



**SKY'S RESPONSE TO
OFCOM'S THIRD REVIEW OF PUBLIC SERVICE BROADCASTING
'PUBLIC SERVICE CONTENT IN A CONNECTED SOCIETY'**

1. Executive Summary

- 1.1 Sky welcomes the opportunity to contribute to Ofcom's third review of public service broadcasting ("the review").
- 1.2 Sky considers that the UK has a dynamic and competitive media services marketplace that provides viewers with access to a vast and growing array of content that meets Ofcom's definition of public service purposes and characteristics.
- 1.3 The multichannel sector is a crucial component of this, with Ofcom acknowledging that the majority of growth in spend on new UK programming has come from non-PSB sources. Sky's own investments have accounted for a significant proportion of this spend, creating high-quality British content across a wide range of genres.
- 1.4 However, although Ofcom recognises the contribution made by non-PSBs, it falls back on an institutional approach when considering the future development of the sector. The analysis equates public service delivery in the future solely with the actions of the PSBs, and therefore infers risks based on unduly narrow inputs and proxies. This is not justified in Sky's view.
- 1.5 Ofcom's duties suggest that the review should take a more balanced approach, rather than focus unduly on the PSBs. A wider view of the industry shows that public service content delivery remains strong, and that the sector is delivering in terms of consumer outcomes. Audience satisfaction remains high, the number of hours of original UK content being broadcast in peak time has risen, and viewer choice is increasing substantially thanks to alternative investment.
- 1.6 Indeed, the growing contributions from the multichannel sector and internet services means that the provision of public service content by the market is likely to increase over time. The availability and plurality of public service content will continue to grow overall as the impact of new platforms and technologies dramatically lowers the costs of both content creation and distribution.
- 1.7 Notwithstanding this wider delivery, the existing regulatory framework has been established to account for any instances of genuine market failure in the provision of public service content. Sky does not consider that further intervention beyond this is required. Should Ofcom identify any gaps in this provision, it must first examine how the existing regulatory framework can be used more effectively to deliver content that will not be provided on a commercial basis.
- 1.8 The guaranteed funding that the BBC receives means that it remains the obvious mechanism to address any deficiencies in the delivery of public service content that will not be provided commercially.

- 1.9 The commercial PSBs also benefit substantially from the current framework, receiving significant regulatory benefits such as privileged access to extremely valuable UHF spectrum and EPG prominence. As more public service content is delivered through commercial incentives, these huge transfers of public and private assets need to be scrutinised carefully to ensure that they remain balanced by commensurate obligations to provide content that will not otherwise be delivered.
- 1.10 It is only a year since Ofcom renewed the commercial PSBs licences, concluding that their contribution to the public service obligations would remain sustainable in the future. That conclusion is further supported by the healthy position that the commercial PSBs find themselves in at present. If anything, analysis suggests that there is a net benefit to the commercial PSBs of holding their licences under the existing framework (at least £87m pa in the case of ITV).
- 1.11 The review proposes a number of different policy options that could, in Ofcom’s view, ‘maintain or strengthen’ public service television broadcasting in the future if necessary. Sky is concerned that most of the options presented focus on amending either the delivery or funding of the PSBs.
- 1.12 No consideration is given as to how the delivery of further public service content by other providers might be incentivised. Similarly, Ofcom gives very little consideration to the possible negative impact of these proposals on the wider market.
- 1.13 The PSBs and the wider sector are providing ever more public service content. Sky therefore does not consider that there is a case for further subsidising the PSBs given the significant benefits they already receive and the fact that the wider sector is providing ever more public service content. Any additional public subsidy for commercial broadcasters risks distorting competition should it enable the PSBs to cross-subsidise commercial activities. This may not be compatible with EU State Aid rules.
- 1.14 In particular, the introduction of mandated platform payments would fundamentally work against the public interest. Rather than strengthen the PSB system, it would unpick it by removing the principle of universal availability and making some consumers pay twice to receive PSB content that has been funded by public subsidy.
- 1.15 The rest of this response is structured as follows:
- Section 2: the current delivery of public service content
- Section 3: the existing regulatory framework
- Section 4: Ofcom’s further policy options
- Annex A: the scope of Ofcom’s review

2. The current delivery of public service content

- 2.1 The UK has a dynamic and competitive media services¹ marketplace that provides viewers with access to a vast array of content that meets Ofcom's definition of public service purposes and characteristics. Sky agrees with Ofcom's broad conclusion that the PSB system remains "strong".
- 2.2 The multichannel sector is a crucial component of this strength. Commercial funding models that are not reliant on state support are increasingly delivering valuable content that meets some or all of the public service criteria.
- 2.3 Sky is concerned that Ofcom's analysis misses this broader contribution. Despite a wider remit than in previous years, the review still falls back on an institutionalised picture of public service broadcasting. Ofcom equates public service delivery solely with the actions of the PSBs, and therefore infers risks based on unduly narrow inputs and proxies.
- 2.4 There is no evidence that the concerns Ofcom identifies pose significant risks to future public service delivery. A wider consideration of the sector shows that it is delivering in terms of outcomes.
- 2.5 Notwithstanding this, it is only a year since Ofcom undertook the licence renewal process for the commercial PSBs. During this process, Ofcom considered that their delivery of public service obligations would remain sustainable in the future and renewed the licences on this basis². Therefore even with a narrow view of what constitutes public service delivery, there is little to suggest that the current system is under threat.

Public service content is more widely available than ever before

- 2.6 The review restates the PSB purposes and characteristics, as set by Ofcom, as well as the statutory purposes and objectives of public service broadcasting. These broad definitions clearly encompass a vast amount of content provided – commercially – by the multichannel sector and online, as well as much of the output of the commercial PSBs³.
- 2.7 By almost any measure, public service content is more widely available than ever before. The structural changes that Ofcom identifies have in the main served to increase the choice available to viewers, both in terms of the content they watch and the way in which they watch it:
- 2.7.1 Digital television platforms are now ubiquitous, meaning almost all households have access to a wide range of PSB and non-PSB channels.
- 2.7.2 Broadband penetration stands at over 80%, granting the vast majority of the UK access to an almost unlimited array of public service content sources (including national and local newspapers, universities, museums and galleries, charities and so on).
- 2.7.3 There has been an explosion in online video on-demand services from PSBs and non-PSBs alike. Coupled with the significant take-up of Digital Video Recorders

¹ As defined in s264A of the Communications Act 2003.

² Ofcom, 'A report to the Secretary of State under section 229 of the Communications Act 2003', May 2012, available at: http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/c3_c5_licensing.pdf.

³ For the avoidance of doubt, when this submission refers to "public service content" or "public service programming", we mean content that meets some or all of the public service purposes and characteristics as set out by Ofcom – regardless of the source of this content or how it is funded. When this submission refers to "public service broadcasters" or "PSBs", we mean the set of broadcasters providing those channels identified by s264 of the Communications Act 2003. When this submission refers to "commercial PSBs" we mean ITV1, Channel 4 and Five.

