. Whether that should at this point in time manifest itself in pricing for broadcasters, particularly PSBs, because of the risk in relation to their programme schedule and their risk in relation to the way they like to behave and incentives and so on, that is something we are looking at at the moment.”<sup>83</sup>

174. On the other hand, we heard from some witnesses that AIP would have little or no impact on the efficiency with which spectrum is used for DTT, because of the constraints placed on multiplex operators by their licences, which determine coverage, transmission power and quality in some detail. We also heard, as alluded to above, that spectrum prices, whatever their merits in encouraging efficient spectrum use, would divert money from investment in public service content:

“In September 2008, as part of its second review of PSB Ofcom noted that ‘the potential charges applicable to current commercial PSB spectrum allocations could be in the range of £16 million to £34 million’, equating to ‘around 15–30% of the projected value of spectrum to the commercial PSBs’. While these figures have not been recently updated, it is clear that the introduction of AIP payments for spectrum used for DTT will reduce the amount of money available for investment in public service content.”<sup>84</sup>

175. Late in this inquiry, however, Ofcom issued a consultation on its proposals for spectrum pricing for terrestrial broadcasting. Its main proposals are:

- In the short term to introduce charges to cover its spectrum management costs;
- By 2020, to introduce AIP based on the full opportunity cost of the spectrum (2014 had previously been proposed).

Ofcom suggests that those opportunity costs could mean prices of £40m a year per multiplex, if DTT still occupies the 700MHz band, and £10m a year per multiplex in the 600 MHz band.

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<sup>82</sup> BBC and Channel 4

<sup>83</sup> Q 603

<sup>84</sup> Channel 4



176. While we welcome the proposals to delay the introduction of AIP until 2020, we are still concerned that its longer term introduction at “full opportunity cost” will reduce funding for PSB, while the anticipated efficiency benefits are highly uncertain. We think, therefore, that Ofcom should consider fully the impact of AIP on high quality PSB before proceeding with its longer term proposals.
177. **While welcoming Ofcom’s proposal to delay introduction of AIP for DTT until 2020, we recommend that, following the current consultation process and before any move is made to full AIP, Ofcom should consider further the risks and benefits involved in introducing AIP for DTT. As part of that analysis, Ofcom should be asked fully to assess the impact that spectrum pricing will have on the funding available for high quality PSB. If any adverse effect seems likely, we recommend that AIP is only introduced once the Government has proposed alternative funding or other plans for offsetting that impact.**

### The window of creative competition

178. We heard calls during this inquiry for the independent production quota and terms of trade for the public service broadcasters to be protected, as these have proven to be a major source of strength and growth in the UK content production sector since their introduction. Regarding the BBC, however, it has been argued that consideration should be given to the merits of extending what is called the window of creative competition (WoCC) to the benefit of the independent production sector, a potential source of growth. The success of the independent production sector so far suggests that more economic value could be generated if the BBC were to commission a greater proportion of its output from external suppliers.
179. Currently, the BBC’s original content is commissioned according to the following formula (50% in-house guarantee, 25% independent production quota, 25% WoCC which is contestable by both). It is arguable as to whether as much as a 50% in-house guarantee is necessary or appropriate. Jane Turton, Chief Operating Officer, All3Media, and PACT Council Member, put it to us that:
- “there is this funny thing called the WoCC ... we would love to increase our opportunity on the BBC even beyond the 50% point. That would be a fabulous outcome of any discussion.”<sup>85</sup>
180. The BBC, understandably, wishes to retain a production capability and not become a publisher-broadcaster:
- “We are keen that, as a principle, the BBC never becomes a so-called publisher broadcaster ... Could we go beyond the present split? Of course, technically you can, but I would be careful not to read too much into the present arrangement of the indies winning the lion’s share. It goes up and down, and I would not criticise the mechanism for the fact that it has seen the independents winning a lot of business. That is part of what you have to accept, if you accept open competition. I would not leap to the changing of the WoCC just yet. I would let it play out to the

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<sup>85</sup> Q 273

end of the charter and then review it within the charter renewal—or whatever Parliament decides to do with the charter.”<sup>86</sup>

181. We also note that the BBC Trust has very recently published the conclusions of its third biennial review of the WoCC, finding that the WoCC is operating well.<sup>87</sup> This is to be welcomed. However, the review is concerned with the working of the WoCC in terms of its operation and compliance. It is our view that there should be a fundamental evaluation of the WoCC and the formula which is currently used. This is not to say that we believe that the WoCC should necessarily be extended as an article of faith, but given the potential economic value, it merits consideration.
182. **We endorse the view that the BBC should not become a publisher broadcaster, and cannot support an arbitrary change to the BBC’s WoCC. However, given its importance to the creative sector as a whole, we recommend that the costs and benefits of further extending the BBC’s external commissioning quota should be assessed by the Government as part of the next Charter Review: how large can the window of creative competition grow (how slim can the in-house guarantee become) while retaining an optimal and sustainable level of in house production at the BBC?**

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<sup>86</sup> Q 395

<sup>87</sup> BBC Trust’s third biennial review of the Window of Creative Competition (WoCC), 6 March 2013. Available online: [http://www.bbc.co.uk/bbctrust/our\\_work/services/programme\\_supply/wocc.html](http://www.bbc.co.uk/bbctrust/our_work/services/programme_supply/wocc.html)

