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## Regulating contracts in the independent television production industry: a cross-national case study

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### Resumo:

This paper adopts a socio-legal perspective to explore the interaction between regulation and contracts in the independent television production industry. It reviews two sets of theories - new institutional economics and autopoietic social systems theory - that are shown to be reconcilable and to provide a common ground regarding the interaction of contracts and regulation. This question is then investigated through the use of a case study that analyses the role of regulatory change in creating a competitive market for television production in the United Kingdom and Portugal. Case study evidence indicates that there has not been a straightforward move from in-house television production to a competitive market in either country. The elements of regulation intended to introduce competition in television production have so far accommodated norms that sustain contracts and which have emerged to safeguard quality in television programming. But as independent production firms increase their commercial orientation, television programming is reconfigured as a commodity, and the need to redefine public service broadcasting becomes critical. Changes in terms of trade and legal rules are having an effect on the boundaries of markets, but the norms that sustain contracts in television production are also influencing the way in which legal rules and terms of trade are being redesigned and interpreted. In conclusion, our analysis suggests that regulation and contracts interact in a mutually constitutive way: regulation and contracts co-evolve.

### Palavras-chave:

Television production, regulation, co-evolution

## 1. Introduction

Current economic policy reveals a belief in the primacy of the market as a basis for efficiency: vertical disintegration has been implemented, for instance, in transports, utilities, public hospitals and public television broadcasters, and contractual forms of organization such as outsourcing are increasingly adopted by private corporations. The boundaries between private and public spheres of economic activity are blurring, and the role of regulation in steering economic activity is being rethought: “command and control” views of regulation as a system of rules imposed by the State and backed by externally enforced sanctions are challenged by “reflexive” understandings of regulation that highlight the role of economic actors in constituting their frameworks of behaviour.

Regulation is understood here as a system of rules intended to govern the behaviour of economic actors, and a contract is interpreted as a long term relationship between autonomous business partners that creates a structure of governance. The contractualization of economic activity has been addressed by research aimed at understanding the effectiveness of particular organizational arrangements and regulatory shifts (e.g. Bartlett, Roberts & LeGrand 1998; Deakin & Michie 1997b; Vincent-Jones 2000). However, interdisciplinary studies that combine law, economics and society are still unusual, and empirical work that explores how contracts are shaped by regulation and how they shape regulation in their turn is still needed. This paper looks at the interplay between regulation and contracts in the independent television production industry by investigating the following research question: how do contracts, on the one hand, and legal rules, terms of trade and social norms or conventions, on the other, shape the television production industry? The aim is to uncover the way in which the co-evolution of contracts and regulation is reshaping the television production industry structure and output.

This paper begins by briefly reviewing the institutional theories that provide greater help in understanding the interaction between contracts and regulation, and outlining the methodology used to address the research question. It then assesses the way in which legal rules, terms of trade and social norms are having a dynamic effect on the structure of the independent television production industry and on the nature and quality of television programmes. It concludes with some considerations on the dynamic effects of the co-evolution of contracts and regulation.

## **2. Theoretical and methodological perspectives on the interaction between contracts and regulation**

A current strand in economic policy and management is the revival of contract as “the foremost organizing mechanism of economic activity” (Deakin & Michie 1997a, p. 1).

The trend towards the liberalization of economic activity has increased the relevance of contracts, particularly relational contracts, as mechanisms of governance. Furthermore, it has highlighted the need to bring together insights from a variety of disciplines, so as to gain a better understanding of contractual relations and contract regulation in the context of a complex economic environment (Deakin & Michie 1997a; Harris 1996; Vincent-Jones 2000). Two theories affiliated with different fields of social sciences provide interesting contributions for an understanding of the interaction between contracts and regulation: new institutional economics and autopoietic social systems theory.

New institutional economics is understood here as a research program that focuses on the ways in which economic activities are coordinated and on the factors which account for alternative governance structures. It is generally identified with transaction cost economics, a theory originated in Coase, who brought forward the need to consider the costs of transacting in the analysis of economic activity, as well as the need to account for the role of regulation in reducing those costs (Coase 1993 [1937], 1960). This theory was later developed by Williamson, who argued in favour of a discriminating alignment between transactions, which differ in their respective attributes, and modes of organization such as markets, firms and networks (Williamson 1991, 1975). On the perspective of new institutional economics, regulation is conceived of as a structure of incentives to which individuals respond. Legal rules assign rights and duties, create taxes and subsidies, impose specific procedures and penalise particular behaviours. Governments thus induce particular courses of action by using the law to manipulate the costs of transacting. The economic actor will calculate those costs and choose the efficient behaviour, meaning that which maximises his self-interest and thus conduces to the welfare of the society. To refer to this approach, Deakin (2000) uses the metaphor of law as a surrogate for price. The author means that legal norms are seen exclusively in terms of implicit signals or prices to

which economic agents respond, much in the same way that choices function in relation to prices in a market setting. Hence, economic actors act *according* to the law, which, like prices, encapsulates all the information relevant for decision making. The perspective of law as a surrogate for price has important implications: first, it directs the attention of governments towards getting the law “right” - the major concern is with designing efficient legal rules (e.g. Djankov et al. 2002; Williamson 2000); secondly, the efficiency of the law is measured in allocative terms - the allocation of resources set by the law will be measured against alternative states in order to ascertain whether there has been an increase in the welfare of particular individuals or of society as a whole. As a consequence, the law evolves through a *linear* process of adjustment: law is changed when another allocation of resources is found to be more efficient (Deakin & Hughes 1999).