(DVRs), these services allow viewers greater choice and flexibility over their consumption of public service content.

- 2.8 These developments have all helped to increase the reach and impact of public service programming, as well as offering revenue generating opportunities and business models that will help fund new types of public service content in future.

The greatest growth in public service content is being driven by non-PSBs, with Sky making a significant contribution

- 2.9 The multichannel sector is a crucial component in the provision of content that meets Ofcom's definition of public service purposes and characteristics, and indeed the review acknowledges that the majority of growth in spend on new UK television programmes has come from non-PSB channels⁴. Commercial funding models are delivering valuable public service content, and this is likely to increase in future.

Investment in content

- 2.10 Overall investment in UK production by members of the Commercial Broadcasters Association (COBA) has grown by 5.5% per annum since 2011, reaching £725m by 2013. Investment in first-run UK production grew at an even higher rate of 7% a year to £597m in 2013⁵.
- 2.11 Sky's own investment represents a significant proportion of this growth. In 2011 we outlined a commitment to invest £600 million specifically in home-grown British programming by 2014 (excluding our additional investments in sports rights), a 50% increase over three years.
- 2.12 Sky's drive to increase investment in original British commissions has particularly focused on areas where we can provide high-quality, distinctive programming that is recognisably different from the PSBs' offerings. Since last July, we have screened more than 60 hours of new British drama programming across our suite of entertainment channels – Sky 1, Sky Atlantic, Sky Living and Sky Arts. This follows on from our increased commitment to UK comedy from 2010 onwards, an area where the PSBs had notably reduced their investment.
- 2.13 An increasing number of Sky's shows have received critical acclaim and awards. These include David Attenborough's *Natural History Museum Alive 3D*, which won a BAFTA TV Award in the Specialist Factual category; Irish family comedy *Moone Boy*, which won Best Sitcom at the British Comedy Awards; drama *The Tunnel*, which won a British Broadcasting Press Award; and Sky Atlantic's documentary *Bradley Wiggins: A Year in Yellow*, which was recognised at the Broadcast Digital Awards. These accolades confirm that Sky is investing more in outstanding industry-recognised content across a broad range of genres and tastes.

Genre delivery

- 2.14 The full breadth of content provided by Sky's channels encompasses a range and diversity of programming across a wide variety of genres.
- 2.15 As noted above, our general entertainment channels have carried increased levels of original drama in recent years, with our broad range of entertainment channels allowing us to commission a diverse and rich slate. Notable successes have included: *The Tunnel*, a gripping Anglo-French thriller inspired by Scandinavian drama *The Bridge*; *Penny Dreadful*, a

⁴ The review, Section 2, p.9.

⁵ COBA census 2014, available at: <http://coba.org.uk/positions-and-reports/positions-and-reports/coba-2014-census>.

frightening psychological thriller executive produced by Oscar winner Sam Mendes; the BAFTA-nominated *Mad Dogs* starring Max Beesley, Philip Glenister, John Simm and Marc Warren; and *Fortitude*, our most ambitious commission so far which launched as Sky Atlantic's most successful original drama premiere to date.

- 2.16 Another key part of Sky's content strategy over the past five years has been our commitment to original scripted British comedy. Our significant investment in this area has led to a number successful hits including: *Stella*, created by and starring Ruth Jones, set in the Welsh Valleys which achieved the highest ever audience for a new multichannel comedy across the series; Manchester-based *Mount Pleasant*, starring Sally Lindsay; feature-length spoof police show *A Touch of Cloth*, the brainchild of Charlie Brooker; and *Hunderby* from Julia Davis which won a BAFTA for writing and two British Comedy Awards. Many of our comedy programmes have been renewed for multiple series, demonstrating an ongoing commitment to this genre.
- 2.17 Beyond this, Sky makes significant contributions in more specialist genres, as well as supporting culture in the UK more broadly.
- 2.18 Sky Arts has a reputation for some of the highest-quality arts programming on TV, spanning opera, dance, literature and theatre. Recent shows include *Sky Arts Portrait Artist of the Year*, where 1,600 artists competed to win a £10,000 commission to paint a portrait for The Scottish National Portrait Gallery; *My Shakespeare*, a series created in partnership with The Open University which sees world-class actors explore their passion for Shakespeare; and *The Great Culture Quiz*, where the UK's leading arts institutions test their knowledge of the arts.
- 2.19 In November 2014, as part of Sky's broader investment in the UK creative industries, we also launched *Sky Arts Amplify*, a new initiative that encourages arts organisations and production companies to pitch collaboratively for up to £1 million annually on new TV ideas. The initiative aims to continue to bring to life the vibrancy and breadth of the arts in the UK in innovative, new ways.
- 2.20 Sky's diverse genre delivery is also reflected in our ongoing commitment to news and current affairs broadcasting. Unlike the PSBs, who have a requirement to provide news programming and are subsidised by the public purse, Sky News operates on a wholly commercial basis, making a vital contribution to media plurality. Twenty-five years after launching Britain's first 24-hour rolling news channel, Sky News now provides news online via SkyNews.com, on the radio, on mobile phones and tablets, on desktops and on out-of-home screens, in addition to its broadcast television channel available on all major platforms⁶. The channel's quality of coverage and editorial integrity, have resulted in Sky News becoming the European news channel of choice⁷ and being named the News Channel of the Year by the Royal Television Society for a record-making ninth time.
- 2.21 Sky's commitment to sporting content also continues to grow year on year. To date, Sky has invested more than £15 billion in sport, providing a much-needed injection of funding at all levels. In 2014, Sky Sports offered viewers more than 59,000 hours of sport across seven channels.
- 2.22 This coverage not only consisted of huge 'shared experience' sporting events such as Europe's historic Ryder Cup victory, Lewis Hamilton's second Formula 1 world championship, and Manchester City's Premier League title win, but also a wide variety of different sports to satisfy a range of interests. The 2015 World Darts Championship had its own dedicated channel; over 1,000 hours were dedicated to boxing including 16 world title fights; in cricket Sky aired all of England's matches including the 200th live England

⁶ In Q4 2014, Sky News had a quarterly reach of nearly 15m viewers (BARB quarterly reach report).

⁷ European Media and Marketing survey 2014.

Test; and tennis fans were able to watch the US Open, all nine ATP World Tour Masters 1000 events and the ATP World Tour Finals. Women's sport – a major priority for Sky – was also scheduled on over 260 days, including England women's rugby union World Cup win, England's Ashes victory Down Under and the Sky Sports Sportswoman of the Year Awards.

