

RTS Fleming Memorial Lecture 2010
Thursday 11 November 2010

Calling Time on Analogue Regulation - an agenda for the next Communications Act

Stewart Purvis CBE
Professor of Television Journalism at City University, London

My thanks to the Royal Television Society for the invitation to give this Fleming memorial lecture.

Sir John Ambrose Fleming was an engineer and physicist who invented what became known as the Fleming valve. Some consider this to have been the beginning of electronics. Fleming was the first President of what was then known simply as 'The Television Society' when it was formed in 1927.

My own credentials are rather more modest, perhaps best summarized as having been around the block in what is known as public service broadcasting or PSB. My first full-time job was at the BBC, ITN was my second and my third, and what I plan to have been my last full time job was at Ofcom where I worked with Ed Richards and Peter Philips on the 2009 report on PSB *Putting Viewers First*. So I'm an analogue PSB 'lifer' who has lived well off the proceeds.

Among my other previous convictions I should declare that there were moments when I was not always a fan of regulation. On my first day at Ofcom a member of the radio team pointed out I was probably the first regulator ever to have received a yellow card. He remembered the official warning which the Radio Authority had given to directors of London News Radio Ltd. The Authority judged that we were transmitting too much news about the rest of the world and not enough about London on a London news station.

Having been a regulator for nearly three years and one of the regulated for over 30 years, I have concluded that now is the time to call time on the system of analogue regulation embodied in the current model of PSB.

Tonight I want to set out some ideas and options for the next Communications Act. I am going to talk about content regulation, which is the area I know best, but of course the Act will cover much more than that. This is going to be a personal lecture. By that I mean that these are my own views and not those of any past employer. I am proud to have worked for Ofcom, it is a remarkable organization that will bear its share of the public sector budget cuts and still do a good job for citizens and consumers. But I don't work there any more. And I have no current employer other than City University London because since leaving Ofcom I have turned down kind offers of consultancy contracts and non-exec posts because I enjoy being free to say what I like, when I like, where I like. And it will be personal because I will try to use my experience as poacher turned gamekeeper turned professor to illustrate my views. However I should reassure my former colleagues at Ofcom that these observations will be evidence-based, and since at Ofcom no concept or thesis is regarded as fully formed without an acronym, regard them as EBAs – evidence-based anecdotes.

The RTS tell me that a 'proper lecture' doesn't have Q and A afterwards. But, should you want to question and challenge what I say tonight, please feel free to e-mail me. My address is on the City University London website.

At the heart of analogue regulation for almost 90 years has been spectrum –airwaves that we can't see, can't smell, can't touch, but which are so valuable that mobile phone companies will bid billions of pounds for them. It is called 'radio spectrum' or 'wireless spectrum' but you can do so many other things with it than just 'radio'. In every sense it is a public asset.

When I started my first full time job in television in 1972 there existed what was known as spectrum scarcity, in other words there was only room for three channels. One night, soon after I joined ITN, I walked down a street in ITV's heartland, the North West of England, and noticed through the windows that every single TV set which I could see was tuned to ITV News at Ten. There obviously wasn't much on the other two channels: BBC One and BBC Two. I concluded at the time that spectrum scarcity was a very satisfactory arrangement for some of us but that it couldn't last.

In two years from now the analogue transmitters will finally be turned off. Digital Switchover, DSO, the switchover to digital terrestrial television will have been completed. Of course, the latest figures show that 92.7% of households in the UK already have some form of digital television. But the final DSO day will still be symbolic. It will be the moment at which calibrating regulation by access to transmitters passes its sell-by date. That's because technology now allows so many more players to reach audiences within spectrum and without spectrum.

At about the same time as DSO – in November 2012 to be precise, according to the DCMS timetable – the legislative process will begin for a new Communications Bill. The timetable mentions 'reduced role for regulator' but no details. In fact the first part of process begins this very month, when the DCMS is due to start what it calls 'a scoping exercise'. So today is a good day to be looking ahead. And there are two other very relevant dates for your digital diary in the next five years: 2014, when the current Channel 3 licences expire, and 2015, by when the Government plans that Britain should have the best high-speed broadband network in Europe.

