

Ofcom consultation – signing on television

Sky response

1. Sky welcomes Ofcom's consideration that alternative approaches to signing on television are appropriate and that any such alternatives need to comply with the principles that "*any alternative arrangements should not impose disproportionate burdens on broadcasters*".¹ As Ofcom will appreciate, "*burdens*" come not only in the form of financial burdens but also administrative burdens – for example the amount of time that needs to be dedicated to an activity in order to meet the underlying regulatory requirement.
2. In light of this fundamental principle, Sky considers that it is sensible for Ofcom to consider alternatives, particularly since Ofcom has acknowledged that (i) sign language users' preferences are not always easily met by broadcasters (notably for sign-presented rather than for sign-interpreted programmes), and (ii) there is a preference for subtitling over signed programmes.
3. Sky would have welcomed the introduction of Option 2, which would both be consistent with the fundamental principle referred to in paragraph (1) above, and reflect the preferences identified by Ofcom in its research (and referred to in paragraph (2) above). Sky notes that this is not an option that Ofcom intends to carry forward which, whilst disappointing, should at least influence the formation of its (clearly preferred) Option 3.
4. There are merits to Option 3, in terms of its implicit recognition that signing programmes for the sake of meeting (arbitrary) targets is not necessarily in the best interests of viewers, including those with the capacity to understand sign language. However, Sky has concerns with the proposal to require broadcasters to schedule sign-presented programming at specified times of the day (in particular at peak times), even if the quantity of such programming is relatively modest, and considers that such a proposal is likely to prove unworkable.
5. On the other hand, Sky continues to support the "alternative" **Sky/Community Channel proposal** referred to in the consultation document, which would be an appropriate, proportionate response to the needs of sign language users. Sky encourages Ofcom to continue to explore this proposal and would welcome further opportunity to engage Ofcom, the Community Channel and other stakeholders in a dialogue over the establishment of such an approach to compliance (with such dialogue taking place in parallel with Ofcom's consideration of responses to this consultation).
6. Sky has a number of points that it would like to make in relation to the approach to Option 3, which it considers will prove beneficial to the formulation and introduction of this option:

¹ Paragraph 1.12 of the consultation document.

- (i) Any alternative proposal should not automatically treat all broadcasters the same, but be sufficiently flexible to be able to take into account relevant differences, such as being a single channel or multi-channel broadcaster, and being a pay or free-to-air (FTA) broadcaster;
- (ii) being an alternative, the proposal should not be any more restrictive than present arrangements (in line with Ofcom's stated aim of reducing, not increasing, regulatory burdens), and should be sufficiently flexible to be capable of taking into account developments such as use of PVRs for time-shifted viewing;
- (iii) broadcasters should be given a choice as to how best to meet its statutory signing requirements; where there are alternatives available, one variant should not be imposed on a broadcaster but rather it should have a choice as to which option to adopt in order to meet its regulatory obligations. Ofcom's role should (and can) extend to allowing broadcasters a choice between how best to meet the needs of sign language users, rather than imposing one approach on all broadcasters.

Differences in broadcasters

Multi-channel broadcasters

7. Ofcom's proposal is that any channel with an average audience share of 1% or less (of all UK households over a 12 month period) be exempt from current per channel signing requirements, and instead be required to sign a prescribed amount of programming on a monthly basis. Whilst such an alternative might be particularly attractive to a broadcaster which operates one or two (small) channels, the attraction is less for multi-channel broadcasters that operate a much larger number of channels, for whom other alternatives (such as the Community Channel proposal) may be preferable, and which are likely to be capable of delivering greater benefits to viewers. In Sky's case, it broadcasts over 25 channels, and based on the audience share threshold of 1%, the majority, but not all, of its channels are likely to be capable of benefiting from exemption from signing. This would mean, however, that the remaining channels would need to continue to meet their current signing obligations.
8. As a consequence, compliance with such a proposed approach to signing obligations is likely to be more complicated and involve a greater administrative commitment for Sky, given the dual approach that Sky would need to adopt. This would particularly be the case where the excluded/non-excluded channels form part of the same "family" of channels (across which resources, and often programming is shared), such as the *Sky Sports* channels, in relation to which *Sky Sports 1* may not benefit from exclusion, whereas *Sky Sports 2* and *Sky Sports 3* may. Given that Ofcom's stated aim of ensuring that regulatory burdens be reduced, not increased, and that regulation is both proportionate and does not impose undue burdens on those subject, Ofcom's proposed option risks not being consistent with its general duties, at least with regard to multi-channel broadcasters.