## CHAPTER 6: COMPETITION

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### Ofcom's competition powers

183. Any competition regime must be capable of keeping pace with a changing competitive landscape. This is a perennial challenge for competition policy across the board, but it is especially pronounced in the media sector on account of the extraordinary technological innovations that have been witnessed over recent years. In many ways, convergence brings benefits in terms of potentially enabling more competition to emerge, more open markets and lower barriers to entry, which should help innovation and bring better value for consumers. But there are also risks associated with market concentration and monopoly power. Moreover, converged markets are much more complex and pose bigger conundrums to competition authorities than the single media markets of old. During this inquiry, we heard calls for more effective “ex ante” (literally—before the event) broadcast-specific competition powers to be given to Ofcom. In essence, Ofcom’s existing media competition powers, it was argued, should be strengthened to match its powers in telecoms markets.
184. Ofcom has extensive ex ante powers in relation to competition in telecoms markets. It also has more limited ex ante powers in relation to competition in licensed services, though these are not often used. The latter, specified in Section 316 of the Communications Act 2003, allow Ofcom to impose on licence holders (i.e. only those that hold broadcast licences) any conditions that “Ofcom consider appropriate” for securing “fair and effective competition in the provision of licensed services or of connected services.”<sup>88</sup>
185. Ofcom explained the status quo as follows, essentially outlining that their powers to intervene in media content markets are considerably weaker than their powers to intervene in telecoms markets:
- “The ex-ante telecoms competition regime (determined by EU legislation) requires specified markets to be reviewed every three years, and requires the regulator to impose remedies in response to a finding of market power in order to promote competition ...
- (whereas ...)
- The ex-ante broadcasting competition regime is different in many respects. For example, the legislation includes provision for the regulator to take action when a licence holder engages in a ‘practice’ which would be ‘prejudicial to fair and effective competition’”<sup>89</sup>
186. In essence, the ex-ante broadcasting competition regime does not provide Ofcom with an obligation to conduct a periodic market review and impose remedies (even if market power is undisputed) unless a licence holder is thought to be engaging in practice prejudicial to fair and effective competition. In telecoms, Ofcom can arguably use its powers to inject competition into a market—for example by promoting competitive entry (to counter the bottleneck power of an incumbent). In contrast, ex post competition powers tend to be more about ensuring that the process of

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<sup>88</sup> Communications Act 2003, section 316 (1)

<sup>89</sup> Ofcom

competition is working effectively and is not distorted by the actions of one or a group of market players. Ofcom's Section 316 powers arguably do not provide as much scope for promoting competition (in broadcast markets) as its telecoms powers (in telecoms markets) do.

187. Evidence to this inquiry has parted on the question of whether the ex ante regime for telecoms, which seems to have people's confidence, should be transposed to the broadcasting regime. Powerful and influential voices were heard on both sides of the argument. On the one hand, BT, for instance, made the case for a new model of regulation that applies across media and telecoms:

"BT believes the focus of the next Communications Act should be to fulfil the promise of the last Communications Act: to deliver a properly converged regime to reflect the realities of the converging elements that form today's communications industry.

We believe that to do this requires adopting measures that ensure the regulation of media sectors is consistent with the model of regulation applied to the telecommunications sectors ...

To align this [telecoms] regime to the media sectors would simply involve copying the powers that Ofcom has for telecommunications and applying them to media: the powers to define markets, identify market failures (including, but not limited to, market power), and the design of remedies to promote effective competition and provide a consistent level of protection for consumers."<sup>90</sup>

188. On the other hand, as Professor Tommaso Valletti told us, market power may be transitory rather than persistent and you should be cautious about being too interventionist ex ante:

"In the markets, any time there is innovation ... in policy terms you want to be very careful ... because you would expect the new Google, the new innovation, the new thing, and you prefer to back off and wait for things to happen instead of being too interventionist ex ante, which is a big risk for innovation."<sup>91</sup>

189. Some concern has been expressed that ISPs and bundled service providers may abuse their control of audience's internet access to their own advantage. Convergence has resulted in people often buying bundles or a range of services (telephony, broadband, TV) from the same supplier. While landline and broadband packages remain the most popular type of bundle, 19% of UK homes have a triple-play bundle of fixed voice, broadband and multichannel TV (up 3% on 2011).<sup>92</sup>

190. The reason this is considered an issue arises from the fact that, even though the triple-play bundle presents a single proposition to the consumer, its constituent elements (broadband, telephony, and premium TV content) are regulated in different ways, and different treatment of competition issues in the broadcasting and telecoms sectors, it is argued, may risk distorting competition for retail bundles of services.

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<sup>90</sup> BT

<sup>91</sup> Q 67

<sup>92</sup> Ofcom, *Communications Market Report 2012*, July 2012, p. 4. Available online: [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR\\_UK\\_2012.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf)

191. An additional concern was expressed over the effectiveness of competition in the market for premium content (sports and in particular first-window pay TV movies), particularly as market power here may be used to attract customers to bundled services where other elements of the bundle are subject to different competition. Again, some witnesses argued for new powers to be awarded to Ofcom to investigate and/or intervene in this market.
192. In evidence to us, Ed Richards, CEO, Ofcom, called for Ofcom to have a general duty to promote competition across converged media markets in place of their current broadcast-specific duty under Section 316. Ofcom claims to have experienced problems with Section 316 due to a lack of clarity in the drafting and because it applies only to companies which have broadcast licences, and so misses out many parts of the converging audiovisual sector (as discussed above):

“Our regulatory duties need to be updated to cope with convergence. There is no question about that at all in my mind ...