Reflecting different cultures

- 2.23 Sky has a commitment to ensuring that programmes on Sky 1, Sky Atlantic, Sky Living and Sky Arts better reflect the diversity of our TV customers in the UK. Consequently, we announced stretching new targets in August 2014 to improve the representation of black, Asian and minority ethnic (BAME) people across our entertainment channels.
- 2.24 These targets state that: all brand new, non-returning shows on Sky entertainment channels will have people from BAME backgrounds in at least 20% of significant on-screen roles; all of Sky's original programmes will have someone with a BAME background in at least one senior production role; 20% of writers on all shows will be from BAME backgrounds in order to promote a greater diversity of voices in Sky programmes and scripts. Sky will also be offering a 12 month placement within our commissioning team as part of the Creative Diversity Network's Commissioning Leadership Programme.
- 2.25 Sky Living's first real-life drama series *Desi Rascals* has shown these ambitious targets in action. The show chronicles the lives of a multi-generational cast within the British-Asian community and is filmed in West London in suburbs such as Southall, Harrow and Gerrards Cross.
- 2.26 In summary, the multichannel sector, and Sky in particular, continues to produce an increasing range, quality and diversity of public service content without public subsidy or other forms of intervention.

Although Ofcom recognises this wider picture, the review falls back on an institutional approach

- 2.27 Ofcom acknowledges that it would not be possible to fully review the public service broadcasting system without considering the role and development of the wider media services sector, and (for the first time in a PSB review) includes explicit consideration of the contribution to public service content delivery made outside of the main PSB channels.
- 2.28 The review concludes that output from the multichannel sector contributes towards many of the public service objectives⁸. It also notes the significant contribution made by the internet, highlighting the ability of services to target smaller, specific audiences and the fact that many services are free at the point of use.
- 2.29 But despite recognising this significant wider contribution, Ofcom fails to consider either the multichannel sector or the internet in its subsequent evaluation of the future of the "public service broadcasting system". In the case of the multichannel sector, the review states that, as many of these channels are available only to pay TV subscribers, this "*limits their contribution to the delivery of public service content, in comparison to the universally-available PSB channels*"⁹. Furthermore, sections 5 and 6 of the review – titled 'potential future market developments' and 'maintaining and strengthening the system' – make no mention of the multichannel sector at all, and only a passing reference to internet services.
- 2.30 Sky recognises that Ofcom is required by Parliament to review and report on the delivery of public service television broadcasting, both now and in the future. However, we consider

⁸ The review, paragraph 4.9, p.79.

⁹ Ibid, paragraph 4.10, p.80.

that the review adopts too narrow a definition of 'public service television broadcasting' in this regard.

- 2.31 Ofcom acknowledges that its review is required to encompass all PSB and non-PSB, linear and on-demand, and internet content services¹⁰. Ofcom's review ought therefore to consider this broad section of services in its entirety. This would provide context for its assessment of the particular contribution of the public service broadcasters' linear channels. Ofcom's consultation instead appears to take the opposite view, with its assessment of the wider sector being an afterthought to its main consideration. Such an approach necessarily risks underplaying the contribution of the wider sector, and overstating the threats posed to the traditional purveyors of public service television broadcasting.
- 2.32 It is notable that no definition of "public service television broadcasting" is provided in the Communications Act, nor was one advanced in the Communications White Paper – *A New Future for Communications*¹¹ which preceded it. But Sky notes the comments of the Select Committee on Culture, Media and Sport at the time, which highlighted that the omission of a definition was reasonable as public service broadcasting would be a constantly changing phenomenon in future and was not exclusive to the privileged broadcasters that were the focus of the proposed regulatory framework¹². We expand on this in Annex A.
- 2.33 Unfortunately, the review reverts to an institutionalised picture of public service broadcasting. Ofcom's analysis essentially equates the future of public service delivery solely with the fortunes of the PSBs.
- 2.34 This approach means that Ofcom takes an unduly narrow view of the risks posed to public service broadcasting, as well as the possible responses. For example, the review states that the real-term decline in programme spend by the PSBs *'would be a significant concern if [it] were to continue and result in a noticeable reduction in the volume, range or quality of content'*¹³. While this concern is qualified, Ofcom does not appear to consider the possibility that other industry players may respond and deliver a greater proportion of public service content in this scenario. Yet this is precisely what has occurred over the past five years.
- 2.35 Sky also disagrees with Ofcom's assertion that the contribution made by the multichannel sector should be 'discounted' as much of it is not made available on a free-to-view basis. A majority of UK households now choose to take some form of pay TV, meaning that the reach and impact of multichannel providers is significant, and continues to grow. This is unsurprising – people are accustomed to paying for entertaining, informative and educational content in many other areas. There is no particular reason why TV should be different to newspapers, books, cultural exhibitions or music in this regard. The barriers to accessing premium content have further decreased over the past five years with the advent of OTT services such as NOW TV, which provide a means for consumers to dip in and out of pay content without being tied to a monthly subscription.
- 2.36 Moreover, a mixed funding model of subscription and advertising may give the multichannel sector certain advantages over commercial PSBs in their ability to produce and deliver high quality public service content. Subscription funding allows broadcasters

¹⁰ Section 264A of the Communications Act 2003.

¹¹ Published 12 December 2000.

¹² Section V of the Select Committee on Culture, Media and Sport's Second Report *"The Future of Public Service Broadcasting"* Available at: <http://www.publications.parliament.uk/pa/cm200001/cmselect/cmcomeds/161/16102.htm#evidence>
The report is the result of an inquiry in which oral evidence was taken from 25 organisations between 25 January and 14 February 2001.

¹³ Ibid, paragraph 1.25.1, p.5.

to target more varied and diverse audiences, combining the viewers' willingness to pay and advertising revenue to enable the funding of programming that would not have been produced by traditional advertising-funded broadcasters seeking to maximise audiences. The extra content that subscribers pay for is likely to be particularly valuable to them, and enabling access to a broader choice of providers means the differing needs and individual tastes of consumers are met more effectively.

- 2.37 It is also the case that some multichannel content is available for free, often in genres that clearly have public service characteristics. For example, the multichannel sector contributes substantially to the provision of national news, and as noted Sky News is provided freely across all major platforms, making it available to nearly all of the UK population.
- 2.38 Given the increasing role played by non-PSBs in delivering public service content, Ofcom should give greater consideration to the current contribution of these providers, and ensure that it does not ignore the potential development of these services when considering the future of the sector.

Ofcom presents no evidence that the system is failing or will do so in future

- 2.39 The evidence Ofcom presents in the review suggests that the provision of public service content remains strong at present, and that the media services sector is delivering in terms of consumer outcomes.
- 2.40 Identifying which content (either from the PSBs or other sources) fulfils the public service criteria is an inherently difficult task that necessitates consideration of proxy measurements. Ofcom has included a number of different metrics in its analysis of public service content delivery – some focused on inputs, others on outcomes. Sky considers that an outcomes-based assessment – i.e. a measurement of what content is actually available to audiences, what they are consuming and how satisfied they are with provision – provides the most accurate picture of the success of the public service broadcasting system.
- 2.41 As Ofcom notes, its own audience research has demonstrated that viewer satisfaction has increased significantly over the past 15 years, up from 69% to 77%¹⁴. Similarly, while hours of first-run originations have fallen by 5% since 2008, the volume of new content being shown in peak time (and therefore being watched by the highest audiences), has increased¹⁵. And as has been highlighted, viewers are benefiting from an unparalleled choice of alternative providers to the PSBs, all increasingly delivering content that fulfils the public service criteria.
- 2.42 Assessing the sector in terms of outcomes shows that public service content as a whole is as strong as it has ever been. However, Ofcom's approach unduly focuses on inputs – in particular the programme spend by the PSBs on UK originated content. Several of Ofcom's major concerns relate to changes in spend by the PSBs (both in total and for specific genres), despite the fact that these changes have had little or no impact on the consequent output and audience satisfaction.
- 2.43 Using broadcaster spend as a proxy for the health of public service content is misleading for a number of reasons, several of which Ofcom recognises itself. Firstly, as the review acknowledges, both broadcasters and producers may have made efficiency improvements over time (certainly a plausible suggestion when one considers the increased levels of competition in the sector). Secondly, alternative methods of funding such as co-production and deficit financing have increased in recent years, meaning that direct

¹⁴ The review, figure 20, p.44.

