

EUROPEAN MEDIA FORUM

OFCOM'S PUBLIC SERVICE BROADCASTING REVIEW

THE EUROPEAN DIMENSION

EXECUTIVE SUMMARY

- This paper contributes to OFCOM's review of Public Service Broadcasting in the UK, focussing on developments at the European level.
- The impact of decisions and debates in European institutions is insufficiently regarded as part of the UK debate on the future of Public Service Broadcasting. Broadcasters and regulators need to play a bigger role in the European debate.
- The use of state aid will need to be justified more thoroughly and in more detail in the future. Court decisions in Europe may change the rules over time.
- National regulatory authorities will become more integrated at a European level.
- The Amsterdam Protocol does not mean that public service broadcasters will be allowed to continue with their current activities without challenge
- The Commission insists that a broadcaster with a public service mandate must have an independent regulator to fulfil that function
- The BBC Governors do not meet that need
- Antitrust Law and the Competition Directorate will play an increasingly significant role as time goes on, although for the moment there is still a role for specific media regulation
- The Altmark legal case, and pronouncements by the Commission, mean that state aid (such as the licence fee) must be limited to covering the costs incurred by the undertaking for the provision of a public service good.

- Responses to the next stage of the updating of the TV Without Frontiers Directive show two clear camps; Governments, regulators and broadcasters favour loose regulation with principles only being decided at a European level, while trade unions, and associations of creative people prefer prescriptive legislation at a European level.
- Content regulation becomes increasingly difficult with the proliferation of channels and delivery platforms. One solution is to impose specific content obligations on certain broadcasters, in return for the right to receive state aid.
- The debate over relaxing competition rules for Services of General Interest will be crucial for public service broadcasters. At present there is confusion about where on the spectrum PSB lies, between those services which should be exempt altogether from competition law, and those which should be treated as normal commercial services.

1) INTRODUCTION

This paper is a contribution to OFCOM's review of Public Service Broadcasting in the UK. Its focus is the large number of developments in thinking at the European level about PSB specifically and audiovisual policy more widely. This includes an assessment of the debate on "services of general economic interest", where the balance between public service obligations and the requirements of competition policy is particularly relevant in the field of PSB, but which has not so far featured in UK discussions.

This absence is part of a wider neglect of the potential impact of EU-level regulation on UK broadcasting institutions, including the BBC and OFCOM itself. It is important for policy makers and commentators not only to understand how thinking inside the various arms of the EU is developing, but also to contribute to the debates at an early enough stage to influence them.

The discussions that follow cover the Commission's thinking on the future of regulatory audiovisual policy, which stems from the "Television without Frontiers" Directive. This includes discussions about the use of state aid for public service broadcasters, regulation of programme content and advertising, and the possibility of the creation of an audiovisual regulators group. The paper also deals with the implications of wider competition policy for Britain's public service broadcasters and their rivals. This strand includes not just the services of general economic interest but also issues such as foreclosure of markets through concentration and vertical integration, and the role of the gatekeeper.

From these discussions the paper derives a number of conclusions about which parts of the UK media sector could be most affected by EU developments, and what these effects could be. Inevitably much of this discussion centres on the future role of the BBC, although the obligations of the commercial public service broadcasters are also affected. It is a peculiarity of the British debate on the future of broadcasting that, even at a time when the issue of European regulation is so prominent in many economic fields; it barely surfaces in this one. To take just one example, if the future of the licence fee in Britain is not to be limited to funding the BBC, what effect will the rules on the use of state aids have on broadcasters or producers receiving this subsidy?

It is as though the existence of the Amsterdam Protocol has ended any prospect of important EU intervention in the British regulatory structure. This would be a misreading of the way European regulation is a dynamic phenomenon, and one which is sensitive to changing market conditions. It is not the purpose of this paper to comment on the political aspects of this. Rather, the paper accepts the reality of the situation, and draws conclusions about the potential effects of this dynamism on the internal UK debate, and more importantly on the future of many of the most involved participants in the debate.

2) EUROPEAN AUDIOVISUAL REGULATION

This section deals with the publicly stated ambitions of the Commission in developing audiovisual policy at a European Level. The basic background assumed by the Commission is of a fast-growing market in which free-to-air broadcasters are playing a diminishing role. Another factor of significance for public service broadcasters is the consistent negative trade balance throughout the audiovisual sector between the EU and the US.

STATE AID

One of the key factors is clearly the control of the use of state aid, which is covered by Article 86 (2) of the Treaty, and the clarifying Communication issued alongside the Amsterdam Treaty. Further clarification has come through individual cases brought by the Commission, notably the action against the Danish public broadcaster TV2, when essentially the Commission argued that the use of the licence fee and other measures were more generous than was needed to compensate the broadcaster for the net costs of public service broadcasting on TV2, thus amounting to cross-subsidy of TV2's commercial activities.

This has clear implications both for the BBC and those British commercial broadcasters that will retain a public service remit after OFCOM's review. For the BBC, there may have to be a rolling back of its commercial activities which saw so much expansion under the previous Director-General. The newly-proposed test of "public value" for all BBC services may well preclude some existing activities anyway, as well as future expansion. But if this has to be done under legal guidelines, or indeed if challenges to particular BBC activities using the Commission's powers become common, there will have been a very significant change in the role both of the Governors and of OFCOM. A more detailed discussion follows in the next section.

As for ITV and Channels 4 and 5, depending on their status once the review of PSB is completed, they may also find unanticipated constraints on their activities from the Commission. There are a large number of controversial details inherent in plans to replace the current BBC Licence Fee with a Fund available more generally. To this we can add the need to conform to European rules which are themselves not established in detail, partly because their interpretation will depend over time on court decisions. This is therefore a matter for UK regulators to consider as part of the PSB review.

ANALOGUE SWITCH-OFF

Similar considerations apply to the issue of analogue switch-off. The BBC has argued for “universal provision, open access and unencryption”, to avoid a world of “digital exclusion”—a version of a digital world that would be disadvantageous for commercial Pay-TV operators. This vision would seem to clash with the Commission’s demand that “National measures should be transparent, proportionate, timely and technologically neutral so as to avoid unduly discriminating against certain parties and distorting competition in the market.”

