

**ROKU'S COMMENTS ON OFCOM'S
"SMALL SCREEN: BIG DEBATE" CONSULTATION**

16 March 2021

INTRODUCTION

Roku commends Ofcom for the thoughtfulness and timeliness of its "Small Screen: Big Debate" Consultation. As a company at the forefront of streaming television, Roku has a significant interest in this Consultation.¹ We pioneered streaming TV and were founded on the belief that all TV content will be streamed. TV streaming is now mainstream, and consumers are spending more time watching TV streaming services. This re-platforming of the TV ecosystem is creating more options not only for consumers, but also content publishers, advertisers and other industry participants. These developments are good for consumers, good for businesses, and good for the national economy.

Roku is focused on connecting consumers to the entertainment they love, enabling content publishers to serve growing audiences, and providing advertisers with unique capabilities to engage consumers. The features and functionality of our platform, powered by the Roku operating system, uniquely enable us to address the needs of our consumers, content publishers, advertisers, Roku TV brand partners, and other partners. Consumers can discover and access a wide variety of streaming content; content publishers can reach our highly-engaged user base of over 50 million active accounts globally and utilize our billing services and data insight tools; advertisers can serve targeted and measurable ads to the TV viewers that they want to reach; Roku TV brand partners can build market share by offering high performance smart TVs in a range of sizes and price points; and retailers can offer customers Roku's highly-rated streaming devices on-line and in stores. In the U.S., all of these features and capabilities and Roku's overall value-proposition as a streaming platform are well-established and familiar to consumers, content publishers, and advertisers; and Roku looks forward to a policy and regulatory environment in the UK that allows us to bring this same value proposition to the UK and grow our platform in similar fashion.

We believe that offering consumers a wide range of content drives increased user engagement by delivering a better overall streaming experience, and we make it easy and affordable for our users to watch their favourite TV shows, movies, and sports, as well as streaming music, radio or podcasts. Furthermore, we believe our platform offers users an incredible streaming experience through a user interface that is intuitive and easy to use, while also allowing users significant freedom to configure the manner in which their favourite content services are displayed and arranged. From the Roku home screen, our users can easily find and access thousands of free and paid movies and TV episodes, including live TV, news, sports, hit movies, popular shows, and more that are available from the thousands of services on our streaming

¹ Roku supports the comments submitted by techUK, and offers its own comments to supplement and amplify a few of the points addressed in techUK's submission.

platform. And Roku's powerful search capabilities make it simple for our users to find the entertainment they're looking for. Roku's platform has been successful in no small part because of its user-friendliness.

That focus on the consumer, and facilitating consumer preferences, must lie at the core of policy-making with respect to public service content on streaming TV. If a determination is made that regulation is necessary, the primary objective of such regulation must always be the protection of consumers, consumer freedom of choice, and consumer demand. The respect for and facilitation of consumer demand for content should be the cynosure of regulation, and consideration should be given to avoid arbitrarily interjecting or interposing assumptions or artificial projections of consumer demand. Nor should policy favour any particular service, content, or business model. All streaming platforms are different, and there is a real risk that regulation could result in unequal implementation of policy, resulting in unfair competitive advantages and disadvantages in the streaming TV marketplace.

Whether public service or commercial content, the Roku platform also offers tremendous value to our content partners. We enable our content partners to publish streaming channels, quickly and easily, which makes us an attractive platform for content publishers to partner with as they seek to reach consumers. Content publishers can deliver content directly to our large and relevant audiences and reach those users who no longer use or those who never used legacy broadcast TV or paid TV subscriptions. As consumers shift to TV streaming, content publishers that use our platform are able to reach these streaming audiences at scale and engage users directly.

This is just as true for public service content creators as it is for subscription services, ad-supported services, and all other streaming services on our platform. For all content creators, including public service providers, streaming represents an enormous boost in availability and distribution. The untethering of content from physical broadcast and cable distribution networks represents a massive increase in the potential for distribution of content. Smaller content creators are no longer dependent on legacy outlets for distribution of their content, with multiple platforms available for development of streaming apps. Streaming allows a vast proliferation of niche, values-focused, issues-oriented, local and other often under-represented content. It also broadens the potential geographic reach of content creators. Global platforms allow small content creators as well as PSBs to distribute their content well beyond their traditional geographical boundaries. Policy and policymakers should focus on promoting, not constraining, streaming options for public service content.