9. It would, therefore, be appropriate for Ofcom to consider introducing a system whereby broadcasters be allowed a choice, and thus flexibility, in how to best meet the relevant signing targets across the excluded channels they operate
10. Given that, in recognition of the low viewing share of signed programmes in general, and Ofcom's recognition of a lack of benefit in signing programmes on such channels, such a flexible approach would be in the interests of viewers (and could not be considered not in their interests) and therefore would be consistent with Ofcom's general duties and the specific statutory obligations in relation signing. For example, it is clear from the wording of s.303(7) & (8) of the Communications Act that, in relation to excluded channels, Ofcom has the power to wholly exclude them from any signing obligation, and is not obliged to introduce alternative arrangements under s.303(10(c)).
11. As a result, a more flexible approach than that currently espoused by Ofcom, must be considered to be (more) appropriate and justifiable, both in terms of the benefits to be delivered to audiences and also in terms of minimising any burden (be it financial or administrative) on the broadcaster in question.

Pay broadcasters

12. It is also appropriate for Ofcom to take into account relevant differences between pay and FTA broadcasters. In the case of pay broadcasters, all viewers, including those that use sign language services, have made the active decision to subscribe to such channels. Whilst it may not be appropriate for such a position to "override" obligations to provide any sign language services, the positive choice to subscribe to such a channel should be taken into account in any consideration of assessing the benefits of signing programmes on such channels. If any viewer was dissatisfied with the programming or any other feature of that channel, they would cease to subscribe to it. This means that it is in the broadcaster's interests to ensure that (all) viewers' interests are catered for, as best it can. Recognition of this fact therefore justifies, and provides further support for, a more flexible approach to the provision of signing services.

No more restrictive than present

13. Ofcom has proposed an alternative system whereby excluded channels be required to broadcast "sign-presented" programming within certain periods of the day. This proposal is more restrictive in two key senses:
 - (i) whereas the current requirements do not specify the time of day in which signed programmes must be broadcast, Ofcom's proposal does;
 - (ii) the term "sign-presented" is explained in footnote to the amended Code² in terms of "*programming that, in Ofcom's opinion, contains a substantial proportion of sign-interpreted content will not fulfil this obligation*".
14. Sky's main concern with this proposal is the requirement to provide sign-presented programming, particularly at peak times of the day, is not one that it

² See footnote 33 of the consultation document.

- would willingly adopt, such that it can be considered a sufficiently attractive alternative to the current approach to signing. As Ofcom recognises, broadcasters are more willing to provide sign-interpreted rather than sign-presented programming;³ this is even more true for pay broadcasters who need to attract customers who are willing to pay for these services, and who will therefore want to ensure that its programming, particularly at peak times, is appealing to as wide a range of viewers/potential viewers as possible.
15. Despite Ofcom's assurances about not imposing disproportionate burdens on broadcasters,⁴ and not increasing cost burdens, this alternative would more restrictive than the current approach. It would also, in effect, result in Ofcom becoming involved in editorial and scheduling decisions, which it has hitherto avoided (and in any case would not be consistent with the aims of the Code). Broadcasters would have less flexibility in terms of the time of day of broadcast of signed programmes and the amount of sign-interpreted rather than sign-presented programming. Overall, Sky considers that this option is unlikely to prove workable.
 16. In addition, this proposal, for example, also completely ignores the ability of viewers using sign language to "time-shift" their viewing through use of a PVR such as Sky+, or use of a video recorder, to record such programming, which must be considered a reasonable factor in light of (Ofcom's own) research as to the lack of benefit in requiring excluded channels to provide signing at all.
 17. It would also increase the burden on broadcasters to produce, acquire or commission sign-presented programming, something which Ofcom itself acknowledges is unlikely to be acceptable.⁵ By their nature, these excluded channels have low viewing shares and therefore, as Ofcom acknowledges, are unlikely to have many, if any, viewers for signed programmes.⁶ The need to divert limited channel budgets to acquiring or commissioning such programming (which by its nature is likely to be more expensive than sign-interpreting comparable programming), away from programming of wide appeal, would be very difficult to justify.
 18. A more proportionate, flexible approach would allow the broadcasters to choose both the time of day and the method of presentation of sign language (be it sign-interpreted or sign-presented). Such an approach would still provide audience benefit, which would by its nature be greater than the benefit of there being no sign language programming on such channels at all (by virtue of these channels otherwise benefiting from an exclusion from signing obligations).