Autopoietic social systems theory is mainly identified with Luhmann (1995 [1984]), who provided a new paradigm for thinking about the relationship between the legal system and other social systems in society. On the perspective of autopoiesis, social systems are not open systems, but self-reproducing ones: each system, such as, for instance, the legal system, is composed of elements that interact with each other without any direct reference to the external world. That does not mean that systems are completely closed. Indeed they are operationally closed, which means that each system is contained within the boundaries of its own internal framework of meanings. But systems are cognitively open, which means that each system does observe the world beyond its boundaries. Each system’s environment is a source of perturbations, in the sense that it triggers change, but it does not intervene directly in the system’s workings. So, for example, the legal system observes what is going on in the economy, but it reads and reinterprets the economy according to its own internal framework of meaning (Luhmann 1995 [1984]; Teubner 1993). Being so, autopoietic social systems theory rejects the linear perspective of the interaction between contracts and regulation that is maintained by new institutional economics. For autopoiesis, economic actors act *within* regulation. Contracts interpret and read regulation through their own systems of shared meanings; the contractual interpretation thus reached is afterwards recognised, reread or “decodified” (Teubner 1992) by the institutional environment, whose regulatory elements in turn interpret, reread or recodify those perturbations through their internal communication processes. Hence, the relationship between contracts and regulation is not linear, but mutually constitutive. This perspective has relevant implications: firstly, the meaning of legal rules is constructed within the social and economic realms which it seeks to regulate; as a consequence, the interaction between contracts and regulation may have unexpected dynamic effects for industry structure and output.

This paper aims to understand the way in which the relationship between contracts and regulation is reshaping the television production industry structure and output. The cross-national case study was the methodology chosen to address the research question. The case study methodology allows the variety of elements of regulation and contracts in specific contexts to be dealt with; it facilitates the capture of the perceptions and meanings that economic actors develop of their regulatory frameworks and business relationships; it permits a longitudinal approach to the contractualization of economic activity; and it provides descriptive material that facilitates the assessment of the usefulness of theoretical combination (e.g. Hamel, Dufour & Fortin 1993; Stake 1995; Yin 1994). The comparison of patterns of social phenomena across nations enables a better understanding of how social processes operate (Hantrais 1999; Mangen 1999): by studying the development of the independent television industry in two different settings, the distinctive qualities of the regulatory environment may be assessed, as well as the extent to which they are shaping the industry in the same way or not. Moreover, a cross-national comparison allows the exploration of what may be the possible reasons underlying the developmental trajectories found. The independent

television production industry was thus studied in two research settings: the United Kingdom (UK) and Portugal.

The UK television market is one of the largest in Europe (alongside France, Germany, Italy and Spain), with more than 1000 independent producers grouped in the largest association of independent producers, the Producers Alliance for Cinema and Television (PACT) (Andersen 2002), and its television programme industry is one of the strongest in the world: it is second only behind the USA in the international programme sales (Associates 2000), and its independent production sector was responsible for a £ 780m turnover in 2004 (Mediatique 2005). By contrast, the Portuguese television market is recent - only in the 1990's was competition introduced in television broadcasting - and the Portuguese Association of Independent Producers (APIT) is last but not one in Europe, aggregating only 21 members that for the most part correspond to the largest independent production companies in the country. Since the UK and Portugal represent extreme cases in terms of industry size and maturity, and possess different institutional patterns in terms of legal system and economy, a case study in these two settings might provide interesting insights into the interaction between regulation and contracts. The trajectory of the television production sector is expected to be quite different in these two countries, and the revelation of such differences may contribute to assess the consequences of specific regulatory measures, particularly of those that have already been implemented in the UK, but are still being planned and discussed in Portugal. At the same time, the fact that, despite their differences, both countries are EU members may enable the capture of eventual tensions arising from the submission to a common legal framework (mainly set by the Television Without Frontiers Directive n° 89/552/EEC, amended in 1997; acronym TWF).

