

Small Screen: Big Debate Consultation The Future of Public Service Media

Summary

Virgin Media welcomes the opportunity to participate in the debate on the future of public service media ('PSM') in the UK. Our contribution stems not only from our position as a pay-TV service provider, but also draws on our experience in the telecommunications market more broadly as some of the changes happening in the connectivity space will fuel the adoption of new ways of consuming content.

We have played, and will continue to play, a leading role in the digitisation of the UK market. Since 2013 when Virgin Media was acquired by Liberty Global plc, we have spent more than £8.7bn on upgrading and expanding Virgin Media's network, extending it to an additional 2.4 million premises to cover more than half the country – more than all of the alternative providers combined. We are also upgrading our network to bring next-generation gigabit broadband to our entire UK footprint by the end of 2021 – a pace unmatched by anyone else.

We, together with our parent company Liberty Global, are a strong believer in the benefits of the fixed-mobile convergence (FMC) and are on a path to become a converged provider pending a regulatory approval of our Virgin Media / O2 joint venture. We expect the new joint venture to be able to deliver £10bn investment in the UK's broadband network over the next five years, expand 5G and build to additional premises.

The joint venture, and the associated investments, will accelerate the availability and take up of FMC propositions in the UK. Crucially, FMC will allow our customers to consume content seamlessly across all their screens and devices, both inside and outside the home.

Access to great content, including PSM, is a key part of this strategy. We value highly the contribution to the UK media made by public service broadcasters (PSBs) and in particular the diversity and range of content the system supports and the wider impact it has on the creative economy in the UK. We therefore have a shared interest in ensuring that the PSBs and the broader PSM ecosystem in the UK continues to be vibrant and world-leading in the long-term. As a key partner for UK PSM, we welcome Ofcom's review.

There is good reason to be optimistic about the future of UK PSM and the resilience of the PSBs to a changing sector. We see significant evidence that the PSBs have the potential to remain popular and will likely still comprise the majority of all viewing in ten years. Their ability to bring together mass audiences at a given point in time is unlikely to be rivalled by Subscription Viewer on Demand (SVoDs). Furthermore, most PSBs have strategies in place to adapt to the shift in viewing patterns away from linear to on-demand. There are encouraging signs of progress. They are finding new ways to respond to competition and adapt to changes in technology. They are also finding new and valuable advertising opportunities.

Nevertheless, we recognise that the changing technological landscape brings challenges for the PSBs. Fragmentation contributes to these challenges. Public service broadcasting in the UK is more fragmented than in many other countries in Europe. There are three commercial PSBs plus the BBC. This structure can make a valuable contribution to the PSM ecosystem by promoting diversity in content. By better meeting the interests and needs of different audiences, such diversity can help maintain the reach and relevance of PSM for viewers. Furthermore, it may also foster competition between PSM providers, further enhancing the quality and innovativeness of UK PSM.

But it also creates challenges for both viewers and the PSBs. It means that viewers may find it difficult to navigate and find PSM content across the various platforms each of the PSBs operate, and that the PSBs are inevitably missing out on a range of synergies, including not fully exploiting the opportunities available to them from pooling audience data.

It also means that individually the PSBs have limited scale. Many of the PSBs' rivals operate at a much larger scale and have access to greater financial resources. This means that their international rivals are better placed to invest in content and their technology and viewer experience.

In addition, PSBs can find it hard to be as agile as some competitors in the face of a rapidly changing market. The PSBs are limited in their ability to secure new sources of funding to allow them to better innovate and compete against the likes of Amazon and Netflix. This is further hindered by their scale.

In our view these challenges are well worth seeking to address. The regulatory and policy response needs to enable the scope for considerable transformation of the PSBs and their business models. Incremental changes to the regulatory framework, designed to shore up legacy models, risk not being enough. Extending PSM prominence to digital platforms will not on its own address the fundamental challenges of fragmentation and sub-scale operations. Furthermore, viewers and partners should not be expected to pay substantially more to access PSM content (or receive a worse service) when there are opportunities for the PSBs to improve materially their efficiency and effectiveness.

The policy framework needs to support further collaboration and strategic partnerships. This will directly address the fragmentation and sub-scale PSB operations, but also will support the PSBs in attracting fresh sources of funding and investment. In this context, we welcome Ofcom's acceptance that it would be *"important for any competition assessment of new partnerships to take into account changing market dynamics and global competition"*.

In addition, the regulatory framework needs to be more outcomes-focussed. Regulation needs to create a framework that will enable the PSBs to be more flexible and agile in responding to market threats and competition, and to benefit from changes in technology, new advertising opportunities and evolving patterns of consumer behaviour. There needs to be more emphasis on the PSM outcomes policymakers want to achieve. In this context, we broadly welcome Ofcom's proposed regulatory and accountability framework.

While we welcome these changes to the regulatory framework, we do have serious concerns about the PSB proposals to change the PSB Compact through a 'regulated must offer'. As we note above the challenges are wider and deeper than this. Moreover, this specific proposal has very considerable weaknesses.

The supply, features and prominence of the PSBs' players are currently the subject of multiple commercial negotiations and agreements, not conditioned by laws or regulations: arguably the best

way for PSBs to discover ‘fair value’ for this content. These arrangements seem to work reasonably well – ITV has said that it has agreements with 35 platforms¹ – likely because, as Ofcom notes, PSB programming is very popular with UK audiences. The evidence of upcoming systemic market failures – the absence of PSB on-demand players from platforms or “exploitative” terms that PSBs have to accept to be on these platforms – is patchy, and so the bar on intrusive regulation should remain high.

Nevertheless, the PSBs propose that rule makers shift the balance in these negotiations to advantage commercial PSBs in their discussions with “Qualifying Undertakings” (QUs). The hope seems to be that the ‘global platforms’ will be persuaded to buy extras not supplied in a stripped back ‘regulated must offer’. Unfortunately, this proposal mires regulators in detailed considerations about where to draw a line between what is in and out of the regulated offer. It also risks a series of stand-offs where the QUs take only the regulated offer, and the PSBs lose viewers to higher specified and easier to navigate on-demand players (including the BBC’s, which is supplied “*in full*” due to the BBC Framework Agreement already in place). As a consequence, the commercial PSBs will likely make their on-demand offers as attractive as possible to prospective consumers and take the benefit from carriage and prominence in viewership, better targeted advertising and not having to share revenue; with no money changing hands.

We suspect that the motivation behind the PSBs’ proposal is to reverse engineer into legislation and licences a bare-bones *broadcast* regulated offer to extract payments from domestic pay-TV providers. There is no market failure (or “asymmetric economics”) to address between PSBs and pay-TV providers – all the players are already carried prominently by these providers. However, the paucity of the proposed broadcast regulated offer looks intended to require transfers of cash from the UK platforms to avoid losing customers. In effect, it is designed to create the asymmetry in bargaining power that the PSBs have alleged they are victims of when they talk to the “global platforms”.

Ofcom rightly makes no substantive case for value transfers of this kind: neither how they are an improvement in the existing outcome nor why they might be in the public interest. Indeed, it is not the job of the regulator to make the commercial PSBs immune from competition, or to dampen their incentives to innovate – any more than it should protect Virgin Media and Sky from the pain of customers cutting the cord to their pay-TV bundle.

The balance of payments issue was given a thorough review in 2016 and government endorsed a continuation of the zero net fees policy. We see no good reason for this to change, not least because it would encourage the pay-TV providers to want to *reduce* PSB viewing as well as the deleterious effect it would have on broadband investment, and, we expect, non-PSB investment in programming.

Ofcom can better enhance PSB broadcasting by having backstop powers to step in to resolve disputes about genuine market failures and by being clear in advance, through the publication of guidelines, about how it would adjudicate. This model is used for other types of regulation and it allows for developments in technology.

If we do end up with regulation that specifies broadcast and on-demand must offer rules, these should be designed with the customer, and the ends of PSB broadcasting, in mind. It would make no sense to regulate into existence stand-offs between the commercial PSBs and global platforms which encourage consumers to go elsewhere for a better experience. At a minimum these must offer rules

¹ Said by Magnus Brooke of ITV at a Westminster Media Forum event in December 2020 on the future of PSB



should include broadcast and catch-up for the PSB channel, the ability for customers to record content (which is a separate consumer right) and the supply of metadata.

Virgin Media

March 2021

Overview

We explain in this response why we are relatively optimistic about the future opportunities for public service broadcasting. The evidence suggests that the PSBs are starting to embrace the challenge of responding to changes in viewing habits;

However, the bulk of this response is concerned with examining the case for designing regulation to engineer a transfer in value (cash) between QUs and the commercial PSBs. We argue that this regulatory construct *cannot* uncover fair value, is more likely to result in the kind of exploitative pricing practices that these PSBs want to avoid, and that, in any case, the value transfer objective is unlikely to be met in respect of on-demand regulation.

