



Ofcom's Consultation on The Future of Public Service Media

Sky Response

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Executive summary

- **Ofcom should put audiences at the heart of any changes**
- **Ofcom's proposed new flexible framework is likely to undermine PSB content without clearly defined requirements, strict monitoring and enforcement**
- **Proposals for a PSB reference offer could work if adapted to reflect the needs of UK audiences**
- **Audiences are best served by the wide availability of PSB content and by a plurality of funding models and providers**

Ofcom's fourth PSB review represents a missed opportunity. This is a time of significant change – with innovative methods of content delivery, fragmenting audiences, and new players investing in British content at scale. Change of this magnitude and at this pace warrants a fundamental, first principles examination of a public service broadcasting system that has been largely unchanged for the past two decades, with UK audiences at the centre, and everything on the table. It demands that policymakers ask big questions on how to reshape the UK PSB sector for the future.

Instead the review is something of a halfway house. While the scale of change is recognised, and the contribution of non-PSBs clearly acknowledged, Ofcom starts from the underlying assumption that the existing institution-based system is the right one and should endure. Radical reform away from this central framework is not given serious consideration. There is therefore likely to be an inherent limit to the change that Ofcom's proposals can deliver in terms of public service outcomes.

Ofcom's envisaged new framework would grant the PSBs the flexibility to deliver obligations across their services and the ability to determine their own approach to achieving public service goals. It also proposes further benefits for these providers, in the form of on demand prominence and a new right to carriage on all platforms.

There is a real risk that Ofcom's approach reduces the impact of PSB content produced, rather than maintains or strengthens it. Commercially oriented PSBs may be incentivised to shift public service content away from high value slots, and loosely defined requirements raise questions over effective enforcement. If Ofcom maintains its proposals, then it must ensure there are sufficient safeguards to preserve the overall provision of PSB content, and that providers are not over-compensated for the new benefits they receive. Ofcom should therefore consider additional obligations for commercial PSBs, in order to maintain the balance of the PSB compact. These could take the form of new content quotas for key PSB genres to be delivered on-demand or via other digital distribution methods, such as through social media, so that this content reaches a broader set of audiences than currently.

Central to any public service regime must be the wide availability of the content. As the ways in which viewers watch continues to change, audiences' needs should be at the heart of any revised framework to deliver this. While the idea of a regulated offer makes sense – recognising as it does the fundamental principle that PSB content should be freely available on a zero net fees basis – the PSBs' proposal would not be in viewers' interests as its focus on playout via PSB apps would limit the ways in which their content could be watched. For example, Sky's research

shows that viewers continue to highly value our integrated on demand service, a view borne out by viewer behaviour on the Sky Q platform: [§<] Given this, a more audience-centric approach would ensure that PSBs made their content available in ways that are convenient for viewers, including as standard full functionality for each platform in question (such as the ability to be included in menus and search results) and applying to on-demand PSB content more broadly rather than simply the PSBs apps. This would do more to deliver for UK audiences, whilst ensuring that the PSBs were present and prominent on all major platforms

Ofcom rightly acknowledges that non-PSBs are now making a material contribution to content of a public service nature and explores the possibility of further interventions that could strengthen this delivery in future. While this is not at the heart of Ofcom's thinking, it is nevertheless welcome, in particular given the continued fragmentation of audiences away from live broadcast TV towards on demand and online services: the more diverse the set of providers and platforms, the wider the audience that can be reached. Given the existing framework, coupled with an increase in British programming produced on a purely commercial basis from a number of sources, outcomes for UK audiences are likely to be positive even absent further intervention. However, where policymakers identify a clear shortfall in the provision of certain types of desirable content, options for additional interventions (such as contestable funding and tax credits) should be open to all providers, so as to strengthen public service output where viewing increasingly takes place.

Introduction

Sky welcomes the opportunity to respond to Ofcom's 'Small Screen: Big Debate' consultation (the Consultation).¹ As both a major broadcaster and platform operator, Sky has a substantial stake in policy discussions around the future of the UK content sector.

Despite the short-term effects of the COVID-19 pandemic, the fundamentals of the UK content sector are strong. Viewers have more choice and quality than ever before, and last year investment in UK original content reached an all-time high. These positive outcomes have been driven not only by the Public Service Broadcasters (PSBs) but, increasingly, by the wider sector as well.

Sky's own contribution to this is significant and growing. As a broadcaster, we are producing an increasing amount of original British content, on a scale comparable to and in some cases greater than the PSBs. Much of our content clearly bears the key characteristics of public service content – be it Sky News' high quality journalism, multi-award winning original dramas like *'Chernobyl'*, channels such as Sky Arts delivering hours of original content in underserved genres, or how we have used our TV platforms to highlight to audiences programming related to Black Lives Matter. Other broadcasters and content providers are also stepping up their investment in UK programming to the point where overall growth is being driven by the non-PSB sector.

Ofcom's review will be a significant input into wider Government thinking on the UK content, possibly leading to new legislation in the coming months and years. The pace, scale and scope of change in the TV sector, driven by the delivery of content over the internet, is plain to everyone; and it will not let up. It is critical, therefore, that Ofcom reflects the contribution and the views of the wider content sector, in order to build an approach to government intervention in the broadcasting sector that is fit for the 21st Century.

In the sections below we explain:

- why Ofcom's proposals for a flexible framework for PSM delivery risk diminishing the impact of commercial PSBs' public service content by incentivising them to move this content away from more popular parts of their services (page 5);
- how the PSBs' reference offer proposals could be adapted to work more in the interests of UK audiences (page 12); and
- the importance of supporting and incentivising the contribution from across the entire sector, in order to ensure that public service content is made available that will appeal to the widest possible range of UK viewers, across the widest possible range of UK platforms and services (page 25).

¹ 'Small Screen: Big Debate - The Future of Public Service Media', Ofcom, 8 December 2020 (Available at: https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0032/208769/consultation-future-of-public-service-media.pdf).

Ofcom's proposals risk diminishing the impact of commercial PSBs' public service content

Although Ofcom concludes there is an "urgent" need for a new regulatory framework² and considers ways to support public service delivery from non-PSBs, the assumption underlying Ofcom's proposals is that the existing institution-based approach to PSB regulation is the right one and should endure. Sky considers that this represents a missed opportunity.

Maintaining an institutional approach means that as a point of principle, the 'PSB compact' whereby the regulatory privileges that benefit the PSBs are balanced by the cost of their public service obligations must be maintained and protected.

In this context, there is a risk that Ofcom's proposal for a more flexible framework may present commercial PSBs with an opportunity to decrease the total amount of public service content they provide or move it to secondary services, in order to serve more commercial content on their primary linear channels. A robust accountability framework, that ensures that PSB requirements can be measured and enforced is needed to prevent this.

If commercial PSBs are to be afforded with additional benefits, they should face new obligations to help prevent PSM from being undermined by the erosion of PSB obligations and to retain the intended benefit to the public. To reflect changing consumer habits, these obligations could take the form of new content quotas to be delivered on-demand or through other digital distribution methods.

Despite a rapidly changing TV landscape, evidence suggests that PSBs do not face overwhelming challenges to their sustainability, rather the PSBs benefit from a number of key assets and advantages that strengthen their ability to compete effectively in the market and support their long-term sustainability. As such, Ofcom must not seek to confer greater regulatory benefits on them whilst reducing the nature and extent of their public service obligations.

We expand on these points in the sections below.

