

2002 - DIGITAL TELEVISION IN THE UNITED KINGDOM

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Abstract

The author describes the extent to which digital television has penetrated the UK, claimed to be Europe's leading digital television market. He argues that digitalisation of television is driven by two high level Government objectives, efficiency in radio spectrum use and promotion of online connectivity. Reference to survey research suggests considerable delay in achieving the Government's target of digital switchover by 2010. The author considers the role of the BBC, the Government's principal instrument for achieving its digital policies, and argues that there is evidence to suggest the effect of the BBC's digital services is to reduce competition and diversity. This argument is supported by data drawn from interviews with executives of competing digital channels. The author concludes by considering the likely effect of the Government's Draft Communications Bill 2002 on the digital television market and the BBC in particular.

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Broadcasting Policy in 2002

2002 sees the UK in a more than usually complicated period of broadcasting policy. The Government has published its Draft Communications Bill (DTI/DCMS 2002a) which proposes, at least formally, an end to a specific broadcasting policy and the beginning of policy and institutions for a “converged” and unified world of electronic communications, notably through an integration of existing separate regulatory agencies into a single Ofcom (Office of Communication). In a further manifestation of its commitment to convergence, the Government is also pushing forward switchover from analogue to digital television (with a target date of between 2006 and 2010). Switchover is designed both to increase efficiency by releasing potentially valuable radio frequency spectrum, currently used for broadcasting, for other purposes (see Cave 2002) and to accelerate achievement of the Government’s “Online Britain” project (whereby everyone in the UK has access to interactive connectivity). Consequently, UK broadcasting is experiencing structural as well as, potential, regulatory change.

However, there are notable contradictions in the UK Government’s policies. Its digital television strategy has the potential to *reduce* pluralism and competition in the UK television market (which is changing from a broadly triadic structure of analogue television, dominated by the BBC, BSkyB and ITV,¹ to a duopolistic digital world shared by the BBC and BSkyB) rather than increase them, as Government policy is explicitly designed to do. Moreover, the Government’s commitment to achieving a high level goal of universal connectivity has impelled it to intervene in a variety of media and communication markets at the same time as it advocates liberalisation, competition and allowing the market to decide. The two principal elements of the Government’s plans for digital television — digital switchover and achieving a competitive market (e-Envoy 2002, 1) — are pulling against each other. Nowhere are these contradictions more evident than in the contemporary status of the BBC which Government has mandated (after the failure of its initial commercial digital standard bearer) to lead the charge towards digital switchover and has, in consequence, so strengthened the BBC as to arouse widespread concern about the BBC’s anti-competitive impact on the broadcasting market.

UK Television Today

In spite of BIPE’s claim that “Britain is the leading European country in terms of digital television penetration” (BIPE 2002, 139) and the high policy salience of digital broadcasting in the UK, the UK is a predominantly analogue broadcasting environment. More than 99% of UK homes are currently served by analogue terrestrial services,² whereas only 24% of UK TV homes have satellite receiving equipment (virtually 100% of which is digital). Only 14% (3.5m) of TV homes subscribe to cable (these homes represent between 25% and 30% homes passed by cable networks) and of these 2m have access to digital cable. Only 5% of UK TV homes had digital terrestrial television when the market was last assessed. It is possible that the number of DTT homes has, in fact, declined following the failure of the ITV Digital DTT service (ITC 2002). At best, therefore, digital penetration amounts to no more than 40% of UK television homes. Most of these homes are also analogue homes (because analogue television receivers and VCRs are not usually

thrown away but become second and third sets in the home). Moreover, there are grounds for scepticism about how rapidly UK television will further digitise. The two principal cable networks, NTL and Telewest, are financially weak and lack the capital required to extend and improve their networks. The established DTT (Digital Terrestrial Television) service, ITV Digital, was closed in April 2002 (though an extended replacement service, Freeview, provided by the BBC and BSkyB,³ will launch in late October 2002). And, in the financial year 2001-2, the most successful digital platform, BSkyB, grew its subscriber base by only 600,000 to c 6.1m homes (BSkyB 2002). Undoubtedly, BSkyB's success in growing its subscriber base by 10% is commercially significant but such growth is unlikely to inspire optimism in those aiming for quasi universal access to digital television in the UK by the Government's target date of 2010.