Our experience suggests that the purpose of the PSBs proposal is to extract substantial payments from domestic pay-TV providers. We outline why we think that this is not desirable policy and point to an absence in the consultation of any justification from Ofcom for its adoption.

Drawing on experience of other regulation, we suggest that there could be a less intrusive path to ensuring the carriage and prominence of the PSB players in the form of backstop powers, with clear guidance about how these would be exercised.

Finally, we make the case that Ofcom needs to expand its definition of universality to reflect the changes in viewing habits and how the SVoDs are responding. Through enlightened self-interest, the SVoDs (and others) will likely become at least partial substitutes for the official PSBs for substantial (younger) cohorts of the population. This will benefit audiences and make the UK's TV ecosystem stronger.

We welcome Ofcom's review

1. We welcome the opportunity to participate in the debate on the future of PSM in the UK. Our contribution stems not only from our position as a pay-TV service provider, but also draws on our experience in the telecommunications market more broadly as some of the changes happening in the connectivity space will fuel the adoption of new ways of consuming content.
2. Virgin Media provides linear and on-demand TV services to nearly 3.5 million households in the UK using our advanced cable TV platform. We carry all the PSB's channels as well as their on-demand players. Over 50% of the viewership of our linear services is for PSB channels. Our customers also use our high-speed connectivity services to consume TV content (both from the PSBs and others) across a broad range of devices. Providing our customers with convenient access to content, including PSM, is therefore a core part of the services we provide.
3. We have played, and will continue to play, a leading role in the digitisation of the UK market. Since 2013 when Virgin Media was acquired by Liberty Global plc², we have spent more than £8.7bn on upgrading and expanding Virgin Media's network, extending it to an additional 2.4 million premises to cover more than half the country – more than all of the alternative providers combined. We are also upgrading our network to bring next-generation gigabit broadband to our entire UK footprint by the end of 2021 – a pace unmatched by anyone else.
4. We, together with Liberty Global, are a strong believer in the benefits of FMC and are on a path to become a converged provider pending a regulatory approval of our Virgin Media / O2 joint venture. We expect the new joint venture to be able to deliver £10bn investment in the UK's broadband network over the next five years, expand 5G and build to additional premises.
5. The joint venture, and the associated investments, will accelerate the availability and take up of FMC propositions in the UK. Crucially, FMC will allow our customers to consume content seamlessly across all their screens and devices, both inside and outside the home.
6. Access to great content, including PSM content, is a key part of our FMC strategy. We value highly the contribution to the UK media made by PSBs and in particular the diversity and range of content the system supports and the wider impact on the creative economy in the UK. We therefore have a shared interest in ensuring that the PSBs and the broader PSM ecosystem in the UK continues to be vibrant and world-leading in the long-term. We therefore welcome Ofcom's review.

² Virgin Media is part of Liberty Global, one of the world's leading converged video, broadband and communications companies, with operations in seven European countries. Liberty Global delivers market-leading products through next-generation networks that are consumed by 26 million subscribers across its brands. Liberty Global also holds material stakes in a range of media companies across Europe, including ITV, All3Media and Lionsgate.

There's good reason to be optimistic about the future of UK PSM

7. The evidence is clear: citizens value public service broadcasters and they will continue to play an important role in the UK's TV ecosystem.³ The BBC is the PSB most valued by viewers⁴ because of its original programmes, in particular its news content, and the fact that it is seen as unbiased, trustworthy and reliable.⁵
8. Advertisers also continue to value PSB broadcasters because of their *unique* ability to gather together mass audiences to experience live events and compelling drama: ITV's 'The Pembroke Murders' had 6.3 million viewers for its first episode⁶ and the final of 'The Great British Bake Off' attracted a record-breaking 9.2 million viewers for Channel 4.⁷ ⁸ ITV had 761 programmes with audiences of over five million in 2019.⁹ This unique ability was recently acknowledged by the Head of ITV Studios, Julian Bellamy, who said "*never underestimate the power and resilience of free to air platforms ... [some] bring 8, 9, 10 million people on to a platform in a 60 minute window. No streaming platform in the world can do that.*"^{10 11}
9. The data show differences in PSB viewership by age cohort, with broadcast content only accounting for 31% of 16-34s viewing per day compared with 56% for all adults.¹² The teenagers of today might not adopt the viewing habits of their parents, but one in four people in the UK will be aged 65 or over by 2050.¹³ Enders Analysis shows that the UK's population growth will come almost entirely from the over-55s (table below).¹⁴ This audience will have aged with traditional linear broadcast content as a significant part of their viewing habits: recent research undertaken for Ofcom also suggests that, despite the

³ For example: "It is always nice to watch a British programme because they are close to home and they are from a different point of view that you can relate to." **Male, 22-24, Leeds**

"I think the whole style I just enjoy more... Even just the language, the way things are presented, I don't know it's just an almost kind of homely feeling that you get around it that you might not necessarily get to recognise through a big American production. Maybe it just feels a bit more rustic and real..." **Female, 25-39, Belfast** 3.17

⁴ https://www.ofcom.org.uk/data/assets/pdf_file/0025/199105/psb-omnibus-survey-findings.pdf

⁵ https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0028/208765/psb-quantitative-research-findings.pdf, page 3

⁶ <https://www.itv.com/news/wales/2021-01-12/itvs-the-pembrokeshire-murders-launches-with-63-million-viewers>

⁷ <https://www.4sales.com/latest/2020-11/news/great-british-bake-s11-final-viewing-figures>

⁸ https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, pages 16-17

⁹ Enders, ITV FY 2019 results

¹⁰ <https://www.ft.com/content/394d4ae2-efe4-4e67-a367-e4248e04a38a>

¹¹ ITV has 92% of all commercial audiences over 7m (<https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/ITV%20Plc%202020%20Full-Year%20Results%20Presentation.pdf>)

¹² https://www.ofcom.org.uk/data/assets/pdf_file/0010/200503/media-nations-2020-uk-report.pdf, pages 8-10

¹³ <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/august2019>

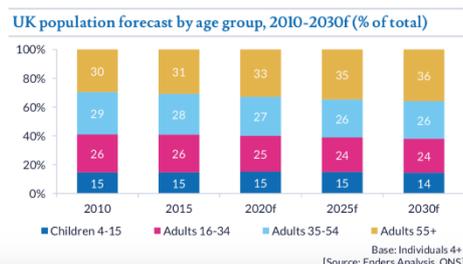
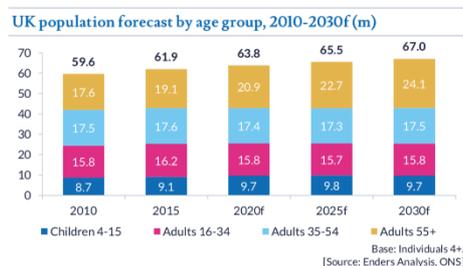
¹⁴ Enders Analysis, 2020

variations in how people of different ages currently access PSB content¹⁵, they see an important role for it in the future.¹⁶

The UK's population growth over the next decade will come almost entirely from the over-55s

- The UK's population is both growing and ageing. Based on ONS data, we forecast overall population growth of 5% between now and 2030, adding 3.2 million more people aged 4+ in this timeframe
- This growth will be driven almost entirely by the cohort aged 55+, which is predicted to increase in size by 15%, whilst all younger cohorts are expected to remain relatively constant in absolute numbers
 - Over-55s are projected to account for 36% of the population in 2030
- It is critical to recognise just how many people in today's older cohorts still have very long lives ahead, as this will have a significant bearing on the UK's overall media consumption habits, not just for the next 10 years, but for many more beyond
 - A 50-year-old woman today has a life expectancy of 87 years, with a 25% chance of living to 95 and a 10% chance of living to 99¹
 - A 50-year-old man today has a life expectancy of 84 years, with a 25% chance of living to 93 and a 10% chance of living to 97¹
- Whilst it is fashionable to keep up with the latest trends in tech and media, those who do often seem to forget that a considerable portion of society adopts changes much more slowly
- The rest of this report aims to quantify, where possible, the differences in habits and attitudes across age groups

¹ ONS, Life expectancy calculator, June 2019.



10. The PSBs are optimistic about the future of linear broadcasting. ITV's 2019 results note that linear TV remains more resilient in the UK than in other markets because of the higher spend on local and original content.¹⁷ Channel 4's results made a similar statement about the resiliency of linear broadcasting¹⁸ and the BBC wants to reintroduce BBC3 as a linear channel in 2022.

11. The Covid-19 pandemic underlined this resilience in spite of major challenges. Channel 4's recent update to its Annual Report noted that a better-than-forecast return in the advertising market helped the channel to end 2020 with a financial surplus¹⁹ and Enders Analysis showed that ITV's advertising revenue was up by 6% by November 2020.²⁰

¹⁵ The PSBs are well placed to 'connect with' younger cohorts. Unlike domestic pay TV providers, the PSBs' players can be downloaded, unencumbered by subscription or equipment requirements, to numerous devices, allowing users to benefit from a broad suite of functionality (including downloads of content). The PSBs thus have direct access to consumers and are not dependent on platforms as a distribution method. This is particularly relevant to younger demographics, who are 'mobile first' and spend little time in front of the (main) TV set.

