

Response of the Campaign For Press and Broadcasting Freedom to *The balance of payments between television platforms and public service broadcaster. Options for deregulation: Consultation Paper (DCMS, London, 26 March 2015)* CPBF, London, June 2015)

The Campaign for Press and Broadcasting Freedom is an independent organisation which has campaigned for more accountable, open and diverse media since its creation in 1979. Issues around which it has worked include, the statutory Right of Reply, ownership and control in the media, the nature of the internet and computer based communications, representation within the media of the diversity of groups in society, the accountability of regulator structures, the need for independent alternative media and the importance of sustaining and developing public service media.

References to *The balance of payments* document are given by paragraph number in square brackets.

Aim of the Consultation

1. As with so much government policy the underlying thrust of this document is to favour private interests in communications over public service operators by promoting the deregulation of aspects of the communications framework. This is made clear in the consultation document:

‘The Government believes that, in general, competitive markets rather than interventions through regulation tend to encourage greater overall levels of investment. However it is also possible in some circumstances that the stability regulation offers can provide the certainty needed to increase future investment. The complexity of the resulting commercial negotiations between the parties mean that neither the direction nor the magnitude of a change in the balance of payments that could result from deregulation is necessarily clear cut, nor is the ultimate impact of such a change on net investment levels in the creative industries sector. The intention of this consultation therefore is to help build a stronger evidence base on the potential impact of deregulation, including the wider repercussive impact on other businesses that are affected by the level and type of investment made by PSBs and platforms. [6]

The direction of policy is presupposed in the object of the exercise which is to ‘help build a stronger evidence base on the potential impact of deregulation...on other businesses’. The Campaign has long taken the view that the way to ensure a proper supply of communications which operate in the public interest is to ensure that regulation is strong across the sector. The suggestion in this proposal that PSBs will, or might lose their prominence on Electronic Programme Guides and might have to pay significant amounts for having a presence on commercial platforms, can only, in the long run, weaken the position of PSBs in the communications environment relative to their commercial rivals.

This is a complex area of policy, and the CPBF's response therefore focuses on those areas where we know we have a contribution to make on issues of approach and the implications of proposals.

Q1. What are your views on the overall balance of the regulatory framework, and how do you think the balance changes under the different options we have discussed?

2. The balance of the regulatory framework at the moment is in need of major re-evaluation. The elements of regulation which this consultation seeks views on are expressions of a wider framework of under-regulation in the sector. For example, though commercial PSBs have some obligations in return for gifted spectrum, they have, it is widely acknowledged, been allowed to withdraw from key public service obligations, most notably the provision of regional programming of high quality and frequency. Thus, altering the balance of the current weak regulations designed to assist the remaining elements of PSB operate within the system, would further destabilise the system, and once again, illustrates the government's lack of commitment to the provision of PSB services.

Q2. How far does the current PSB compact regulatory framework deliver for the consumer? How would the policy options discussed in this consultation impact the balance of benefits and obligations that accompany the PSB licences?

3. The current regulatory framework does not put enough obligations on commercial PSB providers or commercial non-PSB providers to invest in diverse, high quality programming across all platforms. The options here, in so far as they allow commercial PSB providers to negotiate the payments they receive for placement on platforms, and in so far as they weaken the prominence of PSBs on EPGs, will simply exacerbate that. In the former it will be yet another step down the road of full competition for commercial PSBs, and in the latter a device which, in the long run, by undermining ready and easy access to PSBs on EPG's makes the case for continuing public service regulations weaker, as likely audience reach diminishes.

Q3. Do you think that the changing technical landscape and changes in the market for TV services since the Communications Act 2003 mean elements of regulation may no longer be fit for purpose and should be reviewed (including the EPG regulation)?

4. Regulations should be reviewed to respond to technical change. But they should be reviewed without presuppositions such as those which underpin the deregulatory approach of the government. The issues outlined in this consultation should be subject to a longer, fuller, independent review, rather than another, relatively swift 'consultation' which by its speed and use of obscure technical language disables organisations in civil society from taking part. EPG regulation should remain in place and strengthened until such a review is undertaken.

Q4. What are your views on recent trends in UK original content investment and how regulation is impacting, or could impact, these?

5. As the consultation document states 'data shows that PSBs' content investment has been in decline for the past five years' [7]. This is yet more evidence that the direction of policy embedded in communications legislation, by fostering under regulated competition, and weakening obligations on PSB providers, has resulted in less investment in content. There is little reason to believe, in spite of what the consultation paper suggests, that further deregulation of the sort mooted by the government will result in anything other than a more precipitous decline in public service content in the electronic media. There has been a massive increase in the volume of material produced across the sector, but this has also clearly not been an increase in original high quality public service content, in fact quite the opposite.