Ofcom has missed an opportunity to fundamentally re-examine the existing PSB framework

As Ofcom makes clear in the Consultation, the present review of public service broadcasting comes at a critical juncture for the UK content sector. The pace, scale and scope of change – in terms of content delivery, audience consumption patterns and the competitive set of players – is significant and will not let up. Within the timescale provided it was open to Ofcom to use the PSB Review as an opportunity to undertake a 'bottom-up', first principles examination of a PSB system that has been largely unchanged for the past two decades. An assessment like this may well have demonstrated that fundamental reform of the regulatory framework was needed to ensure that it remains fit for the 21st Century.

In particular, a review from first principles would have necessitated a re-examination of the institutional basis on which the PSB system currently operates. It would have

² *Id.*, paragraphs 1.13 and 8.6.

asked the question whether such a system remains the optimal way to deliver PSB objectives, particularly given:

- a significant and growing amount of content that meets Ofcom's definition of 'public service' is being produced by companies other than the BBC and the commercial PSBs, such as Sky, Discovery and Netflix; and
- the PSB institutions operate under a range of funding models, deliver different public service remits, and occupy separate segments of the market. In particular, in the radically different TV landscape that exists today, the model of designating privately owned, profit driven broadcasters as 'public service broadcasters', and providing them with in-kind subsidies and other transfers of value may no longer provide an adequate foundation on which to base achievement of Ofcom's objectives.

Consequently, the consultation represents a missed opportunity. A 'bottom up' PSB Review would have examined each of the PSB institutions in turn and evaluated how well their specific model delivers on public policy objectives.

Since Ofcom has chosen to retain an approach based around PSB institutions, it must ensure that the fundamental underpinnings and guarantees of this system remain. In particular, the PSB compact – whereby regulatory privileges enjoyed by the PSBs are balanced by their public service obligations – must be maintained as the regulatory framework evolves, in order to deliver for audiences and prevent the distortion of competition in the UK broadcasting sector.

Ofcom's proposed flexible framework risks an erosion of the obligations on commercial PSBs

The Consultation proposes a new regulatory framework for the delivery of PSM based on a more flexible 'service neutral' delivery approach that is 'outcomes focused', rather than rooted in spend or volume quotas and other obligations.

The rationale behind such an approach is understandable, given how audience viewing is increasingly spread across multiple different platforms and services. However, there is a clear risk that Ofcom's proposed approach would lead to an erosion of the obligations on commercial PSBs, whilst at the same time maintaining or increasing the benefits that PSB status affords them. This situation would lead to competitive distortion in the market as well as diminishing the impact of PSM.

Under Ofcom's proposed model, a commercial PSB would be able to choose to move important public service content away from the current way in which it is provided (i.e. through its main linear channel, such as ITV1) and onto secondary or 'walled' services (like ITV Hub). Such a move could be motivated by a desire to minimise costs and maximise commercial return, whilst making the case that these services are best suited to deliver PSB obligations. Put simply, for commercial PSBs the temptation would be to broadcast more popular, advertiser-friendly content on a PSB main channel, whilst downgrading less attractive PSB content to the on-demand service.

[X]

The clear risk, therefore, is that Ofcom's proposal for a more flexible framework would grant commercial PSBs the ability to decrease the total amount of public

service content they provide where this content represented an opportunity cost today, or simply move it to less popular services, in order to serve more commercial content on their main linear channels in its place. This would reduce the cost to the commercial PSBs of their PSB obligations, whilst retaining the existing benefits of being a PSB, and any additional benefits resulting from the present review. As profit-driven organisations, it would be rational for ITV and Channel 5 to respond in this way. Consequently, Ofcom's proposal for greater flexibility can be expected to have the perverse effect of incentivising and enabling the commercial PSBs to game the regulatory system, risking a reduction in the impact of public service content and value of the PSB system to viewers.

PSBs must be properly held to account in the delivery of their obligations

Ofcom has not outlined the desired outcomes of its proposed flexible, 'service neutral' approach, or how delivery would be monitored and enforced. For example, if Ofcom's ambition were to secure greater diversity in the audience serviced by public service content, it may take the approach of measuring consumer satisfaction scores against diverse audiences (or may adopt some other metric). A clear understanding of the process, timescales and costs associated with the achievement of all PSB obligations should be firmly understood and made publicly available.

Ofcom considers that a combination of qualitative 'outcome focused' requirements and some limited quotas may be most effective in ensuring the PSBs fulfil their public service obligations. However, without clear and robust quotas, and with PSBs involved in defining the parameters of success, the strength of the current system would be undermined given the incentives outlined above. This risk is heightened when we consider that a number of the commercial PSBs' public service obligations have been stripped back in recent years.

A further risk associated with the proposed flexible regulatory framework is that, under an 'outcome focused' approach, Ofcom's assessment and any subsequent directions will only occur periodically and, crucially, *after* changes to PSB delivery have occurred. Given the incentive of the commercial PSBs under the proposed framework to change their programming output in ways that reduce their overall PSB delivery, Ofcom would only become aware of the changes after a potentially significant period of time. It would no doubt be open to Ofcom to demand corrective action from the PSB(s) in question at that time. However, any remedies will take additional time to implement. In the meantime, audiences will be disadvantaged by the gap in PSB delivery. Furthermore, it is unclear whether any directions Ofcom could give would in some way be more prescriptive than the flexible framework envisaged, meaning that the same weaknesses and risks in delivery could remain.

If Ofcom's objective is to allow the PSBs to evolve their offerings so that public service objectives can be delivered across their services, it needs to do so in a way that ensures the PSBs remain accountable, and that requirements can be properly measured and enforced.

Commercial PSBs should face new obligations if Ofcom's proposed new benefits are introduced

Ofcom has proposed that the PSBs should receive a number of new benefits as part of its envisaged new regulatory framework. It has already recommended to

Government that PSB prominence be extended to on-demand content across a wider range of platforms and services than those which currently provide prominence to the linear PSB services, which would drive substantial value to these services. The Consultation also proposes that new rules be examined which would guarantee that the PSBs' on-demand content be carried by a wide range of platforms – we discuss this in more detail in the following section.

If Ofcom's proposed additional benefits are to be introduced, commercial PSBs should in turn face additional obligations in order to retain the intended benefit to the public and keep the balance of the PSB compact. In recognition of the changing consumption habits of audiences, such obligations could take the form of new content quotas to be delivered on-demand or via other digital distribution methods, such as through social media.

[X]

In the case of the commercial PSBs, the current balance between the value of the privileges they receive and what they deliver in public value (considering stripped back obligations) may already be disproportionate. There can be no good reason for adding to the commercial benefits that they receive, at the expense of audiences and other operators in the sector, without at the same time seeking ways of extracting greater commitments from them to the delivery of public service content. To do so would distort competition further by over-compensating the commercial PSBs for fulfilling their PSB obligations.

Sustainability is not a major concern for the PSBs, who still occupy a hugely important and strategically significant role in the UK content sector

The UK TV market is an increasingly competitive landscape, where both established players and new entrants must continually adapt to new challenges in order to meet changing audience expectations. However, the evidence does not suggest that the evolution of this landscape poses an unresolvable threat to the sustainability of PSBs. The PSBs have previously demonstrated that they are well placed and able to adapt and thrive in the face of a changing competitive landscape.