Data was collected through semi-structured interviews and documentation. Snowballing was used for selecting the informants in both countries, and aide memoires were prepared to guide the interviews. A total of 38 interviews were conducted in multiple organizational settings in the UK and Portugal between December of 2003 and July of 2004. The documents gathered include official documents derived from public and private organizations and sources and mass media outputs, and were used as a means of triangulation. Interview transcripts and documentation were manually analysed according to a conceptual framework that stemmed from the research question. Materials were classified in accordance to a list of themes that corresponded to the elements of regulation under scrutiny: "legal rules", "terms of trade" and "conventions", as well as to the case under analysis: "television production". Throughout the iterative process of going back to textual materials, re-reading and re-classifying them, shared meanings and interpretations (similarities) were noticed, as well as particular perceptions (singularities). This process of organizing the data and the resulting identification of similarities and singularities formed the basis for making substantive connections (Dey 1993) that founded the building of a picture of the interaction between regulation and contracts in the independent television production industry in the UK and Portugal. Despite limitations regarding the level of access to television producers and broadcasters, the number of interviews conducted and the implementation of validity procedures, the cross-national case study updates previous research on the effects of regulatory change in the UK (e.g. Coffey et al. 1997; Deakin & Pratten 2000, 1999), and it is a first attempt to look at "law in action" in the Portuguese television production industry.

### **3. Assessment of regulatory changes in the independent television production industry**

For the past decades, several mechanisms have been used in Europe to foster the emergence and growth of production companies external to broadcasters: the creation of editorial channels; the establishment of compulsory independent production quotas within the TWF Directive ; the set up of specific funding programmes for television production, such as the MEDIA programme of the EU; and the development of licensing models of terms of trade intended to protect the rights of producers over

the content created. These mechanisms are viewed as a means to promote diversity and creativity in television content, and also as a way to protect national and European cultural specificities, particularly in face of the growing pressure of USA originated content (Venturelli 1998)<sup>1</sup>.

However, the television broadcasting and production industry in both the UK and Portugal is not of one view regarding the effects of these regulatory initiatives. Case study evidence suggests that the industry is not organised as a full competitive market in either the UK or Portugal. A market in television production would require the complete disintegration of production from broadcasting, and the establishment of a universal pay-per-view system based on consumer sovereignty. But these conditions do not apply in either country studied. Firstly, despite liberalizing reforms at vertically integrated broadcasters - such as Producer Choice at the BBC (Deakin, Lourenço & Pratten 2006) and the restructuring of in-house production at RTP involving the creation of FO&CO and RTP-Meios de Produção<sup>2</sup> - there has not been an unbundling of production. In fact, there has been in some cases a reversal of the marketization of television production: for instance, former editorial channels integrated upstream the broadcasting process and started to buy shares in production companies (such as, for instance, C4 in the UK and TVI in Portugal), and RTP has been relying on in-house production more heavily than in the recent past. Secondly, programming schedules are still more a reflection of the interests of advertisers than of the wants of consumers. Although digital television services that allow for pay-per-view (and programme targeting to premium audiences) have been steadily increasing, free-to-air television still plays a decisive role in broadcasting in the two countries addressed. Consequently, television schedules are mostly built around mass appeal programming, in the sense of those that are able to generate advertising revenues across demographic groups.

The outsourcing of production was not merely understood by policy makers and managers as contributing to mitigate problems identified in vertically integrated broadcasters, such as excessive bureaucracy, high fixed costs and deficient planning and control procedures. In reality, it was viewed as bringing an increase in innovation and diversity in programming, thus allowing the industry to rival the growing pressure of USA imported content. Indeed new production firms were established following regulatory changes. But these fell short of creating a market in television production.

To begin with, as the majority of production contracts rested on full-funding<sup>3</sup>, the independent producers' exposure to risk was limited, and so was their ability to retain broadcasting rights. The cost-plus character of production contracts thus constrained the possibility of prices playing a market-clearing role. Moreover, case study materials show that independent production companies did not engage in the discrete type of business deals presupposed by the market mode of organization. Most television producers developed on-going relationships of repeat trading with commissioners, which were frequently based on a "red book culture" and sustained by reputation and experience. These informal networks of broadcasting professionals furthered the development of shared understandings of programme quality in a way that markets, which are based on spot contracting, might not provide. Therefore, the network mode of organization seems to have emerged as a means to coordinate the actions of formally autonomous companies in a context of uncertainty regarding the definition of the

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<sup>1</sup> The EU balance of trade in television rights with the USA has been deteriorating since 1997, and in 2000 it recorded a deficit estimated at about €4.1 billion (an increase of 17.5% compared with 1999) out of a total audiovisual deficit evaluated at €8.2 billion (an increase of 14% compared with 1999) (Commission 2003).

<sup>2</sup> The restructuring of RTP's in-house production was intended to develop the production of information on indirect production costs; and also aimed at generating revenues from the supply of programmes to external commissioners and from the lease of facilities to external producers (Contas 2002).

<sup>3</sup> Under the full funding model of terms of trade the broadcaster generally pays in advance all or nearly all the budgeted costs of development and production plus a production fee, in return for acquiring all rights in relation to the programme in perpetuity: the primary rights regarding the broadcast of the programme in the country; the secondary rights relating to its rebroadcast on other channels and audiovisual platforms (e.g. video, DVD, third generation mobile, etc.) in the country and overseas; and tertiary rights concerning residual copyright and merchandising.

product. In other words, networks preserved what was sensed to be a valuable property of vertical integration in broadcasting: the capacity to build a common framework of meaning and behaviour that reduced the costs of coordination.