Q5. What do you think the impacts of removing section 73 (CDPA 1988) will be?

6. It is likely to have an effect similar to the removal of must carry obligations. By removing cable company protection against copyright infringement, then this opens the way for them to remove PSB programmes from their services, or carry only those which they can afford to pay for. Thus the reach of PSB will decline, and the case for removing support for PSB will be bolstered – an outcome which has been at the core of policy since the late 1980s.

Q6. What transitional arrangements, if any, would be needed to accompany removing s73, what form might these take and how long would they be needed for to allow the cable platforms and Commercial PSBs to reorder their commercial relationships?

7. None, because it should not take place, outside of a full, independent review of the issues, rather than in the context of this loaded consultation.

Q7. What would the practical implications be for viewers, including vulnerable viewers, if commercial PSB content were only available on free-to-view platforms?

8. There is plenty of evidence now in the public domain from Ofcom and academia, which shows the importance to democracy and cultural well being, of allowing people regular access to public service content. By removing PSB from all but free-to-view platforms, the government will be leaving many citizens to the mercy of under regulated commercial providers. Thus their access to a rich range of cultural goods, not supplied by the market, will assist in limiting their horizons and their access to information more generally. It has long been the case that commercial provision of high quality media goods is biased towards those with cultural and financial capital to make informed choices. This change will simply reinforce that bias.

Q8. What would be the impact of removing must offer/must carry provisions on:

- a. The universal availability (reach) of PSB content on pay platforms?**
- b. The PSB compact?**
- c. Overall audience experience?**
- d. The net flow of funds between PSBs and pay platforms (including negotiations for other portfolio channels and other services)?**
- e. Investment in PSB content?**
- f. Investment in the creative industries sector more widely?**
- g. Competition between PSB and non-PSB channels?**
- h. Pay-Tv subscription prices for consumers?**
- a. or can the policy objective of freer market negotiations be achieved in the existing system?**

9. The removal of must offer/must carry provisions would:

[a] deny to millions of people easy and ready access to programmes produced within an albeit inadequate regime of PSB obligations

[b] weaken the compact, and provide a further incentive for commercial PSB operators to call for less regulation – a recurrent aspect of industry behaviour for the last 30 years

[c] limit the audience experience for millions of subscribers

[d] open up a market in transactions between PSB's and platforms, which would ultimately provide some financial benefits (unpredictable at this stage) to both sides, but by bringing the terms of access down to money and only money, reinforce the drift away from PSB quality content.

[e] Possibly further undermine investment in PSB content, due to resources being channelled towards access payments and away from programming

[f] It would be surprising if it could be shown definitively that investment in the creative industries was influenced significantly by the removal of the must offer/carry rules; the idea that it would seem to be being used in this document as leverage to press on with deregulation.

[g] It would, of course, favour the deep pockets of under regulated commercial providers who with less obligations than even the weak ones currently associated with PSBs, would find it in their interests to squeeze out PSB providers from platforms, using whatever market mechanisms came to hand.

[h] Presumably it would lead to an increase in subscription prices for consumers if it led to platforms having to pay PSB's for access to their services; but it is more likely that, with some exceptions, exclusion, or gradual attrition of PSB services would be the option chosen.

[i] 'freer market negotiations' is a loaded term; why should that be an object of this exercise? If technical change is driving this process forward, as it clearly is, then to set this as an objective clearly shows that the policy makers in Whitehall and in government remain in the grip of market orientated ideology which has severely undermined the role of PSB in the UK communications system.

Q9. What would the impacts be if the regulatory framework was amended to make the requirement to agree terms stronger?

10. If this means using regulation to press forward the 'free market' then the negative outcomes outlined in our response to Question 8 would come into play.

Q10. We welcome evidence on how changes to the existing regulatory framework would impact other parties in the sector, such as independent production companies, free-to-view platforms or other technical service providers. We also welcome views on other options not discussed here. What evidence is there that a change in a flow of funds would be translated into higher levels of investment?

11. These are complex issues, all bundled into one question, pre-supposing that citizens groups have the resources to provide detailed responses. Without a proper process of public inquiry as suggested above, a question like this is clearly discriminatory. Our view is that if the government is being honest in asking this question, it will set up a mechanism that allows all interested parties to fully respond, rather than simply trigger responses from well resourced commercial interests.

