Ofcom - Call for input: Review of broadcast regulation
ITV plc / STV plc response

This response was drafted by ITV but is fully supported by STV and so submitted on behalf of the C3 network operators together.

PSB at a critical juncture

As Ofcom so starkly warned in Transmission Critical, "*If no action is taken, the very existence of the PSBs – who are the main providers of PSM – will be threatened. Time is running out to save this pillar of UK culture and way of life*." This will require strong interventions at scale, as set out in Ofcom's recommendations to Government and the joint PSB position articulated at RTS Cambridge last year.

Manifestly therefore Ofcom must also ensure that its approach to regulation reflects the radically different environment in which PSB operates. The current regulation of PSB, and broadcasters more broadly, is a sprawling set of interventions that have accrued over time. Cumulatively, they impose a high level of regulation that is not in place for our competitors, many of whom are global operators of enormous scale. We therefore absolutely agree with Ofcom in its current call for inputs that it "*is critical that regulation does not stifle innovation or deter investment in PSM content.*"

Ofcom has historically struggled to remove regulations in the TV broadcasting space, even where it considers interventions might be outdated. There have historically been concerns in relation to any potential level of risk arising from deregulation as being unacceptable, and an approach to evidence that requires absolute 'proof' proposal by proposal that there will be zero negative outcomes in future (or provable and sizable upside for PSB). If Ofcom is to deliver on its growth duty - and play a substantive role in supporting PSB - then it will need to change this approach.

Of course, it is not just about the substance of deregulation, but also the pace of change. Ofcom needs to not only identify legacy regulation that is hampering innovation and growth, but to remove the rules at pace. Previous processed on product placement and COSTA rules suggest Ofcom can struggle to deliver reform in a timely manner.

In truth, deregulation at pace is inherently pro-growth: it opens up opportunities over time, some of which may not be obvious at the outset (and hence mechanical processes to decide whether to deregulate will always be flawed). The less regulation there is in any particular area - and the quicker decisions can be made - the fewer constraints there are on new thinking and innovation, and the faster action can be taken by market participants with little friction. It is this dynamic efficiency that is a key benefit of deregulation.

Proposals for reform

Reform of COSTA

The most substantive area of reform that Ofcom could immediately implement is changes to the COSTA rules. We responded to Ofcom's initial consultation on potential reform of the COSTA rules, in 2022, and its subsequent consultation on its preliminary view, in 2023. As we did then, we remain of the view that the retention of the stricter rules that apply only to PSB channels is not justified, just as Ofcom itself initially concluded during its prior process.

The world today is radically different from when the rules were introduced - even more so than when Ofcom began considering changes in this space over three years ago. There is very clearly no longer a compelling rationale for intervention targeted at just three linear TV channels when they are now competing with global multichannel and online players unfettered by comparable restrictions.

Our previous proposal was that Ofcom initially focuses reform on:

1. the removal of the '40 minute' rule in peak; and
2. the alignment of the rules around the frequency and length of advertising breaks between PSBs and non-PSBs.

In support of this position, we refer Ofcom to our previous extensive submissions and evidence on this issue. We have not repeated the detailed (and costly) research we provided in response to the previous consultation (carried out for us by Frontier Economics). The evidence in that work still stands, and Ofcom's ultimate decision not to proceed was not based on a lack of evidence around minutage and advertising.

Rather Ofcom's decision was on the basis that the changes "*may lead to a reduction in news minutes.*" Given that a) Ofcom has set binding quotas for news output from PSBs, including in peak, and b) if PSBs could not increase the volume of advertising minutes in peak then there would be no point to reform of the rules, we regard this ultimate position as indefensible. This is now even more the case given that Ofcom has concluded that PSB faces existential challenges and that action to assist PSB is critical and urgent. Here is a good example of action Ofcom can take to follow through on its own policy recommendation.

We also found it implausible that Ofcom considered that increases in advertising, to simply align volumes with all other broadcasters, would "*negatively impact the quality of the viewing environment and its societal value.*" Pretty much all news - on TV, from newspapers, and online - is either ad-funded or behind a paywall. Is Ofcom of the view that commercial news (from Sky News or GB News) or the newspapers is of ‘reduced quality and societal value’ because of the advertising they carry?

With Ofcom now consulting on potential changes to STV’s news obligations in light of the financial pressure they face, the previous decision to continue to constrain PSBs commercially in peak time as a supposed mechanism to protect the long-term provision of PSB news looks impossible to justify. We remain of the view that targeted reforms, such as those outlined above, are both necessary and defensible - and increasingly urgent given wider market changes in the intervening years.

Put another way, absent such rules, would Ofcom today propose to introduce PSB-only, linear-only advertising rules to ‘protect consumers’ or protect against ‘a reduction in news minutes’? Would the evidence support the introduction of such measures? The answer on both fronts is ‘clearly not’.