The current regime for UK broadcasting – television and radio – includes two forms of content regulation. There's the regulation to try to help ensure that viewers and listeners get quality programmes, sometimes called 'positive regulation', then there's regulation which aims to protect viewers and listeners, the so-called 'negative regulation'. It is all set out in this hefty volume – the Communications Act of 2003. Ofcom doesn't do anything about content regulation that Parliament didn't ask it to do and gave it the power to do.

Section 264 of the Act lists the public service broadcasters as the BBC, S4C, the Channel 3 licensees like ITV and STV, plus Channel 4, Channel 5 and what's described as the 'public teletext service'. Of course that public teletext service doesn't exist any more. The Daily Mail Group handed back the licence because they couldn't make money from it any more. Already the 2003 Act has been overtaken by events.

The legislation contains about 100 pages of rules and regulations that apply only to PSB channels. Given this focus on PSB, where does the concept of Public Service Broadcasting actually come from? And that familiar PSB motto to 'inform, educate, and entertain'. I thought, and probably you are thinking, that it's got something to do with Lord Reith and the original BBC Charter. Well here are some quotes from the early 1920s at a time when Mr John Reith was running the then private enterprise British Broadcasting Company, owned by a group of radio manufacturers:

- Broadcasting should be "*designed to render a public service of an order which will be ... regarded as valuable by the public*";
- "*I think the principles of broadcasting service are entertainment, information and education*".

These quotes come not from Reith, but from a man called David Sarnoff who was then General Manager of the Radio Corporation of America (RCA). The BBC website describes Sarnoff as the first person to talk about broadcasting as a 'public service'. He had in mind various kinds of public support, including philanthropy, so that broadcasting could be operated on a non-commercial basis rather than rely on advertising. But a decade later things were very different on both sides of the Atlantic. Reith was no longer running a private radio business because he had helped persuade Parliament that a publicly-owned British Broadcasting Corporation was the best way to deliver public service. Sarnoff, by then running NBC, had changed his mind and decided that free enterprise, private ownership and commercial sponsorship were the best ways of ensuring that broadcasting could serve the public. And so two different systems were established and both were based on the allocation of spectrum.

In the first model, most common in Europe, the state released the spectrum first to its own broadcasting institutions and then very gradually to competitor, commercial bodies in return for specific licence commitments about content. And of course there was a standards code. In the second model, most prominently in America, the state immediately released the spectrum to the market and only required compliance with a standards code. Today, about 80 years later, both models exist in the UK.

The first applies to those channels – publicly and privately owned – which were allowed onto analogue television or radio in return for meeting specific licence requirements, normally quotas. As a result, television viewers in the UK have enjoyed the benefits of huge levels of investment in UK content.

The second applies to those channels only on satellite and cable television, or those stations only on digital radio. Without licence commitments these have contributed comparatively little UK content beyond innovative news and sports channels. Sky's position is that if it wasn't transmitting quality programmes customers wouldn't pay their subscriptions. It also points out that it is now investing more money in UK content.

The clear water between the two models began to muddy on the day in 1992 when test transmissions of DTT started from the Crystal Palace transmitter in London. British engineers had created the world's first mass market free-to-air digital television system. There would be two different routes for broadcasters to reach audiences on the same platform.

The PSBs would have their own multiplexes of channels. But for the first time they would face newcomers on their home turf – terrestrial television – in the shape of competitor non-PSBs buying capacity on commercial muxes. These would be competitors who wouldn't have to play by the same rules because they wouldn't have to meet any UK quotas.