Channel 4, for example, has demonstrated resilience through the Covid-19 pandemic, with rapid cost savings, strong viewing figures and growth in their on-demand offering, ending 2020 in line for its first surplus for years. This financial position has enabled Channel 4 to pay back the furlough payments it received through the Government's Coronavirus Job Retention Scheme and indeed Channel 4 continue to recruit.³

PSBs are also showing adaptability by experimenting with 'paid for' content in the form of Britbox and other initiatives through their own on-demand offerings and commercial subsidiaries (such as BBC Studios' recent launch of the streaming service, BBC Select, in North America).⁴

³ '2019 Annual Report: A year of transformation with growth in digital viewing and revenues and the opening of new bases in Leeds, Glasgow and Bristol', Channel 4, 29 October 2020 (Available at: <https://www.channel4.com/press/news/channel-4-2019-annual-report-year-transformation-growth-digital-viewing-and-revenues-and>).

⁴ 'An Antidote to the Predictable, New Digital Channel BBC SELECT Launches Today in U.S. and Canada', BBC Studios, 18 February 2021 (Available at: <https://www.bbcstudiospressroom.com/press/an-antidote-to-the-predictable-new-digital-channel-bbc-select-launches-today-in-u-s-and-canada/>).

The PSBs have a number of key assets and advantages that enable them to compete effectively and remain sustainable:

A focus on UK content

Put simply, programmes produced by the UK PSBs are attractive to UK viewers and are watched by millions every day, and there is no reason to believe that this will change in the foreseeable future. As Ofcom has found, UK viewers have a strong preference for watching content delivered by the PSBs.⁵

In 2018, the average viewing share of the UK Public Service channels was over 55%

Significant regulatory advantages

Key benefits for PSBs

- **98.5% coverage** on DTT through guaranteed access spectrum.
- **EPG prominence** for linear channels on all TV platforms.
- Greater ability to bid for major **listed events**.
- **£3.5 billion** in licence fee funding for the BBC.

As noted above, the PSBs receive a range of benefits that puts them at a significant advantage compared to their commercial competitors. These benefits remain highly valuable and are set to increase under Ofcom's proposals.

Universal free availability

The PSBs' services are available for free in nearly all UK households. By contrast, the maximum reach of pay TV channels is roughly half of UK households. Netflix is regarded as being hugely successful in the UK in growing its subscriber base. Yet it has less than a third of the reach of PSB channels.

Strong brands and legacy

The PSBs are among the UK's most recognised and trusted brands. In the case of the BBC, this stems (at least in part) from its unique non-commercial nature. More generally, public awareness of the PSBs and what they represent, derives from the fact that they have been engaging with UK audiences via television – which occupies a significant role in most peoples' lives – for over 50 years.

Production of content in a broad range of genres

The PSBs have a deep expertise in producing content in a broad range of genres, including key staples of the broadcast schedule, such as news and current affairs, sport, light entertainment (game shows, panel shows etc.), soaps, kids, comedy and documentaries. By contrast, the new streaming entrants to the sector have largely focused their content investment on producing original dramas.

Taken together, these factors place the PSBs in a strong position to be able to navigate market developments and ensure their long-term sustainability. They

⁵ Ofcom, 'Small Screen: Big Debate', op. cit., paragraph 3.14, and viewing share from <https://www.smallscreenbigdebate.co.uk/what-is-ssbd/ssbd-five-year-review..>

begin from a position of strength – notwithstanding the introduction of new well-funded competitors, the continued growth of on-demand viewing and the fragmentation of audiences, it is still the case that the PSBs account for over half of linear TV viewing, and requests to the PSBs on demand services have increased by 65% since 2014.⁶ While the market continues to evolve, the PSBs are and will likely remain significant players in the UK content sector for the foreseeable future.

We recognise that the PSBs, like all broadcasters, face challenges as a result of the increased competition posed by new streaming services and note that younger audiences in particular are increasingly watching on-demand and online content instead of live broadcast TV. We do not, however, believe that these challenges require or justify greater levels of Government assistance to be provided to the PSBs. The PSBs have faced, and successfully addressed, significant challenges of this type in the past. There is much that they can do within their existing resources to overcome these challenges.

In sum, therefore, the evidence does not suggest that the PSBs face insurmountable challenges to their sustainability – certainly not to the extent that Ofcom should seek to confer greater regulatory benefits on them whilst reducing the nature and extent of their public service obligations. There is a rational case for adapting the regulatory framework to better meet changing patterns of audience consumption, particularly the rise in on-demand viewing. However, this should be done in a way that preserves the balance between the obligations that the PSBs face and the substantial privileges they receive and maintains clear and meaningful accountability for the PSBs. It should also ensure that the PSBs continue to be available on a universal basis, free of charge, in ways that viewers find convenient, even as the services used to deliver public service objectives are broadened.

There is scope for further collaboration between PSBs and platforms

Deepening collaboration between PSBs and platforms presents further opportunity for the PSBs to strengthen their long-term sustainability. For example, there is more that the PSBs can do within the existing regime to make their content widely available, particularly via partnerships with other providers. As a key partner of the PSBs, Sky values highly the positive commercial relationships that it has established with Channel 4, Channel 5, and the BBC and ITV, which bring significant value to Sky and those PSBs, and ultimately to viewers.

Sky helps to drive and reinforce the PSBs' objectives and values in a variety of ways:

- Sky's platform delivers critical mass audiences, driving advertising which funds commercial PSBs, as well as providing access to BBC content for millions of licence fee payers. Around one third of TV viewing to the main PSB channels happens through the Sky platform.
- Sky strikes commercial deals with the PSBs, for example to carry services beyond core PSB content in its platform.
- Sky invests in a dynamic and evolving platform that makes PSB content more attractive (e.g. through HD, UHD) and easier to monetise (e.g. partnering with Channel 4 and Channel 5 on AdSmart [X])

⁶ Ofcom, 'Small Screen: Big Debate', op. cit., page 33.

- Sky places UK content, including from the PSBs, at the heart of its customer proposition, regularly promoting the PSBs via the Sky Q platform (i.e. user-interface, Hero images and rails).

As Ofcom is aware, Sky has also developed partnerships with certain PSBs on the content side. For example, Sky has partnered with Channel 4 to share content, including making the final of the 2019 Cricket World Cup final between England and New Zealand free-to-air.

As a platform and content aggregator, Sky's starting position is always that we want to work with broadcasters in the interest of viewers. Sky believes that viewers should be able to watch what they want, how they want, with platforms free to innovate. Sky considers that PSBs should be working with platforms to make this possible, making popular content more accessible, rather than seeking to restrict it.

PSB content should be made widely available in ways that consumers find convenient

In the Consultation, Ofcom identifies ensuring that PSM remains “*widely available and easy to find*”⁷ as one of the central features for assuring the success of the future public service media system. Sky agrees with Ofcom that “*all audiences should readily be able to find PSM and see the breadth of content available to them, in order to maximise its impact and value*”. This is undoubtedly in the viewer interest. Further, any regulatory reform which aims to ensure the wide availability of public service content must also focus on securing a good viewer experience.

As noted in the Consultation, Ofcom has recommended to Government the introduction of new legislation to ensure that on-demand PSB Content is given prominence. Prominence obligations alone, however, will not guarantee the best outcome for viewers. Corresponding ‘must-offer’ requirements would be required to ensure that PSBs make their content available to platforms in the first place.