¹⁶ https://www.ofcom.org.uk/data/assets/pdf_file/0024/199104/exploration-of-peoples-relationship-with-psb.pdf, page 10

¹⁷ <https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/annual-report-2019.pdf>, page 19

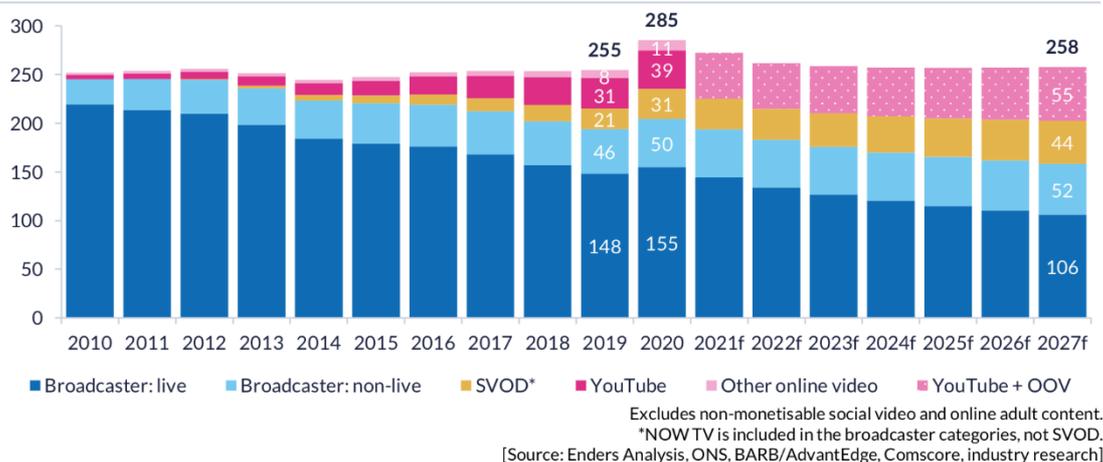
¹⁸ <https://annualreport.channel4.com/>, page 108

¹⁹ <https://www.channel4.com/press/news/channel-4-2019-annual-report-year-transformation-growth-digital-viewing-and-revenues-and>

²⁰ Enders Analysis, Long-term outlook for the media sector, December 2020

12. As predicted by Enders, the PSBs are still expected to account for the majority of viewing in five years' time.²¹ Despite the competition from the SVoDs, ITV is expecting to increase its schedule costs next year and maintain total viewing hours at 16.6bn.²²

Figure 1: Breakdown of total video viewing, UK individuals 4+ (mins/person/day)



The PSBs have changed strategies in response to the shift to on-demand viewing

13. Consumers have many more ways to satiate their viewing preferences than they did 10 years ago. They now have access to vast libraries of content that they view at a time convenient to them and they are prepared to pay for the experience. Even before the Covid-19 pandemic, 53% of UK households already subscribed to at least one SVoD service²³ and this increased to over 60% by the end of the 2020.²⁴ Ofcom welcomes competition between end-to-end broadband providers, Openreach’s wholesale customers and mobile network providers. It should also welcome competition for viewers’ eyeballs as a route to innovate and better satisfy consumer wants.

14. Evidence shows that the PSBs have already grasped the need to compete and have shifted strategies. Channel 4 has recently announced a digital-first strategy that will prioritise digital growth above linear ratings.²⁵ ITV’s strategic mission is now to become “a digitally led media and entertainment company that creates and brings our brilliant content to audiences wherever, whenever and however they choose”.²⁶ As Ofcom suggests, some further digital

²¹ Enders Analysis, Video viewing forecasts: Trends accelerated, February 2021, page 11

²² <https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/ITV%20Plc%202020%20Full%20Year%20Results.pdf> page 15

²³ https://www.ofcom.org.uk/data/assets/pdf_file/0010/200503/media-nations-2020-uk-report.pdf , page 21

²⁴ <https://www.barb.co.uk/trendspotting/tracker-svod/>

²⁵ <https://www.channel4.com/press/news/channel-4-sets-out-path-digital-future-new-strategy-future4>

²⁶ <https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/annual-report-2019.pdf>, page 2

innovation could come from PSBs working together to innovate their digital offerings by, for example, making their User Interfaces (UIs) more appealing to consumers.²⁷

15. There is some encouraging early evidence that these digital strategies are starting to have cut-through from an audience and advertising perspective:

- Ofcom's Media Nations report²⁸ states that broadcaster video-on-demand (BVoD) advertising revenue has increased by an average of 24% a year in real terms between 2015 and 2019, reaching £452m last year.
- A recent Ampere Analysis study showed that the UK is Europe's leading BVoD market, with all the main PSB platforms popular with consumers.²⁹
- On 27 January 2021 Channel 4 announced that *"Last week was All 4's BIGGEST EVER week in terms of views! Views are up an incredible 114% vs the same week in 2020"*. In addition, *"Our Archive content is up 102% vs the same week last year, contributing the majority of 41% of year-to-date views"*.³⁰
- Channel 4 wants 30% of its revenues to come from digital advertising by 2025³¹ and research shows that digital revenues are heading in the right direction for Channel 4 (up 18% to £163 million, which is double four years prior).³²
- The ITV Hub helps reach valuable younger audiences – over 80% of the UK's 16-34 year olds are registered. Younger viewers use the ITV Hub for simulcast viewing, as well as catch up.³³
- Ofcom's 2020 Media Nations report also showed that *"while the vast majority of users access BVoD services to watch on-demand programming, a fifth use them to watch live broadcast channel. This provides an indication that PSBs can evolve their online platforms into destinations for a wide variety of content formats"*.³⁴
- The PSBs have started to launch their own subscription services", such as BritBox and ITV's Hub+.

²⁷ https://www.ofcom.org.uk/data/assets/pdf_file/0010/200503/media-nations-2020-uk-report.pdf, page 20

²⁸ https://www.ofcom.org.uk/data/assets/pdf_file/0010/200503/media-nations-2020-uk-report.pdf, page 5

²⁹ <https://advanced-television.com/2020/07/20/report-uk-is-europes-leading-bvod-market/>

³⁰ https://www.4sales.com/_flysystem/s3filesystem/documents/Viewing%20Report%2028th%20January%202021.pdf

³¹ <https://www.channel4.com/press/news/channel-4-sets-out-path-digital-future-new-strategy-future4>

³² Enders: Channel 4, 2019, 2020 and beyond 3 November 2020

³³ <https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/annual-report-2019.pdf>, page 29

³⁴ https://www.ofcom.org.uk/data/assets/pdf_file/0010/200503/media-nations-2020-uk-report.pdf, page 20

- For the first time in 2019/20, growth in BBC iPlayer almost made up for the falls in broadcast TV viewing.³⁵
 - Enders also states that *"the broadcasters themselves are really largely now under the tent of Sky and Virgin Media in terms of [being] protected from actual technology risk. I think that we will see continued, very strong growth in the video-on-demand offerings of broadcasters"*.³⁶
 - ITV's full year results for 2020 show Video on Demand (VoD) revenue up by 17%³⁷ (with increasing simulcast viewing amongst younger audiences); 33m registered users of TV Hub and 2.6m global SVoD subscriptions.³⁸
16. The shift to on-demand viewing is an opportunity because targeting advertising increases its value and ad-skipping can be prevented. ITV launched its own addressable advertising platform, Planet V, in October 2020 which allows advertisers and agencies to control the purchasing of their campaigns across the ITV Hub.³⁹ Enders reports that, after the launch of Planet V, close to 100% of ads on the ITV Hub will be targeted and that targeting adds a premium of 10% on the CPMs of non-targeted ads, which are around £28.⁴⁰ Linear advertising can also be made more effective (and therefore valuable) by working with partners like Virgin Media who have, and can procure, data about our customers in order to inject targeted advertisements during the breaks.
17. On-demand viewing has the potential to afford content providers much more insight into (and potentially control over) consumers' viewing habits. This obviously manifests in being able to monetise those customers via targeted advertising, but it can be used to make recommendations, build profiles of customer habits and trends, etc. The ability to utilise better users' data transformed supermarkets, for example. It also means that (traditional) content providers can start to mirror the capabilities of the global platforms such as Google and Amazon.
18. The PSBs have also successfully hedged their competition risks by selling the rights to their own commissions to SVoDs or co-producing content. For example, ITV Studios sold *The Bodyguard* to Netflix in 2018 so that it could be viewed by subscribers outside of the UK and Ireland.⁴¹ Its 2020 deliveries to OTTs include: *Suburra*, *Love Island France*, *Queer Eye* and

³⁵ https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, page 31, paragraph 4.23