¹⁵ Ibid, paragraph 3.13, p.37.

broadcaster spend now makes up a lower proportion of total on-screen spend. Finally, the increased contribution towards public service content is coming from alternative sources (the multichannel sector and online services) that may have naturally lower cost bases.

- 2.44 Sky has no particular view on whether Ofcom's base case scenario of 'steady evolution' is the most likely way in which the sector will develop. It is impossible to know with any degree of certainty which developments and behaviours will predominate in the medium-term and beyond.
- 2.45 But however the sector does develop, it is likely to do so because of consumer demand and the choices made by viewers. Most of the future risks that Ofcom identifies – a shift to on-demand viewing, new disruptive entrants, and the fragmentation of audiences – are the result of increasingly empowered consumers who are able to exercise their choice of viewing across different platforms and different providers.
- 2.46 While individual PSB channels may lose out in this exercise of consumer choice, it does not follow that the delivery of public service content as a whole would automatically be under threat. On the contrary, where consumer satisfaction is maintained or increased, the likelihood is that public service objectives would now be being delivered by a broader range of providers, with successful economic models for producing content that viewers value. Policy responses that seek to slow these changes, penalise those who have been instrumental in delivering them, or shore up approaches that have proven less successful with viewers, should be avoided.

Ofcom's previous analysis does not suggest that the PSBs face significant difficulties

- 2.47 Even accepting Ofcom's narrow view of relevant public service broadcasting as relating only to the PSBs, its own recent analysis suggests that this part of the sector is healthy and will remain sustainable in the future.
- 2.48 As Ofcom's accompanying annual PSB report shows, the five main PSB channels accounted for 51.1% of all TV viewing last year. When combined with portfolio channels, the total share of viewing stands at 72.4%. Reach of these channels remains strong at 86%. And the PSBs already have a strong presence in the on-demand world: out of all VOD services, the BBC iPlayer is the most used at 35%, followed by ITV Player on 17% and 4OD on 16%¹⁶.
- 2.49 Moreover, it is only a year since Ofcom undertook the licence renewal process for the commercial PSBs. During this process, Ofcom considered that delivery of the narrow public service obligations would remain sustainable in the future and renewed the licences on this basis.
- 2.50 This analysis is further supported by the commercial PSBs' financially healthy position. ITV has returned more than half a billion pounds to shareholders in the last 18 months alone¹⁷.
- 2.51 Overall, therefore, Sky does not see any evidence of an existing or approaching problem in the general availability of public service content. The UK has a dynamic and competitive media environment that is delivering real benefits to consumers. Viewers enjoy more choice and experience greater plurality than ever before, and have access to a vast and growing array of content that meets the public service purposes and characteristics.
- 2.52 Indeed, the growing contributions from the multichannel sector and internet services means that the provision of public service content delivered by the market is likely to increase over time. The availability and plurality of public service content will continue to

¹⁶ Ofcom, PSB Annual Report 2014, figure 4.10, p.83.

¹⁷ Between 1/1/13 and 30/6/14, ITV plc paid £534m in cash dividends. See Condensed Consolidated Statement of Changes in Equity in ITV interim results 2014, available at <http://www.itvplc.com/investors/reports-and-results>.

grow overall as the impact of new platforms and technologies dramatically lowers the costs of both content creation and distribution.

- 2.53 The growth in UK content investment by the multichannel sector over the past five years has been continual and consistent (even during the advertising downturn of 2009 to 2011 when commercial PSB investment dropped significantly¹⁸). Sky's own ambitions are to build on the significant investments we have made in the past five years and to place original programming at the very heart of the Sky customer experience.
- 2.54 These trends are likely to continue, with subscription television and internet services providing new and growing sources funds for public service content. Rather than perceiving risks to the delivery of public service content in the future, Sky considers that provision is only likely to increase.

¹⁸

Independent Production Sector Financial Census and Survey 2014, Oliver & Ohlbaum Associates for Pact, p. 14.

3. The existing regulatory framework

- 3.1 The growth of the multichannel sector and ever increasing provision from alternative services is not to suggest that the market can and will provide everything that viewers want. Sky recognises that there may remain cases of genuine market failure, or areas where wholly commercial models are unable to deliver in line with public policy objectives, even as non-PSB providers increase their delivery.
- 3.2 The existing framework has been established to account for these gaps. It seeks to balance significant regulatory interventions with commensurate obligations to ensure that public service content which might otherwise be undersupplied is produced and delivered to viewers.
- 3.3 Before suggesting changes to this existing regulatory framework, Ofcom should clearly identify areas where there is a deficiency in what the market delivers. As noted, on the basis of the analysis contained within the review, a current deficiency is not apparent.
- 3.4 However, should any gaps in the provision of public service content be identified either as a result of market failures or changing public policy objectives, Ofcom must first examine how the existing regulatory framework can be used more effectively to fill these gaps.

The BBC remains the major regulatory intervention

- 3.5 The BBC is the cornerstone of publicly funded public service provision. The guaranteed £3.7 billion funding that the organisation receives gives it an unparalleled ability to deliver public service content that may not be commercially viable to produce. By blending this with distinctive programming that appeals to a mass audience, the BBC helps maximise the impact and reach of public service content.
- 3.6 Therefore whilst we recognise that Ofcom's oversight of the BBC's activities is limited, it remains the obvious mechanism through which any gaps in the delivery of public service content should be addressed.

The commercial PSBs benefit substantially from the existing interventions

- 3.7 The existing regulatory framework confers significant benefits on the recipients of the commercial PSB licences. Privileged access to extremely valuable UHF spectrum allows these broadcasters to maximise their reach and impact through their DTT services. EPG prominence affords these channels significant exposure, driving high viewing share (and consequently advertising revenue) as well as enabling cross-promotion of portfolio channels.
- 3.8 The corresponding content obligations that the commercial PSBs face are limited to those programmes that would not be produced without intervention, and as such represent a relatively modest output. The vast majority of the programming on ITV, Channel 4 and Five – including most of their UK originated content – is produced because of commercial incentives rather than licence obligations. Much of this content makes a direct return from advertising, while many other programmes are created because they enhance the broadcaster's brand and reputation, thus supporting the wider commercial objectives of the business.
- 3.9 This is borne out by the fact that the commercial PSBs comfortably exceed many of their programming quotas (e.g. ITV in original productions, ITV and Channel 4 in out-of-London productions, Channel 5 for current affairs¹⁹). The content costs faced by these commercial

¹⁹ Ofcom, PSB Compliance Reporting 2013, December 2014, available at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/psb-review/compliance14/Network.pdf>.

broadcasters as a result of their PSB licences are therefore limited to a small number of programmes which they would not choose to produce (such as, in the case of ITV, regional news and current affairs).