The Government is committed to digital television, as indicated above, for two specific reasons — efficiency in spectrum use and acceleration of connectivity to achieve an “online Britain.” It has also supported digitisation of broadcasting as part of its general commitment to increase competition, choice and diversity in broadcasting.

Online Britain

Getting the UK online is a headline goal for the Blair government. An online UK promises both to contribute to the modernisation of public services to which the Government is strongly committed, reduce the dead-weight of inefficiency carried by the UK economy and clothe the Government which succeeds in getting the UK online with an attractive “halo” of modernity. Accordingly, all public sector bodies are required to establish electronic service delivery and promote public access to services electronically (e-Envoy 2002a). The e-Envoy's (the official charged by the Prime Minister with getting the country online) guidelines for electronic access to services give digital TV a prominent place in the service delivery strategy because of its availability to “all groups in society” (e-Envoy 2002a, 7). However, the e-Envoy's analysis suggests that few use digital television to get online: only 7% of adults have ever used digital television to get online whereas 98% of UK Internet users get online via a PC (e-Envoy 2002b, 1). A recent digital television survey, undertaken by MORI, found that only one per cent of respondents identified e-mail and Internet access as possible reasons to switch to digital television in the next two years (DCMS 2002, 14). Thus, one of the two major rationales given for digitisation of UK television seems to be profoundly flawed. What of the second?

Martin Cave, a leading UK academic economist expert in media and communication issues, was charged by Government with reviewing UK radio spectrum management and recommending changes (see Cave 2002). Cave found that “broadcasting in general, and terrestrial TV in particular, is a major user of radio spectrum. Terrestrial TV transmissions occupy 40% of the spectrum below 1 Ghz” (Cave 2002, 161) and concluded “the chief means of improving spectrum efficiency in the broadcasting sector will be to move from analogue transmission to digital. Digital transmission allows more information to be squeezed into any given amount of spectrum, e.g. six or more digital TV services can be housed in the spectrum used by one of its analogue equivalents” (Cave 2002, 162). Though Cave clearly found that efficiency gains would accrue from digitisation of television broadcasting in

the UK, the *balance* of advantage, between maintaining the analogue status quo and switching to digital, is much less certain. The value of “old” analogue spectrum released by digitisation could only be established in the spectrum market *after* switchover (estimates of its value have differed by factors of four). Moreover, the cost of switchover is also unclear and estimates of potential cost savings are strongly conditioned by initial assumptions (for example, is the cost of switchover to be determined by considering only the first set in each television household or all sets and VCRs in the household?). Elstein has argued cogently that the Government’s “ambitions have come at a heavy price: one that UK taxpayers and licence fee payers will continue to bear for many years” (Elstein 2002, 1) and concluded that it is dubious whether, even if achievable, the benefits of digital switchover will exceed costs.

Switchover

The Government has published (DTI/DCMS 2002c, 1) its criteria for permitting analogue switchoff as follows:

- Everyone who can currently get BBC1 and 2, ITV, Channel 4, S4C and Channel 5⁴ in analogue form should be able to receive them on digital systems.
- Switching to digital should be an affordable option for the vast majority of people and, as a target indicator of affordability, 95% of consumers have access to digital equipment.

However, MORI found, in a survey of May 2002 (in GB only) undertaken for DCMS (Department of Culture, Media and Sport), that:

- 43% of UK homes have digital television.
- An additional 22% anticipate they will have digital television by 2007.
- 24% don’t know when they will switch.
- 11% claim they will never switch. (DCMS 2002, 3).

MORI (DCMS 2002, 6) found that penetration of digital television in Britain was skewed towards middle income social grades (40% of households in social grades AB had digital television, whereas 44% in social grade C1, 51% in social grade C2 and 38% in social grades DE had digital television). However, of the 35% of households that have purchased a new television in the last two years, only one sixth bought a set (iDTV) capable of receiving digital signals (DCMS 2002, 7). Moreover, MORI commented that awareness of the Government’s switchover policy was low, particularly among the elderly and worse-off households (DCMS 2002, 4).

MORI’s findings suggest that the Government’s criteria for analogue switchoff will be difficult to satisfy by the Government’s target date of 2010 and support David Elstein’s (2002) arguments to the same effect. Elstein, however, goes further and argues that “analogue switch-off would bring no benefit to consumers or anyone else” (Elstein 2002, 7). His judgement, as stated, goes too far for, as he demonstrates, it is clear that digital switchover will benefit some — notably the two increasingly dominant players in UK television — the BBC and BSkyB.