This ability of networks to reduce coordination costs may have assumed a particularly relevant role in the conception of public service broadcasting. The evolution of broadcasting policy in both the UK and Portugal highlights how public service broadcasting is an ambiguous and evolving notion (e.g. Cave 1996; Ofcom 2004b; Pinto 2005; Sousa 1997; Sousa & Santos 2005). Legal rules indicate vague features of public service broadcasting - such as "quality", "excellence" and "innovation" in programming - which have to be interpreted by economic actors within the broadcasting production process. Before the marketization of broadcasting and production, the interaction between broadcasting professionals within vertically integrated broadcasters enabled the building-in of notions of public service that reduced the costs of constantly having to assess whether a particular idea, programme or schedule fitted the remit of public service broadcasting. As recalled by Born (2003) in the context of the BBC, the company developed a professional ethics based on the Reithian discourse of serving the public, universality, justification of the licence fee and quality and integrity of output that grounded BBC's distinctiveness. During the course of this study, the way in which some features of this framework of meaning also informed the notion of public service broadcast in Portugal was noticed: interviewees at RTP mentioned the Reithian trilogy as the basis of their understanding of public service broadcasting, and informants at commercial broadcasters criticised RTP for its lack of an editorial guideline "similar to that of the BBC", as it was put by a head of department at a commercial broadcaster. After the introduction of internal markets within broadcasting companies, as well as the creation of editorial channels and the implementation of compulsory independent quotas, the emergence of networks may be interpreted as allowing the safeguard of cognitive resources and common values of public service that had taken substantial time and personal interaction to develop.

It seems that this role of informal networks of broadcasting professionals in preserving frameworks of meaning of public service broadcasting may be more marked in the UK than in Portugal. This may be associated to the fact that the core Reithian notion of public service broadcasting appears to have been substantially maintained in the UK: on the one hand, the BBC seems to have been able to create a common value system of public service broadcast that sustained a creativity culture and reinterpreted Reithian values (Born 2002); on the other hand, the evolution of broadcasting policy implies that the inherent philosophy of public service broadcasting has not been substantially changed: for instance, the Peacock report, though defending the use of market mechanisms in the delivery of broadcasting, did find a place for public service broadcasting understood as a provider of diversity and quality in programming (Peacock 1986). This possibly underlies the statement included in the Davies report according to which: "We decided that we may not be able to offer a tight new definition of public service broadcasting, but *we nevertheless each felt that we knew it when we saw it*" (Davies 1999: 10) (authors' italics). By contrast, the evolution of broadcasting policy in Portugal highlights how there has always been an ambiguity in identifying the core notion of public service broadcasting, which is evident in the concurrent use of the concept in relation to the type of broadcaster, the type of programming delivered, or the ownership and control of broadcasting rights (Fidalgo 2005; Sousa & Santos 2005). The unavailability of a core meaning of public service able to bridge regulatory reforms may be interpreted as impairing the development of a shared framework of meaning of public service. Several interrelated factors may have contributed to this situation: among others, the deficient specification of RTP's remit, the underdevelopment of a culture of accountability, the influence of the government of the day (which is evident in concerns with the scope for exercising power in the context of the privatization of television broadcasting), and the eventual disruption of normative frameworks following the purge of broadcasting professionals during

the revolutionary period of the mid 1970's, and afterwards the hiring of former RTP workers by the new commercial broadcasters in the 1990's.

However, case study evidence also suggests that the independent television production industry is moving away from the network mode of organization. The sector is becoming increasingly divided and dominated by larger companies that are commercially orientated. The current environment of television broadcasting is turbulent, as it faces the competition of new media and the financial pressures associated with crises in the advertising market and cuts in public funding. In so far as this was the case, television broadcasters in both the UK and Portugal are not willing to take risks: television schedules are increasingly ratings-driven, focusing on less specialist genres and on programmes that have been previously tested abroad. This strategy has not been exclusive to commercial broadcasters: both BBC1 and BBC2 are purported to have taken an increasingly aggressive and ratings-driven approach (Ofcom 2004b), and RTP has developed a scheduling strategy in which ratings-driven genres, namely quiz shows and popular series ("telenovelas"), fill in the pre-prime and prime time slots. A few independent production companies have been able to profit from this context of low-risk, insofar as they offer broadcasters a track record of worldwide performance of their products - thus apparently limiting uncertainty - and are then able to leverage on the ownership of the inherent ancillary broadcasting rights. Television formats and programmes are therefore increasingly globalised and homogeneous, as if they were converting from experiential goods into market products. As television programmes convert into commodities, the relevance of informal networks in reducing the costs of coordination seems to fade away.