³⁶ <https://www.campaignlive.co.uk/article/enders-vod-growth-will-help-uk-broadcasters-reign-supreme-years/1703982>

³⁷ Although Enders Analyst Tom Harrington says that *"ITV has been the slowest of the major broadcasters to build up their online player. The reasons for this are probably structural: ITV's raison d'être is monetising large, simultaneous audiences which drive advertising premiums. That means the company may be incentivised to keep advertising spend in linear rather than online."*

³⁸ <https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/ITV%20Plc%202020%20Full%20Year%20Results.pdf>

³⁹ <https://www.itvmedia.co.uk/making-an-impact/planet-v>

⁴⁰ <https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/annual-report-2019.pdf>,

⁴¹ <https://www.itv.com/news/2018-09-18/bbc-bodyguard-richard-madden-keeley-hawes-set-to-go-global-as-itv-announce-new-deal-with-streaming-service-netflix/>

Becoming.⁴² BBC Studios has also done similar deals with the larger streaming platforms. Channel 4 and Netflix have co-produced a number of scripted and unscripted programmes.⁴³ When this programming is listed within SVoDs, it is always explicitly labelled as content made by each PSB, so that the viewer associates it with this broadcaster, and includes BBFC approved age ratings.^{44 45}

19. We too have been affected by, and have needed to respond to competition from the SVoDs. The latest financial results from our parent company, Liberty Global, report that Virgin Media lost 189,400 ‘enhanced video subscribers’ in the year to December 2020 – equivalent to just over 5% of the base.⁴⁶ [Confidential]

[Confidential]

Important challenges nevertheless remain

20. Despite these grounds for optimism the PSBs still face important challenges. Fragmentation contributes to these challenges. PSM in the UK is more fragmented than in many other countries in Europe. There are three commercial PSBs (each with separate ownership), plus the BBC. Furthermore, there are other commercial broadcasters producing PSM-like content.
21. This structure can make a valuable contribution to the PSM ecosystem by promoting diversity in content as the PSBs have somewhat differentiated and targeted propositions. By better meeting the interests and needs of different audiences, such diversity can help improve the reach and relevance of PSM. Furthermore, it may also foster competition between PSM providers by further enhancing the quality and innovativeness of UK PSM. But, it also creates challenges for both viewers and the PSBs.
22. Viewers have an unprecedented choice of content available to them. In order for PSM to compete effectively as the quality and availability of alternative content increases, it needs to be as easy as possible for viewers to find and consume PSM. Alternative content providers such as Netflix provide extensive libraries of content on their single, easy to navigate platform. Despite efforts to consolidate some PSM (e.g. through Freeview and BritBox), Ofcom’s research shows⁴⁷ viewers find it difficult to navigate and find PSM content

⁴² <https://www.itvplc.com/~media/Files/1/ITV-PLC/documents/reports-and-results/ITV%20Plc%202020%20Full-Year%20Results%20Presentation.pdf>

⁴³ <https://www.optomen.com/c4-and-netflix-land-first-unscripted-co-pro>

⁴⁴ <https://www.bbfc.co.uk/about-bbfc/media-centre/bbfc-and-netflix-announce-new-age-ratings-partnership-parents-demand-greater>

⁴⁵ ITV is also diversifying its revenue stream with its content production arm, ITV Studios, generating over 50% of its revenues in its latest set of results. See <https://www.itvplc.com/~media/Files/1/ITV-PLC/documents/reports-and-results/annual-report-2019.pdf>, page 5

⁴⁶ <https://www.libertyglobal.com/wp-content/uploads/2021/02/LG-Q4-2020-Press-Release.pdf> page 14

⁴⁷ https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, page 53,, paragraph 6.33.

across the various platforms each of the PSBs operate. This inevitably reduces the ability of PSM to compete for viewers (and therefore advertising revenues).⁴⁸

23. Fragmentation also means that the PSBs are likely missing out on a range of synergies. This means that they are less efficient than they could be. In the face of increased competition, improving efficiency needs to be a key priority for PSBs. It will help them to invest in content and R&D and therefore better compete. For example, the development of five separate VoD platforms across the PSBs involves clear duplication, but it also limits the ability of the PSBs to invest in advanced features and the quality of the viewer experience.
24. The potential for synergies extends well beyond the development of platforms. Partnering both with other PSBs and with other organisations could unlock other material synergies. For example, as Ofcom identifies, collaboration in content production is “*useful for sharing costs*”.⁴⁹ There are also likely to be opportunities to generate synergies in a whole raft of back office functions.
25. In addition, increasing the use of on-demand platforms creates opportunities for the PSB to use richer audience data to better tailor services and content to viewer preferences. Rivals such as Netflix make extensive use of such technologies to make their user experience as relevant and compelling as possible for different audiences. But, richer audience data also enables the PSBs to enhance their advertising proposition. Fragmentation means that the PSBs are missing opportunities to pool audience data. As a consequence, they are not able to fully exploit the opportunities available to them.⁵⁰
26. Fragmentation also means that individually the PSBs have limited scale. As Ofcom acknowledges, the PSBs are now operating in an increasingly global and online environment in which many of their rivals operate at a much larger scale and have access to much greater financial resources.⁵¹ This means that many of their international rivals are better placed to invest in both content and the technology underpinning their viewer experience. Furthermore, the rapid growth of content providers such as Netflix and Amazon means that the differential in scale is growing rapidly.⁵²
27. In addition, PSBs can find it hard to be as innovative as some competitors in the face of a rapidly changing market. This is both a function of their limited ability to secure fresh sources of funding to allow them to better innovate and compete (which is further hindered by their scale).

⁴⁸ As Ofcom notes (paragraph 4.29) this is likely to be particularly relevant to the younger audiences that consume relatively less PSM.

⁴⁹ https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, page 54, paragraph 6.35.

⁵⁰ As Ofcom notes “*there could be significant gains to the PSBs if they acted to share their data about their end viewers and for the commercial PSBs, their advertising customers*”. Ofcom, December 2020, Small Screen: Big Debate Consultation, paragraph 6.32.

⁵¹ https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, page 25, paragraph 4.4.

⁵² https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, page 26, paragraph 4.8.

A new framework is needed

28. The regulatory and policy response needs to enable the scope for considerable transformation of the PSBs and their business models. Incremental changes to the regulatory framework, designed to shore up legacy models, risk not being enough. Extending PSM prominence to digital platforms, for example, will not on its own address the fundamental challenges of PSB fragmentation and sub-scale operations. Furthermore, viewers and partners should not be expected to pay materially more to access PSM content (or receive a worse service) when there are opportunities for the PSBs to improve materially their efficiency and effectiveness.
29. The policy framework needs to support further collaboration and strategic partnerships. This will address *directly* the fragmentation and sub-scale PSB operations, but also will support the PSBs in attracting fresh sources of funding and investment. In this context, we welcome Ofcom's acceptance that it would be "*important for any competition assessment of new partnerships to take into account changing market dynamics and global competition*"⁵³.
30. In addition, the regulatory framework needs to be more outcomes-focused. Regulation needs to create a framework that will enable the PSBs to be more flexible and agile in responding to market threats and competition, and to benefit from changes in technology, new advertising opportunities and evolving patterns of consumer behaviour. There needs to be more emphasis on the PSM outcomes policymakers want to achieve.
31. In this context, we broadly welcome Ofcom's proposed regulatory and accountability framework. Ofcom argues that there would be audience benefits in "*establishing a more 'service neutral' approach to PSM delivery and regulation*". This could give the PSM providers greater flexibility and would move away from obligations that are tied to specific television broadcasting services. A 'service neutral' delivery approach better reflects the way that viewers now watch content across a variety of services, including content from the traditional PSBs.
32. Given the enhanced flexibility that the 'service neutral' approach would offer PSM providers, it makes sense that these providers should have to set out their delivery plans and be held accountable for them. This will ensure that audiences benefit from the more flexible approach. We therefore broadly agree with Ofcom that it is crucial that a more outcomes focused framework is underpinned with robust and transparent accountability measures.
33. While we welcome these changes to the regulatory framework, as we explain in the remainder of this response, we have serious concerns about the proposed 'regulated must offer' from the PSBs.

What is fair value?

34. In this section we characterise why and how the commercial PSBs (particularly ITV and Channel 5) are regulated, prior to discussing the PSBs' proposals for future regulation.

⁵³ https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, page 52, paragraph 6.30.

