

Review of rules for prominence of public service broadcasters and local TV

Response from the Commercial Broadcasters Association to Ofcom

October 2018



A VOICE FOR COMMERCIAL BROADCASTERS IN THE UK

Executive Summary

1. The Commercial Broadcasters Association (COBA) has consistently argued that both Public Service Broadcasters (PSBs) and multichannel broadcasters have important roles to play in the exceptional success story of the UK television sector. Investment from a variety of sources – licence fee, advertising, subscription and increasingly on-demand – all underpin the creation of UK content, innovation in technology, and the provision of a variety of services that delivers choice for UK audiences. The BBC and other Public Service Broadcasters still provide the majority of investment in UK production, but the proportion derived from non PSBs is growing rapidly. Moreover, while PSBs are vital to this mixed ecology, non PSBs provide content and services that they cannot deliver, such as catering to niche audiences with in-depth arts or factual content that could not be supported on a mainstream channel.
2. The proposals set out by Ofcom for changing the linear EPG Code risk harming this ecology by damaging the health of non PSB channels and their ability to invest in content and new services, in order to address a perceived problem which has not been evidenced. In our view the proposals are therefore disproportionate.
3. In terms of the on-demand proposals, we acknowledge that the prominence of PSB on-demand services is important, as on-demand is of course an increasingly important part of audiences' viewing. However, we do not believe there is a credible threat to the discoverability of PSB on-demand services currently or in the foreseeable future. This is a complex and fast evolving area and Ofcom should first establish whether audiences are genuinely experiencing difficulties in discovering PSB content, and if they are set out detailed proposals for intervention that can be tested through consultation with industry.
4. Our primary concern, though, is with the proposals to take a more prescriptive approach for linear rules. This will be potentially destabilising for many commercial channels and, respectfully, we believe that Ofcom has failed to make an evidence-based case for why change is necessary. This is in our view inconsistent with Ofcom's statutory requirement in performing its duties to have regard "in all cases" to acting in a way that is "transparent, accountable, proportionate, consistent and targeted only at cases in which action is

needed.”¹ In particular, we do not believe the proposals are targeted at cases in which action is necessary, or that they are objectively accountable, transparent or proportionate. This is for a number of reasons:

- Ofcom has not evidenced any need for change from an audience perspective. On the contrary, Ofcom’s own audience research indicates that the greater majority of viewers do not even believe that EPG positioning is in any way important.
- Ofcom has not evidenced that PSBs are failing to meet their statutory duties, or that EPG positioning is undermining PSB delivery.
- The current system is working well, with just three complaints in the 15 years since the 2003 Communications Act.
- Ofcom has underestimated the potentially significant negative impact on commercial channels of the proposals. COBA has commissioned independent analysis from Oliver & Ohlbaum Associates on this point, which we outline in this submission.
- The proposals will harm competition in the children’s genre, where the BBC is already the only portfolio that has increased audience share in recent years. This will result in a negative impact on overall investment in UK children’s content.
- Finally, Ofcom argues that it has weighed up the public value supposedly created by the proposals against the commercial impact. However, it has not set out the criteria on which it has done so.

5. To address those points in more detail:

Audiences appear content with current EPG numbering

6. As Ofcom observes in the consultation paper, one of Ofcom’s statutory duties in reviewing the EPG Code is “to further the interests of citizens and consumers in relation to communication matters”.² Ofcom’s current EPG Code goes further, saying that Ofcom will “have regard to the interests of citizens and expectations of consumers in considering whether a particular approach to listing public service channels constitutes appropriate prominence.”³

¹ Communications Act 2003, General Duties of Ofcom, 3 (3) a

² Review of rules for prominence of public service broadcasters and local TV, Ofcom, 3.9

³ Ibid, 3.12 (b)

7. Ofcom's proposals in this consultation are strangely inconsistent with its own audience research, which indicates that the greater majority of viewers do not attach any importance at all to the EPG discoverability of PSB channels. For some PSB channels, as little as 12% of adults placed any importance on EPG discoverability. Of the minority that do attach some importance to EPG positions, there is no indication from Ofcom's research that they are experiencing any difficulty in discovering PSB channels.
8. The lack of audience concern about this issue echoes the conclusion of Technologia's 2012 report, which noted:

“There appears to be no consumer lobby seeking change to EPG regulation per se, though, when asked, consumers do have views on such matters as the positioning of adult content.”⁴
9. If Ofcom does not believe that this research is detailed or robust enough on which to base a decision, it should commission further analysis in this area to ensure its proposals take into account the interests of citizens and consumers, as it is required to do. We note that Ofcom's accompanying report on discoverability does not include any further audience research.

No evidence of PSB failure

10. Neither Ofcom nor the PSBs have demonstrated that PSBs are unable to fulfil their public service duties because of their EPG positions. Ofcom notes that “PSB channels remain highly viewed.”⁵ Furthermore, Ofcom and the commercial PSBs recently agreed new public service licences after a detailed review of their conditions, which concluded that the balance between benefits and obligations was sustainable.

Current system working well

11. As Technologia's report for the DCMS in 2012 stated:

“One of our primary conclusions is that the platform operators and broadcasters that are subject to the current system of EPG regulation generally consider that the system works well. Ofcom is the arbiter of disputes

⁴ The value and optimal management of channel position and prominence on electronic programme guides, Technologia for DCMS, 2012, page 6, point 7

⁵ Review of rules for prominence of public service broadcasters and local TV, Ofcom, 5.20

or complaints in relation to regulated EPGs and has only been asked to intervene twice under the Communications Act since 2004.”⁶

12. In the five years since the Technologia report, we are aware of only one further dispute, over ESTV channels on the Virgin Media EPG.
13. Furthermore, as a general principle, it is in our view perfectly appropriate for PSB channels to appear in different slots on different platforms. One important factor that Ofcom should take into account is that audiences using different platforms may well have different expectations. For example, a viewer who has paid for subscription channels is likely to value them more highly than someone who has not. It is right that the current regime allows for platforms to take such variations into account.