Sky considers that a ‘regulated offer’ could form the basis of an effective ‘must-offer’ regime for on-demand PSB Content provided it is grounded in consumer-led principles which allow platforms to present the content in ways that viewers value. For the reasons discussed below, the PSBs’ joint proposal would not achieve this.⁸ Sky therefore proposes an alternative version of a regulated offer which would ensure that on-demand PSB Content is made freely available to viewers on their platform/service of choice, together with the platform functionality and innovation which viewers have come to expect as standard. Such a framework would ensure that PSM remains not just available to audiences, but also meets viewers’ expectations. Beyond this, rules should be introduced to ensure that the PSBs continue to make their public service content available to a wide range of platforms (and therefore a wide range of audiences) in secondary rights windows.

Any new prominence regime for PSM should exist outside of (rather than form part of) any PSM regulated offer. The PSBs’ joint proposal calls for ‘significant prominence’ based on prescriptive rules and guidelines that would stifle innovation and lead to a reduction in consumer choice. In contrast to this, Sky proposes a more flexible, principles-based approach based on ‘appropriate prominence’, which would support a wide range of different approaches to user-interface (“UI”) design and the arrangement of content within those UIs.

We expand on these points in the sections below.

A ‘must-offer’ requirement is necessary to ensure the wide availability of on-demand PSB Content

As Ofcom notes in the Consultation, the viewer interest lies in the wide availability of PSB Content as viewers spend more time consuming content in a range of ways: “*Broadcast TV now accounts for only around half (53%) of the average person’s daily viewing, with the remaining time spent on a wide range of on-demand and online content services.*”⁹ It is therefore important that any new ‘must-offer’ regime for on-

⁷ Ofcom, ‘Small Screen: Big Debate’, op. cit., page 36.

⁸ ‘PSB prominence, inclusion and fair value: A new deal for the global online era’, BBC, ITV et al (‘PSBs’ joint proposal’) (Available at: https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0027/208818/psb-submission-broadcasters.pdf).

⁹ Ofcom, ‘Small Screen: Big Debate’, op. cit., paragraph 2.3.

demand PSB Content guarantees that such content is made widely available in ways that consumers find convenient.

Platform providers already have commercial incentives to carry (and give prominence to) PSB Content because programmes produced by the PSBs are very attractive to UK viewers, being watched by millions of viewers every day. The most popular connected platforms in the UK – Freeview Play, Freesat, Sky+, SkyQ, Virgin Media and Youview – all make PSB Content readily available and discoverable in a number of different ways. An increasing number of newer platforms are also including the PSB apps as standard and this trend can be expected to increase given the popularity of PSB Content.

Difficulties arise, however, where PSBs refuse to make their content available in the first place.

As competition for eyeballs intensifies, it appears that a key response for some PSBs to the arrival of new competitors (such as Netflix) has been to attempt to directly replicate an OTT, direct-to-consumer model for their content on an exclusive basis.

[✂]

The danger with this approach, as opposed to one where PSB Content is made available through a variety of outlets (including in secondary rights windows), is that it restricts the potential audience for PSB Content and thereby limits its public value. This illustrates why it would be necessary to introduce a ‘must-offer’ obligation for any content that newly benefits from prominence regulation. This simply matches the current case for linear prominence, with every public service channel subject to a ‘must-offer’ requirement for networks and satellite services.

Beyond this, Ofcom should consider the extent to which PSBs continue to make their public service content available to a wide range of platforms (and therefore a wide range of audiences) in secondary rights windows, rather than limiting availability to their own player apps and PSB joint venture platforms such as BritBox. As set out in Sky’s response to Ofcom’s recent call for evidence in relation to the interaction between BBC Studios and the BBC Public Service, Sky is concerned that the BBC is pursuing a strategy aimed at undermining competing platforms to the benefit of BritBox by restricting early access to key BBC content exclusively to BritBox and restricting access to BBC on-demand content after the early release window.¹⁰ ITV is also making an increasing amount of content exclusively available on BritBox, as secondary rights deals with services such as Netflix come to an end, as well as via its “BritBox Originals” strategy whereby ITV will ramp up the number of original commissions specifically for BritBox.

Good viewer experience should be at the core of regulatory reform

When considering the design of a future ‘must-offer’ regime for on-demand PSB Content, the priority for policymakers should be to ensure that PSBs make their public service content widely available in ways that are convenient for viewers and result in a good viewer experience.

¹⁰ Sky response to Ofcom Call for Evidence, December 2020 (Available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0012/211242/sky-response-to-call-for-evidence.pdf)

Sky has identified the following consumer-led principles which should form the basis of any 'must-offer' regime for on-demand PSB Content, in order to lead to the best outcome for viewers:

- viewers should be able to access PSB Content on their platform or service of choice;
- viewers should not receive inferior content on their platform or service of choice to that available via PSBs' own services;
- viewers value standard platform functionality as well as future innovation; and
- on-demand PSB Content should be freely available to viewers.

We expand on each of these principles below.

Viewers should be able to access PSB Content on their platform or service of choice

Viewers value being able to access PSB Content on the platform or service of their choice, rather than having to switch between different services. This is evidenced by the fact that there are such a large number of different popular platforms via which consumers watch TV – some viewers prefer one, whilst others prefer another. It is also exemplified by the established distinction between how younger and older viewers choose to consume content, with older age groups typically watching a lot more broadcast television than younger people.

We do not believe that consumers should be forced to adopt particular platforms or services in order to access PSB Content. Any regulated offer should therefore enable viewers to choose the platform or service via which they access on-demand PSB Content.

Viewers should not receive an inferior set of content to that available via PSBs' own services

The PSBs may be incentivised to provide platforms with inferior content (e.g. fewer titles or lower resolution) in order to attract viewers to their own services/apps.

[X]

Such incentive will only increase as the PSBs face increasing competition for eyeballs with the emergence of new platforms and services. It is important that viewers do not receive an inferior set of content to that available via PSBs' own services. Any new 'must-offer' regime should therefore prevent PSBs from being able to do this.

Viewers value standard platform functionality as well as future innovation

Innovation and platform differentiation

It is important to recognise that platforms have a variety of ways of incorporating on-demand PSB Content and this represents a key aspect of platform differentiation and competition from which consumers benefit.

Ofcom notes the "*general benefits for audience in choice and innovation in this market*"¹¹ and the need for any new regulation to:

¹¹ Ofcom, 'Small Screen: Big Debate', op. cit., paragraph 5.21.

“effectively balance the promotion and sustainability of PSM, against the general benefits of consumer choice and the regulatory impact on others, such as platform operators, device manufacturers and commercial content providers.”¹²

Sky agrees and has successfully invested significant resource to develop a platform which incorporates a wide range of linear and on demand content from different providers via a sophisticated and coherent user interface. In particular, Sky has an innovative approach to delivering on demand content via its digital satellite platform. Sky ingests its own and third-party content into its servers in an appropriate format for playout. This approach enables Sky to provide easy access to on demand content from a range of providers through a single, coherent user interface, avoiding the need for users to switch between individual apps, and allowing Sky to surface content in a consistent manner, through menus, search and recommendations, irrespective of the content provider.

Sky's integrated service has been, and continues to be highly valued by customers, as well as successful for the PSBs in delivering incremental viewing. [X]

Recent internal data reinforces how Sky Q customers highly value the ease of using Sky Q as a means of finding something to watch, finding what they want to watch and discovering something new to watch. The majority of Sky Q customers also value the design of the home screen and the menus.¹³

[X]

In Sky's view, an integrated approach results in an overall better experience for viewers than switching between individual content providers' players.