We do not need many new powers. It is not about a huge swathe of new powers. We need clear powers that are able to deal with the relevant markets and we do not have that at the moment, so Section 316, which deals with fair and effective competition, is just not clear enough and it is not clear enough for us, it is not clear enough for the companies, it is not clear enough for anybody. If I had said that to you a year ago, you might have said, ‘Well, maybe he would say that, would he not?’ but we have since had a court case in which a judge has looked at it, and he described it—in words that I will not be able to remember, but I will happily send to you—as ‘tortuous’ and ‘capable of being interpreted in completely different ways by two different parties’, so it just is not clear ...

I think we should have a very straightforward duty to promote effective competition. Then everybody knows where they stand ...

The second to mention is what I call scope, where it is more detailed, but you need to make sure that the scope of that duty to promote competition meets the relevant market, and the relevant market is exactly as you suggested in your question, the converged markets. The area where people are buying bundles of telecoms and TV services, pay TV, free TV, upgraded pay TV, broadband, superfast broadband, telephony. It needs to be able to cope with that converged market. More and more people are buying that bundle of products together and the regulatory system must be able to address that competitive dynamic ...”<sup>93</sup>

193. BSkyB have expressed considerable concern about the change proposed by Ed Richards:

“The change proposed by Ed Richards would give Ofcom significant new powers to intervene in markets where it believes that significant market power exists, regardless of whether it has evidence of abuses of a dominant position or whether firms have engaged in practices which Ofcom considers are or would be prejudicial to fair and effective competition ...

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<sup>93</sup> Q 611

This would be the application of a form of regulation that was specifically designed for the telecoms sector, which is typified by dominance by former state monopolies, slow or no innovation, high barriers to entry and, importantly, slow growth. The UK broadcasting sector shows none of those characteristics. In fact it evidentially delivers excellent outcomes for UK consumers, is growing strongly, providing funds for rapidly growing investment in high quality original UK television programmes, and resulting in the creation of new jobs at a time of significant economic difficulty ...

Providing Ofcom with the additional powers that it seeks to intervene in the sector is unnecessary and risks having a significant negative impact at a time when UK media companies face substantial threats from global competitors.”<sup>94</sup>

194. We have not had the time to carry out a comprehensive review of broadcasting competition powers (which would be a lengthy undertaking). Nevertheless, it is clear to us that Section 316 of the Communications Act as currently drafted is flawed, and hence requires either clarification or modification in any new communications Bill. In particular, we think that the following issues should be considered:
- the scope of Ofcom’s media-specific competition powers—should they apply only to broadcast licensees, or more widely as Ofcom has suggested?
  - the nature of those powers—the extent to which they should be extended to the promotion of competition;
  - when those powers can be used—in particular, can greater certainty be given to the sector by making it clearer when Ofcom can (and cannot) use ex ante powers of this nature?
195. While not reaching a view on the answers to these questions, we note that if Ofcom’s competition powers are extended in any way, such an extension should be accompanied by a clear and high hurdle before they can be used, possibly along the lines of the approach taken by the European Commission in establishing criteria for the use of ex ante powers in telecommunications markets. Following this approach, the use of ex ante powers would be justified only in markets:
- Characterised by high and non-transitory barriers to entry;
  - Where market structure does not tend over time towards effective competition;
  - Where competition law by itself is not sufficient to deal with market failures identified.<sup>95</sup>
196. Adopting this sort of language in a revised Communications Bill would arguably offer greater clarity and certainty to the industry than is currently the case with Section 316, and safeguard against Ofcom using ex ante powers excessively and without proper justification.

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<sup>94</sup> BSkyB 2

<sup>95</sup> EU Framework Directive

197. **We recommend that Government should, in the forthcoming White Paper and communications Bill, consider clarification of Ofcom’s existing ex ante competition powers for the audiovisual sector. The aim of such clarification should be to enable Ofcom to take effective action where necessary, but also to ensure a high hurdle before an ex ante approach can be adopted.**

### **BBC’s economic impact**

198. The BBC represents a major market intervention. It receives a significant injection of public funds, and inevitably has a major impact on the creative economy. Much of its impact is overwhelmingly positive—helping to promote innovation, investment and support for a thriving independent sector—but there are also risks. In particular, it was brought to our attention that the presence of the BBC could in some circumstances act to dampen prospects for innovation and growth in the private sector (known as ‘crowding out’). In evidence, the Telegraph Media Group (TMG) wrote about their transition to a ‘multimedia digital business,’ and suggested this might have some impact on the nature of their product and market:

“The reality of this transition is that the Telegraph is now fighting for both national and international audiences from ‘traditional’ TV stations; as well as other newspapers; and other online offerings. In return, we also see them competing for our audiences.”<sup>96</sup>