Proposals will have a disproportionate negative impact on the market that Ofcom has not fully considered

14. Ofcom’s analysis significantly underestimates the impact on commercial channels for the following reasons:
 - Free-to-air platforms: We are concerned that Ofcom has not quantified the impact for channels on the free-to-air platforms (Freeview, YouView and Freesat). COBA appointed O&O to look at these points. According to their findings, in addition to the impact of around £3m for channels on the Sky platform that Ofcom identifies, there could be a further negative impact of up to £2m annually in lost advertising revenues for commercial channels on the free-to-air platforms.
 - Virgin Media: In assessing the impact on slot income for Virgin Media, Ofcom has assumed that this will be passed on in savings to broadcasters. There are no indications that this will be the case, and certainly no requirement on Virgin Media to do so. In addition, Ofcom has not considered the potentially negative impact upon audience performance that could affect commercial channels required to move down the Virgin EPG in order to accommodate its proposals – and the potential for lost ad revenue as a result. O&O estimates that this could be up to £6.1m per annum. As Ofcom’s estimated £25m “savings” figure for broadcasters on Virgin is a lump sum to effectively be spread over the duration of a carriage deal (generally five years), it amounts to an approximate £5m annual saving for broadcasters in the very best

⁶ The value and optimal management of channel position and prominence on electronic programme guides, Technologia for DCMS, 2012, page 5, point 6

case scenario (assuming Virgin passes this saving on to channels in its entirety). Even in this scenario, channels could be negatively impacted by as much as £1m per year on Virgin, and – if Virgin chooses to pass on only a fraction, or none, of the implied “saving” – by potentially far more.

- Area-specific EPGs: Ofcom assumes proposals relating to Channel 4 in Wales would not have an impact beyond the Welsh EPG. We believe that it is in fact more likely that platforms will require channels across the UK to move to the same channel numbers – and sometimes the same slots - as those displaced in Wales in order to have a consistent approach.
 - This amounts to a negative impact on commercial broadcasters of up to £6m a year in the very best case scenario, assuming Virgin passes all the reduction in slot rental fees on to channels. It should also be noted that these estimates only consider lost advertising revenues. In addition, channels may lose significant further revenues in their carriage arrangements with pay TV platforms, which generally include a link to audience or subscriber share.
15. This comes at a time of great uncertainty for many of those channels, who are facing growing competition from less regulated on-demand services in just the same way as PSBs. Compounding this is uncertainty over future licensing arrangements after Brexit, a depressed advertising market and proposed HFSS advertising restrictions. It should be borne in mind that an EPG position, as a key driver of audience share, is a fundamental part of a channel’s long-term business plan. In this way, it is linked to wider decisions about investment in the channel’s development, such as staff, marketing and of course content. These proposals increase uncertainty for many channels.
16. On this point, the Technologia report commissioned by DCMS in 2012 stresses that an EPG position is an intrinsic part of a channel’s business model. In helping to determine audience levels and thereby driving advertising and subscription revenues, it will be part of the calculations on which a channel’s entire strategy will be based. As Technologia concluded:
- “EPGs are an intrinsic and well developed part of the business ecosystem within which TV production and broadcasting takes place. They are also part of the competitive landscape as evidenced by the market in EPG slots on the Sky platform. Changes to the regulation of EPGs will have extensive

consequences, potentially resulting in an undesirable level of instability in the system.”⁷

17. Technologia also warned that increasing uncertainty for businesses could impact on the wider supply chain:

“The content production and distribution value chain is complex and inter-related. For example, any change that signalled that channel owners could not be confident in their ability to retain an EPG slot once they had acquired it would risk discouraging investment in future EPG slots and, more importantly, the content commissioned to be shown on these slots.”⁸

Damaging competition in the children’s sector

18. Ofcom has a core duty “to further the interests of consumers, where appropriate by promoting competition,”⁹ and to have regard to “promoting competition in relevant markets.”¹⁰

19. The proposals for the children’s genre run counter to this, as they will damage competition in this important but potentially underserved genre. CBBC and CBeebies are the only children’s portfolios that have grown audience share in recent years, including on the Sky platform where they have lower EPG positions. In contrast, pay TV children’s channels on the Sky platform have lost audience share over the same five-year period, a fact which the proposals would be likely to exacerbate.

20. Particularly in the children’s genre, the BBC has a number of in-built competitive advantages over commercial channels, which also make it less reliant on EPG positions. These include cross promotion across a wider variety of services – including non kids channels – than its competitors, brand awareness and the absence of advertising, which some parents may prefer. This principle is acknowledged by Ofcom in its consultation, which notes:

“A number of other factors may also influence a channel’s viewing, such as other features of the channels (e.g. brand, audience loyalty, quality or appeal of content, cross-promotion or other marketing)”.¹¹

21. According to BARB data, the BBC portfolio reaches 7.4 million children a month, more than three times the number of children reached by some

⁷ Ibid, page 7, point 14

⁸ Ibid, page 7, point 15

⁹ Communications Act 2003, General Duties of Ofcom, 3 (1) (b)

¹⁰ Ibid, 3 (4) (b)

¹¹ Review of rules for prominence of public service broadcasters and local TV, Ofcom, page 14, 4.6

leading children's broadcasters in the pay TV market. Amongst the BBC shows attracting the highest numbers of children viewing are EastEnders and MasterChef, shows outside their core children's services. This highlights the immense cross-promotional power that the BBC has compared to other children's broadcasters that do not have a significant presence outside the dedicated children's genre.

