

# OFCOM – 2nd Public Service Broadcasting Review

June 19th

# 2008

The Federation of Entertainment Unions (FEU) is concerned that OFCOM will not consider a range of important options that would provide a sustainable future for Public Service Broadcasting in the UK.

In this response, the unions make the case for the second phase of this review to include some original research, and a survey of PSB content funding models that are working in other countries. It also makes the case for a clearer application of relevant EU content rules, and urges OFCOM to consider a proposal from the Music Business Group for time-shift levies.

A response  
from the  
Federation of  
Entertainment  
Unions (FEU)

## ABOUT THE FEU.

The Federation of Entertainment Unions is a joint representative body that includes BECTU, Equity, The Musicians Union, the NUJ, the PFA, Unite and The Writers Guild of Great Britain. The FEU takes up issues that are of common interest among these unions and provides a response that is intended to raise the concerns that our 130,000+ members.

This number understates the contribution that our members make to the British economy. Our creative and cultural industries now make up over 7.3 per cent of the British economy. This is equivalent to the financial services contribution to the economy. More importantly, the sector is growing at twice the rate of the economy as a whole.

The FEU is the single largest representative body for people working in public service broadcasting. Our members are not only employees of public service broadcasters, they also work in the wider industries for whom Public Service Broadcasting is a vital cornerstone.

## TIME TO REVERSE A MAJOR PUBLIC POLICY FAILURE

The FEU would like to make the case that – for the purposes of this consultation – there is a clear correlation between the public interest, and the interests of the FEU’s members. In the 1990s, our members raised concerns about how multichannel TV would impact upon children’s’ TV and local broadcast news provision.

At the time, our members were concerned that the increased capacity, and the increased number of broadcasters would result in a decline of investment in PSB content. A number of entertainment unions warned that the willingness of UK regulators to offer a high level of flexibility around EU audio visual investment rules would result in channels that would largely feature imported content – and that this content would drive out original production.

In the case of children’s TV, the FEU’s predictions about cheap imported programming have been fully realised. In the case of regional news, the increased competition among channels has resulted in a decline of the sustainability of quality reporting. The FEU would urge OFCOM to review the public positions of many of the least-regulated commercial broadcasters adopted in the 1990s. At the time, it was their position that increased competition would result in levels of investment that would ensure an increase in locally-sourced children’s TV, and increased investment into high-quality news programming.

It is clearly not in the interests of our members that there are now significantly fewer jobs in broadcast news and in the making of children’s TV. However, it is also not in the public interest, and – in the context of the protection of public-service values, it is bad for democracy. It is a clear policy failure that must be reversed urgently.

The FEU would like to reiterate the case that will undoubtedly be made by other contributors to this consultation: That PSB is the cornerstone British civil society. Even with the high-profile problems that are effecting commercial PSBs, children’s TV and regional news, the UK still has Europe’s finest investment climate in the production of original drama, news, documentary, and other vital public service broadcasting services – and that this investment results in a sustainable local and regional arts / culture investment.

More than any other stakeholder in this consultation, FEU members are focussed upon ensuring that jobs in this industry are secure. Our members have consistently advocated policies that will grow this sector. However, the FEU is much more than a simple producer interest. It is certainly the case that...

- High-quality regional news is good for democracy, good for public service broadcasting.... and good for jobs
- A large volume of UK-originated children's programming is good for educational standards, good for public service broadcasting ... and good for jobs
- A large volume of high budget drama on UK TV is good for public service broadcasting, good for building technical capacity, good for UK balance of payments ... and good for jobs
- Entertainment formats that involve more investment and creativity (as opposed to reworking of old ideas on low budgets) is good for public service broadcasting, produces formats that may prove hugely profitable exports ... and are good for jobs.

The FEU's members have an intimate knowledge of how broadcasting works in the UK. Our members can see where public service values are slipping, because it is in the material interests of our members that the UK has a sustainable PSB investment model. It is in the material interest of many of our members that are not directly employed in broadcasting. A strong PSB settlement provides a bulwark for everyone working in theatre, music, the arts, audiovisual industries and journalism in the UK.

#### OFCOM'S OBLIGATION TO ENSURE THAT ALL PUBLIC INTEREST PROPOSALS CAN BE FULLY EXPLORED

OFCOM have made it clear that they are interested in exploring a wide range of investment models. The major concerns that this consultation is aiming to address include:

- the need to ensure that investment in original content is retained – and, ideally, that it will grow.
- the need to reverse the decline in investment in key PSB areas – particularly in original children's TV and in regional news.
- the need to promote plurality and diversity of programme-making – not just from the standpoint of promoting public service values, but also encompassing the need to ensure that UK-originated content remains dynamic and competitive.
- the need to ensure that the changes in the advertising market will not result in a huge drop in the funds available to commercial public service broadcasters without practicable steps being taken to replace this revenue.