199. TMG argued that licence fee-funded online content services create a market distortion responsible for limiting innovation from the wider media landscape:

“This market distortion demonstrates itself in many ways. For example, any organisation that wished to create a paywall for their content—which, of course, content has significant costs of producing—is undermined by the existence of [bbc.co.uk](http://bbc.co.uk), shielded from commercial risk. Another would be the sharing of content of BBC News (funded by the Licence Fee) to [bbc.co.uk](http://bbc.co.uk).”<sup>97</sup>

200. In times when the newspaper industry is struggling, and newspapers are focusing on enhancing their online offerings, it would be a cause for concern if the BBC’s online services were, in some circumstances, limiting innovation from the wider media landscape and, in particular, jeopardising the development of online newspapers and mobile applications developed by newspapers. And yet, we also acknowledge that [bbc.co.uk](http://bbc.co.uk) is a much cherished and valued online source, which provides an excellent service for the nation and beyond. It is, in our view, a prime example of the way in which the BBC provides reliable and engaging news and services for citizens, and demonstrates why the BBC is such an intrinsic component of our democratic well-being.
201. The BBC’s service to the public and its support for the UK’s creative economy is vitally important, and the BBC should be encouraged further to enhance the support it provides, and not scale back its activities as matter of principle per se. A more strategic approach by the BBC in support of economic growth would be welcome. However, to reassure the industry, it

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<sup>96</sup> Telegraph Media Group

<sup>97</sup> Telegraph Media Group

should ensure that effective safeguards are in place to address crowding out concerns as they may arise; the future of newspapers matters as well.

202. **In the run up to the next BBC Charter Review, we recommend that the Government invite the BBC Trust to consider how best to make progress on two fronts: enhancing the BBC's overall economic impact, and reassuring the market that there are effective safeguards in place, possibly through the use of periodic and independent market impact reviews.**



## CHAPTER 7: SUMMARY OF RECOMMENDATIONS

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### *Content standards: The Challenges Ahead*

203. Broadcast licences should be amended to ensure that standards similar to those set out in the Ofcom Broadcasting Code, amended for the relevant environment, would apply to any service using the same channel name or brand as a licensed broadcast service. (Para 51)
204. Ofcom should investigate the option of non-broadcast providers of TV-like services, such as Netflix and the content providers mentioned in Box 1, being invited to comply with an appropriate set of standards (the Broadcasting Code suitably amended for their environment) in return for some form of public recognition or kitemark. (Para 53)

### *A New Content Standards Framework*

205. The Government should introduce a new power in the next communications Bill for the Secretary of State to lay an order subject to the super-affirmative procedure which would amend that Act by:
  - establishing scope for Ofcom to introduce a common regulatory framework for TV and TV-like content and giving Ofcom authority to designate a co-regulator for that purpose;
  - moving non-PSB broadcasters from a licence based to a notification-based regulatory system and altering, where appropriate, any detailed content standards requirements set out in the Act for those non-PSB broadcasters.

In this way the Government can make good on its commitment to develop a policy with sufficient flexibility to remain relevant and adaptable to future advances, while being mindful of the need for the exercise of such flexibility to be suitably overseen by Parliament. (Para 84)

206. The Bill should establish a duty for Ofcom to advise the Secretary of State on a regular basis (e.g. once every four years) about the timing of laying such an order, with the first such review to be conducted no later than 2016 (coinciding with Charter renewal). (Para 85)
207. The Government should set out, after consultation, clear guidance to Ofcom on the considerations for Ofcom to take into account in giving advice regarding the establishment of a new system of co-regulation for all (non-PSB) TV and TV-like audiovisual services, whether broadcast or not. These considerations might, for example, include:
  - the demonstrable convergence in the markets for TV and TV-like content;
  - the extent to which disparity in the content standards codes for each is detrimental to audiences and to innovation;

- the scope for reducing the burden of statutory regulations which are or have become unnecessary;<sup>98</sup>
  - the prospects of establishing adequate alternative arrangements which would secure effective co- or self-regulation. (Para 86)
208. On each occasion in this report where a recommendation is made to the Government regarding the next communications Bill, these recommendations should be taken equally to apply to the forthcoming White Paper on communications as far as time allows. (Para 87)
  209. Once the regulatory area for TV and TV-like content has been established, the Government should press for provisions made in its code, as appropriate, to be incorporated into an amended AVMS Directive or its successor. (Para 91)
  210. Given the infrequency and pace of reviews of the AVMS Directive, the Government should also press the Commission to ensure a mechanism or forum is in place through which the relevant national regulators and co-regulators overseeing the fusing category of TV and TV-like content can share best practice and work towards voluntary harmonisation of their codes as far as possible. (Para 92)
  211. We urge the Government to ensure that cooperation on the regulation of converging media content, such as the category of TV and TV-like material, is included as part of the discussions between the EU and the US about the establishment of a free trade agreement. (Para 94)
  212. As part of a new system of co-regulation for all (non-PSB) TV and TV-like services, the relevant industry players should adopt a standard age-based classification system to be used by the content providers under the purview of the co-regulator described above. (Para 106)
  213. Further, given the pivotal role this is likely to play under the new framework, and given that audiences will need to adjust to this new way of prejudging (non-PSB) TV and TV-like content, the TV and TV-like industry should introduce a self-administered age-rating scheme sooner rather than later across (non-PSB) broadcast and TV-like services. While it would initially provide, to a certain degree, a redundant layer of protection for (non-PSB) broadcast TV already subject to the watershed, this redundancy in itself has value, as it will help to habituate audiences to the signals they will need to rely on in the new framework once some of the current protections they are used to, such as the watershed, are no longer in place. (Para 107)
  214. The Government should seek to influence amendment to the AVMS Directive to ensure that such an age-rating scheme is adopted by TV and TV-like providers across the European Union. (Para 108)
  215. While the use of an age-rating system would be required of (non-PSB) broadcasters and TV-like providers, PSBs could also be invited to use the new system, especially for their on demand content, so that it is applied consistently across the board. (Para 109)
  216. As part of a proposed co-regulatory model for TV and TV-like content providers, Ofcom and Government should consider, in consultation with the