35. The broadcasting of sound and images has the ability to influence behaviour and attitudes in ways that have beneficial effects for society (well informed citizens, etc.). However, left to their own devices, commercial PSBs will not necessarily produce programming with these positive externalities. Programmes funded by advertising can have a lowest common denominator effect because they are made to attract the most eyeballs to sell to advertisers and commercial broadcasters may face a reduction in profits from making (or buying) 'worthy' programming.
36. The regulatory framework for the commercial PSBs is therefore designed to ensure certain types of programmes are made *and viewed*.⁵⁴ This is known as the PSB Compact: a mutually reinforcing set of rights and obligations applying to both producers and distributors; designed to ensure that UK citizens view programming with positive externalities. Parliament (and Ofcom) regulates directly through quotas to ensure that socially desirable programming is produced, and the State contributes by subsidising one input cost: spectrum. The Compact also ensures that this desirable programming is made available to view (the 'must offer' requirement) and consumed ('must carry', EPG prominence and ensuring that the content is free at the point of delivery for audiences).
37. Some PSBs have argued that regulation does not allow them to receive 'fair value' for their programming. In its recent submission to the DCMS Committee's inquiry on PSB, ITV states *"we [Parliament and Ofcom] must ensure that public service broadcasters receive fair value from TV platforms for their investment in content."*⁵⁵⁵⁶ This term is not well defined, but it appears to be akin to a market price for the PSB channel that would be derived through a process of commercial negotiation.
38. However, the PSB Compact has never been about an exchange of 'fair value'. The State does not receive fair value (presumably the amount it would receive at auction) for the DTT spectrum that it makes available to the commercial PSBs.⁵⁷ Virgin Media does not receive fair value for the prime EPG slots that it could sell to others,⁵⁸ or the subscribers that it attracts which are sold by the commercial PSBs to advertisers. Indeed, the PSB Compact

⁵⁴ We recognise that this is a simplified characterisation of PSB regulation. Licence conditions, for example, also require that the PSBs make a certain percentage of programming outside of the M25. Our contention is that these conditions do not 'bite' in that this would be done anyway. See Communications Chambers 2014 report on 'The Costs and Benefits of the C3 Licences' for further explanation.

⁵⁵ <https://committees.parliament.uk/writtenevidence/6799/html/>

⁵⁶ The PSBs' joint proposal also calls on Ofcom and the Government to ensure that the PSBs *"get fair value from their content"* on *"all major content distribution platforms"*.

⁵⁷ The PSB broadcasters are guaranteed access to spectrum, with reserved capacity on DTT multiplexes. As part of their licences, Channel 3 broadcasters receive half a DTT multiplex (PSB2), sufficient for 4.5 channels. Out of this capacity they must provide one channel to Channel 5, at a commercial rate, but in essence they receive the value of 4.5 SD channels. In addition the Channel 3 broadcasters have been allocated one HD slot out of five on the PSB3 multiplex.

⁵⁸ Browsing viewers are more likely to come across prominent EPG channels. The incremental viewing generated converts into advertising impacts that can be sold to advertisers. Moreover, the additional viewing generates incremental reach – and this reach enables the PSBs (ITV in particular) to charge a premium for their advertising.

cannot achieve 'fair value' if vital components of the deal (e.g., prominence) are untradeable because they are mandated through regulation.

39. The route out of the 'fair value' conundrum for the commercial PSBs is to relinquish their subsidies and PSB status, and negotiate with the UK pay-TV platforms a market price (which could be negative) for their PSB channels – so that all parties taking part in the deal have an opportunity to receive fair value for their contributions. This escape route has been recognised by Ofcom: *"the benefits to ITV and Channel 5 of being a PSB are broadly in balance with the costs of delivering the public service remit. If the benefits were at any stage to be outweighed by the costs, commercial PSBs could choose to stop being PSBs. The obvious next point to do so would be when their licences come up for renewal in 2024"*.⁵⁹ ⁶⁰
40. The PSB Compact has, *by design*, accepted a variety of cross-subsidies that will differ in quantum (and net direction depending on the pairwise parties involved.)⁶¹ It cannot be tweaked to ensure that justice prevails and the net of any payments ensures 'fair value' to the lucky recipient, because regulation prevents vital elements of the bargain from being negotiable. To manipulate the Compact so that some broadcasters apparently receive fair value for their end of the bargain (without ensuring that the same applies to all parties to the various bargains) seems manifestly *unfair*. We discuss the PSBs' joint proposal in the next section.

On-demand must carry / must offer

41. A key element of the PSBs' proposal is that the on-demand must offer requirement can be specified so that the QUs will end up writing a cheque in order to purchase additional features and services, for example, allowing users to download PSB content to their mobile device; recording or ad-skipping PSB content; accessing PSB metadata; or enabling PSB content to be accessed outside of their player app and presumably content only available on the player or content from portfolio channels.⁶² These services or features would be defined as outside of the regulated must offer requirement; which is the minimum set of services that *must* be bought by a QU.

⁵⁹ https://www.ofcom.org.uk/data/assets/pdf_file/0026/111896/Public-service-broadcasting-in-the-digital-age.pdf, page 4, paragraph 2.6

⁶⁰ By its own admission [on page 13 of 'The Future of PSM' consultation document], Ofcom has not undertaken a full analysis of the costs and benefits for PSBs in the current regulatory system. We think it highly probable that the commercial PSBs are adequately compensated for their PSB obligations. The 2014 paper by Communications Chambers paper on the 'Costs and Benefits of the C3 Licences' concluded that the benefit of the Channel 3 licence to ITV was approximately £87 million per year and that this figure was likely an underestimate of the true value.

⁶¹ We count at least 30 combinations for linear broadcasting: (Freeview, TalkTalk, Virgin Media, BT and Sky) multiplied by (BBC, ITV, S4C, STV, C4 and C5). This ignores the third dimension: the State; since the value of subsidised spectrum will differ between the PSBs.

⁶² https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0027/208818/psb-submission-broadcasters.pdf, page 6

42. That said, we note that there is an asymmetry built into the PSBs' proposal since this taxonomy is not applicable to either the BBC or S4C. Instead, it appears that the players of the BBC and S4C are supplied "in full" so that these channels are compliant with other existing regulatory requirements.⁶³ These PSBs, as a consequence, are presumably excluded from any payment for an "expanded offer" since there is no expanded offer. The anticipated benefits that will derive from the specification of the regulated offer will accrue only to a subset of PSBs.
43. The irony is that, in respect of on-demand services, the PSBs are in a 'fair value' world⁶⁴: the carriage, prominence and payment for services (like download to mobile) are set through commercial negotiations, unencumbered by regulation. The problem is that the PSBs do not like these arrangements because they believe that they "do not deliver fair terms".⁶⁵ Instead they want to design regulations to facilitate a payment from the QU to the PSB without any commensurate increase in their obligations (or, at least, this is absent from their proposal to Ofcom); this is typically known by economists as rent seeking.⁶⁶
44. As we argue above, this proposed regulatory construct does not result in a discovery of fair value. Furthermore, if the set of services that sit outside of the regulated offer are 'must haves' rather than 'nice to haves', the "asymmetric economics" that the PSBs complain of are reversed in their favour. It is the PSBs who can then levy "exploitative" terms.
45. Ofcom appears willing to go along with this because "[t]here is a question about the extent to which the long-term decline in broadcast TV advertising revenue can be offset by increases in other sources of revenue."⁶⁷ This statement is not backed by any quantitative analysis or acknowledgement that, at least a proportion of, these 'in cash' wealth transfers could be wasteful in that they deliver no additional PSB programming, but are transferred to shareholders as dividend payments (in effect, a windfall gain since there is no expectation that commercial PSBs would pay more for their licences in the future).
46. Moreover, it is not the role of Ofcom to protect the PSBs from competition and changes in viewing habits by instituting regulation that is designed to make up for the difference in revenue lost, thereby making the commercial PSBs immune from having to innovate, to shift strategies, or to improve their offer. In order for competition to work it has to have the potential to hurt. Ofcom also offers no analysis that the commercial PSBs will no longer be able to fund their essential public obligations. Noting that it is "difficult for the current PSBs"

⁶³ The proposal notes "BBC already has existing supply obligations on all its services as set out in the BBC Framework Agreement. **These obligations already require the full range of UK Public Services to be made widely available by the BBC.**" (our emphasis).

⁶⁴ Confidential

⁶⁵ See page 1 of the PSBs' joint proposal

⁶⁶ Bhagwati describes Directly Unproductive, Profit-seeking (DUP) activities as representing "ways of making a profit (i.e., income) by undertaking activities which are directly unproductive; that is yield pecuniary returns but do not produce goods or services....Insofar as such activities use real resources, they result in a contraction of the availability set open to the economy. Thus, for example, tariff-seeking lobbying, tariff evasion, and premium seeking for given import licenses are all privately profitable activities. However, their direct output is simply zero in terms of the flow of goods and services entering a conventional utility function." Directly Unproductive, Profit-seeking (DUP) activities, Jagdish N. Bhagwati, Columbia University.

⁶⁷ https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, page 34, paragraph 4.37

to “invest more in the online sides of their business” when “they still need to maintain investment in traditional broadcasting” is not a substitute for a proper quantitative analysis.