Lets come right up to date and today's problem. As DSO progresses and the analogue advantages of the incumbents disappear daily, there is a serious imbalance between the regulation of the older and the newer players. ITV1 as a PSB pays less than the market price to reach all the homes on the Freeview platform. But in return it has to do a long list of good PSB deeds. Among them ITV1 has to meet quotas at network level on:

- Out of London productions
- Independent productions
- Original productions
- News
- Current affairs

Plus at regional level: quotas on regional news and current affairs.

Not all these regulations are about the quality of the service to viewers, some of them are about where and how programmes are made, effectively part of a UK industrial policy. In addition there is the piece of internal Channel 3 regulatory masochism known as the annual 'networking arrangements review'. Channel Five has a lighter load.

At the same time sitting beside ITV and Five on Freeview are channels which can buy a place on the commercial multiplexes at the market price without signing up to any quotas. The difference in potential reach between the PSB multiplexes and the non-PSB commercial multiplexes is a mere 6.4 per cent. That's 98.4 per cent of homes (effectively every DTT home) for PSBs and their spin-off channels compared to 92 per cent for non-PSBs.

The difference exists because the commercial multiplex owners do not judge it cost effective to get their signals up every hill and down every dale in the UK landscape, especially every mountain and glen in Scotland.

Among those channels potentially reaching 92 per cent of homes are Al Jazeera, Russia Today and TMTV (Tease Me TV) a channel whose operator, Bang Media, has breached the Broadcasting Code more times in the past year than any other.

After the final DSO day, the only advantage of a commercial broadcaster in being a PSB will be reaching that extra few percentage points of Freeview homes, and something called 'due prominence' on the electronic programme guide (EPG), which ITV would probably get anyway without being a PSB. The disadvantages will be the costs incurred in meeting the quotas.

And of course none of the quotas apply to the hundreds of other channels which reach millions of homes via Sky and Virgin Media.

No wonder ITV regularly ran the numbers to check whether it would be better off if it stopped being a PSB and joined the ranks of the non-PSBs. I've discovered since leaving Ofcom that ITV would have handed back its PSB licences two years ago had it not been for its uncertainty about the exact scale of the fines it would receive from Ofcom.

So spectrum scarcity provided a simple solution for securing public value from a public asset, spectrum plenty does not.

In the German state of Bavaria, where cable and satellite penetration is very high, the country's most watched channel, RTL, is now only available on DTT in the city of Munich, nowhere else in Bavaria. RTL pulled its main channel and all its other channels off a multiplex in Nuremberg because it cost more than it was worth to RTL. The multiplex was left empty, and the broadcaster has been in the courts challenging traditional licence requirements. It seems that access to DTT spectrum no longer provides sufficient incentive for this particular broadcaster to accept existing levels of regulation.

All around the world new ways of reaching audiences offer a challenge to existing systems of content regulation.

While I wrote this lecture in my study at home there were three pieces of technology on my desk. On my computer I can visit livestation.com to watch TV news being streamed live from both regulated and unregulated providers around the world. On my internet radio I can browse the list of hundreds of stations. I have absolutely no idea whether they are radio stations licensed in their own country or coming from the front room of an unlicensed enthusiast via the internet. I can also select from unregulated podcasts from home and abroad. On my phone I have an app that cost me 59p that allows me to listen to 200 stations from Australia – most of them licensed by the Australian equivalent of Ofcom, but some not.

If it is deemed that as a listener I need regulatory protection from potential harm and offence caused by licensed stations in the UK, how come I don't need similar protection from unlicensed stations from around the world?

The case for the status quo is that these new offerings are fringe activities and don't merit disrupting a system of regulation which the British public broadly understand and support, and that broadcasters can live with.

For instance, in conversations with broadcasters in advance of this lecture, I discovered that rather than complain about the Ofcom standards team they have a sneaking regard for it, but obviously they wouldn't want that too widely known!

There appears to be a logic to a hierarchy of regulation in which the most consumed electronic media is the most regulated. Linear television still commands 94 per cent of all viewing so it would seem sensible that this is where public protection is most needed.

Two problems with that.