In order to preserve viewer choice and cater for viewers on older legacy platforms, any 'must-offer' regime for on-demand PSB Content must therefore allow for variations in platform functionality and design, ensuring that the content is available via the full range of functionality those platforms provide – for example, being included in menus and search results, whether by voice or text, via streaming to other devices and in add-on services such as mobile apps. Ofcom's focus should therefore be on ensuring that on-demand PSB Content is readily available and discoverable, as opposed to PSBs' apps, which may act to restrict platforms' ability to surface content in a manner consistent with other available content.

Standard functionality

Viewers also value 'standard' functionality, such as the ability to record, pause and rewind linear content, as demonstrated by the fact that 20% of viewing to the PSB portfolios on the Sky platform is recorded viewing.¹⁴ Personal video recording (PVR) has been a standard feature of the market for more than 20 years, including on platforms in which the PSBs are shareholders (i.e. Freeview, Freesat and YouView). Any new 'must-offer' regime (or regulated offer) should respect viewers' existing right to make linear recordings in order to watch a home recording at a more convenient time.¹⁵

¹² *Id.* paragraph 5.33.

¹³ Sky can provide further details about this data to Ofcom on request.

¹⁴ BARB 2020: All Sky individuals via Sky box.

¹⁵ Section 70, Copyright, Designs and Patents Act 1988.

PSB content should be available to viewers for free

On-demand PSB Content should be freely available to viewers; they have already paid for it and should not be required to pay for it again. Previous reviews of the PSB linear 'must-offer' regime have consistently concluded that the current system of "zero net fees" works in the interests of all parties, especially viewers:

- The arrangement avoids the need for platforms to pass the cost through to viewers.
- Viewers are able to watch PSB channels on whichever platform they choose.
- PSBs are able to maximise their audience and advertising revenue by being universally available on all major platforms in prominent EPG positions.
- All UK platforms are able to compete on a level playing field, all offering access to the main PSB channels.

The core principle of the universal free availability of PSB Content must therefore be maintained.

In principle, a regulated offer for on-demand PSB Content could benefit viewers

Sky considers that, in principle, a regulated offer for on-demand PSB Content could benefit platforms, PSBs and viewers. For instance, a regulated offer could provide a clearly defined fall-back option in the event that commercial negotiations are unsuccessful, and hence greater certainty for industry and consumers.

Depending on its design, however, a regulated offer could risk being inflexible, limiting innovation and reducing choice for consumers, restricting the ability of platforms to make content available in the way consumers want. For a regulated offer for on-demand PSB Content to work in practice, it is therefore important that it focuses on what is in the best interest of viewers.

The PSBs' joint proposal is not in the best interest of viewers

The PSBs' joint proposal for a regulated offer is lacking in detail and unclear on a number of points. Sky's initial view, however, is that it would limit the ability of platforms to make on-demand PSB Content available in ways that viewers value because it appears that the PSBs:

- are proposing that the regulated offer would entail playout of content via a core PSB app;
- want to exclude the ability for viewers to make linear recording from any regulated offer; and
- are excluding several things that are necessary for platforms to provide viewers with a good experience.

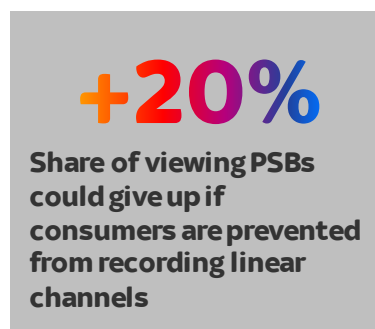
First, the PSBs appear to be proposing that the regulated offer would entail playout of content via a core PSB app. It is unclear whether the PSBs' proposed requirement for playout via the PSB app covers both linear and on-demand content or would prevent other solutions from sitting alongside playout via the app, such as Sky Q's

integrated on-demand service. However, the PSBs propose that platforms be required to carry the PSB “*service rather than disaggregated programme assets*”.¹⁶

The PSBs’ joint proposal also appears to be seeking to undo existing linear ‘must-offer’/‘must-carry’ provisions for DTT, cable and satellite. These rules provide an important safeguard to ensure that viewers are able to access the main public service channels for free via major UK platforms and should therefore be maintained.

A prescriptive approach requiring playout solely via a PSB app would restrict the ability of platforms to surface content in a manner consistent with way the platform operates. It would risk impeding innovation and preventing the emergence of new and inventive methods of surfacing content. This would be particularly damaging at a time when it is becoming ever more important for traditional platforms to compete against newer market players. Over time, this could lead to the homogenisation of platforms and reduce consumer choice.

Second, the PSBs appear to want to exclude linear recording from any regulated offer. However, this would require primary legislation which, as noted above, prevents broadcasters from restricting personal recordings of broadcasts in the home. Sky assumes this proposal stems from the commercial PSBs’ position that the right to enable linear recordings should be negotiated and paid for in order to compensate PSBs for lost revenues as a result of ad-skipping enabled by PVR functionality. [8<] Advertising impacts remain high, even during recorded playback. In addition, innovative solutions, like AdSmart, are available to drive more advertising revenue opportunities. Accordingly, the PSBs should not be seeking to dilute or circumvent viewers’ existing rights; as noted above, it would compromise the viewer experience to remove functionality that viewers have enjoyed for many years (including on platforms such as Freeview and freesat which are controlled by the PSBs themselves) and become accustomed to ‘as standard’.



+20%
Share of viewing PSBs could give up if consumers are prevented from recording linear channels

Third, the PSBs appear to want to exclude several things that are necessary for platforms to be able to integrate PSB Content into their services and provide a rich viewer experience:

- It is unclear to what extent the PSBs are proposing to provide metadata as part of the regulated offer. The viewer interest lies in PSBs providing sufficient metadata (i.e. the key information associated with a programme that supports how effectively the programme is presented within the UI,) to enable platforms to provide a rich viewer experience across a platform’s UI and to facilitate programme discovery via genre listings and other relevant filters. If platforms do not have access under any regulated offer to the metadata necessary to enable recommendations or search (including voice), or to offer a rich experience in terms of imagery and programme information, viewers will be worse off as they will not be able to find the content they want to watch, or discover whether new content they do find is something they might enjoy watching. Also, in the absence of appropriate metadata, it will be difficult for

¹⁶ PSBs’ joint proposal, page 7.

platforms to afford PSBs with prominence in the manner recommended by Ofcom.

- The PSBs are also proposing that the ability for platforms to retain data on PSB viewing should not form part of the regulated offer but should instead be subject to negotiation. While Sky agrees that any regulated offer should require platforms to provide relevant usage data to PSBs in respect of any content provided pursuant to the offer, it is essential that platforms also be permitted to retain and use such data. Platforms such as Sky Q rely on viewing data to inform their UI development and design strategy and to make appropriate recommendations to viewers. Again, in the absence of such data it will be difficult for Sky to afford the PSBs with prominence in the manner recommended by Ofcom.
- The PSB joint proposal suggests that the ability for platforms to include 'overlays' should not form part of the regulated offer but should instead be subject to negotiation. However, it is important that, at minimum, the regulated offer permits overlays which form part of the core utility of the platform, such as navigational overlays (for example, the "now and next" pop up banner on Sky Q, which enables viewers to peruse content on other channels without interrupting viewing of the channel they are currently watching).

For the reasons given above, it is clear that the PSBs' joint proposal for a regulated offer would not be in the best interest of viewers. It could also result in a double standard where there would be a rich viewer experience in respect of non-PSB Content and a far inferior viewer experience for PSB Content.