New rules for on-demand are unlikely to result in a transfer of wealth

47. The regulation advocated by the PSBs puts a very high predictive burden on the legislator/regulator because it must decide where to draw the line between what’s included and excluded from the regulated offer. It is unlikely that external regulators will understand enough about the specific incentives of the parties to design an effective set of rules. We anticipate a number of potential problems depending on whether the regulated offer is what we have termed under or over-specified:

Regulated Offer	Supplied (Only the regulated ‘must offer’)	Supplemented (the ‘must offer’ supplied by the PSBs and extras paid for by the QU)
Under-specified	Undermines PSB objectives	Exploitation as QUs could lose customers without paying for extras
Over-specified	No wealth transfer to commercial PSBs	Not applicable

- If the regulated offer is under specified (i.e., unappealing to viewers), but taken up by the QU who do not believe that they will lose customers as a consequence, the PSB objectives are likely to be undermined because viewers will go elsewhere i.e., to the SVoDs or YouTube;
- If the regulated offer is under specified, but the PSB player with the bulk of its features is ‘must have’ content for the QU, the commercial PSBs can charge “exploitative” prices because the QU is required to carry a regulated offer which *must* be supplemented with extras to avoid losing customers to rivals;⁶⁸
- If the regulated offer is over-specified i.e., it contains too many ‘extras’ so that those excluded have little incremental appeal for the QU, there will be no wealth transfer from QU to commercial PSB because the extras will not be paid for; although the latter will benefit from enhanced viewing from prominence.

48. We think it likely that most arrangements will end up in the first (‘supplied’) column above:

⁶⁸ An example would be if the regulated offer comes without metadata. The latter is required for EPG listings, search and recommendations. In these circumstances the commercial PSB would be able to charge “exploitative” prices. (see the PSB proposal: page 1).

- The apparent need for this type of remedy is premised on an *asymmetry* in bargaining power between the PSBs (other than the BBC⁶⁹) and the QUs. If many of the platforms are prepared to do without the commercial PSB players (i.e., they are not ‘must have’ features)⁷⁰ they are unlikely to want to pay for the extras available beyond the regulated offer – and they may even ask the commercial PSBs to pay to include non-PSB content with the player(!).⁷¹ If the regulated offer is under-specified (and therefore unattractive) the commercial PSB is likely to lose viewers (and therefore advertising revenue) to the BBC and the SVoDs;
 - The commercial PSBs will surely figure this out and decide to provide a fully specified version of their players (akin to those supplied to Freeview/Freesat).
49. In short, we think it unlikely that the PSBs’ joint proposal will result in significant payments for the extras available alongside the regulated offer. However, what appears to be unacknowledged by Ofcom is that even a zero net fees solution is a significant benefit – beyond the enhancement to viewership – because the must carry requirement allows the PSBs to avoid the prospect of *paying* “exploitative” prices to the QUs; for example, ITV claims that “*standard terms from the likes of Amazon and Samsung globally require on-demand players to give up 30% of their advertising inventory in return for inclusion on their User Interface*”.⁷²

Isn't this old wine in a new bottle?

50. Ofcom draws a distinction between linear and on-demand regulation in respect to ‘value extraction’. In reference to the former, Ofcom restates government policy that the ‘must offer/must carry’ exchange in the Communications Act should “*be on a ‘net zero basis’, and that neither the PSB nor the platform service materially gains from the carriage of the channels*”⁷³.
51. Unfortunately, the PSBs, in their submission, do not make this distinction. Their proposals “*cover PSB TV channels regardless of how they are delivered to consumers (e.g., whether broadcast or streamed) as well as the associated on-demand players (and content of the PSBs)*.”⁷⁴ A key component of the proposals is that the PSB benefits, presumably in the form of a cash payment from the use of “*additional functionality by the platform/UI operator which depends on the use of PSB content (ad skipping, recording, overlaying etc)*.”⁷⁵

⁶⁹ Connected TV gateways: Review of market dynamics, Mediatique, 2020, slide 29

⁷⁰ See <https://www.hdtvtest.co.uk/n/LG-brings-the-BBCs-streaming-apps-to-its-2020-TVs> “*Still it’s not clear if LG is regretting its decision not to renew its participation with Freeview – after all, its new 49=8-inch CX 4K OLED TV still appears to be selling like hot cakes even without those apps onboard*”.

⁷¹ An expansive definition of the on-demand must offer may be to the advantage of the PSBs (and be more consistent with the objectives of PSB broadcasting) because it could prevent a situation where a platform asks the PSB to pay for the supply of additional services.

⁷² <https://committees.parliament.uk/writtenevidence/6799/pdf/>

⁷³ https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, page 40, paragraph 5.24

⁷⁴ This is reiterated in the definition of: “In-scope Content Services” comprising the “PSB channels and qualifying VOD players”

⁷⁵ https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0027/208818/psb-submission-broadcasters.pdf, page 2

52. Given our doubts about the ability of the PSBs to gain additional value transfers through the specification of the regulated on-demand must offer, our concern is that the principal objective of their proposal is to construct a regulated *broadcast* must offer to achieve a wealth transfer from the domestic UK pay-TV platforms to the commercial PSBs (who alone would be able to supply the 'bare bones' broadcast must offer – given that the BBC will supply its channels in full). This is despite the absence of any market failure in the supply, carriage, prominence or attribution of the broadcast channels or VoD players of the PSBs on the UK pay-TV platforms. Put another way, the negotiating dynamics are different for the UK platforms. PSBs programming has the 'must have' "*characteristics that are associated with leverage and bargaining power*" (4.8). In the table in paragraph 47 the commercial PSBs/UK pay-TV platforms would be in the top right quadrant, with the former given the opportunity to charge exploitative prices; in contrast to the current commercial arrangements.
53. [Confidential]
54. [Confidential]
55. In 2016, the Government did consider whether broadcast regulation should be changed to engineer payments from UK pay-TV platforms to PSBs. It concluded in its response to the consultation on 5 July 2015 (emphasis our own):
- "*Government considers that the commercial PSBs are fairly compensated for their licensed PSB channels via the existing PSB compact (EPG prominence and spectrum in return for PSB obligations) an agreement which is underpinned in their PSB licences. Government therefore expects that there will continue to be no net payment between all platform operators and the PSBs for carriage of their licensed PSB channels going forward. If this situation appears to be at risk, the Government will consider again whether legislative change is required.*"⁷⁶
56. The Government identified a number of reasons⁷⁷ why "*the repeal of section 73 will not result in new charging arrangements between the commercial PSBs and Virgin Media and the PSB regulatory framework will ensue a zero net fee balance*"⁷⁸. For example,
- "*the PSBs receive a number of privileges and benefits [including guaranteed access to spectrum and EPG prominence] in return for obligations including an obligation that their licensed PSB services are made available throughout the UK free of charge*"⁷⁹.

⁷⁶ DCMS, The balance of payments between television platforms and public service broadcasters consultation report – Government Response, 5 July 2016 ("**DCMS Consultation Response**"), pages 4-5.

⁷⁷ DCMS Consultation Response, page 14.

⁷⁸ DCMS Consultation Response, page 15.

⁷⁹ DCMS Consultation Response, page 14.

- any further payment to the advertising-funded commercial PSBs "*would in effect remunerate the PSBs twice for the same broadcast*".⁸⁰
- "*these arrangements were agreed to and accepted by the commercial PSBs via the licence renewal process (licences run from 1 January 2015). The relicensing process considered the costs and benefits of PSB status via a hypothetical auction - the potential flow of funds from the repeal of section 73 was not considered as a part of this process*".⁸¹

57. In short, the Government concluded that there was no case for an additional value transfer above the benefit derived through prominence. To do so "*would remunerate the PSBs twice for the same broadcast.*" There are other reasons to be wary of defining a broadcast must offer to engineer such transfers:

- It creates odd and detrimental incentives for the pay-TV platforms. They would be motivated to put themselves in a position where they would be content to give up paying for the 'extras' to the regulated offer because the subsequent loss in value (through customers requesting discounts or departing for Freeview) would be lower than the amount they would pay to the PSB(s). In effect, a pay-TV provider would prefer that its customers watched non-PSB channels and would have an incentive to ensure that this happened. This is a departure from the current situation where Virgin Media has an incentive, through commercial negotiation, to enhance the enjoyment of customers who watch the commercial PSB channels.⁸²
- It could hinder good-faith discussions about the mutual creation of value, [Confidential]. Ofcom themselves encourages this type of approach, saying "*[d]eeper strategic relationships between PSBs and other key companies – particularly on platforms and distribution – could help PSM keep pace and compete effectively with global players.*"⁸³ In its recent results ITV notes that it intends to "*explore linear addressable opportunities*".⁸⁴

⁸⁰ DCMS Consultation Response, page 14.

⁸¹ DCMS Consultation Response, page 14.