The shift towards the concentration of television production and the commoditization of television programming may be understood in different ways: on the one hand, it may be seen as a move towards the erosion of public service broadcasting and of networks that have safeguarded quality in television programming for years; on the other hand, it may be perceived as a move towards the enhancement of diversity and innovation in television programming - which is increasingly conceptualised as "content" - allowed by the growing influence of external finance and the increased bargaining power of larger producers.

On the first view, the regulatory changes aimed at intensifying the creation of markets in television production have the potential to undermine quality and innovation in television programming, and with it essential features of public service broadcasting. In the UK, the implementation of Producer-Choice, the split of broadcasting and production into separate directorates, and the introduction of the 25% compulsory independent production quota have been interpreted as eroding the implicit notion of public service that was shared within the BBC: "[...] The conflicts unleashed by the BBC's marketization, and the corrosive effects of commercialization, competition and disaggregation as they were stoked by Producer Choice, the independent quota and the restructuring, had caused a disintegrating unity of purpose inside the corporation. They had eroded the BBC's efficiency, the creative autonomy of its production departments, its quality standards and public service orientation" (Born 2004: 177). Moreover, regulatory changes have been found to be associated to a feeling shared by production workers - who are more likely than other workers to have an overview of the whole production process - that programme quality has declined (Dex & Sewell 2001). These stances of marketization, together with the preservation of the editorial nature of Channel 4, the implementation of a licensing model of terms of trade and the establishment of the Window of Creative Competition at the BBC have empowered the UK independent television production industry to an unprecedented level<sup>4</sup>: according to the Work Foundation (Hutton, O'Keeffe &

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<sup>4</sup> In 2004 the BBC announced the creation of the "Window of Creative Competition" (WOCC), which was intended to open 25% of its programming spend to competition between independent production companies and in-house production. The WOCC thus adds to the 25% compulsory independent production quota set in the Communications Act of 2003.

Turner 2005), the industry has won a unique set of privileges, namely “guaranteed rights across the range of genres from any British commissioner; guaranteed access to 25% of the BBC’s programming with a further 25% available under the WOCC, a public service broadcaster, Channel 4, which is constitutionally obliged to have no in-house production; exposure to limited risk with these guarantees – only needing to put up development funding, and even that sometimes provided by the broadcaster; the advantage of a test market: in particular, showcasing on the BBC gives independents ‘brand edge’ for international markets” (Hutton, O’Keeffe & Turner 2005, p. 48).

Case study materials show that indeed larger independent producers have been profiting from these privileges to grow and consolidate. However, the growth of the independent television production industry has apparently been at the expense of innovation and creativity: on the one hand, the returns from the international exploitation of television formats and programmes are making producers risk-averse; on the other hand, as stated by the Work Foundation, their ability to dictate the terms over what kind of output they want to make within the constraints of the compulsory quota and the WOCC may turn an important section of BBC output indistinguishable from other commercial channels. The case study indicates that PACT has contributed to this state of affairs, insofar as it seems biased towards the perspective of larger producers in detriment of smaller companies that would rather keep working on the basis of the full-funding model. It may be argued that terms of trade are not formally binding, insofar as one of the principles recommended by Ofcom is that “producers should retain rights in their programmes *unless these are explicitly sold to broadcasters and other parties*” (Ofcom 2004a: 3) (authors’ italics). However, case study materials seem to indicate that terms of trade are in practice perceived as binding: on the one hand, as they report their preference for full-funding and their reasons for fearing the new terms of trade, smaller producers signal their perception of terms of trade as mandatory; on the other hand, as they develop strategies such as mandating the use of internal distribution arms, or interpreting the primary rights window in an extended way, broadcasters also seem to perceive the terms of trade as binding.

In addition, in its analysis of public service broadcasting in the digital media, Ofcom has highlighted how the notion and delivery of public service broadcasting in the context of digitalization needs to be rethought. Hence, it has added to the pressures faced by the BBC to justify its role in society. Ofcom (2006; 2005) has reviewed and developed the purposes and characteristics of public service broadcasting, and has recommended a new approach to it. In Ofcom’s view, public service broadcasting is characterized by its high quality, originality, innovation, challenging nature, engaging potential and wide availability, and should aim at informing the understanding of the world, at stimulating knowledge and learning, at reflecting UK cultural identity and at representing diversity and alternative viewpoints. Ofcom thus proposes ways of measuring public service broadcasting that involve the use of market research to ascertain consumer wants (Foster, Egan & Simon 2004), and suggests that the delivery of public service broadcasting in the digital era could be based on the creation of a new organization, the Public Service Publisher (PSP). This organization would provide public service content “using the tools, technology, insights and culture of digital media, both in production and distribution” (Ofcom 2007: 6), and would involve the periodic award of the contract to run it with a tender process open to all organizations including the BBC, so as to ensure competition for quality. In general, Ofcom considers that the PSP may play a valuable role in delivering the reinterpreted purposes and characteristics of public service broadcasting, as it may, among others, profit from production capabilities developed in vertically integrated broadcasters as well as in independent production companies. However, that advances a radical change in the current television broadcasting structure.