The difficulty of rapidly (or at any rate by 2010) expanding the population of UK digital television households beyond its established boundaries is further indicated by the consumption habits of UK TV viewers. In the year ending 31.12.2001 the 5 main public service television channels⁴ accounted for c80% of UK television

viewing. For 60% of homes this was sufficiently satisfactory for them not to take up the opportunity to subscribe to the digital (and analogue) services offered by cable, satellite and DTT (ITC 2002). Given that the overwhelming majority of digital UK television homes received digital signals by cable or satellite, why did the UK Government so strongly support DTT?

DTT seemed to offer a path to achieving four distinct Government objectives. First, increasing UK connectivity, second analogue switchoff and, third and fourth, achievement of either, or both, of two specific broadcasting policy goals — greater competition in broadcasting and a broadcasting market more friendly to public service broadcasting. The Government has promoted DTT as a counterweight to the growing success of BSkyB. BSkyB enjoyed (and still enjoys) considerable market power based on complementary control of attractive content (especially sports rights), encryption and subscription management technologies and infrastructures and an established transmission infrastructure which, unlike cable, is accessible across (almost) all of the UK. News International, which has extensive holdings in UK newspapers, controls the company, and many (particularly on the left) have seen Rupert Murdoch, the controlling shareholder of News International, as an overmighty media proprietor whose influence should be curtailed and/or counterbalanced. Moreover, from the point of view of competition, BSkyB appeared to some to use its market power anti-competitively. Thus, in both the political and commercial contexts, DTT seemed to offer an alternative UK digital platform to the dominant satellite platform controlled by BSkyB. Moreover, DTT was considerably more easily regulated than digital satellite services thereby enabling Government to protect UK public service broadcasting (or, for the cynical, the incumbent UK broadcasters).

DTT Rollout

In 1997 the ITC (Independent Television Commission) allocated a series of multiplex licences to DTT providers (the BBC was granted its own multiplex and capacity was also reserved for the other established analogue public service broadcasters notably ITV, Channel 4, S4C, Channel 5, Teletext and a Scottish Gaelic service — all of which, in UK broadcasting theology — are considered public service broadcasters). The ITC's decision to award the most desirable licences to BDB, (a consortium of the two strongest firms in the ITV network, Carlton and Granada, and BSkyB), was controversial (see Collins 1998a), not least because BSkyB, a founding member of the BDB consortium, was required both to leave the consortium (and received compensation of £75m for doing so) and to supply programming to it! Moreover, Oftel (Office of Telecommunications, the UK telecommunications regulator) had registered its concern at the ITC's choice of the BDB (Carlton/Granada/BSkyB) consortium rather than the rival bidder, DTN (CableTel/NTL/United News and Media). Oftel believed, in my view correctly, that choice of DTN would be more likely to engender a competitive structure for both the carriage (platform) and content elements of the DTT sector than would the alternative, BDB, chosen by the ITC. The BBC took forward its own digital initiatives, under the supervision of DCMS, and gradually launched a portfolio of new digital channels including BBC 4 (culture, history and ideas), Cbeebies and CBBC (children's channels). In 2002 DCMS approved the BBC's proposal for a youth channel, BBC 3.

Shorn of BSkyB, the survivors of the BDB consortium, Carlton and Granada, launched OnDigital, a low pay DTT service, in 1998 but, in April 2002, the service (rebranded ITV Digital) closed (for history and data see BIPE 2002 and Elstein 2002). The failure of ITV Digital is generally attributed to the combination of several factors, notably, the superior attractiveness of the competing BSkyB alternative, Sky Digital, Sky's superior marketing, the poor technical quality of the ITV Digital signal (and its inaccessibility in some parts of the UK) and the inability of ITV Digital's owners to sustain the front loaded costs of increasing ITV Digital's subscriber base through provision of subsidised set top boxes (STB). BSkyB began simulcasting in digital and analogue in 1999 and completed digital switchover in 2001. The majority of UK digital television households are now, of course, receiving digital signals via the BSkyB satellite platform. The cable companies, NTL and Telewest have also digitised most of their network infrastructure but have yet to fully roll out digital customer premises equipment.