⁸² Under the current arrangements, the pay TV platforms are required to provide EPG prominence to the designated PSB channels. Such prominence represents an opportunity cost to the pay TV platforms: the EPG slots could otherwise be sold to other channels. Prominence increases viewership and advertising impressions (versus slots lower down the EPG guide) and the revenue thereby generated is, in part, invested in programming. The value of the programming to a pay TV platform is derived from the importance that its customers attach to the content. However, this 'value', in part, reflects the prominence that the programmes are given on the EPG guide. Put simply, EPG prominence increases the value of the PSB channels to the customers of the pay TV operator because they are more likely to watch them. In effect, the pay TV platform has already paid in kind for the programmes that it carries.

⁸³ https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, pg 5, paragraph 1.19

⁸⁴ <https://www.itvplc.com/~media/Files/1/ITV-PLC/documents/reports-and-results/ITV%20Plc%202020%20Full-Year%20Results%20Presentation.pdf> page 27

- Other effects will depend on the extent to which the value extraction is asymmetric across competing platform providers and whether higher costs can be passed onto customers:
 - In a scenario in which costs are passed through, consumer choices may be distorted relative to other platform operators. Some consumers may pay higher prices if they stay with Virgin Media. Others may no longer take pay-TV from Virgin Media at all and switch to free services such as Freeview or Freesat.
 - Where costs are not passed on, Virgin Media would have to absorb most or even all of the additional cost. This would force Virgin Media to make savings elsewhere. This might be achieved by reducing levels of service, or reducing investment in Virgin Media's pay-TV offering (e.g. reducing expenditure on other content, interactive services, or future product development and innovation). This would ultimately lead to the degradation of Virgin Media's service. In turn this would dampen competition in the markets in which Virgin Media is active, as Virgin Media will become less attractive relative to competing platforms.
 - An increase in Virgin Media's costs may also be expected to have a direct adverse impact on the investment case for network expansion because, on average, the value of each customer added would be reduced. This would, among other things, dampen network competition to the detriment of consumers in the long run.

58. Ofcom has not made the case that law and regulation should be updated to engineer a transfer in wealth from UK pay-TV platforms to the commercial PSBs. The justification for extending the PSB Compact to on-demand programming is premised on the prospect of enduring market failure: either the absence of the PSB players from UIs or “unfair” terms; neither of these concerns exist for UK pay-TV platforms, nor are they likely to. Moreover, there are detrimental consequences to further subsidising the commercial PSBs beyond the prominence, eyeballs and connectivity that we already provide.

Is there another way?

59. To date, there is also only limited evidence of an upcoming structural market failure in the on-demand world that will result in the sustained absence of PSB players from connected TVs etc. Ofcom gives the example of LG 2020 models⁸⁵ (which now include the iPlayer) and unfavourable terms required by Amazon’s Fire TV as standard; although there is no substantiation of why these terms are unfavourable – it could be that the benefit that the PSBs derive from the reach and eyeballs provided by Amazon justifies paying over a

⁸⁵ Note that in its recent results, ITV says that ITV Hub “is available on 28 platforms, and is pre-installed on the majority of connected televisions currently sold in the UK”. <https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/ITV%20Plc%202020%20Full%20Year%20Results.pdf> page 23.

proportion of advertising revenue (which impact for impact may be higher than that earned broadcast advertising).⁸⁶ It also obviates the need to duplicate the significant investment in fixed costs needed to replicate a distribution network akin to Amazon's (who also handle the marketing and customer relationship). Instead, the commercial PSBs pay a variable cost, the quantum of which is dependent on how well it does in attracting viewers. Ofcom could much better scrutinise the PSBs' inference in their proposal that the commercial terms offered by "major content distribution platforms" are "exploitative".⁸⁷

60. The manufacturers of TV set-top boxes point to a different set of obstacles in reaching agreement with the commercial PSBs. Ironically, they claim that the terms of the contracts which the commercial PSBs seek to impose "in effect turns (sic) the PSBs into gatekeepers and quasi-regulators of smart-TV platforms, which acts as a barrier to the market. The result of this is that the PSBs can impose unbalanced commercial terms that discriminate between manufacturers and impact consumer choice".⁸⁸
61. Given the conflicting evidence and the difficulty of defining a regulated must offer that stands the test of time and does not result in a 'race to the bottom', it might be better to contemplate a less intrusive form of regulation that is only engaged if a dispute is referred to the regulator (which it may choose to reject if it believes that a settlement can be reached through commercial negotiations). The regulator would set out in advance guidelines on how it would adjudicate a dispute with the objective of nudging the parties towards finding a solution without the involvement of a third party. In its review of prominence for public service broadcasting, Ofcom recommended that it "should have the power to give guidance and set rules on how the new framework would apply in practice".⁸⁹ Ofcom also added that, if there were an availability obligation "we think it would require a backstop mechanism to determine terms if commercial negotiations fail".⁹⁰
62. A good existing analogy is Ofcom's approach in relation to access disputes. Ofcom has set out extensive guidance about how it would resolve disputes about the Access to Infrastructure Regulations 2016.⁹¹ The guidance is "intended to assist Parties **in reaching a commercial agreement** on issues falling under the ATI Regulations" (paragraph 1.4, emphasis our own). The guidelines cover:
 - the form and manner in which disputes should be referred to Ofcom;

⁸⁶ A priori we might not expect many incidences of market failure given Ofcom's evidence of the popularity of PSB programming. At a Westminster Media Forum event in December 2020 on the future of PSB, Magnus Brooke of ITV said "at the last count ITV Hub was on about 35 online platforms".

⁸⁷ "even if PSBs can get onto those platforms and interfaces, if the terms for that inclusion, set by the platforms, are exploitative and do not deliver fair terms for popular and societally important content then the PSB regime will be undermined." Page 1 of the Joint PSB Proposal

⁸⁸ https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0028/208819/psb-submission-tech-uk.pdf,

⁸⁹ https://www.ofcom.org.uk/_data/assets/pdf_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf, page 34, paragraph 6.6

⁹⁰ https://www.ofcom.org.uk/_data/assets/pdf_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf, page 36, paragraph 6.17

⁹¹ Guidance under the Communications (Access to Infrastructure) Regulations 2016, December 2016.

- the process to be followed and the information/evidence Ofcom requires in order to determine at the outset whether the statutory grounds for a dispute referral are met;
 - the kind of information Ofcom might expect the parties in dispute (Parties) to submit to Ofcom during the course of proceedings to enable Ofcom properly to determine the dispute;
 - the remedies available to Ofcom in any given case; and
 - some of the considerations Ofcom is likely to take into account to determine a dispute.
63. A dispute cannot be referred to Ofcom until there is no realistic prospect of the dispute being resolved throughout that reference and Ofcom requires the parties to provide evidence that they have each made genuine efforts to enter into good faith negotiations.
64. In respect of disputes about the terms for access to the infrastructures, Ofcom guides that it will:
- ensure that the infrastructure operator has a fair opportunity to recover its costs; and
 - take into account the impact of the access on the infrastructure operator's business plan, including investments made by the operator, in particular in the physical infrastructure used for the provision of high-speed electronic communications services.
65. In the application of this approach to PSB regulation, Ofcom could offer general guidance about what must be offered (at zero fee) in order to warrant carriage and prominence on the relevant platform / UI. For example, it could require the PSBs to supply a broadcast or on-demand offer equivalent to that supplied to Freeview/Freesat. This would be akin to a type of non-discrimination requirement.

In the alternative

66. Ofcom may choose instead, in line with the PSB's proposal, to define a set of services or features that must be offered for both broadcast channels and qualifying VoD players. For the reasons that we outline above, we believe that the regulated must offer should comprise a package that both secures the PSB objects (in short, it should be 'consumable') and not exclude services or features that complement the regulated offer; this will deter the PSBs from exploitative pricing practices.
67. At a minimum these should include broadcast and catch-up for the PSB channel, the ability for customers to record (which is a separate consumer right) and metadata. This seems to chime with the grain of Ofcom's thinking; the regulated offer *"would always be able to*

receive “core” services should....negotiations break down” (paragraph 5.31). We explain above in paragraph 49 why it may be in the best interests of the commercial PSBs to have the must offer regulation defined expansively.