- 3.10 The combination of significant regulatory benefits coupled with modest programming obligations suggests that there may be substantial residual value in the commercial PSB licences that, at present, is not being translated into public value – i.e. that these broadcasters derive a material net financial benefit from being PSBs. This conclusion is unsurprising given that ITV and Five have regularly renewed their licences voluntarily.
- 3.11 Indeed, independent research commissioned by COBA from Communications Chambers suggests that ITV receives a total benefit of between £161m and £295m a year from its licence. Factoring in the costs of the programme obligations that it faces, this translates into a net benefit of at least £87m pa²⁰.
- 3.12 The majority of the benefit identified by this report derives from the value of EPG prominence to commercial PSBs. This policy intervention represents a substantial transfer of value from TV platforms to these commercial broadcasters.

The value of EPG prominence

- 3.13 In line with Ofcom's approach during its relicensing process, Communications Chambers values EPG prominence by considering a counterfactual where these channels no longer hold the PSB licences (which instead are awarded to new licensees), and as such are no longer afforded guaranteed EPG prominence.
- 3.14 Such a scenario could see these channels placed significantly further down the EPG than at present. Although it would be open to these broadcasters to reshuffle slots or acquire them from other holders, this could be costly and is still highly unlikely to deliver the page one prominence that these channels currently enjoy.
- 3.15 Communications Chambers concludes that there would over time be loss of viewing amongst even the most loyal viewers, were these channels to lose their position on the first page of the EPG. Given the substantial revenue that the commercial PSBs generate from advertising, even a small drop in viewing could result in the loss of significant financial benefits. For example, an 8.4% loss of viewing for ITV1 is estimated to result in an £88m loss in advertising revenue²¹.
- 3.16 We therefore consider that Ofcom's approach to calculating the value of PSB licences was overly cautious, ascribing too small a value to EPG prominence. Regardless of the precise numbers, it is evident that EPG prominence provides substantial benefits to the commercial PSBs that have not been recognised by Ofcom – benefits which create ample headroom to deliver public service programming that the market is unable to provide.

The existing framework is sufficient to deliver any public service content that will not be produced through commercial incentives

- 3.17 As more public service content is delivered by the market, the significant transfers of assets to commercial broadcasters need to be scrutinised carefully to ensure that they remain appropriate. If they are not balanced by commensurate contributions to public service content, then Ofcom should examine whether and how these interventions could be reduced, or made more effective.

²⁰ 'The costs and benefits of the C3 licences', Communications Chambers, December 2014, available at: <http://coba.org.uk/positions-and-reports/coba-latest/2014/psb-licence-worth-millions-to-itv>.

²¹ Ibid, figure 4.

- 3.18 The residual value of the commercial PSB licences suggests that the existing framework is more than sufficient to deliver any public service content that will not be produced through commercial incentives. Policymakers therefore have the ability to address any deficiencies in the delivery of public service content through these existing regulatory levers.
- 3.19 For instance, Ofcom's concerns in relation to the delivery of certain genres (such as children's and current affairs) could be addressed through consideration of new programming requirements. Rather than maintain quotas which replicate commercial incentives and therefore do not have any effect, policymakers could consider a system that directly counters any deficiencies that have been identified.
- 3.20 Ofcom's future policy options (considered in detail in the next section) rest on an assumption that *additional* public subsidy would be required to deliver *any* incremental increase in PSB obligations, whether related to programming or distribution costs. This does not appear a credible starting point given the commercial PSBs receive such substantial benefits and face relatively modest costs as part of the existing PSB compact. The full value of the current interventions should be extracted before seeking to tilt the system even further in the PSBs' favour.

4. Ofcom's future policy options

- 4.1 The review seeks stakeholders' views on a number of different policy options that could, in Ofcom's view, 'maintain or strengthen' public service broadcasting in the future.
- 4.2 Given that the other providers are delivering an increasing amount of public service content, as well as the continued strong position of PSBs, there does not appear to be a compelling case to suggest that further intervention is required to secure the public service objectives in the future. As stated, any incremental change in the delivery of public service content is achievable through ensuring that the existing interventions function more effectively.
- 4.3 Ofcom is required by its duties to report with a view to maintaining and strengthening public service television broadcasting in the future. As noted above, we consider that the review adopts too narrow a definition of 'public service television broadcasting' in this regard, and that instead it should include all content that meets some or all of the public service purposes and characteristics, regardless of the source.
- 4.4 Ofcom must therefore ensure that it adopts a sufficiently broad outlook when examining future policy options that could maintain or strengthen the quality of public service television broadcasting in the UK – one that specifically takes account of non-PSB providers.
- 4.5 However, most of the options presented focus on amending either the delivery or funding of the PSBs. No consideration is given as to how the delivery of further public service content by other providers might be incentivised. Similarly, Ofcom gives very little consideration to the possible negative impact of these proposals on the wider market and its ability to invest in public service content. Notwithstanding our view that no significant policy changes are required in order to maintain current delivery, any options that Ofcom does examine must fully consider both of these points.
- 4.6 The impact of any changes on wider market delivery is particularly crucial for policymakers to understand, given that (as Ofcom acknowledges) the only source of growth in UK commissioning is coming from the non-PSBs. Reducing incentives for these other providers to invest while at the same time diverting more public and private monies towards already privileged broadcasters is likely to have a detrimental overall impact on production and output.

Commercial incentives are likely to deliver universality and discoverability on new platforms

- 4.7 Sky agrees with Ofcom's view that universality is a defining characteristic of the existing regulatory framework governing the PSBs. It is crucial that content which has been funded by significant public subsidy is made as widely available as possible, and remains free at the point of use. The question facing policymakers is to what extent commercial incentives are likely to deliver this outcome, both in the case of traditional TV platforms and for newer, more innovative services.
- 4.8 As a platform operator and broadcaster, we recognise that the commercial incentives on content distribution are likely to be mutually beneficial. Creators want their programming to be available to the widest possible audience, while platform operators want to ensure a high-quality content line-up in order to attract customers.
- 4.9 In practice, the existing regulatory rules governing content distribution are effectively backstops which are rarely used, such is the alignment of incentives between broadcasters and platform operators. For instance, ITV decided that it was economically rewarding to

include their channels on the Sky EPG many years before a 'must-offer' obligation was placed on them²².