Following the failure of ITV Digital the Government sought a new champion and in July 2002 the ITC licensed the BBC, and its partner Crown Castle, to take over the erstwhile ITV Digital multiplexes and take forward the Government's DTT agenda. The BBC is required by Government to promote digital television (DTI/DCMS 2002c, 1) and is funded to do so. It will take forward the next stage in its digital strategy by launching a 30 channel portfolio of services named "Freeview." Freeview will carry the established "analogue" terrestrial public service channels (including ITV and Channel 5), news channels from Sky and ITV as well as the BBC's News 24 channel, the BBC's own digital channels (notably BBC 3 and 4, Cbeebies and CBBC) and free commercial services such as music channels from MTV and Emap, Sky Travel and QVC. As well as increasing the BBC's own salience by a very considerable margin Freeview seems likely to significantly disadvantage Channel 4 (which lacks the terrestrial distribution for its E4 and FilmFour channels which the ITV Digital platform formerly provided) and advantage BSkyB by providing it, for the first time, with a toehold in the terrestrial television market.

Thus, from almost all points of view UK digital television strategy has not been notably successful. It is a technology that is almost completely lacking in significance for advancing "Online Britain" and the costs of digital switchover may well exceed the spectrum benefits (benefits will, in any case, be long delayed). Yet Government remains strongly committed to a digital strategy and to creating a digital terrestrial television platform. The failure of ITV Digital has led the Government, as in the past (see Collins 1998, 224-7), to vest the BBC with responsibility for seeing through a new technological initiative. The permissiveness of the BBC's Charter, which broadly entitles the BBC to do anything that is not explicitly forbidden, makes the BBC a flexible, and potentially very effective, instrument for pursuit of Government's broadcasting policy objectives. But, although the BBC's Freeview platform may successfully establish an alternative to the BSkyB satellite platform, Freeview is unlikely to assist new service providers to enter the UK television market and also seriously disadvantages some established service providers (not least Channel 4). The BBC's digital initiatives have led increasingly to a perception of the BBC as a threat to competition, diversity and pluralism. The *Financial Times's* comment (1.8.02, 14), that "the biggest threat to diversity is the BBC, which is moving into all sorts of new sectors"⁵ is representative. How far can this novel judgement be sustained?

Public Service Broadcasting and Digitisation

For most of the last two decades proponents (myself sometimes among them) of public service broadcasting in the UK (see, *inter alia*, Garnham 1994, Graham 1999) characteristically have argued that the BBC is embattled, threatened and underfunded — a minnow vulnerable to commercial pikes. Latterly, voices are raised contending that the BBC has too much, does too much and acts anti-competitively — that, rather than being a minnow, the BBC is now a substantial pike. Rather than the BBC having too little power now, it is suggested, the BBC has too much. But how may one judge whether the BBC has too much, too little or just the right amount of public funding? Arguments that the broadcasting market fails, is likely to continue failing and that a public sector presence is likely to serve the public interest do not establish *how much* the market fails and what level of intervention in the UK broadcasting market is proportionate to the extent of market failure. At the core of the difficulty of deciding how much Government should intervene in the broadcasting market is the absence of a clear definition of public service purposes in broadcasting as the ITC acknowledged in its acerbic comment to the Puttnam Committee. The ITC judged that the draft remits for public service broadcasters proposed by Government were “at such a general level that it is impossible to assess sensibly what Parliament could expect each to contribute” (ITC 2002a, 8).⁶

Central to one of the most persuasive arguments for public service broadcasting (Garnham 1994) is the proposition that the economic characteristics of broadcasting mean there is an *intrinsic* tendency towards the failure of broadcasting markets — economies of scope and scale lead to oligopoly which, in turn, demands Government intervention to sustain broadcasting, notably through support for public service broadcasting. However, Garnham and other proponents of public service broadcasting did not consider how the putatively oligarchic tendencies of broadcasting economics play out in a public service context. Might not a public service broadcaster act oligopolistically as Tim Yeo MP, when Shadow Secretary of State for Culture, Media and Sport, suggested? Yeo bracketed the BBC and BSkyB together as possibly abusively dominant broadcasters stating “British television is now dominated by the BBC and Sky, both of whom are more eager to exploit their power than they care to admit” (Yeo 2002, 16). Concern is not confined to Conservative politicians. The Puttnam Committee⁷, for example, in delphic drafting of consummate skill, referred to “a number of unanswered questions about the precise extent to which the BBC’s public service broadcasting functions justify market behaviour which might otherwise be subject to examination under competition law” (Puttnam 2002, para 215). And the UK’s Director General of Fair Trading, John Vickers, has also referred to concerns about the BBC stating, *inter alia*, that “the increasing tendency of the BBC to launch services on markets beyond its traditional public service broadcasting remit, such as web searching, has aroused considerable public interest and could raise difficult competition issues” (Vickers 2002, 4).