22. This point is picked up in Ofcom's own analysis of BARB data for this consultation. Ofcom notes that, while the report from EMP suggests increased prominence would increase audiences for the BBC channels hypothetically, BARB data is "less persuasive", showing that in reality a higher EPG position makes little or no difference to the BBC children's channels.¹² Ofcom's proposal to change its EPG Code therefore seems particularly inconsistent with its own analysis in the children's genre.
23. Furthermore, analysis of channel switching shows that, on average, 74% of viewing to any children's channel on Sky originates from outside the kids' EPG (i.e. switching directly to that channel). The percentage of children switching directly to CBBC and CBeebies is higher (75% and 82% respectively), showing that they are already viewing destinations and highlighting their high levels of brand awareness.
24. Our point is two-fold – the BBC already has significant competitive advantages, and the impact from Ofcom's proposals is likely to be greater for other channels that it is for the BBC.

Negative impact on investment in UK children's content

25. As a result of the impact we have outlined above, the children's genre is likely to suffer a net decline in investment in UK content as a result. This is because the BBC channels do not require audience share to support their content budgets, while every other channel does. As we detail, Ofcom's estimate for the negative impact on children's channels on the Sky platform is equivalent to nearly 10% of their average annual investment in first run UK children's originations.

Lack of objective criteria on which proposals are based

26. The current consultation argues that the public value of awarding greater prominence will outweigh the impact on the market, but this is made as an assertion rather than established according to any objective criteria. Indeed,

¹² Annex 7 to the Consultation, Discussion of Changes to the Code, Ofcom, A7.39

no such criteria are set out, with the proposals for change apparently based on an arbitrary decision. For example, the proposal to move the BBC children's channels to page one but other channels, including BBC Four and nation-specific channels, to page three appears to be particularly arbitrary.

27. We therefore ask Ofcom to either withdraw its linear proposals or to conduct further research into whether audiences are able to find PSB services, and to consider the impact on the commercial sector in greater detail. We also ask Ofcom to set out the objective criteria by which it has weighed up the anticipated increase in public value against the negative impact on the market.

Proposals for on-demand services

22. Many of our concerns about the linear proposals apply for on-demand prominence. We see no risk to PSBs currently, given the prominence of their on-demand services already, and Ofcom has not provided any evidence that there is a credible threat in the foreseeable future. We note the conclusions of the Government's 2016 review of this matter, which concluded that "Government has not seen compelling evidence of harm to PSBs to date."¹³
23. We are also deeply concerned that Ofcom's proposals have not detailed how prominence could or should work in many areas, such as how search and recognition would function. These are complex issues and fast evolving, and any intervention must be careful not to dampen innovation or unfairly distort the market. Furthermore, extending prominence rules to the devices themselves presents a different and challenging set of legislative hurdles, particularly as some devices will be manufactured overseas by overseas companies.
24. If Ofcom does propose changes to linear and/or on-demand prominence then we would also ask the regulator to consider the resulting commercial benefit to PSBs and factor that into future discussions about the value of the PSB licence and the balance of duties and obligations.
25. The regulator should also be clear that the commercial PSBs' on-demand services are currently not statutory PSB services and are not subject to any additional rules over and above those that apply to all on-demand services. This was one of the key points raised in the Government's report on PSB prominence in 2016, which stated:

¹³ The Balance of Payments between television platforms and public service broadcasters, Government response, July 2016, page 24

“Furthermore, it is worth noting that the commercial PSBs’ players are not licensed public services themselves but additional commercial services that offer access to their non PSB channel content as well as PSB content: affording them access to the prominence regime would mean extending PSB privileges to non PSB channels and content, and consideration would also have to be given to the inclusion or exclusion of the ‘must offer’ regime as well. The case for the BBC’s iPlayer is clearly different given that this is a PSB service, but evidence to date suggests that the compelling nature of the content is enough to allow the BBC to retain prominence without the need for additional regulation.”¹⁴

26. As the DCMS report – and indeed Ofcom’s consultation paper – are clear, the PSB on-demand services carry non PSB content as well as content from their main PSB service. This may be from their non PSB portfolio channels or direct to on-demand programming.
27. Nor is it enough in our view for commercial PSBs to argue that their on-demand services will only show content from their statutory PSB channels. Even if this were the case, their main PSB channels carry a broad range of content, some of which is highly commercial, and are therefore themselves subject to strict requirements on scheduling, so that less commercial genres such as news are available in peak time, for example.
28. In order to ensure that public service content is genuinely discoverable on these on-demand services, they should be required to ensure that news content and other core public service genres, as well as Out of London programming, are prominent **within** their on-demand or catch-up services. This would provide a digital equivalent to schedule-based requirements to show a certain amount of news and other PSB content in prime time on linear services, and guarantee that such content is not “hidden” behind more commercial genres. Otherwise, we would fully expect the commercial PSB on-demand services to prioritise their most popular content. There should also be a must offer obligation to ensure that public service content is universally available, one of the cornerstones of the entire public service broadcasting regime.
29. Failure to set such requirements in return for prominence would risk creating unfair competition, and do little to guarantee the discoverability of public service content on on-demand services.
30. Furthermore, the on-demand services of the commercial PSBs are not licensed statutory public services. We would assume that if they are awarded

¹⁴ Ibid, page 24

prominence then they should be made statutory public services, with the corresponding public service requirements including must offer and a commitment to show certain genres of public service content prominently within their players. Ofcom should be clear on this in any recommendation to Government to extend the prominence regime.