As it has been recently recalled, the BBC’s business model is under stress as it strives to justify its role and public funding in a context of primacy of the market model: “the BBC needs high ratings



and mass audiences to legitimate the flat rate tax licence fee, but at the same time audience-chasing popular programmes are criticized particularly by its industry enemies who would wish to confine the BBC activities to areas of market failure such as arts or regional programming. This ratings dilemma over PSB intersects with the perennial political problem about independence and bias highlighted by the crisis over the Iraq war because the BBC must demonstrate its independence by producing news and current affairs content which is responsibly critical of the government in power and also expect that same government to give it a continued mandate for licence fee funding and strategic development" (Froud et al. 2006, pp. 15-16). During the Charter renewal process, the BBC's reaction to the changes in the media landscape, as well as to the array of criticism following the Hutton report (Hutton 2004), has been to reinterpret itself as a creator of "public value". As the BBC has put it: "While commercial broadcasters aim to return value to their shareholders or owners, the BBC exists to create *public value*. In other words, it aims to serve its audiences not just as consumers, but as members of a wider society, with programmes and services which, while seeking to inform, educate and entertain audiences, also serve wider public purposes. Public value is a measure of the BBC's contribution to the quality of life in the UK" (BBC 2004: 7-8) (*italics in original*). The BBC's suggested modes of public value creation - supporting civil life, fostering culture and creativity, promoting education and learning, building social and community cohesion and supporting the UK's global role - recall the citizenship rationale of public service broadcasting, and were used by the BBC as the central argument to justify its role and licence fee funding in an adverse context.

For some, the reinterpretation of BBC's position in society fits well with an emerging new model of governance, whereby governments need to move outside the new public management framework (and its focus on a purely economic and market view of government activity), and embrace a holistic and political perspective that responds to public preferences and the maximization of value for citizens (e.g. O'Flynn 2004). In a similar vein, it may be understood as emphasizing the need for business model analysis to focus on both the financial requirement of cost recovery and the need to respond to expectations of key stakeholders (Froud et al. 2006). Yet for others, BBC uses the public value concept essentially as "a rhetorical device and a rationale for increasing the status of consumer research within the Corporation's decision-making processes" (Oakley, Naylor & Lee 2006: 7), which diverts the attention from the debate regarding public service broadcasting and the public funding role of the BBC. As a leading critic of the BBC has put it: "For all its high-flown language, pledges of reformation and lofty ambition, 'Building Public Value' is at best a detour and at worst an obstacle on the journey to understanding how public service broadcasting might make sense in the digital age" (Elstein 2004: 15).

The combined effects of the creation of internal markets at the BBC, of the empowerment of independent producers, and of Ofcom's defence of independent television production and endorsement of a new model for public service provision have on this view the potential to undermine shared meanings that have safeguarded quality in television programming in the UK for years. However, in contrast to this interpretation, the trend towards the concentration of television production and the commoditization of television programming may be perceived as a move towards the enhancement of diversity and innovation in television programming.

On this view, the evolution of broadcasting policy in the UK has been paving the way for the withdrawal of broadcasting services from the public sphere that will lead to a full competitive market. To begin with, the increased bargaining power of producers brought about by regulatory change and in particular by the new terms of trade has liberated television production from its reliance on key individual talent and personal relationships. In the past, television production was heavily dependent on long term relationships sustained by individual reputation and experience, which were perceived as decisive for the development of shared understandings of quality in programming. Nowadays, the

availability of market research data on the worldwide performance of programmes and formats allows broadcasters to manage their exposure to risk, and producers to develop viable businesses able to attract external finance and grow. Furthermore, it does not rule out the existence of smaller "life-style" producers that may be able to profit from their flexibility in the new media context.

The increased strength of independent producers enables them to risk new concepts: there are financial resources available to risk the creation of new genres and produce corresponding pilots. As case study evidence suggests, innovative cross genres such as factual entertainment have been understood as associated to developments by larger producers empowered by the independent compulsory quota, the new terms of trade and the emergence of venture capitalism in the creative industries. Thus, on this view, regulatory shifts have been providing what was expected at the outset: innovation in programming. Innovation is indeed understood not only in terms of ideas, but also in terms of technology: "Big Brother", for instance, was indicated by a head of department of a commercial broadcaster in the UK as an example of public service broadcasting, since "it meant trying a new thing: nine weeks direct broadcast".

Moreover, the introduction of market mechanisms at the BBC has had the effect of destabilising producer elites that were perceived as an obstacle to consumer choice, insofar as they defined "top-down" what the BBC should broadcast (Elstein 2004; Sawers 2000). As far as consumers are empowered and their wants considered, the mode of financing the BBC is rethought. A report commissioned in 2004 by the Conservative Party recommended that the BBC should be financed by subscription (eventually supplemented by advertising), and that the licence fee should be reduced starting in 2007, and should continue to decline until its abolition. From 2007, a new body accountable to Ofcom would take responsibility for delivering all public service content, which would be publicly funded at the level required to meet the need for and cost of socially valuable content that would not otherwise be funded by the market, and for which all broadcasters should be entitled to bid. These recommendations, although they were not followed in the last licence fee settlement, nonetheless remain on the policy agenda.