Faced with this dichotomy, regulators will have to decide how far it is possible to restrict the activities of Pay-TV operators in securing rights for programmes or events which may fall below the level of national cultural significance which would leave them protected, but which nevertheless could be seen to possess “public value”.

The current EU rules state that regulation must:

“Ensure that events of major importance for society are not broadcast on the basis of exclusivity in such a way that significant sections of the public in the relevant Member State are prevented from following the event in a freely accessible television broadcast”.

This is a restraint which becomes much less meaningful in a fully digital environment. The Commission recognises this, and has said that it is investigating “whether any changes to content regulation for the different distribution channels for audiovisual content would be necessary *at Community level* in order to take account of media convergence at a technical level and any divergence of national regulation which affects the establishment and the functioning of the common market.”

The second half of the last sentence offers intriguing possibilities if a number of events emerge which have genuine international significance in a number of countries. So far, this kind of problem has been restricted to big sporting competitions, and even there the balance between maximising income and guaranteeing free access across a range of territories has proved complex.

Assuming a growing level of cultural globalisation, and therefore the emergence of more events of significance in different countries, the national regulators will find themselves operating inside a tighter EU framework in some of the most sensitive areas.

Indeed the whole idea of extending Community competence in content regulation is potentially fraught. Standards of impartiality, rules on privacy, and the type of content easily available to children are just three of the issues where national characteristics are varied around the EU, and where the UK would find it challenging to find an external jurisdiction claiming some control. This is another matter both for broadcasters and regulators to consider in the course of the PSB review.

NEW REGULATORY INSTITUTIONS

As the technology changes, so does regulation. This applies as much at a European level as nationally, and one of the specific tasks the Commission has set itself is to consider “how national regulatory authorities could better be integrated in the work at European level...The majority of regulators and some Member States are in favour of establishing a regulatory committee at European level, while some other Member States are against a duplication of committees.”

The key question, not least for OFCOM, is what powers would accrete to a European Regulatory Committee. The next step contemplated is a permanent “European regulators group for audiovisual services”. This group would at first be confined to an exchange of views on operational and technical issues”, while the existing Contact Committee, set up by the TVWF Directive, remained in force.

The logic of these changes points to a future in which regulation is shared between national and EU bodies, not least because the increasing availability of digital services will entail greater cross-border access for mass-market consumers. There will need to be a vital debate about the division of powers, and the application of the subsidiarity principle to this division.

There is no parallel with, for example, the role of the European Central Bank, as it is impossible to envisage a single European Public Broadcaster. However, it would be sensible for OFCOM to anticipate proposals for greater institutional activism at a European level, in a way which other UK bodies have frequently failed to do, and to establish the principles which it would seek to apply to such developments.

It will do so in both economic and cultural terms. It is hard to argue that the inherent economic structure of broadcasting is different in the Member States, even though it can be said that the BBC's central role in the UK's broadcasting economy is unique.

There will be a stronger case to be made about the desirability of preserving the different cultural strengths of the different member states, and of using the power of electronic communications to enhance national cultures. This is already regarded as a suitable policy target by European institutions, and could be used to argue that national regulators should retain significant powers even if a greater degree of co-ordination at a European level does emerge.

FORECLOSURE, VERTICAL INTEGRATION AND GATEKEEPING

Most of the problems associated with the issues of anti-competitive behaviour associated with dominant players in a particular media market have affected private companies. Indeed it is notable that many of the individual cases which have pointed the way to the future of regulation in areas such as vertical integration and gatekeeping have been decided at the European level, possibly pointing to the future of PSB regulation as the economic effects of strong public broadcasters come under increasing scrutiny.

Foreclosure is one of the central concerns of EU competition policy in relation to vertical agreements and mergers, since the technology makes it easy to raise rivals' costs by controlling access either to rights or customers by technological means. The relevance of this to the UK debate on PSB is two-fold.

First, if others apart from the BBC are to become eligible for subsidy it will be vital to establish ground rules about what a subsidised entity can do in its purely commercial operations, and whether anti-competitive behaviour can be punished through withdrawal of subsidy. Secondly, the BBC's own commercial operations will also come under increasing scrutiny.

The difficulty here is that while competition matters are increasingly decided under EU rules, content regulation has been a matter largely for national bodies. If sector-specific regulation is destined to die out, then this gap will have to be filled.

3) PUBLIC SERVICE BROADCASTING AND COMPETITION REGULATION

Within the generality of EU regulation are the specific aspects which impact on PSB. The need for PSB is shown clearly in that the three dominant themes in media policy, the need for cultural diversity, pluralism, and an enhanced citizen's voice, point to a media sector which contains non-commercial elements. But at the same time Articles 86 and 87 of the Treaty make clear that even privileged broadcasters must accept the rules of a market economy in terms of competition.

The Commission has based its position on the Protocol to the Amsterdam Treaty, which states:

“The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of the Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.”

In other words, as defined by the Commission, the public goals of PSB can be defined by each Member States, but there must be a considerable degree of transparency and fair competition. Herbert Ungerer, the Head of the Information, Communication and Multimedia Division of the Competition Directorate, who will be speaking at the seminar at which this paper is presented, has been clear about what this entails. Speaking in Bucharest in September 2003 he explained it meant:

- There must be a clearer specification of the public service mandate, and an independent regulator to survey it, and rules of fair competition must be complied with.
- Markets must be allowed to develop freely, as far as the performance of that function is not endangered. The dual nature of the market must not be tilted by public intervention to the favour of any market participant.

- Innovation of the emergence of New Media must not be strangled. “We believe that the sector will look very different before the end of the decade, to the benefit of all---if we let consumer and audience choice develop.”