An analysis of the breaches of the Ofcom Broadcast Code shows the most serious ones occur in some of the lesser watched outlets. Read Ofcom's adjudication this week that the Islam Channel, based in London, transmitted programmes advocating marital rape and violence against women.

Secondly, how do you compare on-air and online consumption? Contrast the hundreds of thousands who might watch a pop video TV channel at some point in a week with the total number of views on YouTube of the video of Lady Gaga's *Bad Romance* – a staggering and record 300 million plus views. Compare the tens of thousands who watch the channels in the remoter reaches of the EPG with the hundreds of thousands who access major websites. Read Ofcom's *Digital Day* research on the simultaneous use of different media and see how for younger people the daily reach of TV, computers and mobiles is now almost identical at around 80 per cent.

With this growth in media has come a corresponding growth in regulatory bodies. I calculate a minimum of eight organisations with some involvement in regulating audio-visual content. A few, like Ofcom, are statutory bodies whose role is set out in legislation. Some are co-regulators, independent bodies to whom Ofcom has devolved the responsibility for enforcing statutory regulation. The most recent example is the co-regulation of video-on-demand (VOD) by a body called ATVOD. And then there are self-regulators set up by media industries themselves, sometimes to forestall any threat of statutory regulation. The best known would include the Advertising Standards Authority which is particularly effective in self-regulation, and the Press Complaints Commission whose role now also includes hearing complaints about newspaper websites.

Some of these regulators enforce a licensing regime, some don't.

Some enforce impartiality, some don't.

Some can sanction, some can't.

Their terminology is not exactly joined up.

If you take the different systems for trying to protect children from inappropriate content or pornography, the European directive distinguishes between content that 'might seriously impair' and that which is 'likely to impair', the BBFC uses '15, 18, R18, and R18 plus', the electronic games body PEGI uses 12, 16 and 18, Ofcom uses 'strong' or 'explicit sexual material', 'adult sex material' and 'sex works at 18'. Normal people use 'soft-core' and 'hard-core' and that's before the police and the Crown Prosecution Service make their latest decisions on what might and might not be a breach of the laws on obscenity. And that's just one area.

All this is the current context of convergence but there will be a new landmark in convergence in the first half of next year. Now it has found its way over the regulatory hurdles, Project Canvas, now known as YouView, will be ready for launch. You'll need three cables into YouView's set-top box: one for power, one for an aerial, one for a broadband connection. Some of the content will be 'broadcast' to you via the aerial and some will be available via the broadband. The set-top box combines it all into one coherent offering. Symbolically, the EPG will take you forward in time to see what's listed as coming up on linear television but also backwards so that you can catch up via broadband and watch programmes you may have missed. The channel list will include the broadcast ones which have to be impartial and the non-broadcast ones which don't.

When you decide which programme to watch, the technology by which it arrived shouldn't really matter to you. But many channels will be trusted brands and that may help. You'll also be able to search for the content you want by genre, interest or locality. As a result, viewers will be able to see on the same living room screen simultaneously content coming from the statutorily regulated (that's live television), the co-regulated (that's video-on-demand), the self-regulated (such as content from newspaper websites) and the unregulated (such as twitter feeds).

Last Sunday at the end of X Factor, my young sons got a laptop and went online to see what tweeters on Twitter made of the panel's decision to send home Treyc Cohen. With YouView they could have displayed the tweets on the TV screen at anytime.

As the EPG managers, YouView will assert their right to take down content but they can't attempt to enforce every detail of every different code. Over time I suspect the service will end up looking as much like an i-Phone as a TV, with graphic icons for applications alongside channel lists.

Whether or not that's the way YouView presents its pro-forma format, as an open platform it is bound to allow for some personalization so that you can lay out your own EPG page. Again I don't think you'll care which technology brought you the content.

Many of us grew up with the old adage that television and radio came into our homes uninvited, but with all other media we made an active decision whether or not we wanted to consume it. I suspect my sons, aged 16 and 11, wouldn't get that distinction.