The theoretical concerns acknowledged by the Director General echo complaints about the BBC expressed by, *inter alia*, PACT, IPC magazines and ITN⁸. Here it is important to acknowledge that there is no warm smoking gun. The BBC has weathered successfully all competition cases thus far brought against it. Nonetheless,

prima facie, the BBC is at or close to dominance in a number of markets,⁹ not just in final consumption areas but in neighbouring markets further up the supply chain. Nonetheless, one of the most important contemporary charges against the BBC is that it “crowds out” actual, or potential, provision by other suppliers with a potential adverse impact on competition, diversity and pluralism. The BBC’s aggressive digital strategy (but a strategy that clearly chimes with the Government’s mandate to the BBC to promote digital television) has amplified such concerns.

Crowding Out

Crowding out is a difficult argument to substantiate for it turns on a hypothetical question — would “y” have happened had “x” not happened? But the Davies Panel (1999) took the problem sufficiently seriously to consider the matter (see its discussion “Fair trading or foul?”) through discussion of three worked examples. In one of the three cases the panel identified the possibility of using “Licence fee money ... to make programmes of a type which could perfectly well be left to the private sector” (Davies 1999, 92). The panel clearly deprecated such behaviour by the hypothetical public service broadcaster but acknowledged the difficulty in distinguishing between illegitimate “crowding out” and fair and appropriate competition.

“Crowding out,” if a reality, has the obvious potential for output maximising public service broadcasting to create the market failure (undersupply of merit goods by the private sector) which public broadcasting exists to redress and thereby set in train a self-fulfilling prophecy — the market provides too little diversity, public service broadcasting is required to redress market failure but, if too strong, public service broadcasting chills diversity. There is some empirical evidence to suggest that the current strength of the BBC, endowed with a generous licence fee settlement, charged by Government with taking forward its digital agenda and with a strongly populist/audience maximising programming strategy¹⁰ is “crowding out” other suppliers.

In mid 2002 I interviewed senior managers of three small UK digital television channels, minnows in the digital pond, each providing services in the high culture/history/ideas segment of the market. One had closed, an event attributed by the Chief Executive to “digital market failure caused by the BBC”¹¹ and the others had either directly experienced, or feared the adverse impact of BBC digital services. Geoff Metzger, Managing Director of The History Channel¹² stated he was “very concerned about the launch of UK History [a joint BBC/Flextech channel] — it will hurt us very badly if it continues.” And John Hambley, Chief Executive of Artsworld,¹³ testified to the difficulty Artsworld, and other similar channels, experienced as a consequence of the mutually reinforcing advantages enjoyed by the BBC. The effect of these advantages was, he claimed, for the “dominance of the BBC to lead to a closed circle of types of programmes made by the same programme makers working within a commissioning structure which narrowed choices for consumers.” Among the BBC’s advantages Hambley instanced, *inter alia*:

- the privileged regulatory status of public service broadcasting whereby BBC channels enjoyed “must carry” status, making it more difficult for competing commercial services to secure access to transport infrastructures of limited capacity;

- the extent to which policy makers, e.g. in DCMS, relied on the BBC for expert advice (a relationship which he described as “uncritical”);
- the effect of the BBC’s presence in a series of complementary neighbouring markets;¹⁴
- concern over BBC terms of trade in programme supply;¹⁵
- the BBC’s ability to cross market and promote its activities;
- the scale of the BBC’s marketing spend (two interviewees separately mentioned the scale of the BBC’s launch party for BBC4, one estimating the BBC’s spend on the party to have exceeded £1m).