The first of these points strikes at the heart of the current regulatory position of the BBC. Certainly its commercial activities are regulated by OFCOM and wider competition authorities at both national and European level—indeed one of the points made by the BBC in its recent document “Building Public Value” is that no complaint to the UK or EU competition authorities against the BBC has been upheld in the last ten years---but there is no independent regulator with the job of “surveying the public service mandate.”

This job, which falls to the Governors, is therefore being done by a non-independent body, which cannot be allowed to continue in its current form. (This makes the exclusion of this area of the BBC’s activity from the terms of the OFCOM all the more puzzling, as it leaves open the possibility of intervention at a European level shortly after the British authorities have completed their own review and consequent legislative changes, with predictable unhappy consequences all round.)

At least the BBC itself seems to recognise that the Governors cannot survive. In Building Public Value it claims that the reforms it proposes what it calls “a set of bold reforms of the current system designed to deliver clear and indisputable independence of the Board of Governors from management.” The question is whether the proposals as they stand live up to this claim. The new system would involve a dedicated “Governance Unit” which would work separately from management (indeed would be “Located apart from senior management”) and commission external research on the BBC.

The problem with this model is that the staff of such a unit would still be BBC employees on attachment to the Governance Unit, and therefore would know that they would at some stage have to re-enter the main part of the BBC, and come under the control of the management on whose performance they had been commenting. Even if everyone involved behaved entirely properly, there would be an inevitable degree of public scepticism that such a structure did meet the Commission’s requirement of an independent regulator.

It therefore seems inevitable that a new structure of independent external regulation will be required for the BBC, even if national policy makers would prefer to shy away from it. Whether this should be inside OFCOM's normal activities, a separate arm of OFCOM, or a free-standing regulator, is outside the remit of this paper. But the thrust of EU thinking on this matter is clear.

In the same Bucharest speech Herr Ungerer pointed out that while Antitrust Law will play a growing role as media markets converge, "specific media regulation will remain indispensable, and strong independent media regulators will be needed, in areas where anti-trust and merger control cannot by themselves ensure pluralism and citizens' choice." In a speech at Oxford earlier this year he made the point that all the main media markets have remained highly oligopolistic. The particular challenge for UK regulators is that a state-funded body is a significant oligopolist, making the need for strong independent regulation more important as convergence continues and traditional forms of regulation come increasingly under question.

What has happened up to now is that the Commission, in its role as preserver of the fair competition regime, has become a main player in regulating media markets and their commercial players. It is likely that the stronger PSB providers will be increasingly affected by this development, as they themselves have such an impact on their national markets. The route by which this will be done, following the reform of EU antitrust regulations, is through national regulators (both OFT and OFCOM in Britain's case) although the principles being applied will have been set at European level. The principles that will require interpretation include the Merger Regulation, the articles of the Treaty (81 and 82) which deal with antitrust measures and the abuse of dominant positions, the control of services of general interest (see below) and the use of State Aid.

The case for the prosecution, as it were, of the publicly funded broadcasters comes from their commercial rival in the ACT, AER and EPC, in their document "Safeguarding the Future of the European Audiovisual Market". This document makes a number of accusations of unfair competition against the public broadcasters, saying that they:

- Misuse their strong and often leading positions across Europe in the audience and revenue markets

- Foster a growing discrepancy between their mission statements and their actual activities
- Distort competition in both the output and input markets for television and radio as well as the related markets of multi-channel television, niche radio provision, television programme production, internet content and the press.
- Capture commercial revenues in addition to State Aid outside the context of Article 86 of the Treaty as applied to other liberalised sectors
- Increase confusion in the limits of their mission statements and their actual activities.

Some of this is the standard fare of lobbying. There is though a possibility that as the debate on regulation moves from a national to a European level the relative strengths of the BBC case and that of its long-term rivals may shift. Over the decades the BBC has been highly skilful at making its case to successive Governments, none of whom has restricted its development whatever the superficial degree of hostility between the BBC and leading politicians of the day. This may not be replicated at the European level.

The most interesting area of dispute raised by the commercial broadcasters is that of State Aid. The significant Altmark Case in July 2003 concluded that state support for a broadcaster did not qualify as state aid if four conditions were met:

- The recipient undertaking is actually required to discharge public service obligations, and those obligations must have been clearly defined
- The parameters on the basis of which the compensation is calculated have been established in an objective and transparent manner
- The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations
- The level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means so as to be able to meet the necessary public service requirements, would have incurred in discharging the obligations.

The question for the future is whether these principles will be applied by the Commission to the broadcasting sector. The commercial operators have been sceptical, claiming that the judgements which have followed Altmark have not so far lived up to its provisions. In 2002 the Competition Commissioner Mario Monti seemed to be clear and strict on the issue. He made the point that the Communication on the application of state aid rules to public service broadcasting struck an important balance between the legitimate objective of PSB and the need to ensure that such broadcasters operate within a defined remit and that they do not distort other markets. He added, significantly:

“The question of proportionality is in principle rather simple: the state aid must be limited to covering the costs incurred by the undertaking for the provision of the public service.” This is squarely in line with the Altmark judgement, and seems to give a clear auditing guideline for assessing the activities of the BBC. It leaves a debate to be had about what the public service remit entails, within the limits set by the Amsterdam protocol, and in particular what the extent and scope of public services should be in a converging media market. But it requires the BBC, and UK regulators, to be stricter than they have in the past in costing individual activities.

On this point it is useful to return to the case made by the commercial broadcasters. Among their accusations against the public broadcasters which have particular relevance in the UK are:

- Running programmes that imitate the programming of private broadcasters
- Adopting schedules that mirror commercial operators
- Pre-empting the development of new multi-channel television and internet content markets by launching initiatives that duplicate private sector activities
- Scheduling serious output outside prime time or on secondary channels
- Entering into, and sometimes exacerbating “bidding wars” for rights to popular programmes

The specific complaint against the BBC is that its PSB remit is not defined tightly enough, and that therefore it can, for example, stretch the definition of what should be on BBC3, or on the content of its various websites---both ventures which have funded through the licence fee and which have a direct impact on commercial competition. BBCi has become a hugely significant player in the UK internet market, with a dominant position in the news and sport segments.