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<sup>98</sup> This could be based on Ofcom's existing duties to review regulatory burdens which are currently set out in section 6 of the 2003 Communications Act.

future press regulator, the implications of incorporating regulation of all non-PSB news and current affairs content into its remit, and removal of the impartiality requirement from those providers. (Para 119)

217. Ofcom should at the same time consider arrangements for providers who combine news and general entertainment in a single TV or TV-like service. (Para 120)
218. In establishing a co-regulator for TV and TV-like content providers, Ofcom should investigate the option of non-PSB providers of news services, such as Sky News, being invited to comply with the Broadcasting Code (suitably amended for their environment if TV-like) in return for some form of public recognition or kitemark. (Para 122)
219. While we have made a number of specific recommendations for action on the part of both the Government and Ofcom, we also invite them to respond critically to the new framework as set out above in overview. (Para 124)

### *A Safer Internet*

220. The next communications Bill should establish a more pro-active role for Ofcom regarding the internet than has been the case to date, to be reflected in Ofcom's general duties. (Para 140)
221. Specifically, Ofcom should be required, in dialogue with UK citizens and key industry players, to establish and publish on a regular basis the UK public's expectations of major digital intermediaries such as ISPs and other digital gateways, specifically with regard to protecting UK audiences and their families when accessing content through digital intermediaries' services, covering for example:
  - The scope of their responsibilities (given they are not always in direct control of the content to which they provide access);
  - Appropriate processes for receiving complaints and subsequent redress;
  - Any specific measures, such as access controls, content classification systems, or other actions which the UK public might expect them to take in protecting children from harmful material. (Para 141)
222. In publishing the UK public's expectations of major digital intermediaries, Ofcom should also carry out periodic reviews to establish their current performance against them. Ofcom should have no sanction or reward for successful or insufficient action, not least because of jurisdictional problems of enforcement. Should these reviews reveal a major concern on the part of the UK public, which the industry repeatedly and without reason fails to respond to, Ofcom would then be required to advise the Secretary of State. (Para 143)

### *Content creation*

223. We recommend that as preparation for the next BBC Charter Review, the Government consider fundamental strategic questions surrounding the PSB system as an interconnected whole and the potential impact of convergence: what is the right scale and scope of PSB, what purposes should it serve and how can it be best sustained in a converged world? Such consideration could be informed by the work of Ofcom's periodic reviews of the current state of

- PSB, and should include the role not just of the BBC but of other providers such as Channel 4. (Para 159)
224. We recommend that the Government consider the implications of changes in the way that public service content will be discovered and accessed by viewers on new connected TVs and other converged devices, and specifically what interventions on prominence and ‘must carry online’ obligations may be appropriate in non-linear environments. (Para 165)
225. We recommend that existing prominence regulation is updated, to include these new forms of access, and their electronic guides, and to ensure in particular, as far as possible, that the on demand services offered by PSBs gain due prominence on any relevant “home” screen or guide used by those devices to direct users to content. (Para 166)
226. We recommend that, as part of its current work in re-planning the UHF spectrum, Ofcom helps secure the future of DTT by making available sufficient spectrum to support a sustainable DTT platform for the future, capable of delivering a sufficient range of services to remain attractive to audiences, and provide a competitive broadcast platform. The Government and Ofcom should also consider how best to manage the costs of any transition to the new spectrum, especially those costs which might be incurred by audiences if they need to acquire new receivers and antenna as part of the change. (Para 171)
227. While welcoming Ofcom’s proposal to delay introduction of AIP for DTT until 2020, we recommend that, following the current consultation process and before any move is made to full AIP, Ofcom should consider further the risks and benefits involved in introducing AIP for DTT. As part of that analysis, Ofcom should be asked fully to assess the impact that spectrum pricing will have on the funding available for high quality PSB. If any adverse effect seems likely, we recommend that AIP is only introduced once the Government has proposed alternative funding or other plans for offsetting that impact. (Para 177)
228. We endorse the view that the BBC should not become a publisher broadcaster, and cannot support an arbitrary change to the BBC’s WoCC. However, given its importance to the creative sector as a whole, we recommend that the costs and benefits of further extending the BBC’s external commissioning quota should be assessed by the Government as part of the next Charter Review: how large can the window of creative competition grow (how slim can the in-house guarantee become) while retaining an optimal and sustainable level of in house production at the BBC? (Para 182)