Now it may be that new devices like YouView will be just fringe activities like my internet radio. But when you see the number of people working on it at the BBC and the partner companies, I don't think that's what they have in mind. If I'm right, and YouView becomes some kind of landmark, what will be the right direction of travel for content regulation from then on? Will it be to extend analogue-style broadcast regulation to content where it has not previously applied? Or to begin to rebalance the two sectors by reducing statutory regulation on broadcast media, and move towards self-regulation which is more common elsewhere in the media?

To put it more directly do we want more legal regulation of content and content providers or less?

In the past few years UK Governments have resisted that first course of increasing the amount of statutory regulation. The last Government set up the UK Council for Child Internet Safety (UKCCIS), on which I was Ofcom's representative. It tried to work in partnership with industry rather than pass new laws. The current Government wants to push industry harder at UKCCIS but it hasn't yet reached for the statute book or even threatened to.

It is one thing not to do more statutory regulation, quite another to actively do less. Progress towards de-regulation may have appeared glacial at times over the last two decades but it has happened nonetheless.

Attending this lecture tonight is Sir George Russell, who's also been both regulator and regulated – but at a rather grander level – and a Fleming lecturer back in 1992. The title of his lecture was *British Television: Art, Business or Shambles*.

When he became Chairman of the IBA, Sir George concluded that “trivia had become rules because this protected both the regulator and the Minister”. But did the IBA really need to approve the choice of non-executive directors by ITV companies? George thought not. Working with the late David Glencross he set out to persuade ministers and MPs that the regulator should no longer preview controversial programmes – a big and very welcome decision at the time.

It is time now for another big step forward.

But there is a serious hitch – this isn't entirely the UK's decision.

Enter the European Union's Audio-Visual Media Services Directive (AVMS) – a rather slimmer volume than the Communications Act of 2003, but no less powerful. In fact, let us be clear, in terms of legal clout, this document trumps this one.

I should declare some more 'previous'. For five years I was the President of EuroNews, a multi-lingual international news channel based in Lyon in France. It is part-funded by the European Commission and Parliament, and more than 20 European public broadcasters.

I am not a Eurosceptic or a Europhile, I'm probably a Euro-pragmatist.

I understand that harmonizing the rules about television allows channels to cross frontiers, which is an important part of a contemporary democracy.

The AVMS directive which came into force a year ago extended statutory regulation to parts of the internet for the first time. The original argument of some of its architects was that the internet was a new form of broadcasting so existing broadcast rules were needed. After a strong lobbying campaign by the UK a compromise was reached which was to limit the extension of regulation to those video-on-demand services which are 'television-like'. The regime is lighter touch than the broadcast one, but it is statutory regulation nonetheless.

Defining a television-like VOD service is never straightforward. The easier examples are catch-up TV services and those websites which ape conventional TV channels with a schedule of programmes streamed at set times. But how about one of YouTube's many branded 'channels' based in Britain, or a newspaper site which also includes video clips?

This may explain why the web pages that were once called Sun TV are now called Sun Video. What was called Telegraph TV is now called Telegraph Video. In the newspaper industry they jealously guard their independence from any form of statutory regulation. A name change helps deflect any suggestion that these are 'television-like' services and should be regulated, but I predict we may have not heard the end of all this.

It is worth remembering that the European Commission's job is to enforce directives which were agreed by member states and it sometimes does this in a very direct way. For instance, it has monitored the sponsorship messages on UK television to check that they don't break the rules and contain any 'advertising'. That's turned out to be something that keeps the compliance lawyers busy.

Taking all the above into account, I believe that three things need to be done:

- In the area of 'positive regulation' the next Communications Act needs to resolve the pressing issues around the regulation of ITV.
- In 'negative regulation', it needs to begin turning some statutory regulation into self-regulation.
- The third action point is one for the next AVMS directive – and yes, I know the current one has only just come into force, but these things take a long time to sort out. I think the UK should decide that it wants to not only halt the current European direction of travel, which seems to me to lead inevitably to yet more statutory regulation of content. But more than that is needed. It is time for the UK to try to reverse the trend in recent European directives, and release from statutory regulation the parts of our media which have been forced into it. Impose some 'sunset clauses' on existing European rules and regulations. This fits with the general approach to regulation which the new Government set out in the Coalition Agreement in May.

