

Submission to Ofcom's consultation on proposals for access services on non- domestic channels

From the Commercial Broadcasters Association

July 2012



A VOICE FOR COMMERCIAL BROADCASTERS IN THE UK

Executive Summary

1. The UK broadcasting sector is “a world leader in both the extent and the quality of access services available” in the domestic market.¹ Channels providing access services account for 90% of UK audience share and, as demonstrated in Ofcom’s most recent access services report, many COBA members exceed their minimum statutory requirements by a substantial level.²
2. Building on this success in non-domestic markets is a complex process. It may not be practicable or desirable to replicate practices that have worked well in the UK in other markets, where audience numbers, preferences and technology may differ. In short, a one-size-fits-all approach may not necessarily be in the interests of industry or audiences.
3. We believe a key factor in the UK’s domestic success has been basing regulation on a detailed, and demonstrable, understanding of audience needs. This reflects Ofcom’s statutory duty under the Communications Act 2003 to ensure that its Code on Access Services takes into account “the extent of the benefit which would be conferred by the provision of assistance”, including the number of persons who would benefit and the extent to which they would benefit.³
4. While we appreciate Ofcom has carried out some work in this area for this consultation, we are concerned that it has nevertheless not developed a full understanding of audience needs across Europe. We are not aware of any original research carried out for this consultation, and consequently do not believe Ofcom can draw firm conclusions on the benefit for audiences in EU Member States of introducing non-domestic requirements for access services. Nor does the consultation contain an impact assessment, either to assess the benefits for audiences or to look at the costs for industry.

¹ DCMS Consumer Perspective Paper, issued for July 4 2012 seminar on the Consumer Perspective for the Communications Review.

² Television Access Services: Full Year Cumulative Report, published March 2012, Ofcom

³ Communications Act 2003, Section 303 (8)

5. In comparison, in developing regulation for domestic access services following the 2003 Communications Act, Ofcom first commissioned a review of existing literature to establish what original research was necessary, concluding that understanding of audiences with sensory impairments was “patchy”.⁴ Ofcom then commissioned “large scale”⁵ quantitative and qualitative original research to:
 - “establish the the numbers of people with hearing and / or visual impairments who had potential to benefit from access services;
 - gauge awareness and usage of access services, as well as barriers to use;
 - establish how users find out about programmes with access services; and
 - understand users’ experiences, preferences and satisfaction levels.”⁶
6. In a domestic context, this has since been followed up with further audience research, for example Ipsos MORI’s analysis of audience awareness of audio description for Ofcom in 2009.⁷
7. For non-domestic services, we are concerned that, in the absence of an evidence base for understanding audiences in non-domestic markets, Ofcom has assumed that they will be best served by practices developed for UK consumers. This may not be the case, and may result in costly requirements for industry that deliver little or no benefit for audiences with sensory impairments. For example, Ofcom is currently proposing to extend domestic requirements for sign-presented programming to non-domestic services (after a two year period, if alternative ways of promoting sign-presented programming cannot be found). Domestically, one of the more surprising findings from Ofcom’s 2006 research was that two thirds of hearing impaired people with the strongest signing skills still expressed a preference for subtitling over signing.⁸ One response to this, as has happened domestically, may be to encourage sign-presented content, as opposed to sign interpreted programmes. However, sign-presented programming represents a high-cost approach for industry and requiring it be introduced on a range of non-domestic services across the EU is a significant and burdensome step for industry. In doing so, Ofcom should first demonstrate that this is an effective measure that is desired by audiences in non-domestic markets.

⁴ Television Access Services: Review of the Code and Guidance, Consultation, March 2006, Ofcom, section 1.6

⁵ Ibid, section 2.6

⁶ Ibid, section 2.5

⁷ http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/research_audio_description/

⁸ Ibid, section 11.1

8. We are not convinced that Ofcom is obliged under European law to require precisely the same duties in overseas terms as it does domestically. As Ofcom is aware, Article 2 (1) of the Directive states:

"Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State."