- 4.10 Incentives are also aligned in areas where no regulation is present. Sky has reached mutually beneficial commercial deals with all of the PSBs for carriage of their on-demand catch-up services on our platform, and the same is true for other major TV platforms.
- 4.11 The review also considers whether discoverability – i.e. prominence rules – should be extended beyond linear services.
- 4.12 Ofcom is right in noting the crucial role that prominence has played in the PSB system historically²³. As set out earlier in this submission, the existing prominence requirements are a major intervention which continue to deliver substantial value to the PSBs. Extending this regulation even further would be a significant step, representing a further appropriation of private assets to deliver value to the PSBs.
- 4.13 Sky does not consider that an extension of prominence rules to non-linear services is required. Again, the commercial incentives of broadcasters and platform operators are likely to be aligned. If the content provided by the PSBs is content that consumers value, we are confident that mutually beneficial deals along with new and innovative technology will ensure appropriate visibility and ease of access. It is notable that the PSB catch-up services available via connected Sky+ boxes receive the most prominent placing, even absent regulation.
- 4.14 Furthermore, it is risky and counter-productive to try to legislate for technological developments which cannot fully be appreciated or accurately predicted, and which are in any event likely to result in more favourable, consumer-centric viewing experiences. Being overly prescriptive in light of these changes would likely work against the consumer interest. Broadcasters and platform operators need to be free to innovate and improve discoverability, to the benefit of consumers.

Providing PSBs with more flexibility would require a rebalancing of the PSB compact

- 4.15 The review considers whether it would be appropriate to afford PSB institutions greater flexibility in how they deliver public service content, including examining the possibility of regulating by institution, rather than by channel.
- 4.16 Sky agrees with Ofcom's analysis that audiences are accessing content in new and increasingly varied ways. Given this, policymakers may choose to amend the requirements on PSBs to better serve diversifying audiences.
- 4.17 As with all potential changes, Ofcom must carefully examine the balance of benefits and obligations when considering reform in this area. The review considers two potential approaches:
- 4.17.1 applying some or all of the obligations and benefits which are currently applied only to the specific PSB channels to some or all of the other services offered by the PSBs, including online; or
- 4.17.2 applying benefits and obligations to the PSBs, rather than to specific services, and allowing them the flexibility to choose how best to deliver the purposes and objectives in line with audience expectations.
- 4.18 Sky sees no case for extending the benefits PSBs receive to their other services, particularly given the net benefit that the commercial PSBs currently gain from the existing

²² Communications Act 2003 (Commencement No 4) Order 2009.

²³ The review, paragraph 6.14, p.110.

framework. Indeed, the regulatory framework already confers significant indirect advantages on the ancillary services of the commercial PSBs through cross-promotion and awareness that parent channels with EPG prominence provide. Granting benefits such as prominence to these additional services would only serve to stifle growth and investment by competitors.

- 4.19 If policymakers were to afford the PSBs flexibility to choose how best to deliver their programming obligations, this would likely serve to lessen the costs faced by these broadcasters at the expense of the public. ITV, for example, would be able to reduce the opportunity cost it faces in providing regional news by choosing a different method of delivery and placing cheaper and/or more popular programming in its place during peak time on ITV1.
- 4.20 Such a move could only be justified, therefore, if it was coupled with corresponding measures that reduced the benefits which accrued to the commercial PSBs as a result of intervention.

There is no case for further subsidising the PSBs

- 4.21 As stated frequently in this submission, Sky considers that the current delivery of public service content serves viewers well, and that the possible risks Ofcom identifies are unlikely to harm this delivery in future. With the wider media services market providing more public service content and given the significant benefits the PSBs already receive, there can be no justification for increasing public subsidy for the PSBs, either in scale or scope.
- 4.22 Any additional public subsidy for commercial broadcasters risks distorting competition should it enable PSBs to cross-subsidise commercial activities. This may not be compatible with EU State Aid rules.
- 4.23 Ofcom proposes a number of areas that may be explored further. Some of these – such as amending rules on advertising minutage, or exempting PSBs from future AIP charges and contestable funding – would serve to unduly benefit the PSBs at the expense of non-PSB competitors. As noted, this would damage the ongoing investment that other parts of the sector have provided and which has been increasing.
- 4.24 In particular, Sky fundamentally disagrees with the notion that mechanisms to transfer value from other parts of the sector towards the PSBs should be explored as part of this review. In addition to being unnecessary and unjustified, to do so would be discriminatory, disproportionate, would hinder competition and serve to disadvantage the UK by disincentivising ongoing investment from the parts of the sector that are currently delivering the greatest amount of growth in commissioning.
- 4.25 These risks are inherent in all of the funding models proposed by Ofcom – industry levies, new taxes, or copyright regimes. Moreover, private companies already contribute significantly to the value that the PSBs receive through the transfer of assets such as prominent EPG slots.
- 4.26 Other options that Ofcom lists might prove beneficial to all parts of industry, and therefore may warrant consideration. These include relaxing wider TV advertising rules, and the introduction of new tax breaks for new programming genres. Providing these measures were applicable and available to all providers in the market, they may be worth exploring further.

The introduction of mandated platform payments would fundamentally work against the public interest

- 4.27 The final section of the review considers the debate around the ‘balance of payments’ between the PSBs and platform operators. Sky welcomes Ofcom’s analysis of the wider context of this debate, noting in particular the range of potential consequences that could arise from change in this area²⁴.
- 4.28 Rather than strengthen the PSB system, the necessary introduction of platform payments would fundamentally unpick it by removing the principle of universal availability and making some consumers pay twice to receive PSB content that has been funded by public subsidy.

Current situation

- 4.29 In contrast to the description of this issue as one of ‘retransmission fees’, Sky does not ‘retransmit’ any free-to-air channels to its viewers. Instead, broadcasters (including the commercial PSBs) make their own arrangements to broadcast their channels over satellite. Sky provides services which allow them to be listed in our EPG, as required by regulation²⁵, and is further compelled²⁶ to provide the PSB channels with valuable prominent slots.
- 4.30 Sky’s set top boxes are also required by law to enable viewers to watch unencrypted channels, without payment²⁷. Even if a household with a Sky set top box no longer subscribes to Sky’s services (and removes their viewing card), they can still use it to watch a wide range of free-to-air channels, including the PSBs’ channels. A material number of households choose to receive TV in this way.
- 4.31 The legal framework further obliges Sky to provide the commercial PSBs with access to technical platform services, on terms that are subject to Ofcom guidance. These consist of services such as EPG listings, regionalisation to support ITV’s regional advertising sales network, and use of Sky’s interactive technology and systems. As Ofcom notes, this framework has previously resulted in charges for cost recovery being payable by broadcasters to Sky.
- 4.32 Despite this framework, in 2013 Sky proactively sought long-term deals with the BBC and ITV that effectively reduced their payment for these services to zero. As a result of these deals Sky has given up the ability to recover the costs of providing those services.