So those are the three headings, how would the first two actually work, and how would they affect what's on our television and radios?

After all, 'negative regulation' alone covers everything from protecting the rights of people who take part in programmes, to protecting viewers and listeners from what's now termed 'harm and offence' but what some people still call maintaining 'taste and decency'. It also includes the requirement for due impartiality.

The focus here should be on the areas where we know from experience that sadly there are a few broadcasters who set out to do harm. But leave the less contentious areas to self-regulation. And begin the transition by giving Ofcom the power and the flexibility to hand over to self-regulators in certain areas.

This shouldn't be seen as a threat to my former colleagues in the Standards team, at Ofcom. They are a centre of excellence which will be needed for Ofcom's continuing work, and they'll provide a valuable recruiting ground for self-regulatory bodies.

Clearly there is going to be a debate about the consolidation of self-regulators, their roles and their governance structures – let alone their egos. As one former colleague in broadcasting put it to me "why end up with less regulation but more regulators". This challenge should not deter us from steering a course towards self-regulation.

To help prioritise the areas for statutory regulation, there's one given – that broadcasters put their licences at risk if they break the laws of the land on incitement to crime or racial hatred or commit other criminal offences.

Over and above that the primary area which I would reserve for statutory powers is the protection of children. So why not keep the watershed on linear TV for as long as viewers understand it and support it, even if the i-player by-passes it to an extent.

Of other possible areas, we know from the 'trust in broadcasting' scandal of a few years back that viewers don't want competitions which they can't possibly win because the broadcaster has already decided who's won.

Beyond that? Complaints about lesser 'harm and offence' and about fairness and privacy from viewers caught up in programmes could be handled by a self-regulatory body.

Lets move on to the regulation of advertising and of impartiality. I link them because I think there are similar options for both.

On advertising, I would consider moving the content of TV advertising from the ASA's co-regulatory wing to its self-regulatory wing.

Looking a long way ahead, I wonder about the future of the European directive which defines the amount of TV advertising allowed in each hour. I think it ignores the fact that platform operators and even set manufacturers will start doing their own deals with brands for the insertion of commercial messages, by-passing restrictions on the linear stream from the channel operator. So why not experiment with a different regime for advertising minutage – and where better than the Government’s plans for local television, a type of TV where the European directive already allows some flexibility?

I would also investigate whether there is any legal flexibility around the sponsorship rules on local television. And if a way could be found I would allow sponsorship around but not inside news programmes on local TV. That’s the way it has been done for years on PBS’s national news in the US. They call it ‘underwriting’ – doesn’t sound so commercial. ITN World News used to go out on PSB stations across America preceded by an ‘underwriting message’ and with no apparent impact on the content. Contrast that with the programme’s re-transmission by the state broadcaster in Singapore who wanted to edit out any shots of riots anywhere in the world in case it encouraged local copycats.

Which takes us on to impartiality. For 30 years I lived and breathed impartiality and took it so seriously I never even voted in elections. However whenever I visited the US, I was reminded that if Ofcom’s equivalent, the FCC, ever enforced impartiality on broadcasters it would be in court for breaching freedom of expression. What’s enshrined in British law is illegal in American law.

Part of my role at Ofcom was to oversee the enforcement of ‘due impartiality’ in the news and in other programmes of ‘matters of political and industrial controversy and matters relating to current public policy’ broadcast by the 980 UK and international television channels and 1,256 radio stations which Ofcom licences. It was a noble calling. I’m not sure it is a sustainable one.