9. We are not convinced, however, that this means that national legal rules must be applied in the same way in all respects to all broadcasters all the time. According to legal opinion taken in 2010 by one of our members, SBS, in relation to advertising minutage, Article 2 (1) simply means that the same general rules must apply, i.e. the home country must treat all broadcasters established in its jurisdiction as being within its system of rules, not that the rules cannot draw distinctions depending on the circumstances.
10. Furthermore, according to this legal opinion, the principle of non-discrimination in EU law requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified.⁹
11. While we of course appreciate that this opinion was in a relation to a different issue under the AVMS Directive, we believe it may also be relevant to the application of access services, and would welcome clarification on Ofcom's view on whether it believes it is bound under European law to require exactly the same duties for non-domestic services as domestic ones regardless of audience benefit. Although Ofcom has previously seen this opinion, we would be happy to provide it again.
12. Also of concern to us is Ofcom's statement in paragraph 3.29 of the consultation paper that it "...does not consider that it would be compatible with the UK's obligations under the AVMS Directive to have regard to the extent to which members of the intended audience live outside the UK ... so has concluded that it should not take this factor into account."
13. We ask Ofcom to clarify its thinking in reaching this view. As Ofcom is aware, Article 7 of the AVMS Directive only requires a member state to "encourage"

⁹ Joint Opinion by Lord Pannik QC and Brian Kennelly in the matter of Directive 89/552/EC (The Audiovisual Media Services Directive) and Advertising Regulation of Foreign Broadcasters, for SBS Broadcasting and Viasat Broadcasting, 26 March 2010

broadcasters under its jurisdiction to provide access services on a gradual basis. On the other hand, the Communications Act requires Ofcom to have regard to a range of factors including the extent to which the intended audience for a service is outside of the UK.¹⁰

14. In terms of Ofcom's understanding of the costs and technical feasibility for industry, it is also crucial that the regulator does not assume that industry can readily replicate UK practices in a wide variety of non-domestic markets. In some aspects, providing non-domestic access services raises very different cost and feasibility implications than doing so domestically. For example, compared to the UK, it is in our experience less common for non-domestic channels to control the bandwidth that operators use. In these cases, certain channels may be delivered via contribution feeds which the operator uplinks to their own satellites using their own capacity. Under these circumstances, it may be the case that platforms will restrict what is possible. We also understand that in some markets such as Poland, broadcasters will be dealing with up to 300 platforms, while in others some channels are still provided on analogue.
15. We believe these are significant issues that make providing non-domestic services a different proposition in terms of feasibility compared to the UK. While we acknowledge that Ofcom proposes to consider exempting services for technical reasons under the broad criteria set out in Section 10 of the Code, we ask the regulator to clarify how it will approach such appeals, including outlining detailed criteria for Ofcom's decision-making and timetables, and clarifying whether services risk being held non-compliant while an appeal is pending. The examples of technical difficulty cited in Section 18 of the Code should also be extended to include issues, such as we have noted above, that are more relevant to non-domestic services.
16. In addition, in considering technical feasibility and costs, we believe Ofcom should consider not just whether providing access services is practicable in the short term, but whether it is proportionate to require a company to invest in technology that may become out of date in the medium to long term. We note that the Swedish Broadcasting Authority (SBA) considered Ofcom's approach when it was reviewing the implementation of access services and rejected it as not being appropriate for the Swedish market, partly on the grounds that this approach required a commitment to technologies that might soon be out of date. As the SBA concluded:

¹⁰ Communications Act 2003, Section 303(8)

"A decision model of this kind [i.e., the UK model] which regulates the specific techniques with an indication of facilitating accessibility as a percentage, is clear and predictable. A disadvantage to such micromanagement is that it can impede competition ... In addition, such a model would not take into account the development of any new services and could force TV4 AB to commit to technologies that are not viable in the near future or use services that are so bandwidth-intensive that in the current climate it would difficult to implement them."¹¹

17. We of course acknowledge that Ofcom is not obliged to follow the views of any other European regulator when implementing any requirement of the Directive. However, as we have outlined, we believe that access services is not an issue where a one size fits all approach is appropriate. We therefore think substantial further research into audiences in other markets is necessary to provide an evidence base on which to develop and implement effective and proportionate regulation that meets the needs of audiences with sensory impairments across Europe on a reasonable basis for industry.

