

Protecting participants in TV and radio programmes

Response from the Commercial Broadcasters Association to Ofcom

September 2019



A VOICE FOR COMMERCIAL BROADCASTERS IN THE UK

Executive Summary

1. We welcome Ofcom's consultation as an important opportunity to provide clarity for the industry and develop best practice.
2. Based on member feedback, we would like to make two main points. It is vital to provide sufficient flexibility in different genres and types of programmes as to the level of care that is expected. As well as varying according to genre, the appropriate level of care may also vary for original productions or commissions as opposed to acquisitions. The inclusion of "due" is therefore vital.
3. Secondly, Ofcom should consult in detail on its guidance – not just in the general approach but on draft wording. We have identified several areas where greater clarity is needed, but given the sensitive and complex nature of the issues in question we would prefer to have an opportunity to consult on the wording of the guidance itself.

Introduction

1. COBA is the UK industry body for commercial broadcasters and on-demand services. COBA members operate a wide variety of channels and services, including news, factual, children's, music, arts, entertainment, sports and comedy. Their content is available on free-to-air and pay-TV platforms, as well as on-demand.
2. COBA members are arguably the fastest growing part of the UK television industry, and are increasing their investment in jobs, UK content and infrastructure. They make this investment without public support, direct or indirect.
 - Scale: In the last decade, the sector has increased its turnover by 30% to more than £5 billion a year. This is rapidly approaching half of the UK broadcasting sector's total annual turnover, and has helped establish the UK as a leading global television hub.¹
 - Employment: As part of this growth, the multichannel sector has doubled direct employment over the last decade.²
 - UK production: In addition, the sector has increased investment in UK television content to a record £1.1 billion per annum, up nearly 75% on 2011 levels.³
3. For further information please contact Adam Minns, COBA's Executive Director, at adam@coba.org.uk or 0203 327 4101.

¹ Ofcom International Broadcasting Market Report 2013

² Skillset, Television Sector – Labour Market Intelligence Profile

³ COBA 2019 Content Report, Oliver & Ohlbaum Associates for COBA

Response to questions

Question 1: Do you agree with our rationale for proposed new Rules 2.17 and 2.18? Please give reasons for your answer.

Yes. We acknowledge that over 18s may be vulnerable and that broadcasters and producers have a duty of care. Ofcom's consultation provides an important opportunity to provide clarity for the industry and develop best practice.

However, it is vital to retain the word "due" to provide sufficient flexibility in different genres and types of programmes. The level of care for a broadcaster or producer could justifiably be very different for participants appearing in different types of programmes. Ofcom should be absolutely clear on the different criteria it intends to use and, assuming these will be developed in accompanying guidance, we urge the regulator to consult with industry on the actual wording. It is worth noting that, in the vast majority of cases, participation in a programme is a positive experience.

Several members have also noted that programmes that are acquired from third-parties may require a different approach to those that the broadcaster produces or commissions itself. Again, this should be developed in the guidance, in close consultation with industry. In such cases, one possible approach might be for the onus to fall on the contributor to contact the broadcaster and for the broadcaster and contributor to have the opportunity to resolve the matter before Ofcom is involved.

We also note that Ofcom appears to be seeking to regulate the treatment of participants via Section 319 of the Communications Act, which refers to standards for the content of programmes rather than the treatment of participants. As such, the proposals could allow any viewer to raise a complaint, rather than participant themselves. The new rules might sit better in the Fairness and Privacy Section of the Code rather than Harm and Offence.

Question 2: Do you agree with the proposed meaning of 'participant' for the purpose of these rules? Please give reasons for your answer.

We have a number of concerns. Firstly, where the nature of involvement of a member of the public changes. For example, a person may appear anonymously (e.g. blurred) and then subsequently consent to appear. It is unclear to us whether the broadcaster's responsibility according to Ofcom would change in these circumstances.

Secondly, we ask for greater clarity on active and passive members of the public. For example, it should be clear that audience members, including those who might ask a

question, are not participants in the programme. Ofcom should be clear that to qualify as a participant involves significant contribution to the programme.

In addition, the Guidance should have a specific section on those who agree to participate in news and documentary programmes. The proposed principles use the examples of players in a sports game as those who have not given consent and are therefore not participants. It would be helpful if the Guidance could also use the example of those who appear in news coverage.

The Guidance should also make clear that Rule 2.18 cannot be used by a willing participant in, for example, a tough news interview to seek to prevent its transmission because they claim their portrayal causes unjustified distress or anxiety. Someone interviewed on a controversial topic may regret participating in a fair and balanced interview if they fail to get their own point of view across. This rule must not be used to prevent the transmission of news, current affairs or documentary programming that meets the other Rules of the Code (fairness, accuracy etc.) because of distress in the context of news and documentaries, if due care has been taken as to the participants welfare.

Question 3: Do you agree with the proposed scope of these rules? Please give reasons for your answer.

Yes, with the caveats outlined in response to Question 1.

Question 4: Do you agree with the proposed wording for the new Rules 2.17 and 2.18? Please give reasons for your answer.

On 2.18, we ask for further clarity on deciding what is justifiable or not. While we do not object to the use of term itself, without guidance this could potentially be used for vexatious claims. On a similar note, the definitions of “welfare” and “wellbeing” are unclear and should be addressed in guidance.

Question 5: Do you agree that Rule 1.28 should be amended in this way? Please give reasons for your answer.

Yes, with the caveats outlined in response to Question 1.

Question 6: Do you agree that Rule 1.29 should be amended in this way? Please give reasons for your answer.

Yes, with the caveats outlined in response to Question 1.

Question 7: Do you agree with the proposed approach to the Code guidance? Please give reasons.

We are unclear as to Ofcom's intended process beyond consulting on its general approach. This is an extremely complex area and we would support Ofcom consulting on a draft of its Guidance, not just on its general approach. We have already noted several instances where the guidance should seek to provide clarity. In addition, the Guidance should reflect the different approaches needed for different types of programmes, types of contribution, and different types of participants. As part of this, it should recognise that, for many programmes, background checks, risk assessments, and engaging expert support may not be necessary.

Question 8: Can you provide examples of best practice in the due care of programme participants which you think should be included in the guidance? Please share details if possible.

n/a