### *Competition*

229. We recommend that Government should, in the forthcoming White Paper and communications Bill, consider clarification of Ofcom’s existing ex ante competition powers for the audiovisual sector. The aim of such clarification should be to enable Ofcom to take effective action where necessary, but also to ensure a high hurdle before an ex ante approach can be adopted. (Para 197)
230. In the run up to the next BBC Charter Review, we recommend that the Government invite the BBC Trust to consider how best to make progress on two fronts: enhancing the BBC’s overall economic impact, and reassuring the market that there are effective safeguards in place, possibly through the use of periodic and independent market impact reviews. (Para 202)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

The Members of the Committee which conducted this inquiry were:

Baroness Bakewell  
 Lord Bragg  
 Lord Clement-Jones  
 Baroness Deech  
 Lord Dubs  
 Baroness Fookes  
 Lord Gordon of Strathblane  
 Lord Inglewood (Chairman)  
 Bishop of Norwich  
 Lord Razzall  
 Lord St John of Bletso  
 Earl of Selborne  
 Lord Skelmersdale

### Declarations of Interest

The following relevant interests were declared:

BAKEWELL, Baroness  
*Professional broadcaster*

BRAGG, Lord  
*Director, Director's Cut (an independent broadcasting company)*

INGLEWOOD, Lord  
*Non-executive Chairman, CN Group (a media group based in Carlisle)*

ST JOHN OF BLETSO, Lord  
*Advisor, Board of 2e2 Group (a private IT services company)*

A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

### Specialist Adviser

Robin Foster, founding member of Communications Chambers, acted as Specialist Adviser for this Inquiry.

Robin Foster specialises in advice on media and communications sector policy, strategy and regulatory issues, and has worked for a wide range of clients in the UK and internationally.

## APPENDIX 2: LIST OF WITNESSES

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Evidence is published online at [www.parliament.uk/hlcommunications](http://www.parliament.uk/hlcommunications) and available for inspection at the Parliamentary Archives (020 7219 5314)

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with \* gave both oral evidence and written evidence. Those marked with \*\* gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

### Oral evidence in chronological order

**	QQ 1–18	Professor Stewart Purvis CBE
**		Dr Damian Tambini
**	QQ 19–39	Professor Patrick Barwise
**		Dr David Levy
*	QQ 40–62	Tim Suter
**	QQ 63–100	Professor Martin Cave OBE
**		Professor Tommaso Valletti
*	QQ 101–182	BT
*	QQ 183–237	BSkyB
*	QQ 238–315	Pact
*	QQ 316–385	Virgin Media
*	QQ 386–407	BBC
*	QQ 408–428	Channel 4
*	QQ 429–444	Telegraph Media Group
**	QQ 445–466	Facebook
**		Google
**	QQ 467–481	European Commission
**	QQ 482–495	TalkTalk
**	QQ 496–506	RadioCentre
*	QQ 507–523	Lara Fielden
**	QQ 524–542	ITV
*	QQ 543–560	Institute of Public Policy Research (“IPPR”)
**	QQ 561–580	Australian Convergence Review
**	QQ 581–597	Philip Graf CBE
**		Richard Hooper CBE
*	QQ 598–616	Ed Richards, CEO, Ofcom
*	QQ 617–634	Authority for Television on Demand (“ATVOD”)
*	QQ 635–645	Arqiva

- \* QQ 646–665 Ed Vaizey MP, Minister for Culture,  
Communications and Creative Industries,  
Department for Culture, Media and Sport

### Alphabetical list of all witnesses

- Advertising Association  
Advertising Standards Authority
- \* Arqiva (QQ 635–645)
- \*\* Australian Convergence Review (QQ 561–580)
- \* ATVOD (QQ 617–634)
- \*\* Professor Patrick Barwise (QQ 19–39)
- \* BBC (QQ 386–407)  
British Board of Film Classification
- \* British Sky Broadcasting Ltd (QQ 183–237)  
Professor George Brock
- \* BT (QQ 101–182)  
Campaign for Press and Broadcasting Freedom
- \*\* Professor Martin Cave OBE (QQ 63–100)
- \* Channel 4 (QQ 408–428)  
Professor Richard Collins
- \* DCMS (QQ 646–665)  
Directors UK  
Ericsson UK
- \*\* European Commission (QQ 467–481)
- \*\* Facebook (QQ 445–466)
- \* Lara Fielden (QQ 507–523)  
Full Fact
- \*\* Google (QQ 445–466)
- \*\* Philip Graf (QQ 581–597)  
Guardian Media Group
- \*\* Richard Hooper (QQ 581–597)
- \* IPPR (QQ 543–560)
- \*\* ITV (QQ 524–542)  
Robert Kenny
- \*\* Dr David Levy (QQ 19–39)  
Media Standards Trust  
National Union of Journalists
- \* Ofcom (QQ 598–616)



PayphonePlus

Press Complaints Commission

\* Pact (QQ 238–315)

Professional Publishers Association

\*\* Professor Stewart Purvis CBE (QQ 1–18)

\*\* RadioCentre (QQ 496–506)

\* Tim Suter (QQ 40–62)

\*\* TalkTalk (QQ 482–495)

\*\* Dr Damian Tambini (QQ 1–18)

\* Telegraph Media Group (QQ 429–444)

\*\* Professor Tommaso Valletti (QQ 63–100)

\* Virgin Media (QQ 316–385)

Voice of the Listener and Viewer

Professor Lorna Woods

## APPENDIX 3: CALL FOR EVIDENCE

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### Has public policy been left behind in the media convergence revolution?