The solution of the commercial broadcasters is to

- Impose clearly defined remits on each channel or station operated by a publicly funded broadcaster which must include specific programming obligations which are not also imposed on other broadcasters
- Ensure that public funding to broadcasters is both necessary and proportional to the remit, and that the principle of economic efficiency is fully applied to public broadcasters' expenditure
- Establish independent authorities to monitor publicly funded broadcasters through a binding act.

The BBC's response to this is the concept of "public value", a test of which it says it will apply to all its services in future. This test encompasses:

- Individual Value: the benefit that people derive as individuals from a BBC service, compared with the costs of providing it. Measures will include willingness to pay, consumer demand, and conjoint analysis.
- Citizen value: the benefit that people derive from a BBC service as citizens, such as its contribution to a better-informed democracy, higher educational standards, or a more inclusive society. The BBC admits that these are complex, judgemental issues, and assigning a monetary value is likely to be difficult and sometimes impossible.
- Net Economic Value: the net benefit that the wider media economy may derive from the BBC's services. It will have a positive dimension, such as the impact of the BBC on the profitability of the creative economy, training and market development.

This is a serious attempt to devise a measurement of the remit a Public Service Broadcaster should aspire to in the digital age. But it does not address the detailed issues such as a specific programming target for each service, or the necessity for subsidy only to fund services at a level which an efficient operator would spend to make them. Successive regimes of BBC management have committed themselves to driving down costs, and specifically administrative costs. It may be helpful to them if they were funded in a more targeted way which attempted to provide the appropriate amount of subsidy for the services they were required to provide.

SUBMISSIONS ABOUT THE TVWF DIRECTIVE

If the battle does move onto a European forum, it will be useful to take a detailed look at the overall climate, as reflected by the submissions to the EU review of the TVWF Directive. The Commission has received 150 submissions running to some 1350 pages of written evidence. (Annex A displays the most relevant specific submissions.) The authors include Governments, regulators, consumer groups, trade unions and academics. There are also a large number of submissions from the voluntary sector and church groups. Many of these submissions concerned themselves with narrow interests such as concerns over alcohol, healthy eating etc and therefore fall outside the remit of this report.

The submissions to the Commission show a surprising degree of consensus. Where diversions of opinion do occur the proponents can be broadly put into two relatively cohesive camps. Governments, regulators, broadcasting companies and sporting organisations generally favour loose regulation with principles being established in Brussels, with practice, implementation and details being decided at a member state level with some sort of watchdog or arbitration body in Brussels (not it should be noted necessarily a new body).

It is argued that this approach allows flexibility and leverage for regulating public service broadcasting in what are rapidly changing and evolving technological times. At the same time however distance and light touch regulation do leave loopholes and a certain amount of room for circumnavigation of the rules.

The other camp consists principally of trade unions, actors, writers and other theatrical guilds and organisations, along with independent producers and more loosely, consumer groups. They favour prescriptive legislation at a European level with regulators and enforcers also more likely to be in Brussels than the relevant member state.

Events of Major Importance for Society.

Those submissions that name “Events of Major Importance for Society” refer to sporting fixtures. There are 5 principle concerns involving Events of Major Importance for society (listed events):

- 1) The necessary levels of coverage a broadcaster must achieve in order to cover an event.
- 2) The price paid to promoters for rights to broadcast.
- 3) The proposed setting up of list at a European level.
- 4) The potential retrospective nature of any decision to list.
- 5) The effects of one member states listing on other member states.

The fact that in order to qualify for showing listed events one has to have a high level of coverage goes undisputed. The wording in the directive is currently “substantial proportion”. Some submissions argue that this should be harmonised across the union so that a common level can be achieved. Those in favour of harmonisation have therefore suggested potential coverage figures of 80% to 90% of the population or used a form of words such as “almost universal” to describe an appropriate level of coverage.

The case for resisting harmonization is that it would simply be inflexible enough to work. A standard rate would be unlikely to be popular. If it were set too high, it might prove impossible for smaller, less developed, sparsely populated countries to provide a single broadcaster capable of meeting the threshold. A figure that was set to low would have implications for countries like Britain and Ireland where it is conceivable that the 90% coverage required might be lowered.

The second issue surrounding listed events is the amount of money paid to the organisers of listed events. It is agreed in all the submissions that the remuneration should reflect and be at a level of a fair commercial price that could be expected from broadcasters.

If there is more than one suitable broadcaster then the issue does not arrive as the market should determine the price. If this is not the case then there clearly needs to be a regulator to arbitrate a price, and it is felt that this is best done at the member state level.

Some submissions suggested the setting up of a European wide list of events that must be reserved for public service broadcasters. The consensus is that if a European list is to exist, then it should do so as an absolute minimum, as a floor and not a ceiling and something which member states would be welcome and indeed expected to build upon.

The consensus therefore is that whilst a European list might be of interest the bulk of definition and designation is better left to the Member States. It is a widely felt that States should consult on the drawing up of the list with members of the public and other interested parties. One submission stated that governments can go too far. In Portugal for example the government listed the World Youth Sailing Championships despite the dubious levels of public interest in them.

The issue of retrospective listing has been raised. This would allow listing after contracts have been signed. The overwhelming feeling is against this as certainty over contracts is required. The Irish Football and Rugby Unions have expressed concern over this, relating to a piece of domestic legislation. It is worth noting that the retrospective clause could and would be unnecessary if governments were more careful and timely in drawing up listed events. The British Government's opinion is that retrospective legislation is to be avoided.

Promotion of Cultural Diversity and Competitiveness in European Programme Industries

At the center of the directive is the desire to promote cultural diversity and help promote and foster the European Television industry. By far the most important and controversial elements covered here are the two quotas, namely the requirement for the majority of scheduled programmes to be "European" and the requirement that 10% of programmes are made in the independent sector. Both can be worked around and the "opt-outs" are the subject of some controversy.