Sky's alternative version of a regulated offer would result in better outcomes for consumers

Sky proposes an alternative regulated offer for on-demand PSB Content which is based on the consumer-led principles outlined above and is therefore better for viewers. Annex 1 provides an overview of Sky's proposal.

Viewers should be able to access PSB Content on their platform/service of choice

To support the principle that viewers should be able to choose on what platform/service to access PSB Content, Sky's proposed regulated offer would require the PSBs to make their content available to a wide range of platforms/services. However, Sky considers that it would not be practicable to require PSBs to make their content available to every single audio-visual platform/service operating in the UK, and agrees that the regulated offer should only apply in respect of platforms which meet certain minimum qualifying criteria.

Sky also agrees that it would be sensible to apply a threshold based on a minimum number of end-users. However, this approach would not capture new platforms or devices, which would clearly not meet this criterion at launch. Sky therefore proposes that the minimum criteria also captures *new* services operated by providers with existing scale and brand presence and awareness, as consumers would expect to be able to access PSB Content through these services from launch, and these services are likely to quickly grow their customer base following launch.

In order to ensure that the PSBs are engaging with platforms in a timely and consistent manner, Sky proposes the PSBs be subject to a requirement to inform Ofcom within 30 days of a request for content pursuant to the regulated offer; to provide such content as soon as reasonably practicable; and to inform Ofcom once provided. Ofcom should be empowered to impose financial penalty for PSB failure to comply with regulated offer.

Viewers should not receive inferior content to that available via PSBs' own services

To safeguard the quality of content provided under any regulated offer, Sky's proposed regulated offer would require the PSBs to make available their PSB linear channels (where not covered by existing must-offer requirements) as well as all on-demand PSB Content broadcast on a linear PSB channel within an appropriate window.

In addition, if the PSBs are to be afforded more flexibility in how they meet their public service obligations, as Ofcom has proposed, the regulated offer should also include any other on-demand content through which the PSBs satisfy their public service obligations.

To address the risk of PSBs favouring platforms in which they have an interest (for example, by offering such platforms more public service content or granting more extensive rights), the PSBs should be required to provide their content to platforms on a fair, reasonable and non-discriminatory basis. This requirement should extend to the provision of content in alternative formats, such as HD, UHD and HDR, to the extent that such content also benefits from mandated prominence.

This should all, of course, be subject to proper attribution and timely provision of any available and relevant viewing/usage data that relates to content provided pursuant to the core offers.

Viewers value standard platform functionality as well as future innovation

In order to support this principle, Sky's proposed regulated offer would require PSBs to provide content in a manner consistent with the way the platform operates. For Sky Q, for instance, this would require the PSBs to provide their content to Sky on a disaggregated basis, and all of the content would then be made available to viewers all in one place. Under Sky's proposed regulated offer, the PSBs would also be required to provide the metadata needed to support platforms' functionality across UI, search (i.e. access to sufficient metadata to support platforms' functionality across UIs).

However, Sky acknowledges the commercial PSBs' desire to monetise their content, for example through preventing ad skipping on their on-demand content (but not recordings) and agrees that this should be reflected in the regulated offer.

PSB Content should be freely available to viewers

Consistent with the principle (noted above) that PSB Content should be made freely available to viewers, Sky's proposed regulated offer is based on delivering zero net fees. Ofcom suggests that the extension of the 'zero net fees' principle to PSM *may lead to significant real or opportunity costs for PSM providers. This would in turn reduce*

their ability to invest in original content that reflects the PSM features.”¹⁷ This does not reflect what happens in practice.

First, [§<]

Second, there is no guarantee that payment would be invested in PSB Content. For example, the payments could be passed on to the PSBs’ shareholders in the form of higher dividends.

A requirement for platforms to carry on-demand PSB Content, give it prominence and pay for it would amount to a mandatory tax which would undoubtedly be passed on to consumers. Further, it would potentially result in an uneven playing field assuming that, in practice, the payment requirement only bites on platforms in which PSBs do not have a controlling interest.

Accordingly, any proposal to require payment in respect of on-demand PSB Content (or indeed to unpick the existing zero net fees arrangement for PSB linear channels) should be resisted.

However, Sky recognises that there might be costs involved in providing platforms with the regulated offer, particularly where a platform asks for an alternative solution to the PSB standard core app. Hence it is fair that platforms should meet PSBs’ reasonable costs of adapting PSB services to their platforms.

Conclusion on Sky’s proposals

The outline of Sky’s proposal in Annex 1 shows that it is aligned with the PSBs’ joint proposal on a number of points, but a key divergence is the extent to which the regulated offers support alternative approaches to providing PSB Content via the PSB core app, and the ability for platforms to integrate PSB Content into their wider UIs via recommendations and search. Sky’s proposal seeks to achieve these aims whereas the PSB joint proposal clearly does not.

¹⁷ Ofcom, ‘Small Screen: Big Debate’, op. cit., paragraph 5.29(b).

Consumer-led principle	Sky's proposal	Subject to
Platform/service: Viewers should be able to access PSB Content on their platform/service of choice	PSBs should make their content available to a wide range of platforms/services	<ul style="list-style-type: none"> • Minimum qualifying criteria e.g. significant number of end users, or service operated by provider with scale, brand, presence etc • Platform must afford 'appropriate prominence' to PSB Content (addressed in a separate regime)
Content: Viewers should not receive inferior content on their platform of choice to that available via PSBs' own services	PSBs should make available their PSB linear channels, all on-demand content broadcast on a linear PSB channel within an appropriate window and on-demand content through which they satisfy their public service obligations	<ul style="list-style-type: none"> • Proper attribution etc • Proper provision of relevant data to PSBs
Functionality: Viewers value standard platform functionality as well as future innovation	PSBs should provide content in a manner consistent with the way the platform operates (e.g. disaggregated for Sky Q) as well as the data needed to support platforms' functionality across UI, search etc	<ul style="list-style-type: none"> • Preserve the ability of PSBs to monetise their content
Payment: PSB Content should be freely available to viewers	Zero net fees	<ul style="list-style-type: none"> • Platforms should meet PSBs' reasonable costs of adapting PSB services to their platform

Beyond the regulated offer, PSBs and platforms would be free to negotiate and reach agreement on alternative arrangements, for example in relation to content from the PSBs that does not form part of the regulated offer, and additional rights and functionality, such as the ability to enable VOD ad skipping, rights to boxsets, downloading to mobile, and use of cloud storage. [36]

Prominence for on-demand PSB Content

As noted in Sky's previous submission to Ofcom, Sky does not consider it necessary to extend the prominence regime to on-demand PSB Content on the basis that such content is already prominent on all major UK platforms.

However, assuming Government adopts Ofcom's recommendation to introduce new prominence requirements for on-demand PSB Content then this should sit alongside the regulated offer rather than form part of the regulated offer itself.

Sky also proposes that any prominence regime for on-demand PSB Content should only apply to content which falls within the regulated offer. To the extent that the PSBs and platforms negotiate commercial agreements in respect of additional content, platforms should not be under a regulatory obligation to afford prominence to this content. Platforms may, however, choose to do this voluntarily or pursuant to commercial agreement with PSBs.