#### THE LOGIC OF COLLECTIVE ACTION – AND THE POSSIBILITY THAT OFCOM WILL IGNORE THE MOST ATTRACTIVE PUBLIC-INTEREST OPTION

The FEU is particularly concerned that OFCOM will not consider many of the options that are clearly in the public interest - because of the way this consultation is being conducted. The FEU commends OFCOM for its willingness to consider new models, and the energy with which it is soliciting such proposals. However, simply to solicit proposals from civil society, and from pressure groups is not enough.

In Mancur Olson's *The Logic Of Collective Action*<sup>1</sup>, it is demonstrated that optimal policy solutions are often not considered fully because – while a particular proposal could be the most acceptable and beneficial solution to the widest group of stakeholders - no single stakeholder in a consultation such as this derives sufficient benefit from fully researching and modelling it.

Furthermore, if a small number of stakeholders have a reason to object to it strongly, the result is often that a position that isn't fully researched finds itself with articulate and well-resourced opponents.

We would argue that this scenario could be illustrated perfectly by the argument for 'investment quotas' and other levies based upon spectrum or other licences to complement the existing revenue streams that support PSB programming.

#### PLACING ORIGINATION OBLIGATIONS UPON CHANNELS – THE ADVANTAGES

There are, of course, a number of reasons to believe that placing investment obligations upon commercial broadcasters will make up a portion of the revenue shortfalls that some Public Service Broadcasters are suffering in these changing times. However, replacing lost funding for struggling PSBs is not the only task in hand here.

As outlined in OFCOM's executive summary (1.6), only a small number of broadcasters (BBC, ITV, C4 and FIVE) commission significant amounts of original content. Investment quotas or levies would result in other large channels recycling less existing material and, instead, originating and making new programmes.

Increasing the range of broadcasters that *make* new content – thereby reducing the near-monopsony that exists in the UK - is highly likely to increase the diversity and plurality of UK broadcast material. PSB content is not just produced by the handful of familiar large channels. *Teachers TV* provides a good example of PSB content being provided outside of the traditional PSB framework, and investment rules would ensure that much more of this kind of content would be available to viewers.

It will certainly increase the *quantity* of locally produced material and – therefore - the capacity of UK producers to respond to global market conditions. There is also a case that – by reducing the near-monopsony, it will increase the *quality* (in terms of technical expertise, commercial attractiveness, and public service values) of UK broadcast material. It is certainly likely to increase the dynamism of the UK independent production sector.

It is also likely to increase the number of programme formats that are developed in the UK. There is a strong reason to surmise that the application of investment rules could positively change the broadcast ecology in the UK. Currently, the major broadcasters are obliged to compete with channels that only buy-in low-risk proven programming – imports, recycled local programming, or low-budget non-drama programming.

This allows low-investors to dominate the creative space and define British broadcasting. It increases the incentives on major broadcasters to focus on recycled / low-budget / non-drama in scheduling – a race to the bottom in terms of plurality, diversity, and – arguably – quality.

Investment rules would mean that broadcasters would aim to be the first to air programmes that have a significant amount of investment behind them, and – as such – they would be highly incentivised to make their investment really count in terms of quality.

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<sup>1</sup> "The Logic of Collective Action: Public Goods and the Theory of Groups" - Olson, M (Harvard) 1971

## THE INFORMATION THAT OFCOM NEEDS TO COMPLETE THIS REVIEW EFFECTIVELY

Section 7.24 of OFCOM's consultation says that

*"...**industry funding** for public service content could be introduced through levies. President Sarkozy has proposed this as a possible approach for France. It might be possible to introduce levies on providers not currently part of the formal public service broadcasting model, such as broadcasters, equipment sales, internet service subscriptions or UK online content providers."*

The consultation document then goes on to make a slightly odd claim (7.26):

*"Ultimately, most of these options are for government and Parliament to consider."*

In a consultation that is fairly thorough on industry data, the lack of flesh on this option is telling. Furthermore, it is not clear where OFCOM believes that its obligation to explore options ends and parliaments' begins. There is no question that OFCOM needs to consider existing and proven models of regulation and finance from abroad, and the application of investment rules is one of these.