Overall, Hambley testified to the chilling effect of the BBC presence on market entry and the impact of the BBC’s expansion into digital services on Artsworld. He referred specifically to the crisis earlier in 2002 when closure of the channel was thought to be imminent and one of Artsworld’s principal investors, the Guardian Media Group (GMG), withdrew from Artsworld. Hambley said, “If BBC4 hadn’t come along GMG would have hung in there. They decided they couldn’t face the might of the BBC.” He continued, “I think BBC funding and size is disproportionate and will go on being so. One doesn’t know what will come next” and instanced another case of crowding out known to him, where investors decided not to proceed with a new UK television nature channel for fear of competition by the BBC. Metzger referred to the aggressive business plans foreshadowed by the director of UK History, Matt Tombs (see *Ariel* 18.9.02, 6) and further stated that “anyone entering the market now does so with knowledge of much greater risk.” The BBC, in its internal house journal *Ariel*, foregrounded the competitive advantage the BBC/Flextech channel would enjoy as a consequence of its privileged access to the BBC’s archive stating “the vital weapon in its arsenal is the BBC’s history archive” (*ibid*).

Hambley deprecated the narrowing and commercialisation of the BBC’s programme offer¹⁸ and argued that “the dominance of the BBC leads to a narrowing of choices for consumers and to a lack of diversity in the voices available on television and radio.” He emphasised the adverse impact of the BBC’s controlling influence on DTT stating “it is a bridge too far ... the BBC has another great slice of control... A channel like ours will never get onto a DTT platform.” Hambley also observed that the cable “must carry” privileges enjoyed by the BBC and other qualifying terrestrial channels (including Channel 5) meant that, because of capacity constraints on cable infrastructures, Artsworld, and channels like it, would experience great difficulty in reaching cable subscribers. It is, Hambley continued, “absurd that Channel 5 should be a must carry channel” but the most important difficulties were presented by the BBC which “held all the aces and may be given some more.”

The Chief Executive of Digital Classics¹⁶, Chris Hunt,¹⁷ made the most powerful criticism of the BBC and stated that it “had the market power and the will to take out the opposition” and added that “we would still be running were it not for BBC4.”

Perhaps these testimonies from senior managers of commercial digital channels are simply special pleading for their own interests, pleas to which one might appropriately respond by echoing Mandy Rice-Davies’ immortal words, “he would say that wouldn’t he?” Perhaps. But proponents of a broadcasting policy seeking to foster diversity and pluralism and to ensure that viewers enjoy supply of high

quality, merit good, programming must surely see the closure of Digital Classics, the fragility of Artsworld and the concerns of The History Channel as important testimony to perceptions of the BBC's market power acting, whether exercised in a formally anti-competitive way or not, as hostile to competition, pluralism and diversity. It is one of the many ironies in contemporary UK broadcasting that Artsworld's lifeline to survival came from BSkyB. Sky's support stemmed from its perception that subscriptions to its film and sports channels had plateaued and the consequential need, if Sky is to extend its subscriber base, to secure customers for different types of television, such as the arts programmes screened by Artsworld.¹⁹

From the perspective of competition policy, there are thus several areas of potential concern arising from the BBC's activities. At the most general level there is the potential for a public firm to act more aggressively than a for profit, investor owned, firm in excluding potential competitors from markets and maximising output rather than returns. This, added to the tendency towards an oligopolistic structure in broadcasting markets identified by Garnham, suggests a greater potentiality for anti-competitive behaviour by a public broadcasting undertaking than that of a private undertaking. To balance such potentialities, there are countervailing forces, including the fair trading requirements of the Competition Act 1998 (except insofar as the BBC undertakes specific public service obligations imposed by Government); the compliance procedures established by the BBC; and the approval regime for new BBC services established by the Secretary of State. Resolving whether there are *actual*, not solely potential, grounds for concern is a complicated matter. First, the markets would have to be defined and analysed. Second, assessment would be needed of the extent to which the requirements of the Competition Act were satisfied, whether the Act's provisions are sufficient and, if they were not, what sector-specific ex ante regulation might be required. This is beyond the scope of this article.

Regulation, Digital Television and the BBC

It is, as stated above, an open question as to whether there are legitimate grounds for concern about the strength of the BBC's position in the UK broadcasting market and the digital sector in particular. However, for those who share the concerns expressed by the minnows competing with the BBC in digital supply of public service type cultural and factual programming, the combination of the BBC's self regulatory status (the BBC's Governors, rather than an independent agency, are principally responsible for the BBC's regulation) and weaknesses in broadcasting competition law create a worrying gap in provision of redress and regulation, a gap which the Draft Communications Bill will do little to fill.