Introduction

1. The Commercial Broadcasters Association (COBA) is the UK industry body for multichannel broadcasters in the digital, cable and satellite television sector, and their on-demand services. COBA members operate a wide variety of channels, 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.¹⁵
 - Employment: As part of this growth, the multichannel sector has doubled direct employment over the last decade.¹⁶
 - UK production: In addition, the sector has increased investment in UK television content to a record £725m per annum, up nearly 50% on 2009 levels.¹⁷
3. For further information please contact Adam Minns, COBA's Executive Director, at adam@coba.org.uk or 0203 327 4101.

¹⁵ Ofcom International Broadcasting Market Report 2013

¹⁶ Skillset, Television Sector – Labour Market Intelligence Profile

¹⁷ COBA 2014 Census, Oliver & Ohlbaum Associates for COBA

Response

Q1) Do you agree with our proposals that the main five PSB channels hold the top five slots on EPGs provided UK wide or in the UK outside of Wales?

- 1.1 This is already the case in practice across all major platforms. We see no problem arising from the current wording in the Code, and no reason to change it.

Q2) Do you agree that on EPGs provided for viewers specifically in Wales BBC One, BBC Two and the relevant Channel 3 service should take the top three slots, with S4C in slot four, Channel 5 in slot five and Channel 4 guaranteed a position on the first page?

- 2.1 Again, other than the position of Channel 4, this is already the case in practice and we see no reason for changing the Code.
- 2.2 Our main concern about this proposal, however, is moving Channel 4 to a guaranteed position on the first page. In our view, the case for guaranteeing Channel 4 a page one position has not been made. The original intention of Parliament was for a Welsh-language channel to have prominence in Wales, not Channel 4. We are not aware of any evidence that audiences in Wales are struggling to locate Channel 4. The published findings from Ofcom's audience research for this consultation offer little insight on this, other than to say "a significant proportion of viewers place at least some importance" on the discoverability of the main PSB channels. We note that Ofcom does not provide a precise figure, and that the reference to "at least some importance" suggests the overall strength of opinion was not high. Nor does this research address the specific views of audiences in Wales regarding Channel 4, although the greater majority (88%) seem to attach no importance to S4C's discoverability at all. Overall, this research does not suggest Welsh viewers are experiencing a problem finding Channel 4 on the EPG.
- 2.3 This lack of evidence that there is a problem created by the current regime should be considered alongside the fact that moving Channel 4 would cause disruption to channels across the UK, not just in Wales, something which Ofcom does not appear to have factored into its impact assessment. EPG providers are likely to want to move channels on all EPGs, not just in Wales, in order to put them at the same number regardless of the geographical location

of viewer, thereby ensuring consistency for marketing materials and easy discoverability for viewers. This could potentially impact many channels across the UK on the free-to-air and Sky platforms. We have commissioned independent analysis on this from Oliver & Ohlbaum, who found that the overall impact from Ofcom's combined proposals (i.e. not just those related to the Welsh EPG) on channels on the free-to-air platforms (Freeview, YouView and Freesat) could be a further negative impact of up to £2m annually in lost advertising revenues.

- 2.4 This is in addition to the impact on commercial channels on Sky. On this, we note that Ofcom has only estimated the impact on advertising revenues from lost audience share. There would be a potential additional impact on carriage deals with subscription platforms, which are also linked to audience/subscriber numbers.
- 2.5 We therefore ask Ofcom to withdraw the proposal to move Channel 4 on the Welsh EPG, or at least to conduct further research to understand the impact of the change and to establish whether audiences are experiencing a problem.
- 2.6 If Ofcom does indeed decide that Channel 4 should be guaranteed page one in Wales, the regulator should consider the additional commercial benefit for Channel 4 in terms of increased audiences, and factor this in in assessing Channel 4's statutory public service duties. Failure to do this would in our view undermine the Public Service Broadcasting regime, which rests on the regulator maintaining a balance between benefits and duties, and would potentially lead to unfair competition.

Q3) Do you agree that BBC Four should be guaranteed a slot within the top three pages of all EPGs?

- 3.1 As mentioned in our response to Question 1, this is already the case in practice across all major platforms. We see no problem arising from the current wording in the Code, and no reason to change it.

Q4) Do you agree that the designated public service News channels (currently BBC News and BBC Parliament) should be guaranteed slots on the first page of the news genre section or an equivalent position within the grouping of news channels on the EPG, as applicable?

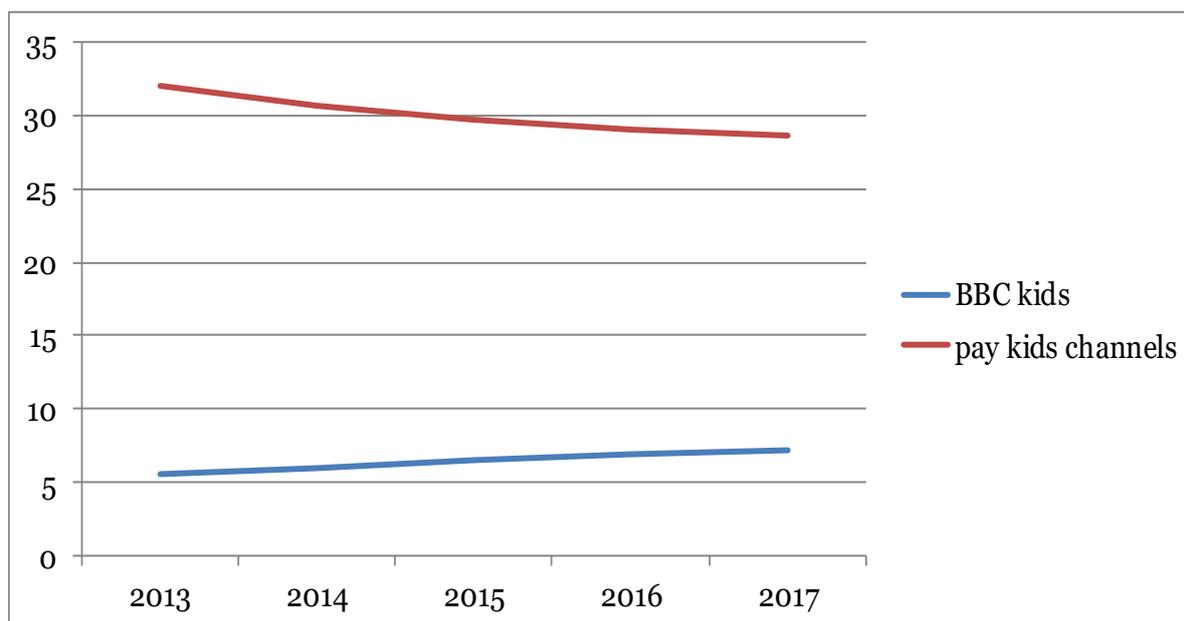
4.1 Please see answer to Question 3 above.