Q11. Do you think that updating the existing regime to reflect technical innovations and entrenching the PSBs' prominent position would encourage more long term investment in content and services and if so how might this impact be quantified?

12. It is likely that entrenching PSB's prominent position, and increasing PSB obligations across the sector, will benefit viewers by providing a level playing field for investment in content.

Q12. What steps would have to occur to translate the removal of appropriate prominence requirements into more effective competition between broadcasters for audience share and content investment benefits for viewers?

13. As is clear, we do not accept that there is a case for doing this, without a fuller public review analysing the evidence. If any steps such as these were taken it would be surprising if they resulted in increases in content investment for viewers of a PSB type, given the way current deregulatory policies have, on the governments own statement, resulted in decline in content production.

Q13. In order to maintain the current policy objective of PSB discoverability in view of technical developments, do you believe that the current EPG framework would require updating in order to remain fit-for-purpose?

14. Yes, but only after fuller consultation; and only in the context of a policy which recognised the centrality of PSB values to the whole regulatory system, which is clearly not the case at the moment.

Q14. If so, do you agree with the three areas we have highlighted for review:

Making the existing framework technology neutral;

- a. Including VoD content, and;
- b. Integrating technologically advanced service (e.g. HD services) into the existing framework? (Detailed options are discussed in the Appendix)

15. Given the current framework of policy, these would be positive steps.

Q15. Alternatively, do you believe that deregulation would provide a productive route to ensure the best quality content is easily discoverable for viewers while also maximising investment?

16. As there is little evidence that deregulation increases quality over quantity, and as deregulation in this context will remove existing benefits to the viewer/listener and replace it by the uncertainties of market based competition, the answer to this question is clearly 'No'.

Q16. What would be the impact of removing the requirement for EPG providers to offer commercial PSBs appropriate prominence on:

- a. Discoverability of PSB content including Local TV?
- b. The PSB compact?
- c. Net investment in the creative industries sector overall, including investment in content?
- d. The ability of commercial PSBs and non-PSB channels to make medium/long-term investment commitments?

The ability of non-PSB channels to compete more effectively with commercial PSB channels?

17. It would weaken discoverability; undermine incentives for commercial PSB providers thereby weakening the compact; have unpredictable (as far as we can see without proper detailed evidence being in the public domain) consequences for investment; weaken the political justification for commercial PSB, by attacking its audience base, and so weaken investment; provide a massive boost for non-PSB channels, as seems to be the underlying intention of this document, at the further expense of sustaining a varied public culture based on properly regulated public communications.

Q17. Do you agree with our proposals to amend the EPG definition in law to make it:

- i) **technologically neutral - so that so regardless of how the information on the content is communicated to the EPG service it will be within scope of regulation;**
- ii) **include video-on-demand content?**
- iii) **if not, why not?**

18. Yes, to both (i) and (ii).

Q18. Do you agree that it is preferable to have the same regulatory system for EPGs for broadcast and VoD services or do you think it is better to introduce a separate regulatory system for VoD EPGs? If the latter, what should that look like?

19. Incorporate new technologies into the existing framework, with a view to enhancing prominence and discoverability of all PSB services including the BBC, across all emerging platforms.

Q19. Do you think a change from the current licencing system to a notification system is necessary or preferable? What impact is to be expected from a change from a licencing to a notification system?

20. We have no views on this at the moment, as this like so much else in this consultation requires much longer and better informed debate.

Q20. Do you agree that there is a technologically feasible solution to create a system that would enable EPG providers to substitute in the highest quality PSB content that each consumer can access (depending on their TV) from the same slot? Does this solution only cover perfect simulcasts in HD and SD? If not, is it for Ofcom to determine what appropriate prominence is if the channel or programme is not an SD - HD perfect simulcast?

21. We have no views on this at the moment, as this like so much else in this consultation requires much longer and better informed debate.

Q21. If there is no technologically feasible solution, do you think the EPG prominence regulation should be extended to HD sub-genre menus?

22. EPG prominence should be extended to all PSB services whatever their method of delivery.

23. As we point out in paragraph 4 above, we consider there is a need for a fuller, longer open public inquiry into these issues. The only objection to this would be that it would in some way slow down the process of decision making. By throwing light on the issue for the public it would be possible, however, to analyse the complex issues more fully and possibly point to fairer and more sustainable solutions to these issue than are stated or implied by this consultation document.

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