The best way forward I have heard comes from William Perrin, a former Cabinet Office civil servant who worked on previous Comms Acts, and now campaigns for local digital media. Having helped to legislate for due impartiality, he now suggests that local television should be allowed to operate under a version of the PCC Editors code which requires accuracy but not necessarily impartiality. The issue would be who enforces it.

William believes the state can’t justify regulating very small audiences in an age of media diversity, and the providers of small audiences can’t bear the regulatory cost of traditional impartiality. But they want to be able to show to their audiences and advertisers that they are responsible. Hence a light touch self-regulation which, he thinks, some non-broadcast local websites might well sign up to as well. And I’d add to that the community radio stations and RSL radio licences.

So those are some of the ways I would bring about fundamental reform of ‘negative regulation’.

And now to possibly the toughest task – ‘positive regulation’ or ‘regulating for quality’?

Lets start with terminology. The next Comms Act should differentiate between 'public broadcasters' on the one hand and 'private broadcasters' on the other and make the regulatory requirements proportionate. At the moment, the term Public Service Broadcasting confusingly covers the two publicly-owned broadcasters and the biggest two free-to-air private broadcasters. If it is decided to keep the term PSB, and how can anybody be against such a worthy description, let it mean what it means everywhere else in Europe and that's 'what public broadcasters broadcast'.

Creating clearer roles for the BBC and Channel Four, and freeing up ITV and Channel Five from unnecessary regulation will be critical if we are to incentivise them all to continue with high levels of investment in UK content.

Bearing in mind that much of what the BBC and Channel Four already produce is online we should really be talking about 'publicly-owned media', 'privately-owned media' and not forgetting 'community media' of the kind pioneered by community radio stations.

The UK is lucky enough to be served by two public broadcasters – the BBC and Channel 4 – (the US has barely got one), so they should be the primary focus for the delivery of industrial policy such as Out of London quotas. The BBC and Channel 4 provide excellent programmes for audiences, and long may that continue. That means resolving the regulation and governance of both these publicly owned broadcasters.

Now the privately-owned media.

The Ofcom PSB review recommended 'positioning the Channel 3 and Channel 5 services as commercial networks with a limited public service commitment with modest licence benefits balanced by appropriate obligations on a sustainable basis'. What a way we had with words. But what exactly should a limited public service commitment be limited to?

When Michael Grade was running ITV plc, he challenged politicians to say what public goods they wanted delivered in return for ITV accessing universal DTT spectrum. He never got an answer before he left.

ITV plc is now playing a polite game of poker with the Government. The principal prize for ITV would be the removal of a piece of competition regulation affecting the sale of TV advertising. But regulation which impacts on content is in play too: that's the mechanism for the renewal of the Channel 3 licences, ITV's commitment or otherwise to regional news and other quotas, its role if any in the rollout of local television, and the current structure of the Channel 3 networking arrangements which ITV says means it subsidises STV, UTV and Channel TV to the tune of millions of pounds.

There is clearly a deal to be done involving some of these elements but it is difficult to forecast what it will be.

Let's take the shifting sands of ITV's view on regional news. During the so-called IFNC process, which I was involved in, ITV was initially agnostic, then strongly enthusiastic but finally bordering on the obstructive. Looking further back over the last seven years, ITV has been positive about continuing with regional news, then negative and now – after seeing their response to the Lords Committee last week – I can only characterise their position as a 'definite maybe'.

How is this to be resolved? The ambition must be for a settlement which will last for a 10-year licence. But Government and Parliament first have to decide two things:

- Number one, should there be a public intervention or not to sustain a regional news service in competition with that of the main public broadcaster? France and Germany both do, but in different ways. The German equivalents of ITV have similar regulatory requirements to ITV, the French don't. In France the public interventions are in support of the multitude of local daily newspapers. Other countries have no interventions at all and leave it to the market to compete with the public broadcaster.
- Secondly, do Government and Parliament want Channel 3 to continue to be a regional licence system based on regional DTT distribution offering the licensees universal reach and the opportunity to sell both UK wide and regional advertising? What exactly is the point in providing spectrum for this purpose if the service doesn't carry any programming for the nations and regions?