Q5) Do you agree that CBeebies and CBBC should have guaranteed slots on the first page of the Children’s genre or area of the EPG, as applicable?

5.1 No. Ofcom has not provided any evidence to suggest the current arrangements are causing problems for audiences. This proposal would harm competition in the children’s genre and undermine investment in UK kids content. This would run counter to Ofcom’s core duty to have regard to “promoting competition in relevant markets.”¹⁸

5.2 According to new analysis of BARB data for this response, the BBC children’s channels have increased their audience share on the Sky platform in the last five years by 8%. In contrast, the combined audience share of the pay children’s channels on the Sky platform has declined by 16% over the same five-year period, as shown below.

BBC children’s vs pay TV children’s audience share – Sky platform

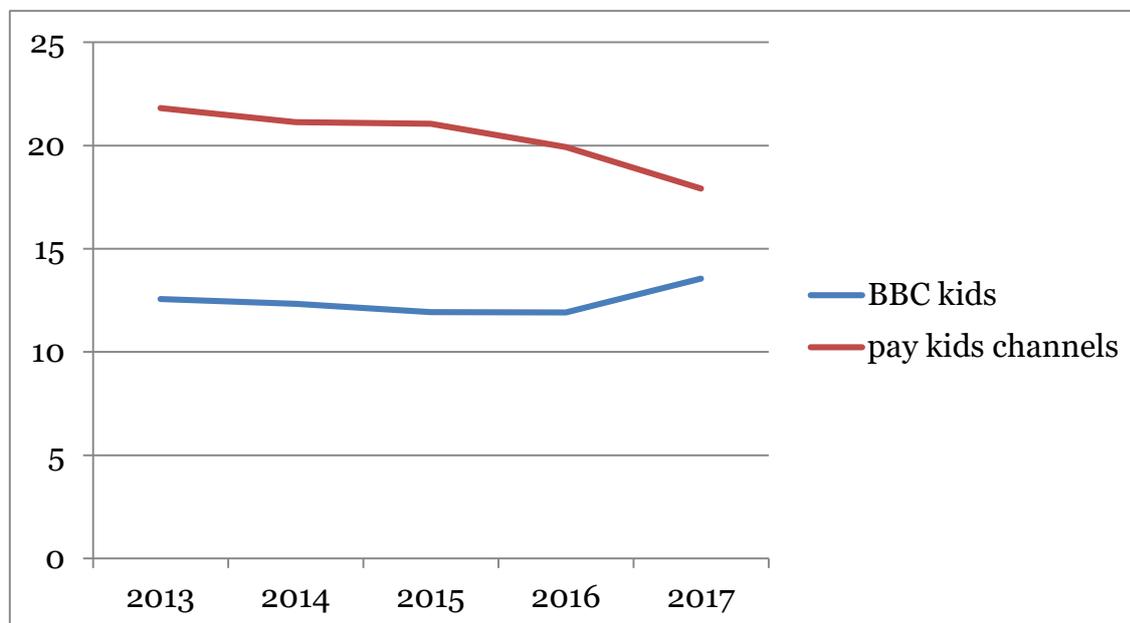


Source: BARB data

¹⁸ Ibid, 3 (4) (b)

5.3 The picture of declining pay TV share and increasing BBC share is similar across all platforms in the children’s genre.

BBC children’s vs pay TV children’s audience share – all platforms



Source: Barb data

5.4 Ofcom’s proposals would be highly likely to exacerbate this trend, undermining competition in this genre. Ofcom acknowledges that “our proposals would likely involve costs to non PSB broadcasters that move down the EPG, through loss of viewing and subsequent revenue loss.”¹⁹

5.5 The fact that the BBC kids’ channels have grown linear share, while the rest of the children’s sector has declined, highlights their existing competitive advantages, including strong brand awareness and cross promotional advantages. According to BARB data, the BBC portfolio (including non-children’s channels) reaches 7.4 million children a month, more than three times the number of children reached by some leading children’s broadcasters in the pay TV market. Amongst the BBC shows attracting the highest numbers of children viewing are EastEnders and MasterChef, shows outside their core children’s services. This highlights the immense cross-promotional power that the BBC has compared to other children’s broadcasters that do not have a significant presence outside the dedicated children’s genre.