Removing regulation could result in payments flowing in either direction

- 4.33 One approach to reform that has been suggested is for the relationship between broadcasters and platforms to be deregulated. The Secretary of State recently stated that he would seek to ask questions “whenever he sees a highly regulated market”, and look to “take government out of what should be private matters between private companies”²⁸. ITV has also called for the “repeal of legislation that currently prevents [ITV] from having a normal commercial negotiation with the pay television platforms”²⁹.

²⁴ Ibid, paragraph 6.77, p. 122.

²⁵ Continuation notice issued under the Communications Act 2003, 23rd July 2003.

²⁶ Section 310 of the Communications Act 2003.

²⁷ Advanced Television Services Regulation 2003.

²⁸ Secretary of State for Culture, Media and Sport Sajid Javid in a speech to the Royal Television Society, 9th September 2014.

²⁹ p.11, ITV preliminary results for year ended 31 December 2014, available at:
<http://www.itvplc.com/sites/itvplc/files/ITV%20Preliminary%20Results%202014.pdf>

- 4.34 As a general principle Sky is in favour of deregulation, allowing market-based competition to act as a source of choice, innovation and value for consumers
- 4.35 Genuine deregulation in this instance would mean removing specific obligations on both PSBs and platforms so that an unfettered commercial negotiation can take place. This would include removing the rules that require Sky to carry PSB channels on its platform and to provide them with the prominent slots on our EPG. At present, Sky receives nothing in return for giving up these valuable slots, which deliver high audiences and hundreds of millions of pounds of advertising revenue to the commercial PSBs.
- 4.36 The commercial PSBs would no longer have any obligation to offer their channels to all major platforms, allowing them to withdraw these services where they saw fit and, potentially, to favour platforms they own such as Freeview, Freesat and Youview. Removal of the 'must-offer' obligation would require an amendment to the PSB licences which were renewed last year for a further 10 years, and another review of the benefits commercial PSBs receive from those licences (we assume that the BBC, with its special position, would not have its universal availability obligation withdrawn).
- 4.37 The outcome of any such commercial negotiation would be inherently uncertain. Funds could flow in either direction given that value is created for both parties, with the magnitude of any payment being impossible to predict in advance. Given the significant benefits that the commercial PSBs would lose if they were not available on a major platform in a prime EPG slot, it is perfectly plausible that the outcome of a commercial negotiation would be payments flowing from broadcasters to platforms, rather than the reverse.
- 4.38 While Sky may therefore stand to benefit financially from such an arrangement, we also recognise that a change of this nature would carry risk and uncertainty for consumers. In particular:
- 4.38.1 The US experience points to one very clear risk – blackouts, where channels are withdrawn from platforms for a period when negotiations break down. These are regular occurrences in the US, with over 100 instances in 2013 alone. If the rules around platform-broadcaster relationships were fully removed, there would be nothing to prevent this happening in the UK, causing significant disruption and inconvenience to viewers.
- 4.38.2 Even if a negotiated settlement were to be reached, consumers may still be disadvantaged. PSBs could seek to recover any additional payments to platforms through cutting their own programme investment. Or, in the event that these payments flowed the other way, platform operators might seek to recover any payments to PSBs through higher fees for consumers (as happens in the US, where retransmission fees are often broken out on customer bills as an additional charge), a reduction in the fees paid to partner channels, or a decrease in programme investment on their own channels.
- 4.39 Given the potential negative impact on customers, Sky is not convinced that removing regulation governing the relationship between platforms and PSBs would be in the public interest.

Alternative proposals amount to increased regulation delivering a new TV tax

- 4.40 While ITV and Channel 4 have frequently cited retransmission fees in the US as an arrangement that should be replicated in the UK, Ofcom's analysis sets out the stark differences in the two countries' broadcasting systems³⁰. Significant features of the UK

³⁰ The review, paragraph 6.74, p.121.

market (the BBC, the commercial PSBs, guaranteed platform access and EPG prominence) are not present in the US, making a practical comparison challenging.

- 4.41 Whilst ITV claims to support a deregulatory approach, Channel 4 has instead explicitly rejected deregulation by saying that a commercial negotiation would not deliver the outcome it desires in the UK³¹. Instead it has sought the maintenance of the existing privileges of the commercial PSB system, and the introduction of additional regulation in the form of 'backstop' powers for Ofcom to set and impose a mandatory 'retransmission fee'. This would amount to a new tax on TV viewing via certain platforms, payable to the commercial PSBs.
- 4.42 It is unclear how such a tax would be calculated. But the harm to consumers is self-evident:
- 4.42.1 A new tax would discriminate against consumers/licence fee payers who choose to watch the PSB channels through certain platforms, including those who opted for satellite through digital switchover and received Government assistance from the publicly funded Digital Switchover Help Scheme.
- 4.42.2 It would distort competition between platforms by favouring those platforms in which the PSBs have a commercial interest such as Freeview, Freesat and Youview. There is no objectively justifiable reason why such an approach should be restricted to Sky (and Virgin). To do so would raise significant competition and state aid concerns.
- 4.42.3 As with all the policy options that would further subsidise the PSBs, a new tax would risk undermining the ability of non-PSB commercial broadcasters to invest in further UK programming.
- 4.43 Neither is it clear what the tax would be used for. Ofcom notes that "*there are no guarantees that privately-owned commercial PSBs would invest the proceeds of any transfer of value from platforms into PSB content or even into their programme budgets at all*"³². In the case of ITV at least, investors appear to regard 'retransmission fees' (however achieved) as something that would boost ITV's bottom-line rather than increase programme spend³³.
- 4.44 In summary, this alternative proposal would require additional regulation rather than deregulation, carry the significant threat of consumer harm, and fundamentally unpick the underlying principle of universal availability, free at the point of use.

The status quo delivers significant benefits

- 4.45 The current system works well for consumers, delivering important benefits:
- 4.45.1 Viewers are able watch PSB channels without payment (beyond the licence fee) on whichever platform they choose and are able to switch platforms without fear of losing access to these channels.
- 4.45.2 The PSBs are able to maximise viewing share (and advertising revenue) through universal availability on all major platforms, with guaranteed access to the prominent slots on the EPG.

³¹ David Abraham, MacTaggart Lecture at the Edinburgh TV Festival, August 21st 2014.

³² The review, paragraph 6.80, p.121.

³³ See for instance *Investors switch on to ITV*, Daily Telegraph, 11 September 2014, available at: <http://www.telegraph.co.uk/finance/markets/marketreport/11090847/Market-report-Investors-switch-on-to-ITV.html>.

4.45.3 Platforms are able to offer their customers the full suite of free-to-air PSB channels, with a level playing field between pay TV platforms and competitor platforms backed by the PSBs.

4.45.4 This is achieved without payment, by consumers, broadcasters or platform operators.

4.46 In summary, any suggestion that new regulation and a tax on TV platforms should be introduced solely for the benefit of commercial PSBs is not sustainable. Given this, policymakers must properly weigh the benefits of the existing arrangements (which have served consumers and industry well for many years) against the potential benefits of limited deregulation, which may come with downside risks for consumers.