OFCOM may rightly believe that the final decision is with Parliament but it would be an unbalanced report that did not contain a fully fleshed-out outline of all of the options that were being considered. OFCOM don't appear to believe that such proposals are out of scope for this consultation either. As OFCOM's Peter Phillips said at a recent Westminster Media Forum seminar...

*"... one of the things that we welcome through the consultation process is any new models that people want to put on the table."*

*"We are absolutely open to any new suggestions about new models, I think the critical thing about this debate is that it is really wide ranging and that we take account of a whole spectrum of views..."*

In asking for an 'investment quota' proposal to be taken seriously, we have a major handicap that OFCOM's drafting illustrates perfectly. A significant amount of research and consultation would be needed in order to explore a funding model that requires levies upon broadcasters, carriers or hardware manufacturers.

Some broadcasters would be less willing than others to support such a proposal, and getting impartial analysis done to explore this would require significant expertise. Models such as these have been applied with a degree of success in Spain, Canada, South Korea, Italy and France, and there is ample reason to believe that they are applicable to the UK.

The FEU don't have access to the kind of data that would build a moral case for a small content-investment contribution from the beneficiaries of the developments in digital entertainment.

It doesn't however, mean that such a case doesn't exist, and we would argue that OFCOM will not be able to claim to have carried out a professional consultation exercise unless it is prepared to put the flesh on the bones of such public-interest proposals.

There are a number of stakeholders in broadcasting that would benefit from such a settlement, but the benefits are spread relatively evenly among a large number of organisations and groups. None of these stakeholders are sufficiently incentivised to conduct the kind of campaign that other proposals will be able to rely upon.

The first stage of this review will undoubtedly feature some carefully researched proposals that advance the specific interests of some respondents. But, in the case of investment rules of the kind that the FEU would like

to see explored, no single organisation will have sufficient resources to make the case properly, or would be able to make a business case for investing in modelling this solution.

If OFCOM can only consider solutions that well-resourced pressure groups can make the case for, it will result in a sub-optimal policy outcome.

For this reason, we are asking that...

- OFCOM should commission research into alternative models of funding – specifically investment quotas on channels and levies on infrastructure and hardware providers.
- Specifically, that OFCOM should report upon how investment rules are applied in France, Canada, Spain and Italy – and what impact these rules have upon the broadcast content.
- OFCOM take all steps to ensure that such a proposal is explored as thoroughly and positively as proposals that are likely to be advanced by other industry vested interests.

To do these – and to be seen to do them – will be central to any OFCOM claims to have conducted this review impartially, and in the public interest.

## INFLUENCING THE INVESTMENT IN CONTENT BY COMMERCIAL CHANNELS – OTHER OPTIONS

This paper has advocated investment rules as a means of ensuring that UK commercial broadcasters will not simply screen low-cost / low risk imported content. There are other funding options that the FEU would urge OFCOM to consider.

The first is the possibility of creating a fund that will support creativity, akin to the private copy levies that operate throughout most of Europe. For over 100 years the music industry has provided exactly this infrastructure: the ability to develop such business relationships and distribute income directly back to creators and right holders. There is no reason why such an arrangement couldn't be transferable to other parts of the audiovisual industries.

Unquestionably, there is a value produced by the ability to format shift for both consumers and commercial enterprises which directly arises from the transferability of audiovisual content. Such a levy would ensure that the UK's copyright framework provides a careful balance between the interests of technology companies, consumers, and our creators' talent and ability.

It is imperative that creators and performers should benefit directly from this value; ultimately it is their creativity which underpins the entire value chain. The only solution which achieves these goals is a flexible and market-led approach based upon a business-to-business relationship

A detailed proposal has been submitted<sup>2</sup> by the Music Business Group in response to the UK IPO consultation on copyright exceptions. We would urge OFCOM to consider this within the scope of this consultation, and to support the establishment of such a levy in the UK.

A similar case can be made for a less flexible application of EU investment rules. While the main PSB channels in the UK continue to honour their obligations under the *TV Without Frontiers* directive (now the AMS directive), the UK has adopted a highly indulgent position towards non-PSB channels. The UK has chosen to

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<sup>2</sup> The Music Business Group's response can be seen here: [www.bpi.co.uk/pdf/MBG\\_Formatshifting\\_Response.pdf](http://www.bpi.co.uk/pdf/MBG_Formatshifting_Response.pdf)

fully exploit some room for flexibility in this directive (which says that rules should be applied ‘wherever practicable’<sup>3</sup>).