The House of Lords Select Committee on Communications, chaired by Lord Inglewood, is announcing today an inquiry into media convergence and its public policy impact. The Committee invites interested organisations and individuals to submit written evidence as part of the inquiry.

Written evidence is sought by Monday 24 September 2012. Public hearings are expected to be held in October, November and December. The Committee aims to report to the House, with recommendations, early in the New Year. The report will receive a response from the Government and may be debated in the House.

Media convergence refers to the phenomenon of traditionally distinct media activities coming to overlap, and therefore to a process which is dissolving the frontiers between previously separate industries. It has been under discussion for over 10 years—Ofcom itself was a child of convergence, established by the Office of Communications Act in 2002. Yet, only in the last few years have converged devices become a mass market reality, giving a great number of people access to types of content—which were conventionally distributed over different platforms—on one single platform, be it on their desk, table-top or in the palm of their hands. The possibilities have naturally stimulated media providers of all types into a search for and to experiments with new ways of providing their content, many of which have been straightforwardly borrowed from industries they each used to consider neighbours. They have, as such, led to textbook examples of convergence at work.

Newspapers are not just printed but are online and they carry video packages with the look and feel of traditional TV; broadcasters publish websites including text-based articles similar to online print; scheduled programmes are broadcast but also available on-demand, both on digital channels and a variety of websites; network operators are participants in the market for original content; user-generated material vies for online audiences alongside professionally produced content; professional and amateur bloggers share the same debates.

In many ways convergence is an exciting process to watch, shifting the tectonic contours of the media world, establishing opportunities for new businesses, new services, revenue models and so on. It is also, however, creating some pressing issues for public policy. To date, through a mix of regulation and public funding, we have created a highly successful broadcast ecology in the UK, which brings together the best of commercial enterprise and public service values for both consumers and citizens. It is an ecology in which, by and large, publicly accepted standards are understood and upheld, and a high level of quality and public trust has been secured. Can we (and indeed should we) be thinking of how to create similar outcomes for a potentially much more anarchic converged world, in which the regulatory levers may be weaker, economic models threatened, and the main participants much less attuned to UK sensibilities and interests? The Internet has opened up access to lots of innovative and exciting content, but also poses some real threats to quality, social values, trust, privacy etc, and is often dominated by intermediaries and suppliers from outside the UK. While some can navigate its highways with confidence, other more vulnerable people may need help, guidance and protection. How do we help encourage the good things to develop, while addressing the risks?

The Committee would welcome written submissions on the main impacts of convergence and the key areas of legitimate public policy interest which arise. The Committee will draw on this evidence to make forward-looking but concrete recommendations. To assist those making written submissions, what follows are a number of the broad themes on which the Committee would be interested to receive evidence and opinion, as well as a number of the specific questions which might arise from considering them. You need not address all these areas or questions. The Committee would also welcome any other views, and practical proposals, of which stakeholders think the Committee should be aware. Equally, should the Committee need to follow up on a particularly helpful piece of evidence or one that touches on a pivotal area, they may invite individual witnesses to submit supplementary evidence on specific points of interest.

*Key, overarching issues*

- Setting the scene for the inquiry, what is the best definition of convergence?
- To what extent has convergence already happened, or is it a process that is still underway? Has the ‘dust settled’?
- What are the key changes which have occurred and are likely to occur in its wake (in production, distribution and consumption of content)?
- What are the major themes which emerge with important and legitimate public interest? What are the potential points of focus for the inquiry?
- Which roles (e.g. editorial, commissioning) are being performed by software or by people other than those who would have traditionally carried them out? In each case, what effect does this have on the output of the role, and the extent to which it falls under appropriate legal or regulatory oversight?
- How effective a response is the current legal/regulatory regime to the new converged world? How, if at all, do the purposes and objectives of this regime have to change in light of convergence?
- How much do different media industries still exist? What are the important differences between them which have implications for any potential need for different legal/regulatory systems?
- Is it still possible/desirable to have different approaches for e.g. broadcasting and the internet?
- Can there be an overarching framework of the type suggested by some? How could this work? Would it need to take a more or less active approach than we are currently used to?
- Could a regulator set some broad principles but then allow different parts of the content sector to develop their own approaches, consistent with public expectations for different media and platforms?
- How are the tools and mechanisms of leverage affected by convergence? Are the current tools decreasingly relevant? Do they need to be re-thought? What are the practical options available if we think more needs to be done?

- To what extent can a national framework function in an increasingly digital world? What role should Internet providers and other intermediaries, aggregators and so on be asked to play, and can they be brought within a UK based regulatory framework? Do jurisdictional boundaries put these participants in the media world beyond our reach and can nothing, therefore, be done?
- Should there be an overall goal/approach to policy on convergence—a guiding principle?