Reform of the Broadcasting Code

Section 9 - commercial references

Within the Broadcasting Code, Section 9 is our priority for reform, with an eye on improving the sustainability of PSB (and broadcasting more generally). The current rules create a much more heavily regulated and restricted environment than that which exists for notified VOD services (under Ofcom’s ODPS Rules and Guidance) and content on other platforms that are major competitors of ITV and other Ofcom-licensed broadcasters, such as YouTube, social media platforms and internet-based services. This places ITV/STV and other Ofcom-licensed broadcasters at a significant commercial and competitive disadvantage with competitors operating on less regulated platforms.

Widespread consumption of unregulated content on TV sets in the home also undermines any argument that the TV-specific rules might ‘protect’ audiences from exposure to such commercial references. Regardless, we believe decisions on commercial references can safely be left to broadcasters, who can consider the requirement to fund programmes and make money alongside the requirement to produce and broadcast programmes that are engaging for viewers and likely to attract the best audiences. In such a competitive market in which an advertising free BBC is also a substantial competitive presence too, it is not in a broadcaster’s commercial or editorial interest to create overly-commercialised programmes that are a turn-off for viewers.

Our experience also shows that when done the right way, advertiser-funding, sponsorship, product placement and other commercial arrangements can create or make available content for viewers that is engaging and popular as well as attractive to funders, sponsors and advertisers and commercially rewarding. Ofcom's 2022 research into viewer attitudes towards commercial references suggested viewers were not concerned where commercial references were seen as relevant and not disruptive of or a distraction from a programme. They seemed comfortable with the examples they were presented with.

However, in truth product placement in particular has not taken off as a category in TV because of the rule on undue prominence in Rules 9.5 and 9.10 of the Ofcom Broadcasting Code. The rule itself is highly subjective which means that enforcement is subjective, which has a chilling effect on the willingness of broadcasters and advertisers to innovate in the space, given the uncertainty of compliance.

However, there is now a huge volume of US content available to UK audiences where the makers of those programmes face no constraint under product placement rules. There does not seem to be any particular concern from UK audiences in relation to this content, indeed, the reverse, they are consuming it in large volumes.

We therefore think the simplification and reduction of the rules on product placement should be a particular priority. There is, for instance, no need for a separate category of prop versus product placement any more, and no need for on-screen signalling etc. This is overly complex and not a consideration for US acquired content with which UK originated content has to compete. Specific changes should include:

- Removal of the general rules on promotion and undue prominence (Rules 9.4, 9.5, 9.9 and 9.10).
- Amendment of the definition of current affairs programme

Beyond product placement, whilst we support the continued separation of sponsorship credits both from editorial content and from advertising (for instance by spatial or acoustic devices), we also believe reform of the rules around sponsorship is merited. For instance:

- In the notes to Rule 9.18, removal of references to (i) 'limited circumstances' in which the sponsor may be referred to (which we believe is an outdated and unnecessary bit of guidance) and (ii) promotional and unduly prominent references to the sponsor and its interests (i.e. the cross-reference to Rules 9.4 and 9.5). These days, it is not uncommon for references to a sponsor, its products/services and interests to be more than 'limited' in sponsored programmes. Furthermore, it is telling that in Ofcom's research into viewer attitudes towards commercial references, most participants were surprised that Lego did not sponsor *Lego Masters* and that Farrow and Ball did not sponsor *Farrow and Ball: Inside The Posh Paint Factory*. Participants accepted overt sponsorship references if they were non-promotional, did not impact on the editorial integrity of the programme and the sponsorship arrangement was made transparent.

- Making the rule on placement of sponsorship credits (Rule 9.20) consistent with the ODPS Rules. Rule 9.20 is preferable as it gives broadcasters flexibility to include credits at the beginning, end or during a sponsored programme. Paragraph 2.56 of the ODPS rules requires credits to be broadcast at the beginning or end only.
- There is no need to continue to regulate the actual content of sponsorship credits, so Rules 9.22(a) and 9.22(b) of the Ofcom Programme Code should be abolished. If however Ofcom decides to retain these Rules, they should be relaxed. We believe the sponsor's products and services should be able to be referred to in credits for purposes other than the identification of the sponsor or the sponsorship arrangement, as long as the focus of the credit is the sponsorship arrangement. Furthermore we believe product/service references, straplines, etc should be permitted in credits during programmes.

Other sections

Whilst reform of the rules around commercial references would be our priority within the Code, we would be happy to talk to Ofcom about wider reforms.

<u>Removal of the Cross-promotion Code</u>

The Cross-Promotion Code was last reviewed in 2005, in the age of analogue television and a very different media landscape to the one that exists now. Television broadcasters now compete with streaming, social media and internet services that are free to cross-promote products and services they have an interest in, without the restrictions of a cross-promotion code. Indeed, many companies are very deliberately structured to cross promote their portfolio of services (e.g. Amazon using streaming television to help drive take-up of its shopping services). Far from protecting fair and effective competition, we consider that the Code is outdated and in effect prejudices fair and effective competition between television broadcasters and their non-television competitors.