¹⁹ Review of rules for prominence of public service broadcasters and local TV, Ofcom, page 27, 5.48

- 5.6 Furthermore, analysis of channel switching shows that on average 74% of viewing going to any kids' channel on Sky comes from outside of the kid's EPG (i.e. switching directly to that channel). The percentage of kids switching directly to CBBC and CBeebies is higher (75% and 82% respectively), showing that they are already viewing destinations.
- 5.7 These points are reflected in Ofcom's own analysis of BARB data for this consultation. Ofcom notes that, while the report from EMP suggests increased prominence would increase audiences for the BBC channels hypothetically, BARB data is "less persuasive", showing that in reality a higher EPG position makes little or no difference to the BBC children's channels.²⁰ Ofcom's proposal to change its EPG Code therefore seems particularly inconsistent with its own analysis in the children's genre.
- 5.8 Requiring commercial channels to take inferior EPG positions is likely to exacerbate their decline in share, and in so doing increase pressure on their ability to invest in UK content. We have already given Ofcom a detailed breakdown of investment in UK children's production by COBA members, which was worth more than £20m last year. This content is provided by COBA members without public subsidy in a safe, heavily regulated space.²¹ Investment in this content, however, is largely predicated on generating a return through advertising and subscription revenues, which are linked to audience share. This would result in a net decline in children's investment, given that the licence-fee funded BBC channels would not increase their commissioning spend on the basis of improved EPG positions.
- 5.9 Ofcom estimates that the impact on revenues for children's channels of its proposed changes would be £1.4m.²² Ofcom suggests that this might be mitigated by channels increasing their marketing spend to compensate for inferior EPG positions. While we reserve judgement on the accuracy of this estimate, £1.4m is not insignificant in the children's genre, given the already declining audience share we have noted. Even if mitigated by increased marketing spend, this would still increase pressure on investment in UK content – increasing marketing spend would still necessitate diverting resources from other areas, such as content budgets. In our view, there is a direct relationship between revenues and content budgets, and it is not unrealistic to expect a comparable decline in investment in UK content as a result. £1.4 million represents nearly 10% of COBA members' combined

²⁰ Annex 7 to the Consultation, Discussion of Changes to the Code, Ofcom, A7.39

²¹ Response to Ofcom's Children's Content Review, COBA, January 2018

²² Annex 7 to the Consultation, Discussion of Changes to the Code, Ofcom, A7.42

average annual investment in first-run UK content over the last three years (£15.6m).

- 5.10 In terms of Ofcom’s audience research, we note that only a minority of adults thought it was important that the BBC children’s channels were easy to find on their EPGs. The research does not indicate whether any adults thought that this was not the case currently, or whether they experienced any difficulty in finding the channels.
- 5.11 Furthermore, this proposal appears to be particularly arbitrary. We are unclear why the BBC children’s channels should be guaranteed page one, but BBC Four on the top three pages. We ask Ofcom to set out its thinking on this, including the objective criteria it has used.

Q6) Do you agree that S4C, BBC Alba, and BBC Scotland should be guaranteed prominence within the first three pages of UK wide EPGs?

- 6.1 No. This is one of the most potentially disruptive proposals in this consultation. A high number of commercial channels could be displaced as a result. As Ofcom acknowledges, this would result in a loss of audience share and revenues. However, we believe Ofcom’s analysis underestimates the impact on commercial channels in this area. Firstly, Ofcom has not quantified the impact for channels on the free-to-air platform. Secondly, Ofcom has assessed the impact on slot income for Virgin Media, not the loss in advertising revenue for channels that are moved.
- 6.2 As we have mentioned, COBA appointed O&O to look at these points. To take the free-to-air platforms first, according to O&O, in addition to the impact of around £3m for channels on the Sky platform that Ofcom identifies, there could be a further negative impact of up to £2m annually in lost advertising revenues for commercial channels on the free-to-air platforms.
- 6.3 In terms of Virgin Media, in assessing the impact on slot income for Virgin Media, Ofcom has assumed that this will be passed on in savings to broadcasters. There is no indication that this will be the case, and certainly no requirement on Virgin Media to do so. In addition, Ofcom has not considered the potentially negative impact upon audience performance that could affect commercial channels required to move down the Virgin EPG in order to accommodate its proposals – and the resulting potential for lost ad revenue. O&O estimates that this could be up to £6.1m per annum. As Ofcom’s estimated £25m “savings” figure for broadcasters on Virgin is a lump sum to

effectively be spread over the duration of a carriage deal (generally five years), it amounts to an approximate £5m annual saving for broadcasters in the very best case scenario (assuming Virgin passes this saving on to channels in its entirety). Even in this scenario, channels could be negatively impacted by as much as £1m per year on Virgin, and – if Virgin chose to pass on only a fraction, or none, of the implied “saving” – by potentially far more.

6.4 This comes at a time of great uncertainty for many of those channels, who are facing growing competition from less regulated on-demand services in just the same way as PSBs. Compounding this is uncertainty over future licensing arrangements after Brexit, a depressed advertising market and proposed HFSS advertising restrictions. It should be borne in mind that an EPG position, as a key driver of audience share, is a fundamental part of a channel’s long-term business plan. In this way, it is linked to wider decisions about investment in the channel’s development, such as staff, marketing and of course content. Far from providing more certainty for the market, these proposals increase uncertainty.

6.5 On this point, the Technologia report commissioned by DCMS in 2012 stresses that an EPG position is an intrinsic part of a channel’s business model. In helping to determine audience levels and thereby driving advertising and subscription revenues, it will be part of the calculations on which a channel’s entire strategy will be based. As Technologia concluded:

“EPGs are an intrinsic and well developed part of the business ecosystem within which TV production and broadcasting takes place. They are also part of the competitive landscape as evidenced by the market in EPG slots on the Sky platform. Changes to the regulation of EPGs will have extensive consequences, potentially resulting in an undesirable level of instability in the system.”²³

6.6 Technologia also warned that increasing uncertainty for businesses could impact on the wider supply chain:

“The content production and distribution value chain is complex and inter-related. For example, any change that signalled that channel owners could not be confident in their ability to retain an EPG slot once they had acquired it would risk discouraging investment in future EPG slots and, more importantly, the content commissioned to be shown on these slots.”²⁴