Answer these questions and you are halfway there. If the answer is that Britain does want Channel 3 to perform this public purpose then in those negotiations with ITV plc and the other Channel 3 licensees there is one way forward. The licensees should be invited to sign up for a clearly defined pattern of content for the nations and regions for 10 years with no annual renegotiation downwards, and in return the licences will be rolled over.

If Britain doesn't want that kind of deal or ITV won't agree to it then the only logical next step is to review the use of that spectrum and see if other interested parties have a better idea about how public value can be realized. I suspect that ITV will find it hard to take that risk.

The Government will need to make ITV a straight offer and ITV will need to give a straight reply. The poker game will have to be brought to a conclusion if the Government is going to deliver its very ambitious timetable for local television set out in the DCMS business plan this week.

Last Friday at City University we organized the biggest conference yet held on the local television plan. After a day of what we christened 'speed-debating', one blogger wrote that "all the voices seemed ranged against the idea that you can make money out of this". Kelvin McKenzie's voice was particularly strident. But then Kelvin does do strident particularly well.

Personally I can envisage certain circumstances where local television might be viable. But frankly no investors with any sense are going to commit money until they know whether or not Channel 3 will stay in the regional and local news business and compete with them.

So it is make your mind up time on regional news and local television.

I've talked a lot about ITV but there's time for a few words on Channel 5. The few words are: *The Dirty Dozen*, *Shallow Hal*, *Harold and Kumar get the Munchies*, *The Aristocats* and *Stand by Me* – the five movies which took up Five's entire schedule last Sunday from 2.40pm until 1.00am, only interrupted by a five minute news at 6.00pm. Difficult to get too excited about its contribution to public service broadcasting.

Now PSB really means PST – Public Service Television – but some of my most interesting time at Ofcom was spent on the regulation of commercial radio. The Digital Economy Act reduced the regulatory burden but there is still room for more de-regulation. I would remove the input-based requirements on local commercial stations which regulate where their studios are based. Again I think that's industrial policy implementation best left to the BBC. What listeners value is the content, not where the studio is. Again focus regulation on output based requirements for news and information.

Finally, as I wrote so many times at ITN as a scriptwriter on *News at Ten*, "tonight's main points again". The challenges for the next Communications Act are:

- To change the terminology and the rules to reflect the very different roles of publicly-owned and privately-owned media;
- For the publicly-owned, resolve the regulation and governance of the BBC and Channel 4, and let's not forget S4C, which one day was a standalone tax-payer funded broadcaster, and the next day was told it wouldn't be much longer;
- For the privately-owned sector, resolve the future of ITV by deciding what form of public good we want for the value of the DTT capacity while it has real value. If Britain wants competition to the BBC in regional news make ITV an offer it would be risky for them to refuse;
- In 'negative' regulation, focus on where statutory powers are really needed, and create a flexible framework to allow the rest to move over time to self-regulation;
- Use local TV and community radio as a test-bed for innovation, including rules that emphasise freedom of expression and accuracy more than impartiality;
- Stop Europe taking us any further down the road to more statutory regulation and try to pull back where it has gone too far already;
- Reduce the regulation on commercial radio.

And always have in mind that one day there may be no such thing as 'television', 'radio' and 'online', just audio and visual content, some live, some recorded, which you select using apps on your phone as well as buttons on your TV handset, literally thousands of content offerings, all jostling for attention on a screen near you.

And that leaves one extremely difficult decision for a very long way out, maybe 10 years on from 2014. That's whether Parliament should one day remove the final elements of statutory regulation of content produced by the private sector, remove content conditions from the licensing of spectrum and leave quality to the market and protection to the law of the land.

That's definitely for another day and another Act.

In the debate to come about this Bill lets focus on a framework which is future-proof for the next decade.

And whatever Parliament does next, it needs to bear in mind that this revolution has only just begun.

- END -