In Portugal, the changes in regulation aimed at creating markets in television production may be interpreted as endangering the building-in of production capabilities in a country where innovation was already lacking. Case study evidence indicates that the compulsory independent production quota did not play a major role in furthering the independent production sector. The ambiguity of fundamental concepts, the purported lack of legitimacy of regulators, and the uncertainty involved in the way in which they interpret the law underlie the reported problems in enforcing the independent quota. By contrast, the creation of SIC and TVI as editorial channels, together with the preservation of advertising funding at RTP had significant effects on the television production industry. Broadcasting professionals perceived the liberalization of broadcasting as an opportunity to profit from the industry's "red book culture": some left RTP to join the staff of its commercial rivals in broadcasting and production, and others created their own production companies. As case study materials suggest, the terms of trade that were in use at RTP were maintained at the commercial broadcasters: with the exception of multinational television production companies, producers were offered full-funding contracts that guaranteed their income. Since commercial broadcasters lacked reliable benchmarks of production costs, and were at the time earning considerable revenues due to EXPO 98 and the creation of new telecommunications companies, independent producers had the financial margin to acquire property rights on international formats that they further adapted. Independent production companies were thus more adaptors of programmes or formats than originators of material.

Consequently, independent producers were under-developing the most valuable production capabilities (understood as those which are difficult to appropriate and replicate, such as the ability to spot new trends), and they were not building assets from which they would be able to profit in a

context of digitalization and convergence. With the crisis in the advertising market in the beginning of 2001, all broadcasters adopted a risk-averse strategy in terms of programming that further damaged the development of production capabilities: they relied more heavily on in-house production, and built schedules based on popular programming in the pre-prime and prime-time slots. The immaturity and financial vulnerability of the television production industry as a whole, the broadcasters' aversion to innovative content and long term contracting, and the difficulties involved in the international trading of programmes (due to the immaturity of the industry and to linguistic specificities) increased the consolidation of television production and the commoditization of television programmes.

Within this context, the reasons for APIT's recent lobbying efforts in favour of the licensing model are not easy to grasp: on the one hand, larger producers such as Endemol or Fremantle are already able, in most cases, to retain secondary and tertiary broadcasting rights, and other medium to large producers (such as Valentim de Carvalho or Teresa Guilherme Produções) often adapt international formats, and are therefore constrained in their bargaining power by the terms of the licensing contract; on the other hand, smaller producers anticipate difficulties in getting commissions and trading broadcasting rights, and thus seem to prefer the full-funding model. The recent proposal of a new Law of Television (Law Project nº 452/2006 of 22 February 2007) indeed seems to echo this view: it includes a definition of independent producer according to which a production company must satisfy four cumulative requirements to be considered independent: it must not be the subject of a shareholding by a single television broadcaster of more than 25%, or by several broadcasters of more than 50%; it must not exceed a limit of 90% of sales to the same broadcaster; it must retain the property rights over the content produced, including the clear contractual definition of the type and duration of the broadcasting rights transferred to broadcasters; and it must have the freedom to develop the content produced, namely in relation to the selection of studios, actors, production equipments and distribution (art. 2, nº 1-g).

Such as it is, this definition of independent producer is, to say the least, excessively restricted, on the one side, and ambiguous, on the other side. First, taking these requirements of shareholding, turnover, property of broadcasting rights and freedom of choice, it is legitimate to wonder whether there is one producer in Portugal (or indeed in any other country) that qualifies as independent. Second, although it clearly aims at preventing situations of *de facto* in-house production, the phrasing "freedom to develop the content produced" is too vague, open to plural interpretations, and almost impossible to monitor. It seems that EU orientations in the context of the TWF revision, and measures adopted in larger and more mature television markets are being taken up without there being an assessment of how economic actors have been constituting their frameworks of behaviour.

At RTP, the liberalization of broadcasting further heightened the ambiguity of its role in society. As stated by one of its senior managers: "Until 1993, RTP managed to cope with the competition of the new commercial channels, but it did not reposition itself nor did it develop a strategy that marked its public service vocation. It embarked on the "war for ratings" and "counter-programming"; it hesitated in terms of content; it could not capitalise on its long experience; it got scared; it searched for many way outs and none" (Louro 2005 [2002]: 142) (authors' translation). In 2002, the public debate about RTP and public service broadcasting following the proposal to privatize RTP2 illustrates how after a decade of competition in broadcasting, the company was still lacking a mission, a guiding principle as to its purpose. As stated by several authors (e.g. Fidalgo 2005; Lopes 1999; Sousa 2006), public service was anything broadcast by RTP, independently of its content or purpose. On the whole, case study materials show that the evolution of broadcasting policy in Portugal is marked by a political instability that reflects upon the conception of public service broadcasting. Successive governments approve new laws of television, appoint new boards of administration to RTP, restructure the company

and influence its mission and strategy<sup>5</sup>. Hence, it is not surprising to find claims that RTP “has always been more of a ‘State television’ than a ‘public television’” (Fidalgo 2005: 29). Alongside this political and managerial instability, problems involving the role, activity and legitimacy of regulators contributed to impair the development of a shared framework of meaning of public service, and may explain the pervasiveness of social norms that, while perceived as damaging the credibility of the industry and detrimental to society as a whole, allow economic actors to manage uncertainty.