Other issues include the possibility of a “sub-quota” for European productions other than from the home nation and how to increase distribution within Europe. The issue of intellectual rights also keeps reappearing in a range of submissions. Many submissions expressed surprise that “promoting cultural diversity” features so prominently in the discussion paper as it does not appear in the present text at all.

European Programming:

Many submissions point out that original programming is expensive and extremely risky. It therefore makes sense, especially for new broadcasters, to import successful, tried and tested shows and formats from the USA. Companies will in due course begin to invest in home grown programmes for the very simple reason that this is what the consumers want, and in time will invest in home made programmes.

At present the Commission requires broadcasters to show a “majority” of programmes that are of European origin, excluding certain categories such as news and game shows. There are some calls to include Game Shows and News programmes, which currently don’t qualify towards the quota, but this is very much a minority opinion.

Some see the “where practicable” in the article as a get out clause and should be removed. The counter argument to this is that its presence allows niche and narrow interest channels, as well as those just starting out to by-pass the requirements. The majority opinion is that the “where practicable” wording should remain.

Definition of European Works:

It is felt by some, though again very much the minority that the definition of European works needs to be tightened up. The most popular alternative system is a points based system whereby points are awarded for producers, editors, principal actors, musical director etc with a certain number of points been allocated, with a certain number required to have the work designated “European”. This system if adopted would ensure that the works are truly “European” however the majority opinion is that the system works as it is and should not be changed significantly.

Cultural Spread:

The directive as it stands stipulates “European” programmes but makes no distinction between programmes made in the home nation and European productions made in other member states. Many submissions stated that while many nations and channels may meet the obligation they show no programmes made outside the country. Some submissions say this is not good enough and have suggested that there be a sub-quota for programmes from the state and also from other European nations.

Works by Independent producers:

Works by independent producers are another element in the directive that causes much controversy. Many submissions argue that since virtually every member state surpasses the 10% quota for works by independent companies, that the requirement is therefore unnecessary and serves no useful purpose at all, and should therefore be abolished. Indeed many member states including the UK already require broadcasters to commission much higher percentages from independent producers.

There is, among the submissions considerable concern about the relationship between independent producers and broadcasters. It is claimed that public service broadcasters have too much control and an overpowering business relationship with the independent producers. The issue of intellectual property is also discussed in the discussions with many arguing that rights should pass back to the writer/producers after a period of 3 years.

New Media & Regulation:

A recurring theme in the submissions is that when the directive was introduced in 1989 there were approximately 50 channels licensed in Europe. There are now thousands. The general consensus from the submissions is that in order to accommodate this, regulation should be light touch and flexible.

As regards regulating broadcasting on the Internet it is the overwhelming opinion from the submissions that this should be covered by the E-Commerce directive and not TVWF. Indeed it may even put traditional broadcasters at a distinct disadvantage if their websites are subject to different regulation to BT, for example, simply because BT has not been in the broadcasting market.

Many draw the distinction that interactive TV, information services and other such services are demand-led and the consumer has to make a positive decision to access and view them and so should not be treated in the same way as traditional television.

There is however some specific concern over competition and the Internet. Many respondents felt that it was unfair that state companies could run websites effectively with a cross subsidy and the opportunity for cross promotion.

Conclusion

There are forces within the European creative industries who want to see more regulation moved to an EU level. These tend to be the bodies who are most concerned about protecting European producers and consumers from being overwhelmed by American content. The paradox of this for the UK debate about Public Service Broadcasting is that, while European regulation would entail much greater restrictions on the activities and funding of the BBC than has been enforced by the national regulatory structure, those who favour the Europe-wide solution would be most fervent in arguing the case for the national production base that is provided by the BBC.

The key issue for the future of regulation will be the balance between EU level and national regulators. It may be that national regulators will be left as the implementation arm of policies agreed at a European level. Certainly as sector-specific regulation withers away in the face of increasing convergence, the supremacy of competition law, where there is an explicit regime of European law enforced by national regulators, is likely to be established as the regulatory model. This could prove uncomfortable both for the regulatory authorities in the UK, who are used to a greater degree of independence, and more particularly for the broadcasters, especially the BBC, who will find themselves facing more detailed prescription than before.

CONTENT REGULATION IN THE DIGITAL AGE

Apart from the regulatory structure, there will be controversy over content requirements once digital switch-over is achieved. At present the Commission believes that the European content provisions are operating effectively. But the sheer ability of regulators to monitor effectively thousands of new channels must be under question, and inevitably the boundary between different types of service will become blurred.

One of the suggestions made for reconciling the paradox of allowing state aid to broadcasters who are competing in a commercial market is to create a new type of obligation more appropriate for the digital age. This would serve the same purpose as quotas currently do, in that it would aim to protect and stimulate European culture, but it would do so by imposing specific content requirements on broadcasters who in return would be allowed to receive state aid. In other words we would create a “European Public Service Obligation” as a means of achieving cultural diversity.

4) SERVICES OF GENERAL INTEREST

Various institutions of the EU have been developing doctrines to reconcile the special powers given to publicly controlled or subsidised bodies with the generality of competition law. This effort has been concentrated on the so-called “Services of General Interest”, on which the Commission produced a Green Paper in 2003. The Parliament produced a report on the Green Paper at the end of last year, and the Commission has recently responded with a White Paper.

Those who wish for the maximum freedom of manoeuvre for Public Service Broadcasters in the future will welcome at least some of the Parliament’s conclusions. The conclusions of the Committee on Economic and Monetary Affairs, under Rapporteur Herzog, are that:

“Service of general interest provided as essential functions by the public authorities, in the areas of basic education, and services of general interest assuming functions of social security and social inclusion, should be excluded from the scope of competition rules if they have no economic impact and cannot be rendered in a competitive market; so also should services of general interest provided as a matter of pluralism of information and cultural diversity; wishes, moreover, to see objectives and tools put in place that will enable more active common policies to be pursued in those areas; notes that, in the area of higher education and even more in the area of health, private entities play a significant role, and that it is not possible categorically to exempt SGI provided in these areas from the scope of competition.”