The FEU would suggest that this flexibility is the result of concerted lobbying by highly profitable commercial broadcasters, rather than any consideration of the public interest, or the sustainability of public service broadcasting. For example, the FEU would urge OFCOM to publish the data that led them to conclude – in a report for The House of Lords in 2006

*“The “content quota” provisions need to be understood and applied in context and in a way that is proportionate. In the case of small broadcasters or start-ups, the burden of compliance may be very onerous and quota-type of obligations do not seem to be appropriate. For this reason, Ofcom welcomes the retention of the words “where practicable” in the new proposals.”<sup>4</sup>*

In the light of the ‘national debate’ on children’s broadcasting that OFCOM called for only a few months after submitting this evidence, it is time for OFCOM to publish a thorough survey of the evidence that led it to reach this conclusion. BSKyB, as one example, is hardly a ‘small broadcaster’ or a ‘start up’. Had OFCOM (and its predecessors) heeded the FEU’s warnings about how the flexible interpretation of TVWF would impact upon children’s TV, this decline in production wouldn’t have happened. This should cause OFCOM pause for thought, and it should result in a policy change.

To this end, it is our recommendation that EU investment quotas should be publicised more widely by OFCOM, monitored more thoroughly and reported on more regularly. OFCOM should publish a quarterly statement detailing their findings on the investment in original content by commercial digital channels.

These statements should continue to monitor the growth in investment, and where it is clearly in decline, OFCOM should be prepared to reconsider its deregulatory flexibility.

Finally, we would also add that – as a general principle – that when creators and performers are commissioned, this should be by a **licence of rights** and *not* an assignment. There should be equitable remuneration for all re-use of their work.

## THE ROLE OF A REGULATOR

The FEU believe that there is a strong moral case for EU investment quotas to be applied fairly and evenly. For this to be done there needs to be a broader understanding of these rules, and what they have set out to achieve.

Again, this is an area where it is possible that the public interest is not being asserted because it does not provide sufficient benefit to any pressure group to make a case in the public interest. OFCOM – as an effective regulator – cannot simply base its decisions upon the evidence that commercial and institutional lobbies are prepared to provide. It is time for OFCOM to compensate for the market failure that effects the provision of public-interest evidence.

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<sup>3</sup> For a detailed outline of how this flexibility has been historically applied, see Marsden, C and Verhulst, S: *Convergence in European Digital TV Regulation* (Blackstone Press) 1999 pp99-140.

<sup>4</sup> House of Lords – European Union Committee – 3<sup>rd</sup> Report of Session 2006-7: Television Without Frontiers. This can be seen here: <http://www.parliament.the-stationery-office.co.uk/pa/ld200607/ldselect/lducom/27/27.pdf>

## CONCLUSION

Among the many successes associated with the roll-out of digital broadcasting services, and related technologies, there has been a major public-policy failure in broadcasting regulation over the past decade. Children's TV has been severely damaged by the flow of unregulated imports in exactly the way that the FEU warned about a decade ago. Where commercial broadcasters assured regulators that there were no penalties for a light-touch regulation, we have seen a decline in regional news programming.

These regulatory failures are bad for our members' jobs, but the real damage has been done to civil society. It is time for OFCOM to consider its position on a range of issues – some of which it had previously decided to discard. In particular:

- OFCOM needs to acknowledge the advantages that spectrum / investment rules may provide to civil society in general, and public service broadcasting in particular
- OFCOM needs to ensure that it has a fully-formed and even-handed proposal to consider on the question of investment obligations that are placed upon commercial broadcasters. Such a proposal will not really be provided by the stakeholders that OFCOM is consulting here
- Time-shifting levies offer a vital alternative source of funding, and OFCOM should consider matching European best-practice on this
- EU directives have not been applied even-handedly in the UK, and it is time for OFCOM to revisit this in the light of the damage that imported programming has done to children's TV.

We hope that OFCOM will consider this response carefully, and we look forward to participating in the next stage of the consultation.

## HOW TO CONTACT THE FEU

If any further information on the FEU, or on this consultation is required, in the first instance, please contact Paul Evans, Secretary and Coordinator - Federation of Entertainment Unions.

Tel: 0845 126 1341 (mobile: 07973 714206). e-mail: [entertainment.unions@gmail.com](mailto:entertainment.unions@gmail.com)

Address for all formal correspondence:

Paul Evans  
Federation of Entertainment Unions  
c/o Equity  
Guild House  
Upper St Martins Lane  
London  
WC2H 9EG