The UK Government has defined three headline objectives for UK media and communications. It aims for a "dynamic, competitive communications industry" for "universal access to a choice of diverse services of the highest quality" and to ensure that "citizens and consumers are safeguarded" (DTI/DCMS 2002, 3). The Government has also undertaken that "Ofcom will have the powers necessary to prevent unfair competition" (DTI/DCMS 2002b, 5). The Bill gives Ofcom concurrent competition powers with the Office of Fair Trading but, except for some BBC matters (e.g. complaints, taste and decency and vetting the independent produc-

tion quota) currently handled outside the BBC, leaves the BBC substantially outside Ofcom's remit and regulated by its own Governors and DCMS.²⁰

The Director General of Fair Trading, John Vickers, himself has acknowledged that competition law may not be sufficient to secure public policy goals in broadcasting. Vickers asked rhetorically, "is general competition law, and the rules on mergers in particular, enough to constrain power and protect diversity and choice in broadcasting?" Vickers answered his own question by acknowledging that competition regulation is not always sufficient to secure public policy goals in broadcasting and stated "Given the inevitable imperfections of prescriptive conduct regulation in such a fast moving sector, there is a case for a degree of structural limitation, beyond general merger control rules, on some potential patterns of ownership of media assets. There may also be scope for specific regulations covering access to bottlenecks" (Vickers 2002, 3). If Vickers is right, a sectoral regulatory agency, such as Ofcom, is a very appropriate response to the deficiencies in competition law. But the exclusion of the BBC, the largest single element in the UK broadcasting market, from Ofcom's jurisdiction may not be so appropriate a response if, as the digital minnows have argued, the BBC impacts adversely on competition, diversity and pluralism. In the same speech Vickers identified the scale of intervention represented by the BBC "which provides services that are primarily free at the point of delivery in return for about £2.5billion per annum in tax payers' money — not far off one day's gross domestic product for the UK" (Vickers 2002, 4).

Conclusion

Unfortunately, it is difficult to avoid the conclusion that many provisions in the Draft Bill reflect a simple rolling forward of established arrangements for public service broadcasting rather than the result of a rigorous assessment of the contemporary performance, necessity and value of public service broadcasting. Whether the scale and kind of intervention currently represented by UK public service broadcasters, and the level of intervention foreseen, is proportionate and appropriate is almost impossible to assess, for the UK has no clear definition of the deficiencies, actual, anticipated or potential, of the broadcasting order which public service broadcasting is to redress. Again, Hambley made a related point stating "If DCMS were clearer about desirable outcomes it could put things out for tender. Why does everything have to go into the machine of the BBC?"

Undoubtedly there are deficiencies in the present, and any foreseeable future, UK broadcasting regime which justify a public service presence (for example, to secure diversity in provision of news in some local UK broadcasting markets). If the broadcasting market is presumed not to be dynamic, public service broadcasting seems to make a positive contribution to diversity and pluralism — without it there would be fewer broadcasters. Radio and television provision would be less pluralistic and possibly less diverse. But if one assumes a dynamic market this conclusion cannot so confidently be reached. Indeed, there is reason to believe that UK public service broadcasting, amply funded and enjoying a privileged regulatory regime chills entry of new suppliers and services. The scale and character of the BBC's activities inhibit competition and militate against the achievement of core public service objectives such as diversity, pluralism and quality. Whereas market opening initiatives, whether fostered by Government (such as the inde-

pendent producers' quota) or those initiated by commercial undertakings, such as Sky's entry to the UK television market, which ran against regulators' attempts to manage the market, suggest that diversity grows as competition intensifies.

Lacunae in competition law, the scale of the BBC's operations, the complexity of the broadcasting market, the inter-relationship between neighbouring markets (e.g. in facilities, programme supply and broadcasting) and the substantial exclusion of the BBC from the regulatory authority of the new integrated agency Ofcom foreshadowed in the Government's Draft Communications Bill (DTI/DCMS 2002a), mean that the BBC's digital competitors' fear that there will be no effective forum in which they can seek redress for their concerns. Hambley, for example, stated that the "BBC Governors are not an independent regulator but are equivalent to the board of directors of a commercial company" and that there is "no cogent argument for the BBC being outside Ofcom." Hunt made similar arguments claiming that "Ofcom would be the only comfort. The hybrid proposed leaves the Governors controlling everything the BBC does — they are not going to stand in the way."