On this basis the cultural providers, such as PSB, may regard themselves as off the hook with regard to the competition laws. But the following conclusions from the Committee reveal that this is not the case;

“A good many services of general interest can be provided under fair competition, and (the Committee) stresses that private and public sector undertakings must be dealt with essentially on equal terms in that connection.”

“Welcomes the effect of the Altmark judgement in confirming by way of European case law that financial compensation on the basis of obligations to provide a public service is not governed by the rules of state aid as soon as it begins to meet four inter-related conditions, viz, clarity of obligations, transparency of calculation parameters, proportionality, public-service tendering procedure or comparison with a reference enterprise’s costs.”

“Notes, nevertheless, the persistence of uncertainties relating to the problem of the method of calculating relevant costs, and to the fact that other transparent and non-discriminatory public procedures are not referred to in the judgement; calls on the Commission, acting in close coordination with the Parliament and Member States, to draw up a Community legal framework for aid in order to remove those legal uncertainties.”

“Stresses that calculating the actual costs of services of general economic interest is a problem, and calls for clear rules that will create transparency in determining the costs of providing services of general economic interest and ensure that any form of competition-distorting subsidy over and above the actual costs of provision will be excluded.”

There is an important and under-estimated point of principle to be fought, as to whether the services provided by a Public Service Broadcaster in the digital environment should be classed as one of the services of general interest that should be exempt from competition laws. Where PSB sits will have a big impact on the future governance and regulation of the BBC. If it is seen as providing “pluralism of information and cultural diversity” purely and simply, then it may be able to claim exemption from competition rules. But if the argument runs the other way, that PSB can be provided by others who are funded in different ways, then the weight of the Altmark judgement will prevail, and much more detailed restrictions on BBC activities will be necessary.

The White Paper defers any decision. It says that “the issue should be left to Member States at this point in time...At the same time the Commission will continue to closely monitor the situation.” The White Paper also confirms the trend towards closer cooperation between the Commission and national regulators. The Commission will return to this area next year.

CONCLUSIONS

The European dimension to the British debate about the future of the BBC and public service broadcasting more generally is underplayed. In particular the fact that the rulings of the competition directorate are increasingly as important as those which stem from the TV Without Frontiers Directive and its updates is insufficiently recognised in the UK.

One key area where this is the case is the use of state aid. Current thinking in the EU is that it can only be justified in pursuit of clearly defined activities which must only be subsidised at the level which an efficient institution would need. This has clear implications both for the breadth of activities pursued by the BBC in the future, but also for its programming and its financial scrutiny. The costing of individual activities by an outside regulator would be a much more intrusive form of regulation than the BBC has experienced up to now.

The whole issue of how to regulate the BBC and the rest of UK broadcasting could also be significantly affected by European developments. The proposed European Regulators Group for audiovisual services is likely to accrete powers over time, leading to a situation where regulatory power would be shared between national and EU bodies. OFCOM's role could be more narrowly defined along the lines of national competition authorities, which apply European Law in their own territories. The key debates in the coming years will be over the extent to which power is taken from national regulators to the European level, and how long sector-specific regulation is tenable as convergence widens and deepens.

The Commission has already said that there needs to be a clear specification of the public service mandate, and an independent regulator to survey it. It is hard to see how the current regime of the BBC Governors fulfils this role, so if their activities are not changed by the UK authorities, they will fall foul at some stage of the European authorities.

One possible role for the BBC in the future is as the UK repository of a European Public Service Obligation, able to receive subsidy in return for maintaining the UK production base and the values which flow from national production to enhance cultural diversity.

Another debate is over the extent to which public service broadcasting (or its digital successor) should count as a Service of General Interest which therefore can be exempt from normal competition laws. The wider debate about SGIs and how to create a fair competitive framework around them is at an early stage, and British participants should be heard more loudly.

ANNEXE A

Submissions to European Commission on TVWF

Unless otherwise indicated, all denotations, lines etc as are they appear in the original texts. Page numbers refer to the relevant page for each submission.

Theme 1: Events of Major Importance to Society

BBC:

“The importance of article 3a for widespread access to main events, cannot be overestimated. It seems certain that in the absence of regulation in this field the rights for the most attractive sports events will be acquired by the operators of free-to-air channels will be deprived of access to them.”

It is unlikely that free-to-air broadcasters could have reached deals with KirchMedia on the 2002 Football World Cup in the absence of rules which offered them the chance to make a first offer based on a fair and reasonable price. The case R Vs ITC, which was ruled upon in the UK represented a first test of the functioning of article 3a, a test which that provision passed seemed to pass with flying colours.” Page 2 & 3.

Channel 4:

“The “listing” of major events should continue to be an issue for individual member states. We agree with the UK government that “the burden of proof should be on the Commission if it disapproves of a member states list” and we agree with the UK’s ITC that the issue of public access should take precedence over single market objectives of provision. We do not believe that the listed events rule should be applied retrospectively.” Page 4.

EURALVA: (European Alliance of Listeners and Viewers Associations)

“EURALVA considers that each Member State should be required to consult members of the public- or alternatively television viewers- before it draws up its list of designated events. Moreover, that consultation process should allow television viewers to nominate specific events for potential inclusion on the list. Page 1 & 2.

ENPA: (European Newspapers Publishers Association)

“ENPA would suggest to the Commission that it improves the clarity of application of Article 3 (a) in that the articles sole relevance

ENPA would suggest to the commission that it improves the clarity of the application of Article 3 (a), in that the articles sole relevance to broadcasters and not other media should be made explicitly clear. In several Member States in recent years, it has become apparent that rights holders are denying event footage access to newspaper reporters too. Which is unjustifiable in ensuring the medias right to disseminate information. Therefore, ENPA would Commission action which encourages rights holders to make such events as widely available as possible for free.