¹¹ The Swedish Broadcasting Authority, Requirements of accessibility of television broadcasting for persons with functional impairments, 23 June 2011

Introduction

1. COBA (the Commercial Broadcasters Association) is the industry body for commercial sector broadcasters in the UK. Its members are Discovery Networks, BSkyB, Chinese Channel, Fox International Channels, Viacom International Media Networks, NBCUniversal, QVC, SBS Broadcasting Network, Sony Pictures Television, Turner Broadcasting System, UKTV and The Walt Disney Company. COBA was formerly known as the Satellite and Cable Broadcasters' Group (SCBG).
2. COBA members are significant investors in the UK: they operate nearly 300 UK-regulated television channels and invested £432 million in UK original content in 2009, an increase of 7.5% from £402 million in 2008¹².
3. This means that COBA members are important investors in the UK production sector. Commissioning spending on UK independent producers has almost tripled since 2004, and the sector spends a relatively higher amount on smaller independent producers than PSB broadcasters, helping promote start ups and SMEs.¹³
4. Furthermore, as COBA members include many of the leading global media companies, they represent a crucial source of inward investment, bringing finance from international markets into the UK and the UK production sector and creating skilled jobs.
5. **For further information please contact Adam Minns, COBA's Executive Director, at adam@coba.org.uk or 0203 327 4101**

¹² The Commercial Broadcasters Association's content investment, Deloitte for COBA, 17 March 2011

¹³ Independent Production Sector Financial Census and Survey 2011, Oliver & Ohlbaum Associates for Pact

Q1 Do consultees agree with the proposed approach to setting audience share thresholds for other EU Member States? If not, do they have practicable alternatives that they would like to propose, which would be comparable with the approach taken to domestic channels.

- 1.1 We welcome in principle the approach to defining audience share threshold based on absolute minutes represented by an audience share. However, we are concerned that the audience share threshold should not necessarily be set at the UK level of 0.05%. To our understanding, this figure was arrived at as a result of Ofcom's 2004 consultation, which concluded that such a threshold would mean that a sufficient amount of larger channels would be within scope in order to ensure access services were widely available – across channels with a combined audience share of around 95%.
- 1.2 We ask Ofcom to clarify whether it has carried out comparable analysis for non-domestic markets in order to establish the level of audience benefit from its proposals for non-domestic services. In addition, according to impact assessment for the 2004 consultation, this threshold equated to a value of up to £150m to audiences, which outweighed resulting costs for broadcasters.¹⁴ Although this cost-benefit exercise was not the basis for Ofcom's decision, which was a matter of public policy, it provided a useful analysis of whether the proposals were proportionate, and we ask Ofcom to carry out a comparable exercise for non-domestic requirements if it has not done so already.

Q2 Do consultees have any comments on whether the approach taken to assessing the costs faced by domestic licensees is also appropriate to non-domestic licensees? If so, what alternatives would they propose, and why?

- 2.1 We believe the costs of providing access services may differ in non-domestic markets compared to the UK, not just in the level of costs for comparable services but also in the type of costs that may be incurred. Firstly, we do not think it is correct to assume that there will be no additional transmission costs for audio description. Compared to the UK, non-domestic broadcasters are less likely in our experience to have ownership of a platform or control the bandwidth operators use. As a result, some operators may charge for additional bandwidth.

¹⁴ Code on Television Access Services, Statement, 2004, Ofcom

- 2.2 In addition, where countries are part of multi-territory feeds, incorporating access services is likely to require additional capacity. Ofcom's suggestion that channels introduce capacity-saving measures such as reductions in the capacity allocated to video and soundtracks may reduce the viewing quality for all audiences, whether they use access services or not.
- 2.3 We do not accept that administration and compliance costs should not be included on the grounds that broadcasters already carry out similar tasks. Where an additional cost is incurred this should be reflected as part of Ofcom's duty under the Communications Act to take into account the costs of providing access services.
- 2.4 We also ask Ofcom to clarify what it means in section 3.8 (b) of the consultation paper, which addresses common ownership but refers to paragraph 22 of the Code, which covers declarations of turnover.

Q3 Do consultees agree with the proposed approach to determining a provisional assessment of costs for 2012 and 2014?

- 3.1 Yes.

Q4 Do consultees agree that non-domestic channels required to provide access services with effect from January 2014 should commence provision in accordance with the targets corresponding with the first anniversary of the notice date?