²³ Ibid, page 7, point 14

²⁴ Ibid, page 7, point 15

- 6.7 For these reasons, we believe Ofcom’s proposals are disproportionate. Given the potential disruption for many channels, it is in our view incumbent on Ofcom to clearly evidence the need for change. Respectfully, we do not believe this has been done. It has not been demonstrated that audiences are struggling to find public service channels. Indeed, it has not even been demonstrated that audiences think discoverability is important. Ofcom’s audience research for this consultation found that a particularly small proportion of adults – just 12% of those in Scotland, and 4% UK-wide - placed any importance on BBC Alba being easy to find on the EPG. For S4C, this was just 22% of adults in Wales and 4% UK-wide.²⁵ Ofcom’s proposals for change therefore seem particularly inconsistent for these channels.
- 6.8 Nor have the commercial PSBs demonstrated that they are unable to fulfil their duties. Indeed, Ofcom and the commercial PSBs recently agreed new public service licences after a detailed review of their conditions, which concluded that the balance between benefits and obligations was sustainable. The current consultation argues that the public value of awarding greater prominence will outweigh the impact on the market, but this is made as an assertion rather than established according to any objective criteria. Indeed, no such criteria are set out. In our view, the case for change has not been evidenced, and the proposals grossly disproportionate in terms of the negative impact on the wider market.
- 6.9 We therefore ask Ofcom to either withdraw its proposals or to conduct further research into whether audiences are able to find PSB services, and to consider the impact on the commercial sector in greater detail. We also ask Ofcom to set out the objective criteria by which it has weighed up the anticipated increase in public value against the negative impact on the market.
- 6.10 Finally, if Ofcom does go ahead with these proposals, it should ensure that that PSB services are subject to commensurate public service obligations to reflect these additional advantages. Failure to do so would undermine the PSB paradigm, which is based on a balance of obligations and requirements, and potentially lead to unfair competition.

Q7) Do you agree that local TV should be guaranteed prominence within the first three pages of UK wide EPGs?

²⁵ Consultation, page 16, point 4.14

- 7.1 In our view, Ofcom has not evidenced the need for change in the case of local TV. Ofcom's audience research found that just 22% of adults attached any importance to local TV channels being easy to find on their EPG. The research does not say whether any of this 22% experienced any concerns with the current set up.
- 7.2 Furthermore, we believe Ofcom has underestimated the impact of its proposals for the rest of the market. We have already outlined our concerns about the impact on the Virgin Media platform in response to Question 6.

Q8) Do you agree that S4C, BBC Alba, and BBC Scotland should be guaranteed prominence within the first three pages of relevant Nation specific EPGs e.g. S4C in Wales, BBC Alba and BBC Scotland in Scotland?

- 8.1 Again, we do not believe Ofcom has evidenced the need for change. Its own audience research indicates that only a minority of viewers believe EPG position is important in this area. The research does not indicate whether this minority currently experience any difficulties.
- 8.2 Furthermore, Ofcom has in our view under estimated the impact of its proposals on the wider market. We set out the conclusions of O&O's analysis in response to Question 6.

Q9) Do you agree that local TV should be guaranteed prominence within the first three pages of relevant regionalised EPGs?

- 9.1 Once again, we do not believe Ofcom has evidenced the need for change. In the case of local TV, Ofcom's audience research found that just 22% of adults attached any importance to local TV channels being easy to find on their EPG, and the research does not indicate whether this minority currently experience any difficulties.
- 9.2 Furthermore, Ofcom has in our view under estimated the impact of its proposals on the wider market. We set out the conclusions of O&O's analysis in response to Question 6.

Q10) Do you agree with our proposals to ensure prominence for either the SD or HD version of BBC channels rather than both?

10.1 Our understanding is that this proposal would not disrupt other channels.

Q11) Do you agree with our proposals to allow broadcasters to swap HD simulcast variants of their SD designated channels, such that those HD variants could occupy the slots which the SD channels would be entitled to?

11.1 Our understanding is that this proposal would not disrupt other channels.

Q12) Do you agree with our proposal to provide a 12 month transition period once the Code is finalised?

12.1 Yes, with the obvious caveat that we do not support the proposals. Ofcom's proposals are potentially disruptive as for many channels and a reasonable transition period would be a necessity.

Q13) Do you think that the prominence regime should be extended to ensure EPGs themselves can be easily found?

13.1 COBA members are linear broadcasters themselves, and so have an interest in ensuring that the linear EPG is easily found. However, we see no reason to extend rules into this area as, as Ofcom acknowledges in the consultation paper, it is currently the case that linear EPGs are easily found. In the future, linear EPGs may share a User Interface with other services, such as VoD services, but we are not aware of any current examples where this has meant that linear EPGs are not easily discoverable, and Ofcom has not provided any evidence that there is a credible threat in the foreseeable future.

13.2 On this point, we note the conclusions of the DCMS consultation in 2016, which found no case for further intervention. The Government's final report stated:

“At present, we have not seen evidence that there are new EPGs offering purely linear content that sit outside of the regulatory regime and therefore no changes are required to bring any such services into scope. There are, however, a large number of different User Interfaces (UIs) that act as portals

for linear, catch-up and ondemand content. These include those offered by Sky, You View, TiVo as well as Smart TVs from manufacturers such as Samsung or Panasonic. Within these UIs, linear channel listings are subject to the current regulatory regime. Government has considered whether it is necessary and practical to extend this regulation to cover these new UIs but has not seen sufficient evidence that making such a significant extension to Ofcom's regulatory powers so that it covered device manufacturers as well as more traditional broadcast TV platforms is currently proportionate. Government will, however, continue to keep this area under close consideration."²⁶

- 13.3 If, however, Ofcom does recommend intervention in this area then we would also ask the regulator to consider the resulting commercial benefit to PSBs and factor that into future discussions about the value of the PSB licence and the balance of duties and obligations. Failure to do so would risk creating unfair competition. All broadcasters, not just PSBs, face challenges from on-demand services. COBA members are not PSBs but they are also heavily regulated as linear broadcasters compared to online services.