Further to this point , ENPA wishes to suggest with regard to the definition of “substantial proportion of the public (article 3a I)1) that a stronger definition is needed here to ensure that other forms of media such as the press are able to report on such important events.” Page 1

FAI: (Football Association of Ireland)

The FAI proposes that the EU commission introduce a ruling whereby a designation does not take effect until the expiry of contractual arrangements previously entered into with a broadcaster in respect of the subject event provided that the contractual arrangements made with the broadcaster are for a license term (whether exclusive or otherwise) of no more than 5 years from the date of entering into the contractual agreement.

The FAI also request that the EU commission put in place arbitration procedures that ensure the process provides for valuations that are calculated on the basis of a completely open market i.e. a marketplace that would exist where all broadcasters both free to air and subscription would be bidding for the designated event. P 1 &2.

MTV

“the access to major events should not be considered in a too extensive way: we think that the list mentioned by the TVWFs Directive should be limited, and should be subject to an extensive right of access to short extracts by all operators.

The price for the exclusivity of the major event should be left to commercial agreements as presently.” Page 4.

Theme 2 Promotion of Cultural Diversity and Competitiveness in the European Programme Industry:

Scope:

ARCA: (Romanian Association for Audivisual Communications)

“We propose that Article 9 (This chapter shall not apply to television broadcasts that are intended for local audiences and do not form part of a national network) shall be more precise concerning the identification of the television broadcast as belonging to a national network, licensed as such. It is possible for a licence holder to have more local stations working in different locations, which could be identified by the regulatory authority as forming a national network, even if in fact the licence holder never got a national network licence, with all benefits related, but hardly developed a sum of simple local licenses.” p.1

Transmission Quotas (European programmes):

Association of Commercial Television.

“The broadcasting industry remains opposed to transmission quotas at European level. As there are strong business imperatives driving commercial broadcasters’ scheduling freedom should ideally be repealed. In the event that this is politically impossible, then DG EAC should firmly reject unrealistic calls to regulate this matter in even more detail than is already the case. The same goes for regulatory intervention at EU level on independent production.” P.5

BECTU (UK trade union representing technical and creative workers)

“The economic justification- that without countervailing regulation market forces drive broadcasters to import a large and increasing amount of American programming- is as compelling as ever. The US retains its huge structural advantage in the world market. It has the largest domestic audiovisual market in the world- which means that programme stocks, often with high production values, can be sold abroad relatively cheaply since the production costs are (largely) covered by the domestic market. European broadcasters can buy US programmes for 10% of the cost of original production. The evidence- in the form of the continuing massive audiovisual trade deficit between Europe and the US- is all too apparent. Page 2.

CEPI (European Coordination of Independent Producers)

“The European production quotas are easily attained by local domestic/national production. Non-domestic showing of European programmes is in some European countries 0% and can be as high as 12%. If the objective was to increase the circulation of European works, it has failed! Page 2.

Discovery Networks Europe

“DNE believes that market forces and customer tastes and preferences drive investment in high quality European production which is derived from a wide variety of sources, and the imposition of quotas to artificially create this dynamic is not necessarily in the interests of all elements of the audiovisual industry. Our experience shows that viewers tune in to relevant and thought provoking content with high production values, which in itself requires that we as broadcasters provide a rich and varied diet of material, much of which reflects local tastes and issues.” Page 4 & 5 (This of course can be equally applied the independent sector quota).

EBU: (European Broadcasting Union)

“A certain degree of flexibility in the quota system will continue to be needed, also to take into account new developments and the situation of smaller countries. (For the latter it is more difficult to reach the quotas for European works, since they have fewer national productions than do the larger countries.) It is primarily for Member States to clarify the meaning of “where practicable and by appropriate means”.”

Any strengthening of this quota system through the imposition of supplementary sub-quotas or by additional programming obligations, for example in prime time, should be excluded, in order to protect the independence of programming.” P.14

ECCA: (European Cable Communications Association)

“The existing system penalises the emergence of new services (e.g. niche channels, Nvod) by obliging these channels – which have a limited target audience- to invest in content that falls beyond the scope of niche offering. With a reference to the necessary practicability of the quota regime – and proportionality- this leads to the conclusion that for new services (or emerging markets) the quota requirement should not apply. For the cable sector this is a crucial issue since the success of digital TV depends heavily on “new services” such as niche channels and interactive television. P.2

ICRT: (International Communications Round Table ASBL)

Quotas were designed for an era of scarcity of access for the viewer. They are no longer viable or justifiable in a global and technological converging environment.... A more constructive alternative would be the creation of further support programmes or measure....The negotiations should aim at the “reduction or elimination of the adverse effects on trade in services” as a means of providing effective market access.” P.2

ITV (also refers to independent quotas)

“We remain unconvinced of the case for harmonising quotas at EU level and request the Commission to undertake a thorough review of the rationale for these provisions before proposing their retention. It is commercial imperative not legal obligation that drives ITV’s investment in UK content- viewers simply prefer to watch home-grown programmes. It is also in ITVs best interest to commission the best programmes for its channels, regardless of production source. Page 3

NRTC: (National Radio & Television Commission of Hungary)

“Although the idea of a (super) quota for non-national-European works (which could guarantee that members states do not substitute European Works with national works) came up at the public hearings the National Television and Radio Commission is against this, as this would be a disproportionately big interference to the national regulation, and to the broadcasting of broadcasters on the one hand, and on the other it would be an extremely big burden on the broadcasters.! Page 1.

Nordic Council

“There are serious concerns that the costs involved in producing television programmes coupled with consumers wish to have a wide choice of viewing will mean that much transmission time is occupied by American programmes.....it is particularly important to ensure that a certain amount of television programmes are produced in the Nordic countries and thus endorses that parts of transmission time should be reserved for European or even more regional programmes with special language inter-connections. Page 2.

RTE

“A certain degree of flexibility is required and it is important that the wording “where practicable” is retained within the wording of the directive. RTE submits that measures which would seek to impose additional programming obligations could compromise the ability of member states to organise and define the remit of public service broadcasting as set out in the Amsterdam protocol.” Page 3.