Sky strongly disagrees with the PSBs' proposal for 'significant prominence' for PSB channels and qualifying on-demand players or any negotiated expanded offer.¹⁸

Requiring platforms to afford on-demand PSB Content 'significant prominence', with prescriptive rules and guidelines, would not be in the viewer interest as it would risk stifling innovation and restricting choice for consumers. This would be particularly damaging given the rapid pace of technological change and the increasing number of new market players - it is becoming ever more important that platforms are able to reconfigure their UIs to improve their attractiveness to consumers in order to compete. Sky instead advocates a more flexible, principles-based approach which would support a wide range of different approaches to user-interface design and the arrangement and surfacing of content within those user interfaces. This could be achieved by introducing 'appropriate prominence' requirements for on-demand PSB Content (i.e. on-demand content to which 'must-offer' requirements apply), mirroring existing linear prominence legislation.

Ofcom should have a role to play in providing guidance on what would constitute 'appropriate prominence'. Such guidance could include examples of 'appropriate prominence' (e.g. first four player apps within the apps menu). However, such guidance should be sufficiently flexible and principles-based to safeguard investment in innovation and choice for consumers. To this end, as with the EPG Code pre-Jan 2021, such guidance should not contain any specific requirements on positioning/layout/search/recommendation or an absolute requirement to list on the home page.

If Ofcom later considered that the new code was not achieving its desired outcomes, then it would be open to Ofcom to amend the code at a later date, as it has recently done in respect of the linear prominence requirements under the EPG Code.

Finally, Sky trusts that the current prominence rules relating to linear PSB Content will not be disturbed. Ofcom recently noted in its review of competition rules in the EPG Code that, in general, the existing rules are "*working well*".¹⁹ Consequently, no changes should be made to the linear prominence regime.

¹⁸ PSBs' joint proposal, page 2.

¹⁹ 'Review of competition rules in the EPG Code - Statement', Ofcom, 30 November 2020.

The regulatory framework should support, incentivise and grow the contribution from across the entire sector

As noted above, Sky considers that Ofcom has missed a significant opportunity to undertake a fundamental, 'bottom-up' examination of the PSB system. Such a review could have given due consideration to alternative, wider approaches to public service content delivery, instead of continuing to drive public policy through a narrow set of operators.

Notwithstanding this, however, the Consultation rightly acknowledges that non-PSBs are now making a material contribution to content of a public service nature, and it explores the possibility of further interventions that could strengthen this delivery in future. This exploration is brief and measures are clearly envisaged as additive, as opposed to being at the heart of Ofcom's thinking, but it is nevertheless welcome. As the PSB Review proceeds, Ofcom should give serious and more detailed consideration to how the regulatory framework can best support, incentivise and grow the contribution from across the entire sector.

Public service content is produced by a diverse range of players

As the Consultation acknowledges, public service content is no longer exclusively produced by the traditional PSBs, but increasingly by offerings from multichannel broadcasters, SVODs and content sharing platforms. Sky plays an important role in this ecosystem and is making a growing public service contribution that often matches and sometimes exceeds those of some traditional PSBs.

As an integral part of the UK content sector, Sky makes a substantial contribution to the UK cultural economy through a range of content, including news, drama, documentaries, arts, comedy and sport. Much of this is demonstrably public service in nature, clearly fulfilling the purposes and characteristics of public service content as envisaged in legislation and set out in further detail by Ofcom.

As Europe's leading media and entertainment company, our drive to invest more in original UK content is a direct response to customer demand, recognising the value in local, relevant and authentic storytelling. Sky's own contribution continues to grow and our ambition is to double our investment in original content by 2024. Sky Studios was launched in 2019, a Europe-wide development and production business, while progress continues to be made on our new TV and film studio, Sky Studios Elstree, which is due to open in 2022. Sky Studios Elstree is expected to create over 2,000 new jobs and generate an additional £3 billion of UK production spend in the first five years alone.

The breadth of success seen by Sky Original programming is best exemplified by *Chernobyl*, which received 10 Emmy awards, been nominated for a record 25 BAFTAs and (by the end of award season 2020) received 91 awards globally. With an increasing number of Sky's productions receiving critical acclaim and award nominations internationally, we will continue to grow our ambition during 2021 - Sky Studios will deliver over 50 original documentaries, scripted dramas and comedies, and in the UK alone there will be 125 Sky Originals.

There has been debate in recent years as to whether, despite the significant increase in UK production spend from non-PSBs, the content they produce is designed to appeal more to global audiences and therefore does not fulfil an

important element of public service content in reflecting UK audiences' lives back to them. This is demonstrably not the case for Sky. As a longstanding UK broadcaster we understand that audiences value content they can relate to and that represents their own experiences on screen. Countless numbers of Sky productions are identifiably rooted in British culture – recent notable examples might include *Save Me*, *Brassic*, *Gangs of London*, *Britannia*, and *COBRA*, but it is true of the vast majority of Sky's output. Sky's entire original comedy portfolio, with 14 series in 2021, is entirely British focused, as are key entertainment titles such as *A League of Their Own*. With a focus on serving our UK customers, we are highly motivated in this respect.

Sky's free to air services

No two services better exemplify Sky's significant contribution to public service objectives than our two flagship free-to-air channels, Sky News and Sky Arts.

Operating on an entirely commercial basis, Sky News is widely available and provides impartial news to 100 million viewers across Europe. It delivers significant public benefit without subsidy, unlike the traditional PSBs. The channel is widely recognised across the political spectrum for its quality of coverage and editorial integrity, most recently receiving six RTS awards, including News Channel of the Year. According to Ofcom's own research, Sky News outscores PSBs on trust, accuracy, impartiality and a wide range of views²⁰. Sky News has played a vital role in keeping the public informed during the Covid-19 pandemic across a multitude of platforms, frequently setting the agenda – stories like Stuart Ramsey's award-winning report from Bergamo in Italy and Nick Martin's investigation into care homes being prime examples.

Ofcom states in the Consultation that *"unlike PSB provision, services such as Sky News... ultimately depend on continued commercial viability"*.²¹ This statement is misleading. Legally binding commitments established following Comcast's acquisition of Sky guarantee the continued operation and long-term funding of an editorially independent Sky News until 2028²² – four years longer than the current commercial PSB licence periods, and a year beyond the end of the current BBC Royal Charter. Sky News is therefore the only news service in the UK guaranteed to maintain its output until this time, and in 2020 was the only major newsroom not facing funding cuts.

We further amplified our investment in the cultural economy by moving the UK's only dedicated arts channel, Sky Arts, free-to-air. By partnering with a variety of cultural institutions, we create access to, and broadcast, a diverse catalogue of cultural events resulting in hundreds of hours of original content each year. The current reach for Sky Arts across the first 7 weeks of 2021 is a weekly average of over 4.15 million viewers, which is up 217% on the same period in 2020.²³



²⁰ Page 73, 'News Consumption in the UK: 2020', Ofcom (Available at: https://www.ofcom.org.uk/data/assets/pdf_file/0013/201316/news-consumption-2020-report.pdf).

²¹ Paragraph 3.6, The Consultation.

²² Establishment of independent Sky News Editorial Board and confirmation of long-term commitments to Sky News, December 2018 (Available at: <https://www.skygroup.sky/article/establishment-of-independent-sky-news-editorial-board-and-confirmation-of-long-term-commitments-to-sky-news>).

²³ BARB, weeks 1-7 2021 versus weeks 1-7 2020.

Non-PSBs, and Sky in particular, continue to produce an increasing range of diverse and high quality public service content without public subsidy or any of the other benefits accorded to the traditional PSBs. This directly translates to the positive outcomes and greater level of choice being enjoyed by viewers across the UK.