The introduction of competition in broadcasting and the trend towards the commoditization of television programming have been used as arguments to question the need to maintain RTP within the public sphere. In 2002, during the debate following the government’s intention to reduce RTP to one channel and to search for other forms of funding it, Pereira (2005 [2002]) argued that any reform of broadcasting in Portugal should set out from a definition of what the public service is that the State has an obligation to provide, and only then should the means to provide it be discussed. An alternative to publicly owned television broadcasters would be, for instance, the contractualization of public service content to the private sector, meaning that State grants would be allocated to commercial broadcasters that would produce and broadcast public service content. Indeed, the protocol agreed by RTP, SIC and TVI in 2003 involved the contractualization of public service content, but not directly at the expense of State grants: SIC and TVI assumed public service obligations in exchange for a reduction in advertising hours at RTP. Underlying the claims in favour of competition in television broadcasting was the acknowledgement of the homogeneity of schedules between RTP and its commercial rivals, without there being any discussion of whether that fulfilled RTP’s public service remit.

In a similar vein, the homogeneity of schedules across television broadcasters and the technological changes allowing for each consumer to design its own schedule of contents have justified the Social-Democrat party’s recent proposal to privatize RTP1. In the discussion of the new Law of Television, the Social Democrat party has stated that “on average, in 2007 each Portuguese family will pay approximately 75 euros which will exclusively benefit RTP [...] It’s more than 225 million euros that the company will receive only this year, via State grants, the audiovisual licence fee and 59 million euros regarding new equity [...] So, the central question is what differentiates RTP from the commercial broadcasters and justifies such a substantial contribution from the Portuguese?” (Branquinho 2007). However, this proposal was rejected by the Socialist party (as well as left-wing minority parties), which maintains that RTP must be preserved as a publicly owned broadcasting company. In any case, although there has been a trend towards concentration and commoditization of television production in Portugal, the discussion about the effects of structural changes in independent television production is still in its infancy. The debate is centred on the need to define public service and to free it from its association to RTP. Implicitly, the system of “political clientelism” or “State paternalism” that has characterized the television broadcasting industry is under scrutiny. Issues that have been paramount in the UK for years, such as the impact of compulsory quotas and the allocation of intellectual property rights all come second.

#### 4. Conclusion

This paper has explored how the co-evolution of contracts, on the one hand, and legal rules, terms of trade and social norms (or conventions), on the other, has been shaping the television production industry. The way in which regulatory changes that were implemented in the last decades – such as the privatization of television broadcasting, the creation of editorial channels, the restructuring

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<sup>5</sup> During the course of this research, for instance, a new Law of Television was published and RTP was granted a new corporate statute in August 2003 (under a Social-Democrat government), but last February the elected Socialist government granted RTP a new corporate statute and approved a new Law of Television.

of in-house production in vertically integrated broadcasters, or the introduction of independent compulsory independent production quotas – have given rise to an independent television production sector has been analysed. The industry, which used to be characterized as a “cottage industry” of informal networks of broadcasting professionals sustained by conventions of quality, reciprocity, cooperation and flexibility, seems to be evolving towards a concentrated “commercial business”. This shift in the nature and structure of the industry has been in itself triggered by the effort to replace the prevalent full-funding model of terms of trade by one that would allow producers to retain their intellectual property, thus making their businesses attractive to venture capitalist and other forms of external finance. The rise of venture capital funded firms, stock market listed production companies and vertically integrated multinationals of content production, alongside the wide adoption of market research and the corresponding focus on viewers as consumers seems to be redefining television programmes as commodities. This change in the nature of the television output is triggering changes in the notion of quality of television production and in the conception of public service broadcasting, thus having implications on the preservation of public service broadcasting as a particular content and remit, and on the maintenance of publicly-owned television broadcasters.

The relationships between broadcasters and independent producers are socially embedded and sustained by a number of norms that bind these broadcasting professionals in informal networks. But these networks are also being shaped by changes in regulation that have been pushing the industry into intensified competition and commercial orientation. This marketization of television production has been triggering changes in terms of trade, which have been having an impact on the nature of the product and the structure of the industry. In the end, there is not a linear relationship between contracts and regulation, but instead they seem to interact in a mutually constitutive way. Therefore, regulation intended to produce competitive outcomes may have unexpected effects, such as those suggested in this work: an increased concentration of television production and a commodification of television content.

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