To this end, Roku strongly encourages Ofcom and the Government to adopt progressive, forward-looking policies that reflect the changing and dynamic marketplace that has been fostered by the development of streaming television. Forbearance from regulation is appropriate unless and until it is determined that critical societal objectives cannot be met in the absence of regulation, and neither the mere passage of time since regulations were last adopted nor an evolution of technology are in and of themselves sufficient justifications for a "new regulatory regime." As DCMS warned the EU several years ago in connection with its

review of the Electronic Communications Framework, “We should avoid knee-jerk reactions to change.”² All industries must evolve to keep up with changes in technology and consumer demand, and overbearing and prescriptive regulation is not the solution for failure to do so. It is critical that policy-makers and regulators, particularly those in industries whose regulatory roots lie deep in the previous century, look forward to where markets and technology will be and not merely where they are now or where they were a decade or a century ago.

Nor should policymakers intervene in the exchange and distribution of value among market participants or place their thumb on the scales favouring any particular business model over another. Regulation must be designed to foster investment and innovation across the full range of the digital communications, media, and technology ecosystems. Policy should encourage investment, innovation and new ways of bringing services to **all** components of the evolving streaming TV ecosystem, not just the traditional, legacy network players. Roku believes there are myriad opportunities for growth, innovation and investment in streaming TV in the UK – particularly if policy is designed to encourage content creators and service providers to drive important products and services into the UK market in response to growing consumer demand.

Beyond these general precepts, Roku has concerns about two specific topics in the consultation: prominence and must offer/must carry.

PROMINENCE

“Prominence” is a specific regulatory by-product of 20th century linear broadcast television that has little or no relevance in the streaming world. The restrictive geometry of a two-dimensional, one-way scrolling grid is no longer a concern with or even applicable to the multi-dimensional, user-configurable world of streaming TV user interfaces. Roku’s platform provides a high degree of configurability, allowing users to freely change the location of apps within the user interface, essentially rendering prominence a non-issue. Regulation on this issue would artificially limit consumer choice, disadvantage small, start-up content providers, and represent nothing more than a transposition of legacy linear television regulation to the world of streaming TV. There simply is no need for regulatory intervention, particularly overly prescriptive regulatory requirements that could constrain and interfere with the ability of Roku and other platform operators to design user interfaces and provide the most relevant content that best meet the demands of their customers.

In consideration of this issue, as with most issues associated with transposing legacy media and broadcasting policy to online business models, care should be taken to avoid protecting or preferencing any particular content or content provider. Nor should policy entrench a

² Department for Culture Media and Sport, “UK Non-Paper: Review of the Electronic Communications Regulatory Framework, September 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/464971/20150903FINALDRAFTANNEXAFWRhighlevelobjectivesnonpaperdraftv3EV_1.pdf

regulatory scheme that effectuates a “design only with permission” principle. Policy should establish basic principles, such as availability and discoverability, and perhaps establish some guardrails around those principles. While it may retain enforcement authority for failure to adhere to such principles and guardrails, Ofcom should not arrogate to itself the power to approve or reject the appropriateness of a platform’s user interface design.³ Power must remain with platform operators to freely design their user interfaces, in the face of a highly competitive marketplace, to meet the needs of consumers to discover and arrange their favourite content. Policymakers should simply establish the principles necessary to ensure that consumers have access to and can find the content they want.

Policy should be designed to mitigate the problems of a “one size fits all” approach to these issues. Whilst establishing the concepts of availability and discoverability, regulation should not delve into details such as the overall look and feel or design of a platform’s user-interface. Nor should regulation prescribe any particular positioning of tiles or other representations of content on a platform or the manner in which a platform allows consumers to arrange those representations. Similarly, regulation should not interfere with the manner in which search is performed or search results are displayed on a platform. Streaming platforms should have the freedom to innovate, design and develop the best user interfaces and user experiences for their customers to meet their evolving habits and demand for content.