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ANNEX A

1. The scope of Ofcom's third public service broadcasting review

- 1.1 Sky considers that Ofcom's approach is too narrow and Ofcom should take a more balanced approach, consistent with the statutory framework that governs the Review³⁴ and Ofcom's general duties³⁵.

The legal basis for the Review

- 1.2 Ofcom's duty to carry out a review of public service television broadcasting is set out in sections 264 and 264A of the Communications Act 2003 (the "Act").
- 1.3 Section 264 obliges Ofcom to review and report on the extent to which the public service broadcasters have, during the period under review, provided relevant television services which fulfil the purposes of public service television broadcasting in the UK.
- 1.4 For the purposes of section 264, public service broadcasters are the BBC, the Welsh Authority, providers of licensed public service channels and the public teletext provider. "Relevant television services" are television broadcasting services provided by the BBC, Channel 3, Channel 4, Channel 5, the public teletext service and the public services of the Welsh Authority.
- 1.5 As a result of the Digital Economy Act 2010 and government recognition that there had been substantial consumer and technological changes since 2003, the Act was amended to introduce section 264A. This extended Ofcom's existing review obligation to include an assessment of the contribution made by "media services" towards the fulfilment of the public service objectives.
- 1.6 "Media services" are any television and radio services, on-demand programme services or services provided by means of the internet where there is a person who exercises editorial control over the material included in the service³⁶. Notably, section 264A(5) indicates that the provision captures all media services available to members of the public in the UK, irrespective of whether these are provided by the PSBs or other institutions.
- 1.7 At the time that section 264A was introduced, Ofcom itself recognised that viewers had access to an ever increasing number of services via an expanding range of media and acknowledged that a significant contribution had been made to public service purposes by multi-channel (non-PSB) broadcasters in certain genres³⁷. Under the existing legislative framework, however, Ofcom had no power to take this into account³⁸. Government's intention was to address this regulatory shortcoming in order to "require Ofcom to consider

³⁴ Sections 264 and 264A of the Communications Act 2003.

³⁵ As set out in section 3 of the Act.

³⁶ Section 264A(5) of the Act.

³⁷ Notably sport, entertainment, UK and international news, p.45 Digital Economy Act 2010 Impact Assessments, April 2010.

³⁸ p. 45 Digital Economy Act 2010 Impact Assessments, April 2010.

public service media content provided on platforms beyond television and beyond the existing public service broadcasting institutions³⁹. Government therefore opted to extend the scope of Ofcom's public service broadcasting review obligations to cover:

- 1.7.1 the delivery of public service media content on platforms other than traditional linear television (e.g. on-line, on-demand and mobile); and
 - 1.7.2 the provision of these services by institutions beyond the traditional PSBs (e.g. the PSBs' digital channels, Sky and others)⁴⁰.
- 1.8 Accordingly section 264A obliges Ofcom to consider the extent to which the wider media services sector fulfils the public service objectives set out in section 264. Logically, the review required by section 264A, encompassing as it does, all PSB and non-PSB, linear and on-demand, and internet content services, ought to be the focus of Ofcom's review, providing context for its assessment of the particular contribution of the public service broadcasters' linear channels. Ofcom's consultation appears to take the opposite view, with its assessment of the wider sector being an afterthought to its main consideration. Such an approach necessarily risks underplaying the contribution of the wider sector, and overstating the threats posed to the traditional purveyors of public service television broadcasting.

Ofcom's obligation to maintain and strengthen

- 1.9 Ofcom notes in the Review that it is required by Parliament to undertake a review *"with a view to establishing the extent to which the PSB television channels have fulfilled the purposes of public service broadcasting, as defined by the Communications Act 2003. We are also required to report with a view to maintaining and strengthening public service broadcasting in the future."*⁴¹
- 1.10 The second half of this statement reflects Ofcom's review and reporting obligation under sections 264 and 264A of the Act⁴². However, no definition of "public service television broadcasting" is provided in the Act, nor was one advanced in the Communications White Paper – *A New Future for Communications*⁴³, for which the White Paper received criticism.
- 1.11 However, the House of Commons Select Committee on Culture, Media and Sport, did not consider this omission unreasonable. It noted that there was an enduring future for public service broadcasting but that this was a constantly changing phenomenon⁴⁴. The Committee instead considered that three general principles should guide the future provision of public service broadcasting:
- 1.11.1 The combination of funding arrangements, status and regulatory provisions of the "privileged broadcasters" - the BBC, ITV, Channel 4 and Channel 5 – may mean they will continue to produce considerable public service content for the foreseeable

³⁹ p.47, Digital Economy Act 2010 Impact Assessments, April 2010.

⁴⁰ p.12, Digital Economy Act 2010 Impact Assessments, April 2010.

⁴¹ Ofcom: Public Service Content in a Connected Society, Ofcom's third review of public service broadcasting, 15 December 2014, para 1.2

⁴² Section 264(3)(b) of the Act.

⁴³ Published 12 December 2000

⁴⁴ Section V of the Select Committee on Culture, Media and Sport's Second Report *"The Future of Public Service Broadcasting"*.
<http://www.publications.parliament.uk/pa/cm200001/cmselect/cmcumeds/161/16102.htm#evidence>

The report is the result of an inquiry conducted in which oral evidence was taken from 25 organisations between 25 January and 14 February 2001.

future, but it does not follow that their output can be equated with public service broadcasting.

1.11.2 The position of the privileged broadcasters brings with it very considerable costs, both in terms of direct and indirect charges upon the public and in terms of the impact on development of a competitive and dynamic market. These costs should be transparently identified and continuously assessed against other means of achieving the desired ends in terms of public service content.

1.11.3 The focus in future should be on ensuring the provision of public service content from whatever source is the most appropriate rather than on protecting the privilege of certain broadcasters.

1.12 It is therefore clear that, in assessing whether regulatory action needs to be taken to maintain or strengthen the quality of public service television broadcasting in the UK, Ofcom is required to conduct a balanced review, taking account of the wider provision of media services, whether by the PSBs, the PSB's digital channels or other broadcasters, as well as the provision of television services by the PSBs themselves. While Ofcom has given some consideration to the wider provision of media services in the Review, it is Sky's view that Ofcom places undue focus on the PSBs and therefore fails to discharge its section 264A obligations.

Ofcom's general duties

1.13 In conducting the Review Ofcom should also be mindful of its general duties under the Act, in particular the need to ensure that regulatory intervention is proportionate and targeted only at cases in which action is needed⁴⁵. Sky questions how Ofcom can conclude that it is satisfied that any proposals are compliant with these duties and, in particular that any action is required, in circumstances where Ofcom has not conducted a complete and balanced review of existing market conditions. Government itself indicated that only once a balanced exercise had been undertaken would Ofcom "*be in a position to make better informed recommendations to Government on the provision of public service media content and to better consider where regulatory intervention may be desirable in accordance with their existing duties*"⁴⁶.

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⁴⁵ s3 of the Act.

⁴⁶ p.47, Digital Economy Act 2010 Impact Assessments, April 2010.