To the extent there are concerns with television programmes being used to promote products and services that are of no interest to viewers, adequate protections exist in Section 9 of the Broadcasting Code.

We accept the importance of ensuring a distinction between advertising and editorial content and we agree cross-promotions should inform viewers of products and services that are of interest to them, not create a shadow advertising category. But in the current media landscape, with viewers consuming audiovisual content on many different platforms and devices, there may be many more services that are of interest to them that don't fall within the traditional definition of 'broadcasting related services'.

We therefore believe there are strong arguments for the removal of the Cross-promotion Code.

If Ofcom takes the view that the Code needs to be retained in some form, then we suggest:

- The services which can be cross-promoted outside advertising should be expanded from broadcasting-related services to cover any services that are of interest to viewers in which the broadcaster has an interest (for instance, we note the CMA is proposing to remove the restriction on the BBC cross-promoting BBC magazines).
- The 30% ownership/control limit and presumption should be removed, allowing broadcasters to cross-promote any service they have an interest in where the product or service is relevant to their viewers. The latter could include audiovisual services that broadcasters share with others without owning or controlling them.
- The prohibition on consideration should be removed. As Ofcom recognised in its 2006 consultation response paper, some cross-promotion arrangements often require consideration to pass between the parties. In the case of programmes or series shared by broadcasters, the guidance Ofcom gave in 2006 suggested that programme related material was an appropriate route to take, and that in these cases consideration would not be a problem. We believe it is time for Ofcom to extend this approach and regulatory flexibility to other relevant audiovisual services.

Regional production quota ratchet

We remain extremely concerned about Ofcom's decision to mechanically increase the out of London by value obligation by 2% each year. This is a fundamental departure from the principle that the quota levels will broadly maintain the current requirements, instead representing an in-built bias to increasing the regulatory burden over time. We refer Ofcom back to our previous submission on this, but in brief our issues can be summarised as follows:

1. The previous quota gave us flexibility to tailor our content spend to fit with our revenue [✂]

2. Ofcom's own work for the PSB Review highlighted graphically the risk of falling spend by the PSBs - but the made outside London quota will inflate regardless. As a result, the scale of the quota will rise considerably. Accordingly, Ofcom's proposal breaches the clearly agreed principle that the regime should broadly maintain the current requirements.

Ofcom should look again at this decision in light of its own findings about the future sustainability of PSB.

Licence reform

The Channel 3 (PSB) licences are extraordinarily complicated. Any simplification of requirements would be welcome, with benefits potentially including:

- *Reduction in resource requirements:* there is clearly some complexity inherent in a system based on multiple nations and regions licences operating as a single network. Ofcom already operates in ways that offer some simplification - for instance, basing much of our network compliance reporting around the Granada licence rather than requiring similar submissions for each licence area. There may be other areas where changes might be considered
- *Improved clarity of licence obligations:* whilst our (and, we assume, Ofcom's) systems and processes have evolved to ensure compliance, we believe the complexity of the Channel 3 regional licences carries unnecessary long-term risk given the need for extensive staff knowledge rather than clarity of drafting alone. By way of illustration, see the extended process recently required to correct a small historic error in the Border licence.

Other possible areas for reform might include:

- *Shared content reporting*: currently on a 'maximum minutes' basis with detailed reporting required - could move to a qualitative requirement to be 'mainly unique' or similar, with no reporting
- *Late night News and Current Affairs*: cut off of midnight for quotas, in contrast to BBC, though currently little runs overnight - a simplification for reporting systems only
- *Regional programming*: currently the same quotas are expressed in multiple ways - could be simplified to have a single number. Could also move to an annual quota rather than weekly
- *Reporting*: processes might be simplified and data fields reduced

More broadly, there is also a compelling argument to simplify the broader (non-PSB) TV licensing framework now. It is exceptionally difficult to establish what services require a licence today and/or whether versions of services can be covered on different platforms by the same licence. We have a plethora of licences and some decisions as to whether licences are required for some services (such as YouTube channels) are impossible to rationalise. Given that there are criminal sanctions for providing unlicensed services, this is an area that should be given rapid attention.

In future, there ought to be a single licensing regime, ideally with a class licence for all activities that meet a particular description. That would enable everyone to be clear that they were covered by a relevant licence (perhaps with a very simple notification regime to Ofcom) if they were engaging in particular activities and would remove an enormous workload at broadcasters and Ofcom.

And finally, reporting requirements are now far more extensive than they have ever been. Each individual data point and process may have been viewed by Ofcom as defensible, but cumulatively represent a significant resource demand. We would encourage Ofcom to consider what data is necessary in meeting its duties. For instance, we have previously suggested a lighter touch approach to EU works reporting, whilst reporting on regional production criteria has become notably more onerous over the period covered by our last PSB licences.