### *Convergence and content standards regulation*

- How much are consumers aware that the content they engage with over the same platform may have a legacy separate from its competitors, leaving it subject to different regulation?
- To what extent are consumers satisfied with the different approaches? What do consumers expect and need in the way of content standards and protection in a converged world?
- What are content suppliers themselves doing in response to the mixed bag of standards they have to adhere to, and how transparent and accountable are their varying approaches?
- What impact does convergence have on increasingly important issues such as privacy and data protection?
- Where should such powers to intervene be located? Should there be one regulator for all content? Should this be separated from the regulation of competition?

### *Convergence and competition*

- What and who are the emerging holders of power in the new converged world? How do they relate to and alter the traditional holders of power? What is their effect on plurality, and how should plurality in the context of these new players be ensured; is it better that they are diverse enough to provide external plurality, or that they are committed to providing access to diverse sources, offering a form of internal plurality? How should such ends be achieved?
- How much does convergence call for a different approach to thinking about the definition of communications markets and competition? How should the relevant markets and market power be defined in a rapidly changing world?
- To what extent does the packaging of services (e.g. triple play bundles) and in particular the packaging of delivery services with content services raise to competition?
- What are the effects of vertical integration on the plurality of voices, and diversity of tastes represented in content?
- What is the right regulatory structure/framework for competition in the light of convergence? Should responsibilities continue to be shared by a number of separate authorities or swept up into one? How effective / relevant is this shared responsibility now?

- In sum, how can we secure effective competition which will deliver great value to consumers and encourage innovation and investment in the UK?

### *Convergence and content creation*

- Separately from any impact it may have on the industry as a whole, what impact, if any, does convergence have on responsibilities for the public provision of high quality and diverse content made in and about the UK? What, if any, impact does it have on public provision for access to such content?
- How should such public provision be secured? How, if at all, are the purposes of the licence fee affected by media convergence? What incremental changes to public funding or other forms of support might be of value?
- Can the UK continue to play a key role globally as a content creator? What is the impact of globalisation on the nature and economics of content? How are the economics of production changing in light of convergence?
- What is the impact on the industry of the need to provide ‘hybrid products’? How are the skills and practices of production changing? To what extent is suitable training in place to equip students with all of the skills they may require?
- In sum, how best can we ensure the UK continues to produce and consume high quality content which meets not only consumer demand but key social and cultural goals, against a background of economic pressures, changing consumer tastes, and globalisation of the content industry?

2 August 2012

## APPENDIX 4: GLOSSARY

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A short glossary of the acronyms used in this Report is shown below:

ASA	Advertising Standards Authority
AIP	Administered Incentive Pricing
ATVOD	Authority for Television On Demand
AVMS	Audiovisual Media Services Directive
BARB	Broadcasters' Audience Research Board
BBC	British Broadcasting Corporation
BBFC	British Board of Film Classification
DTT	Digital terrestrial television
EPG	Electronic programme guide
Hz	Hertz
ISP	Internet service provider
MHz	Megahertz
ODPS	On demand programme service (as defined in the AVMS)
OFCOM	The Office of Communications
PCC	Press Complaints Commission
PEGI	Pan European Game Information
PSB	Public service broadcaster / broadcasting
TBC	To be confirmed
TV	Television
UHF	Ultra high frequency
VoD	Video on demand
VSC	Video Standards Council
WoCC	Window of Creative Competition

## APPENDIX 5: MODELS OF SELF REGULATION, CO-REGULATION AND STATUTORY REGULATION

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The following note on models of self regulation, co-regulation and statutory regulation was provided by Ofcom in evidence to the Leveson inquiry.<sup>99</sup>

### Models of self regulation, co-regulation and statutory regulation

We have previously set out for the Inquiry our views on when self regulatory, coregulatory and statutory regulatory models are most effective. In summary our view is:

- Self regulatory models are industry designed and led, allowing the industry to define an approach best suited to achieving its desired outcomes. Self regulatory systems rely on a strong alignment between the incentives of participants and the wider public interest. Membership is voluntary and there are no formal legal backstops to enforce the rules of the schemes. In the absence of alignment between the interests of the industry and the public interest, self-regulatory regimes are unlikely to prove effective when confronted by circumstances which present a tension between the public interest and the corporate interests of industry players.
- Co-regulatory models typically provide more industry involvement than statutory regulation and can be particularly effective when there is widespread industry support for the objectives of regulation. They require periodic monitoring by a backstop body to ensure effectiveness and can require the backstop body to carry out enforcement activity. Co-regulation can, like self regulation, also struggle where there are pronounced tensions between commercial interests and the wider public interest, but usually less so than self regulatory models. This is because the existence of the backstop body obliges the participants to find a way of resolving the inherent problems, or else face some kind of sanction from the backstop body.
- Statutory regulation is usually carried out by an independent body, accountable to Parliament and subject to scrutiny by the National Audit Office. It is usually the most effective model where there is a clear divergence between commercial interests and the wider public interest.

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<sup>99</sup> Ofcom, 'Submission to the Leveson Inquiry on the future of press regulation: A response to Lord Justice Leveson's request' April 2012. Available online: <http://media.ofcom.org.uk/files/2012/04/Ofcom-Submission-to-the-Leveson-Inquiry-April-2012.pdf>