UK Government

“It seems that articles 4 & 5 have provided an overall stimulus to the European audiovisual industries, but flexibility remains a key element in this. 50 plus 10% is targets to be aimed at, but for multi-channel television channels and services, often with tiny audience shares, narrow niche interests or predominantly non-European programming content, these targets may be impossible to achieve.” Page 4.

Definition of European Works:

BECTU

“We favour a more precise definition of “European works” in TWFD. In particular we favour a labour based definition which reflects the essentially labour-intensive and creative nature of the original production process and which fits well with the aim of promoting European production.

A cinematographic or other audio-visual work is a European works if: European elements achieve at least 16 points out of a total of 20 in the following schedule, a majority proportion being achieved in each group.

Creative Group

Direction	3 points
Screenplay	3 points
Composer	1 point

Performing Group

First role	3 points
Second role	2 points
Third role	1 point

Technical Craft Group

Production Designer	1 point
Director of photography	1 point
Editor	1 point
Sound recordist	1 point
Studio or shooting location	2 points
Postproduction location	1 point

Page 3.

The Independent Sector:

Danish Ministry of Culture:

“In Demark’s view it would not be appropriate to introduce a common definition of independent producers. To start with, the independent production sector is in a constant flux, with rapid changes in the degree of independence that producers enjoy. In addition, earlier attempts to establish a common European definition have shown that the situation in the audiovisual sector varies so much between large and small countries/language areas- as regards, for example, the number of customers for independent productions- that a common definition would serve no purpose.” Page 1.

Endemol: (International content developer, production, and distributor.)

“The current market is characterised by a dominant broadcasting sector and a weakened independent sector, where broadcasters are in a position to impose the business conditions upon the independent producers...In practice the terms of trade between broadcasters and independent producers do not provide a framework for negotiations; rather one could argue that the terms of trade are imposed on the independents, which have very little room for actual negotiations.

In this context we would like to express our particular concern about the bundling of rights in negotiations between broadcasters and independents rather than being separately valued...In addition one should consider that broadcasters are tending to extend their in-house production arm and thus directly compete with the independent producers. We believe that the independent producers therefore assume an important independent role in guaranteeing the maintenance of an important competitive and creative discipline on in-house productions. P.1

FIAPF: (International Federation of Film Producers Associations)

Properly conceived, monitored and implemented, independent access regulation can have a number of virtuous effects, including

- Introducing a measure of competition for programmes in terms of ideas, quality and price- a market exclusively driven by a small number of broadcasters/ producer structures is not to foster such competitive dynamics- the result is a disbenefit to the consumer and an ineffectual use of public resources such as licence fees collected as a tax on TV households to finance public service broadcasting.
- Fostering cultural diversity through a more open and diverse commissioning and programme acquisition culture.
- Kick-starting the engines of creative innovation in programme making, which invariably become choked-up and less effectual under a monopolistic structure- Europe's independent production companies lead the charge in developing co-production partnerships with other EU countries.
- Unlocking the potential for the circulation of programmes and films by creating a multi-polar system for the commercialisation of rights- if primary broadcasters end up owning all rights in programmes they acquire or pre-purchase, this stifles the impetus for international programme exchange, simply because sales is never a broadcasters primary business concern- programmes which may have been usefully exploited on the secondary market by themed channels frequently end up being warehoused, locked away from public gaze.

Despite a two decade shift from an exclusory public service model to a mixed public/private economy the structure of European broadcasting is still predominantly a closed oligopoly, dominated by large scale integrated Broadcaster/producer operator. Page 2 & 3.

ITC

Quotas for European and independent European works should be kept at current levels of 50% and 10% respectively and the “where practicable” proviso retained. Page 2.

The pitch and scope of legislation.

Association of Commercial Television:

A clear restatement of the Internal Market motivation for the directive, and the unambiguous application of the Country of Origin principle as requested by the Court of Justice is essential. The eventual revision of the Directive must proceed on the basis of the Commission’s Five Principles for regulatory intervention in our sector, according to which regulatory intervention- whether existing or new – should be:

The minimum necessary to achieve a clearly defined policy goal, guaranteeing legal certainty and technological neutrality and enforced as locally as possible to the operators concerned. P.4

BBC

“It is increasingly difficult to draw a clear line between different types of services. European legislation operates a distinction between broadcast and information society services based on whether a service is provided on individual demand or not. This distinction is challenged by the co-existence of interactive, on-demand elements with traditional linear broadcasts. Adapting rules on almost any particular aspect of broadcasting to new technologies- for example in the field of advertising- leads to questioning the existing service classification. Page 2 &3

ANNEX B

BACKGROUND READING

Directive “TV Without Frontiers”. Council Directive 89/552/EEC as amended by Directive 97/36/EC of the European Parliament and the Council.

E-Commerce Directive 2000/31/EC

Report on TVWF Com (2002) 778 Final

Communication on State Aid Rules OJEC (2002/C 320/04)

Green Paper on Services of General Interest COM (2003) 270 Final
Amsterdam Treaty Protocol on the System of Public Broadcasting in Member States

Commission Communication on Barriers to new services COM (2003) 410 Final

Copyright Directive 1993/83/EEC

Principles and Guidelines for the Community’s audiovisual policy in the digital age COM (1999) 657 Final

Communication on the Future of European Regulatory Audiovisual Policy COM (2003) 784 Final

Discussion Papers 1-6 on update of TVWF Directive available on <http://europa.eu.int/comm/avpolicy/regul/review-twff2003/contribution.htm>

International Journal of Communications Law and Policy Issue 7, Winter 2002/2003. “Open Access from the EU Perspective” by Michael Rosenthal

Vertical And Horizontal integration in the media sector and EU competition law, April 2003, by Miguel Mendes Pereira

European Parliament Report on the Green Paper on Services of General Interest A5-0484/2003

Safeguarding the future of the European Audiovisual Market ACT/AER/EPC March 2004

“Building Public Value—Renewing the BBC for a digital world” BBC June 2004