MUST OFFER/MUST CARRY (MOMC)

In the abstract, the general concept of a MOMC regime would appear to be a rational regulatory approach to ensuring availability of public service content on streaming platforms; however, it is nearly impossible to endorse, or even offer any detailed comments on, the prospect of a MOMC regime without first understanding the details of such a regime. In particular, any MOMC regime would have to include a set of regulatorily-approved, standard terms and conditions that would govern the relationship between parties in a MOMC regime, and without knowing what those standard terms and conditions would be, it is impossible to say whether they would be reasonable, appropriate, or acceptable. Accordingly, Roku believes it is premature to either endorse or reject the notion of a MOMC regime applicable to public service content on streaming platforms.

A must carry requirement has significant technical implications for streaming platforms that can result in substantial consumer harm. For example, requiring carriage without taking into account a platform’s technical capabilities could place a significant technical burden on a platform that may result in higher costs for the consumer. For example, Roku is typically the low-cost leader in streaming hardware, and we consistently drive down the price of hardware by reducing memory requirements, utilizing low-power / low-cost chipsets, and creating a proprietary low power software development kit that maximizes performance on Roku’s hardware. This low-power / low-cost strategy has direct consumer benefits. If Roku were

³ These principles, moreover, should be limited to the technical means by which consumers discover content, and should not be broadened into other aspects of the business relationship between PSBs and platform operators, including aspects of marketing and promotion of PSB content by platform operators.

forced to carry public service apps, and carriage provisions did not have to adhere to Roku's hardware and software certification requirements, Roku could be forced to upgrade device's memory, chipsets, or its software development kit that would ultimately result in more consumer expense.

If policy discussions move forward on this issue, Roku believes that certain principles must govern the discussion of any potential establishment of a MOMC regime for public service content on streaming platforms. First, any set of standard terms of conditions must be limited to no more than core business terms governing the carriage of public service content on streaming platforms. Care should be taken to resist any effort to inflate the scope of standard terms and conditions. In particular, terms pertaining to ownership and use of data, hardware and software certification requirements, marketing and promotion, and other areas beyond the core terms necessary to govern carriage of content should be well beyond the bounds of a set of standard terms and conditions. Allowing such provisions to creep into a set of standard terms and conditions invites the possibility of a free-for-all race to load up the standard terms and conditions to include every sort of special and niche term of every potentially interested party, and thus poses a real risk of expanding the potential "surface area" of inapposite regulatory intervention in commercial relationships. The adoption of a set of standard terms of conditions by Ofcom necessarily represents the circumvention of commercial negotiations between parties in favour of a regulatory imposition of terms and conditions between those parties. Great care must therefore be taken to ensure that Ofcom does not substitute its judgment for what would otherwise have been the result of commercial negotiations, and in no way endeavours to pick winners and losers in the marketplace. This is especially critical with respect to streaming because of the wide variety in features, functions and capabilities of streaming platforms. A one size fits all approach will be particularly challenging in this space.

In addition, any standard set of terms and conditions must represent the sum total set of contractual terms between parties. Parties should remain free to opt of MOMC and negotiate and reach agreement between themselves on any set of commercial terms, but any party invoking the MOMC regime must accept the standard set of terms and conditions, with no modifications or deviations. The rules of any MOMC regime must reflect this fundamental tenet. Anything other than strict adherence to the standard terms and conditions for parties who invoke the authority of MOMC undermines the entire basis for having a set of standard terms and conditions in the first place.

Finally, any effort to construct a MOMC regime must strictly delimit the set of public service companies who may invoke MOMC. Streaming platforms represent an unprecedented democratization of content distribution. Thousands of apps carrying content that might never have been carried by large content services, including PSBs, can now make their content available directly to the public on streaming platforms. It would be untenable to allow any such app to claim PSB status and invoke MOMC. Such an outcome would make a mockery of the entire notion of a PSB. Accordingly, if a MOMC regime is established, it should include a presumption that only the current PSBs are able to invoke MOMC. Any effort to broaden the

roster of PSBs beyond those presently established as such must be required to clear a high hurdle, based on specifically articulated, objective criteria.

CONCLUSION

There is no question that streaming is the future of TV. The consumer value of streaming TV depends on the availability of (and consumer demand for) compelling content. Policymakers and regulators should not interfere with the ability of streaming TV platform operators to deliver the content demanded by consumers in the manner consumers demand that such content be delivered. Only by focusing relentlessly on the perspective of consumer demand, coupled with a regulatory mindset that appreciates the value of the entire digital media ecosystem and fosters a positive environment for the development and proliferation of compelling content, applications, and services will the promise of streaming TV be fulfilled.