The evolution of digital television in the UK seems therefore a story unlikely to have a happy end. The two major objectives that led Government to prioritise digital switchover, advancing the progress of UK Online and making more efficient use of the radio frequency spectrum, seem unlikely to be served well by digital television. Moreover, the structures and instruments adopted by Government to advance the cause of digital television seem likely to act adversely on other Government goals — notably competition, diversity and pluralism. Two major established players, the BBC and BSkyB look set to dominate digital television with scant opportunities for sustained and successful market entry by new suppliers of content or for genuine competition between rival digital platforms. Garnham's diagnosis of the oligopolistic structure of the broadcasting market seems, yet again, vindicated by events. Piquant irony that the remedy he advocated, a stronger UK public broadcasting presence, seems in the contemporary instance to be more part of the problem than part of the solution.

Notes:

1. The British Broadcasting Corporation (BBC) is the UK's chief public service broadcaster, BSkyB a privately owned satellite broadcaster, ITV the principal UK commercial terrestrial television network.
2. However, Channel 5 reaches only 80% of UK terrestrial TV homes.
3. With Crown Castle, a transmissions company.
4. Channel 4 is an advertising financed non-profit distributing English language television channel; S4C is its Welsh language equivalent. Channel 5 is an advertising financed for profit television channel.
5. See also Elstein 2002a.
6. The Chairman of the Competition Commission made a similar point in his evidence to the Puttnam Committee on 27.5.02.
7. The Joint Scrutiny Committee of the House of Lords and House of Commons on the Draft Communications Bill established in 2002. See Puttnam 2002.
8. Educational publishers have also expressed alarm at the prospect of the BBC entering, and perhaps foreclosing, the digital online educational market.

9. The Puttnam Committee referred to the “dominant market role” of the BBC (Puttnam 2002, para 212).
10. See Collins 2002 for analysis of a small sample of the BBC’s television programme schedule. Metzger, interviewed 2.10.02, stated “the Reithian ideals have gone completely except for BBC 4.”
11. Interview with Chris Hunt, CEO Digital Classics 30.9.02.
12. Interviewed 2.10.02.
13. Interviewed 12.9.02. Artsworld is a UK subscription financed digital television channel carried on Sky’s satellite platform. Currently, Artsworld has fewer than 50,000 subscribers and in mid 2002 there was serious concern about the prospect of the imminent closure of Artsworld’s services.
14. He stated, “the BBC has so much commercial power it distorts the market for all of us — especially small channels like Artsworld” and instanced the lack of salience given to non-BBC services in the BBC’s magazine *Radio Times*; the BBC’s ability to cross promote its undertakings across a variety of platforms and media; the use of the abundant resources of the parent BBC to fund promotional activity, eg a launch party for BBC 4, which Artsworld and other small competitive channels, could not and cannot afford. Metzger made the same points and Hunt also referred to the BBC 4 launch party.
15. Hambley acknowledged that the separation of BBC Worldwide from the public service side of the BBC made it hard to formally sustain a case that the BBC was guilty of anti-competitive behaviour of refusing to supply programmes to a competitor. However, Hambley referred to negotiations with BBC Worldwide the previous year in which Artsworld expressed interest in acquiring rights to 50 BBC programmes from a list of 100 presented by BBC Worldwide only to be told that 46 of the 50 were no longer available because the BBC wished to reserve the programmes in question for subsequent transmission itself. The author heard a similar tale from the Chief Executive of another UK television channel in which the BBC declined to supply programmes from its catalogue because it might, at an unspecified future date, wish to transmit them itself. Such decisions might be lawful commercial behaviour but are not always easily reconciled with the general public interest in access to public service programming.
16. An arts channel that went off the air in consequence of the BBC’s impending launch of BBC4.
17. Interviewed 30.9.02.
18. “Eastenders five nights a week is no justification of the licence fee, a range of diverse, high quality programmes is.”
19. Hambley cited Sky’s growing commitment to cricket and investment in “Music Choice Europe” as other cases in point.
20. Hambley referred to the “uncritical relationship” between DCMS and the BBC, which, perhaps hyperbolically, compared the relationship between DCMS and the BBC to that of Sinn Fein and the IRA!

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