Others can (and do) make PSB-like programming

68. It is often claimed that broadcasting can only be ‘PSB’ if it meets a universality threshold and, by extension, putting SVoDs and public service broadcasting together in the same sentence amounts to a category error. Ofcom clearly thinks that universality is important: “[w]e consider that public service broadcasting must continue to be universal if it is to deliver these benefits in future”.⁹²
69. In this section we ask whether non-PSB providers of content can meet the universality test; we conclude they can. This is not the same as asking whether programming that appears on, for example, Netflix or Sky can look like it was made by the BBC; we take this to be obviously true: see for example, The Dig, Criminal, Landmark or The Big Flower Fight.
70. In the quote in paragraph 68 above, Ofcom seems to distinguish universality from the type and benefits of programming; universality is therefore about widespread ‘access’. However, later in the consultation access and programming are conflated. In paragraph 3.26, universality is “the ability of people of all backgrounds to access content which is **valuable to them, through which they are connected to others**” (our emphasis).
71. According to Ofcom, there are three aspects to universality: “availability, relevance and public accountability”. Availability is associated with “distribution via a commonly available technology”; relevance concerns the popularity and type of programming: “content must be sufficiently attractive to everyone....the PSB system needs to produce a large amount of high quality and diverse UK content, which is authentic and meaningful to audiences.” Finally, relevance is associated with the PSB system being one “in which everyone has a stake” (3.29) and because “audiences are treated not only as individual customers, but as members of a diverse society”.⁹³ The definition of universality noticeably omits any comment on payment for content or excludability through encryption. By implication, a non-PSB content provider *could* meet the universality test, even if it levies a monthly charge for access to an unencrypted signal. (Although we note in paragraph 6.26 of the consultation Ofcom appears to believe that subscription services *do* conflict with universality requirements without giving sufficient reason as to why this is the case).
72. In the table below, we use Ofcom’s criteria above to test whether the leading SVoD and AVoD (respectively, Netflix and YouTube) could ever meet the universality threshold. We have left out the “treated not only as individual customers” criterion because we are unsure about how this can be evaluated.

⁹² https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf, page 13

⁹³ All quotes taken from https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf

	PSB providers	SVoD	AVoD
Distribution via a commonly available technology	DTT 98.5% household coverage ⁹⁴	Broadband availability (99.4%) – increasing over time. ⁹⁵	Broadband availability (99.4%) – increasing over time.
Content attractive to everyone	More than a third (35%) of adults can see themselves no longer watching the main TV channels (BBC, ITV, Channel 4 and Channel 5) within the next three years, with this proportion rising to more than half (51%) among 16-34-year-olds. ⁹⁶	UK SVoD penetration is over 50% of all adults and around over 80% of 15-34 year olds. ⁹⁷ The content is paid for via a subscription would indicate that the value to the consumer / household is higher than the subscription price.	YouTube was used by 75% of online adults in the first two months of lockdown ⁹⁸ . All individuals averaged around an hour viewing YouTube each day in April. <i>“There is a lot of music viewed / listened to on the platform and a long tail of niche YouTuber content, as well as a substantial body of content with TV-like production values.”</i>
High quality and diverse UK content	Yes	Limited	Yes

73. In summary,

- There is no technology bar which stops interested consumers from watching SVoDs or AVoDs in the same way as they do PSBs. The PSBs and SVoDs/AVoDs are universal in that no category of viewer or listener is excluded from their services (except where there is no DTT signal or broadband is of sufficient speed);

⁹⁴ Robert Kenny, Communications Chambers, The costs and benefits of the C3 licences, December 2014. Page 22

⁹⁵ See https://www.ofcom.org.uk/data/assets/pdf_file/0028/195256/connected-nations-spring-update-2020.pdf (Based on expected coverage of 10Mbps download broadband by December 2020).

⁹⁶ https://www.ofcom.org.uk/data/assets/pdf_file/0010/200503/media-nations-2020-uk-report.pdf, page 20

⁹⁷ https://www.ofcom.org.uk/data/assets/pdf_file/0010/200503/media-nations-2020-uk-report.pdf, page 22

⁹⁸ https://www.ofcom.org.uk/data/assets/pdf_file/0010/200503/media-nations-2020-uk-report.pdf, page 5

- The traditional PSBs may, within a very short timeframe, cease to meet the “*content attractive to everyone*”⁹⁹ (our emphasis) criteria amongst significant cohorts of the population;
- What appears to constrain Netflix, Sky and Amazon etc., from obtaining universality status is the quantum of diverse UK content that they host/broadcast.

74. If we accept that, given the differences in viewing habits among different age cohorts, the traditional notion of universality needs to adapt to become: “*content attractive to broad cohorts of the UK population*”, the SVoDs could become close substitutes for the PSBs in the future (although we accept that, apart from Sky, they are unlikely to produce national/regional news). There are reasons to be optimistic that this will occur:

- A subscription television system allows the content provider to extract viewers’ surplus directly, therefore we expect that it will have an incentive to show a diverse selection of programmes of quality appropriate to viewers’ willingness-to-pay. For instance, drama series might be unprofitable for an advertising- funded broadcaster, but not for a subscription broadcaster which can extract viewers’ higher willingness-to-pay for this genre compared to soaps, say. As Helen Weeds says “*market provision is now capable of providing a wide variety of high-quality programming, meeting diverse consumer preferences*”¹⁰⁰.
- SVoDs do not just cater for profitable *niches*; the watercooler moments of the Covid-19 pandemic have been: Tiger King, Bridgerton, WandaVision and The Queen’s Gambit.
- In order to expand their penetration in the UK, the SVoDs will need to appeal more to the older demographics where they are under-represented (the reach in the 25-34 age group is nearly 50 percentage points greater than for 55-64¹⁰¹) who a higher consumer of PSB content. They will do this by appealing to the latter’s taste for diverse, local content. Helen Weeds notes that “*The implications of globalisation for UK television viewers is not straightforward to predict: while idiosyncratic UK tastes may gain less attention from global providers, the appeal of some UK-focused content to non-UK audiences, facilitated by the English language—witness the international success of Downton Abbey, for example—may stimulate the production of such programming.*”¹⁰²

75. If accepted, this analysis has implications for policy makers. At a minimum they should be very cautious about interventions designed to soften the blow of competing with on-

⁹⁹ Ofcom accepts this “*The universality of PSB in the future cannot be taken for granted.*” (3.21)

¹⁰⁰ https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0027/208827/helen-weeds-rethinking-psb-for-digital-age-report.pdf, page 21

¹⁰¹ In a recent report by Enders Analysis (Video viewing forecasts: trends accelerated, Feb 2021) it states that 55-64s spend 5-6% of their video time on each of SVoD and YouTube, whereas for the over-65s it is more like 1-2%.

¹⁰² https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0027/208827/helen-weeds-rethinking-psb-for-digital-age-report.pdf, page 8

demand rivals. One plausible scenario is that the SVoDs become very good substitutes for PSBs for significant cohorts of the UK population and more than make up for reductions in spend from the more traditional sources.

Answers to Questions

Question 1: Do you agree that a new regulatory framework for PSM delivery should support a more flexible 'service neutral' delivery approach that is more outcomes focused? p 39

We broadly agree with this proposal. A 'service neutral' delivery approach better reflects the way that viewers now watch content across a variety of services, including content from the traditional PSBs. That said, any 'must offer' requirement for PSBs must include the content which is discharging the relevant PSB obligation.

Question 2: Do you agree with our proposals for a clear accountability framework? p 39

We agree with the accountability framework outlined in the response. Given the enhanced flexibility that a 'service neutral' approach would offer PSM providers, it makes sense that these providers should have to set out their delivery plans and be held accountable for these. This accountability will ensure that any additional benefits received from this flexible approach are used to enhance PSB programming for audiences.

Question 3: What do you think should be included in the PSM 'offer'? p 43

We believe that Ofcom should first question whether the PSM 'offer' is the right approach. It has made no substantive case why regulation should be designed to engineer a transfer in value between QUs and PSBs beyond the benefits that carriage and prominence will bring.

Moreover, if the premise of the asymmetry in negotiating power is correct, we doubt whether there will be a transfer of value in the on-demand world. Instead, this regulatory construct appears designed to extract money from the UK pay-TV providers (where there is no hint of market failure) with consequential poor outcomes for consumers and investment.

If a PSM offer is defined, it should be done so expansively, so that it is a genuine backstop that, if deployed, does not undermine the objectives of PSB broadcasting. At a minimum, it should include PVR functionality and metadata.

Question 4: What options do you think we should consider on the terms of PSM availability? p 43

Consistent with the objectives of public service broadcasting, PSM should be widely available. However, the evidence of enduring market failures is patchy: Ofcom's bias for less intrusive forms of regulation is better served if it has backstop powers to arbitrate in disputes – accompanied by guidance, published in advance, about how it would act. This model is used for other types of regulation.

Question 5: What are the options for future funding of PSM and are there lessons we can learn from other countries' approaches? p 52

As is clear from the above, the case has not been made that advertising funded PSBs should be bolstered by engineering value transfers from 'platforms'. We contend that they derive adequate benefits to meet their obligations through carriage and prominence and, in 2019, Ofcom proposed that these benefits be extended to on-demand services.

Question 6: What do you think about the opportunities for collaboration we have referred to? Are there other opportunities or barriers we haven't identified? p 54

We are broadly supportive of the opportunities for collaboration in the consultation, such as the PSBs working together on the distribution of their on-demand content and co-production with commercial companies.

Question 7: What are your views on the opportunities for new providers of PSM? p 60

We think the signs are encouraging that others will complement and, in some cases become, at least partial, substitutes for the designated PSBs for large cohorts of the UK population. Their own commercial imperatives will drive them to offer more diverse content, relevant to UK audiences.