Q14) Do you agree with the broad range of factors for consideration we have identified? Are there other factors that policy makers should consider?

- 14.1 As we have noted, we see no need for intervention in this area. COBA recognises the PSB system as a vital part of the mixed ecology of the UK broadcasting sector. However, the PSBs' on-demand services are performing well and are prominent without statutory requirements.
- 14.2 In addition to the lack of any credible threat to the discoverability of PSBs' on-demand content, intervention brings a number of risks. Ofcom's proposals have not detailed how prominence could or should work in many areas, such as how search and recognition would function. These are complex issues and fast evolving parts of the sector, and any intervention must be careful not to dampen innovation or unfairly distort the market. Furthermore, extending prominence rules to the devices themselves presents a different and challenging set of legislative hurdles, particularly as some devices will be manufactured overseas by overseas companies.

²⁶ The Balance of Payments between television platforms and public service broadcasters, Government response, July 2016, page 24

- 14.3 This was one of the key conclusions from the Government’s 2016 report on this issue, which stated:

“Government has not seen compelling evidence of harm to the PSBs to date. Creating a new regulatory regime that defined the UIs that should be caught, particularly in a fast-moving technological landscape, is likely to be complex and Government is not convinced of the benefit of regulation that might extend to, for instance, smart TV manufacturers’ UIs which are developed with a global market in mind.”

- 14.4 Government was also clear that the on-demand services of the commercial PSBs are not statutory public service services, and carry non PSB content alongside content from their main PSB channels. The 2016 report said:

“Furthermore, it is worth noting that the commercial PSBs’ players are not licensed public services themselves but additional commercial services that offer access to their non PSB channel content as well as PSB content: affording them access to the prominence regime would mean extending PSB privileges to non PSB channels and content, and consideration would also have to be given to the inclusion or exclusion of the ‘must offer’ regime as well. The case for the BBC’s iPlayer is clearly different given that this is a PSB service, but evidence to date suggests that the compelling nature of the content is enough to allow the BBC to retain prominence without the need for additional regulation. Government will continue to monitor this area closely however, particularly as new ways to discover content develop.”²⁷

- 14.5 This point is acknowledged in Ofcom’s consultation paper, which observes that the VoD propositions of PSB players include content from both PSB and non PSB linear channels as well as a range of on-line only content.”²⁸

- 14.6 As we have already mentioned, if Ofcom does recommend changes, then we would also ask the regulator to consider the resulting commercial benefit to PSBs and factor that into future discussions about the value of the PSB licence and the balance of duties and obligations. Failure to do so would risk creating unfair competition. All broadcasters, not just PSBs, face challenges from on-demand services. COBA members are not PSBs but they are also heavily regulated as linear broadcasters compared to online services.

²⁷ The Balance of Payments between television platforms and public service broadcasters, Government response, July 2016, page 24

²⁸ Review of rules for prominence of public service broadcasters and local TV, Ofcom 6.15, page 35

- 14.7 In addition, to address the presence of non PSB content within the PSB players, Ofcom should consider requirements on any on-demand service that is given statutory prominence to ensure that PSB content, such as news, Out of London programming, or original content, is featured prominently within that particular player.
- 14.8 It is not enough in our view for a PSB broadcaster to argue that its catch-up service only carries public service content from its main channel. Even if this were the case, the PSBs' main channels carry a broad mixture of programming, some of which is highly commercial. The "prominence" of certain genres, such as news, is protected by requirements to show certain programmes in peak period. In the on-demand world, a digital equivalent might be introduced requiring certain genres or types of content to be featured prominently within PSB on-demand players.
- 14.9 Furthermore, such content would have to be universally available, which would require the introduction of a must offer obligation. Finally on this point, the on-demand services of the commercial PSBs are not licensed statutory public services. We would assume that if they are awarded prominence then they should be made statutory public services, with the corresponding public service requirements including must offer and a commitment to show certain genres of public service content prominently within their players. Ofcom should be clear on this in any recommendation to Government to extend the prominence regime.

Q15) Do you agree with the principles we have set out? Are there other principles that should be considered?

15.1 Please see our response to Question 14.

Q16) Do you think that the prominence regime should be extended to ensure PSB Players can be easily found?

16.1 Please see our response to Question 14.

Q17) Do you think that the prominence regime should be extended to ensure PSB content can be easily found via recommendations and / or

search? If so, what key parameters would you set for this aspect of the regime?

17.1 No. We are also deeply concerned that Ofcom’s proposals have not detailed how prominence could or should work in many areas, such as how search and recognition would function. These are complex issues and fast evolving parts of the sector, and any intervention must be careful not to dampen innovation or unfairly distort the market. Furthermore, extending prominence rules to the devices themselves presents a different and challenging set of legislative hurdles, particularly as some devices will be manufactured overseas by overseas companies.

17.2 We note the conclusions of the Government’s 2016 report on PSB prominence, which stated:

“Creating a new regulatory regime that defined the UIs that should be caught, particularly in a fast-moving technological landscape, is likely to be complex and Government is not convinced of the benefit of regulation that might extend to, for instance, smart TV manufacturers’ UIs which are developed with a global market in mind.”²⁹

Q18) Do you think that the prominence regime should be extended to platforms and devices not currently captured by the EPG prominence regime? If so, how do you think the regime could be extended and who should be captured?

18.1 No. Please see our response to Question 13.

Q19) Do you think that the prominence regime should be extended to online services? If so, who should be captured?

19.1 No. Please see our response to Question 13.

²⁹ The Balance of Payments between television platforms and public service broadcasters, Government response, July 2016, page 24