- 4.1 While we welcome Ofcom's decision that it would be disproportionate to require channels to be classified as if they had been broadcasting since 2003 for the purposes of Access Services, Ofcom's suggestion that technical difficulties are not insuperable is a generalization and may be materially wrong. In some aspects, providing non-domestic access services raises very different cost and feasibility implications than doing so domestically.
- 4.2 Ofcom has assumed that channels control the bandwidth that operators use, as is the case in the UK. However, in some markets certain channels are delivered via contribution feeds which operators uplink to their own satellites using their own capacity. It may be the case that platforms will restrict what is possible, and this may have implications for Ofcom's proposed timetable.

- 4.3 We also understand that in some markets such as Poland, broadcasters will be dealing with up to 300 platforms, while in others some channels are still provided on analogue.
- 4.4 We believe these are significant issues that make providing non-domestic services a different proposition in terms of feasibility compared to the UK. Such issues need to be borne in mind under Ofcom's statutory duty under the Communications Act to take technical feasibility into account.¹⁵
- 4.5 While we acknowledge that Ofcom proposes to consider exempting services under the broad criteria set out in Section 10 of the Code, we are concerned that this approach places the onus on licencees to demonstrate a lack of technical feasibility. We ask the regulator to consult further with industry on the process for such appeals, including setting detailed criteria for Ofcom's decision-making and timetables, and clarifying whether services risk being held non-compliant while an appeal is pending. The examples of technical difficulty cited in Section 18 of the Code should also be extended to include issues, such as we have noted above, that are more relevant to non-domestic services.
- 4.6 In addition, in considering technical feasibility and costs, we believe Ofcom should consider not just whether providing access services is practicable in the short term, but whether it is proportionate to require a company to invest in technology that may become out of date in the medium to long term. We note that the Swedish Broadcasting Authority (SBA) considered Ofcom's approach when it was reviewing the implementation of access services and rejected it as not being appropriate for the Swedish market, partly on the grounds that this approach required a commitment to technologies that might soon be out of date. As the SBA concluded:

"A decision model of this kind [i.e., the UK model] which regulates the specific techniques with an indication of facilitating accessibility as a percentage, is clear and predictable. A disadvantage to such micromanagement is that it can impede competition ... In addition, such a model would not take into account the development of any new services and could force TV4 AB to commit to technologies that are not viable in the near future or use services that are so bandwidth-intensive that in the current climate it would difficult to implement them."¹⁶

¹⁵ Ibid, Section 303 (8) (e)

¹⁶ The Swedish Broadcasting Authority, Requirements of accessibility of television broadcasting for persons with functional impairments, 23 June 2011

Q5 Do consultees agree that Ofcom should count language subtitling towards access service targets for subtitling?

5.1 Yes.

Q6 Do consultees agree that, for a transitional period of two years from 1 January 2012, broadcasters should be allowed the alternative of providing additional subtitling in place of signing, in order that they can have the opportunity to devise alternative arrangements that may be more beneficial to sign language users.

- 6.1 While we welcome the two-year transitional period, we are very concerned about the lack of alternatives to providing 30 minutes of sign presented programming a month once this period is over. As Ofcom is aware, under UK rules, channels with an audience share of less than 1% are able to support the work of the British Sign Language Broadcasting Trust as an alternative, but an equivalent body does not exist in many non-domestic markets. Sign-presented programming is highly costly, perhaps the highest cost of all forms of access service, and for channels with a market share of less than 1% may not be financially viable.
- 6.2 We are not aware of any audience research carried out to understand the needs of audiences across Europe to inform this proposal, which appears to be based on the assumption that audiences in other markets will want the same as UK consumers. We are therefore concerned that requiring sign presented programming on non-domestic services places a substantial financial burden on industry for a benefit that is far from proven, and does therefore not represent proportionate or evidence-based regulation.
- 6.3 On the subject of multi-territory channels, we welcome Ofcom's acknowledgement of the difficulties posed by signing obligations. However, we object to the notion that audience share for such channels should be considered on a national basis: multi-territory channels should be measured in terms of the total television audience in Europe. Further, Ofcom should analyse more thoroughly the benefit of imposing signing obligations on multi-territory channels. This could result in subtitles in English for English-language programming broadcast in non-English speaking countries to benefit non-English speaking viewers with sensory impairments. As we have pointed out, any

decision to increase costs to Ofcom licensees should be based on evidence of real benefit.

Q7 Do consultees have any comments on the proposed changes to the Code on Television Access Services, as set out in Annex 2?

7.1 No, except for our concerns raised in this submission.

Q8 Do consultees have any comments on the impact assessment

8.1 N/A