Choice

19. Ofcom has indicated that is alternative proposal would be imposed on channels with less than 1% viewing share, unless acceptable alternative (voluntary) arrangements are put in place.

³ Paragraph 3.13 of the consultation document.

⁴ Paragraph 3.5 of the consultation document.

⁵ For example, see paragraphs 3.13 and 3.18(c) of the consultation document.

⁶ Paragraph 1.9 of the consultation document.

20. In light of Ofcom's duty to ensure that a proportionate approach to its regulatory activities, and given that no arguments or evidence has been presented to the contrary, it would be appropriate for Ofcom to allow broadcasters the **choice** of electing either to continue to comply with the current (statutory) targets, or comply with Ofcom's alternatives as specified in the Code (subject to the proposal set out in the consultation document being amended as per Sky's suggestions in this submission), or signing up to an acceptable alternative (voluntary) arrangements such as the Community Channel proposal.
21. As indicated in paragraph (5) above, Ofcom has been willing to consider a voluntary alternative that Sky has been involved in, namely the proposal to establish a Signing Zone on the Community Channel. Ofcom clearly accepts that it has the flexibility to do so (under s.303(10)(c) of the Act) and indeed refers to its discretion to adopt alternatives in the consultation document (for example, see paragraph 1.20(a)).
22. For Ofcom to **impose** one solution, thereby disregarding others, without leaving the choice to the broadcaster, would be disproportionate, and would not necessarily lead to the most appropriate solution being adopted, targeted at the problem that has been identified (given the differences in broadcasters, as discussed above). To do so, so that the broadcaster has no ability to elect, for example, to continue to comply with the existing statutory requirements, rather than meet some alternative (compulsory) arrangements, risks the imposition of undue burdens. These concerns would be exacerbated by the lack of suitability of Ofcom's proposal for multi-channel broadcasters (see paragraphs 7-12 above), which risks Ofcom mandating such broadcasters to adopt different compliance systems for its different channels, without any regard either to the broadcaster's own wishes, the actual audience benefit, or the costs and administrative burdens that such an approach would inevitably entail.
23. Ofcom should therefore focus on developing an appropriately adapted proposal, based on its current Option 3, as a choice for broadcasters of excluded channels, rather than a matter over which a broadcaster has no say. To do otherwise would make adherence to the current system much more appealing (for broadcaster and, in all likelihood, viewers of such channels alike), which is exactly the antithesis of the position that Ofcom's consultation seeks to achieve.

Sky/Community Channel proposal

24. As indicated above, Sky continues to be interested in the principle of contributing to a fund operated by an independent trust to pay for the production and acquisition of sign-presented programming on the Community Channel and encourages Ofcom to continue to explore this option with all relevant stakeholders as a means of addressing the needs of sign-language users.
25. Sky considers that such an approach would be beneficial to sign language users, as it could involve the provision of sign-presented programming (at peak times of the channel's schedule) on a channel that has wide availability. As Ofcom is aware, this proposal has support across relevant stakeholder groups, including the Sign/Community Channel Working Group and the SCGB.

26. Sky remains available to discuss this proposal with Ofcom and would welcome the opportunity to do so, especially in advance of the finalisation of Ofcom's statement at the end of this consultation process.

Sky

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