Incentivising public service delivery from new providers will be critical as audiences continue to fragment

Shifts in audience patterns in recent years are well documented, and the Consultation notes that PSBs, while remaining highly popular, have nevertheless lost share to an increasingly diverse set of competitors. As audiences continue to diverge from a traditional viewing of a small number of services, maintaining and building on the current level of public service content produced by this broad range of sources will become increasingly important.

This is particularly true given that trends we were already beginning to witness in the sector have accelerated during the Covid-19 pandemic. Lockdown drove substantial shifts in viewing habits. In late March, Sky saw the highest ever TV viewing among its customers, an increase of almost a third,²⁴ with a predictable growth in viewing hours as the majority of the population stayed home. In the early months of the first lockdown, this initially translated into a rise in linear viewing – but this trend has subsequently reversed and is now broadly in line with declining levels pre-pandemic. Conversely, the increase in ‘unmatched’ viewing to streaming services has been sustained consistently throughout the pandemic, and at the end of May were still a third higher than at the same time in 2019.²⁵ Lockdown restrictions may have cemented a transition to newer viewing methods which may prove irreversible.

New interventions should be open to all and non-zero sum

Given the continued growth in both investment and output by non-PSBs, many of the outcomes that the current PSB regime seeks to deliver are better suited to industry wide policy initiatives. We see diminishing value in privately-owned PSBs, over and above what these broadcasters produce on a commercial basis. Horizontal interventions offer policymakers the greatest opportunity in the future, with a number of approaches that support the delivery of public service content across the entire sector, driving innovative approaches to programming and, most crucially, reaching a greater proportion of UK audiences.

Sector wide interventions that are widely applicable have many advantages over narrower approaches. For example:

- they offer greater flexibility, being easier to change without primary legislation, for instance;
- there are many different policy instruments that can be used;
- they do not distort competition among firms in the sector, since the opportunities they present are available to all; and

²⁴ Sky data (Available at: <https://www.skygroup.sky/en-gb/article/sky-identifies-top-trends-among-viewinghabits-in-lockdown>)

²⁵ See Week 22 2020, BARB.

- they are more transparent and therefore clear in what Government support is being provided, and what is being delivered in return.

We are already witnessing policy moving in the direction of greater use of horizontal interventions available to a wider group of players. As the Consultation notes, the Government has established a contestable fund for the production of public service children's programming and the system of tax credits for high-end TV productions has been immensely successful in ensuring the UK production of high-end content

The existing framework, coupled with an increase in UK content produced on a purely commercial basis from a number of sources, means that outcomes for UK audiences are likely to be positive even absent further intervention. Commercial investment from both UK and international content providers continues to increase with the support of financial incentives. However, where policymakers identify a clear shortfall in the provision of certain types of desirable genres and content types, there are two key proposals which Sky believes should be considered: contestable funding and tax incentives.

Contestable funding would see the establishment of further funding pots, open to all, with awards made on the strength of proposition. As with the Young Audiences Content Fund, policymakers could attach criteria to this funding in order to ensure a particular level of availability or certain programming characteristics. It is important to recognise that these criteria can be set as required in order to drive specific outcomes that policymakers may be looking for. For example, the Young Audiences Content Fund places a significant emphasis on reach and universal availability (i.e. all supported content must first be aired on a free-to-air channel with significant audience reach, while a two-year holdback exists for non-PSBs that receive awards via co-commissions). This reflects a somewhat 'traditional' view of PSB characteristics, but new funds could have different objectives or criteria. They could, for instance, place particular weight on new and innovative distribution approaches in order to reach new viewers, or favour programmes with high appeal to a particularly underserved audience segment.

Similarly, Sky believes the example of widely used tax incentives in the film industry across Europe and, more recently, for high-end TV content could also help promote sustainable production of other culturally relevant programming in the UK. Such schemes effectively reduce the cost of a programme to the commissioning broadcaster by offering tax credits to the producer, enabling them to claim back a portion of their qualifying production spend. Reducing the costs to commercial broadcasters can increase the gross margins such programmes achieve, helping to maintain their viability.

There may be particular industrial policy objectives that could be achieved through new tax incentives – for example, stimulating the emergence of TV production hubs in the regions. Multichannel out-of-London commission spend has grown strongly in recent years, both in nominal terms and as a share of total market-level out-of-London commission spend. A new tax relief for out-of-London TV production might stimulate higher regional investment. This could concentrate the benefits of any increase in top-line UK external production spend upon regional TV hubs, sharing the economic benefits of the sector around the UK and potentially increase plurality of audience provision.

Extending the benefits of prominence to new providers would lead to diminishing returns

The Consultation refers to prominence (and any new availability rules) potentially being 'extended to new providers' as a method of strengthening PSM in the future. Sky considers that this would inevitably undermine the key value that prominence provides, as well as risk poor audience outcomes more broadly.

If the fundamental purpose of the prominence regime is to ensure that public service content is easily discoverable by UK viewers, then extension of the regime risks undermining this benefit. Put simply, the more providers which produce public service content and 'qualify' for prominence, the less value that prominence holds. Prominence for everyone risks ultimately meaning prominence for nobody.

Such a system would also create a significant level of uncertainty if the level of prominence afforded was intended to vary depending on the level of public service content produced. Periodic assessments by Ofcom could lead to channels and services being included then excluded on a frequent basis, with consequential changes to platforms as a result. Not only would this create a poor user experience but it would also eliminate certainty for platform operators and, in turn, reduce choice and innovation to the detriment of viewers. An all-encompassing prominence regime could result in a situation whereby the regulator is effectively determining how platforms' UIs operate.

It remains the case that platform providers are best placed to determine what content access methods are most appropriate for their customers, in line with viewer preferences. UK audiences continue to have an appetite for UK content and therefore Sky and other platforms have a strong commercial incentive to adapt to meet viewer's needs and remain competitive. Our approach to content discovery is subject to a process of continuous improvement as we seek to optimise the customer experience. We believe that viewers should be able to watch what they want, how they want, with platforms free to strike commercial deals with content producers and innovate wherever possible.

Sky

March 2021

Annexes

Annex 1 - Sky's proposed "regulated offer" for on-demand PSB Content

- "Regulated offer" would cover PSB linear channels and "core" form of ITV/C4/C5 VOD service (i.e. only content recently first broadcast on a PSB channel and/or such other content through which the PSBs satisfy their public service obligations). Offer would be in addition to existing linear 'must-offer' regime.
- PSB controls content.
- Offer available for free to 'Qualifying Services' – defined as a platform or service operated by a company with scale, brand, presence etc or used by a significant number of people.
- Platform must accept "regulated offer" as fallback option (if unable to reach negotiated deal).
- PSB controls content.
- Content provided in a manner consistent with the way the platform operates (e.g. Sky Q integrated PDL solution).
- If platform chooses core app (because consistent with the way the platform operates), platform must ensure the full functionality of core player is provided to audiences.
- Any necessary technical moderations at expense of platform.
- Attribution and real time data access where relevant for the relevant PSBs.
- Provision of sufficient metadata to enable rich viewer experience (and to enable platforms to meet any new prominence requirements).
- Everything else subject to commercial negotiation and payment.
- Standardised, reasonable contractual terms to be approved/set by Ofcom.
- PSB to inform Ofcom within 30 days of a request for content pursuant to "regulated offer". PSB to provide such content as soon as reasonably practicable and to inform Ofcom once provided. Ofcom empowered to impose financial penalty for PSB failure to comply with regulated offer.
- MFN/FRND requirement against platforms in which PSBs have significant ownership or control (in respect of the provision of "core" public service content).