

Assessing the impact of proposed changes to the BBC's public service activities

Response from the Commercial Broadcasters Association to Ofcom

February 2017



A VOICE FOR COMMERCIAL BROADCASTERS IN THE UK

Introduction

1. The Commercial Broadcasters Association (COBA) is the 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 critical to the global success of the UK broadcasting sector and its “mixed ecology” of public and private investors. As arguably the fastest growing part of the UK television industry, they are increasing their investment in jobs, content and infrastructure:
 - 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 £725m per annum, up nearly 50% on 2009 levels.³

¹ Ofcom International Broadcasting Market Report 2013

² Skillset, Television Sector – Labour Market Intelligence Profile

³ COBA 2014 Census, Oliver & Ohlbaum Associates for COBA

Response to consultation

1. COBA supports a mixed ecology of public and private investors and believes that this has been at the heart of the success of the UK television sector. This mixed ecology means that investment flows from three key sources – the licence fee, subscription and advertising – along with emerging funds such as video-on-demand. These diverse funding sources all support content creation, innovation and choice, for the benefit of audiences. The BBC is one of the cornerstones of this diverse ecology, and we agree with Ofcom’s comment in the accompanying overview document that:

“The UK has a successful broadcasting sector, sustained by a competitive media landscape of which the BBC is a central part.”⁴

2. Equally, such a significant public intervention as the BBC must be mindful not to dampen competition in the rest of the market. COBA welcomes increased oversight by Ofcom of the BBC, believing that this will lead to increased independence, rigour and transparency in the regulation of the BBC. This is in the longterm interests of the BBC itself, as well as of course the wider market.
3. Most of the proposals put forward by Ofcom for assessing the market impact of the BBC seem practicable and are welcome. Clearly, Ofcom’s increased role is a major development and the midterm review of governance arrangements that is set out in the Charter is a welcome “health check”.
4. We would, however, like to highlight certain issues that arise from Ofcom’s consultation paper on assessing proposals for changes to BBC public services.

Public Interest Test

5. Firstly, point 4.17 in Ofcom’s paper asks that third parties engage effectively with the BBC’s work on its public interest test and that they should not assume that Ofcom will provide a second opportunity to raise concerns.
6. We understand the importance of engaging as fully as possible with the BBC board in order to inform its insight into the market. However, there should also be a clear process for redress to Ofcom if third party stakeholders are concerned that the board has not fully taken into account market impact when deciding whether a change is material (and therefore whether it should be referred to Ofcom).
7. A key issue here is that it is wholly unreasonable to expect commercial sector stakeholders to provide the BBC board with financially sensitive information,

⁴ Regulating the BBC’s impact on competition, Ofcom, Section 1.3

such as revenue levels for a channel or other parts of their business, forecasts for their business or for the wider market, profit margins, or audience data, amongst other things. As we have consistently relayed to Ofcom, the BBC board is, under the Charter, responsible for setting the BBC's strategy, and will include a number of BBC executives that are charged with delivering that strategy on a day-to-day basis. Members of the board will be able to use any commercial data to help inform their strategic and operational decisions, both in the specific area of the Public Interest Test and in their wider work. While we will of course engage as fully as possible, stakeholders may well not be able to fully support their concerns with evidence due to commercial sensitivities. A system which relies on commercial competitors providing the board with commercially sensitive data is simply not fit for purpose, if that is what is intended here.

8. We do not believe that the intention of policy makers was to substitute Ofcom's role in assessing market impact, but rather to require an additional commitment from the BBC board to also consider such matters. It is welcome that the BBC board should also consider this area, but it would be a backwards step if this replaced Ofcom's role. Not only is it wholly unrealistic to expect companies to provide commercially sensitive data to the board, but it must be acknowledged that the board itself is, at best, less independent than Ofcom, and, at worst, conflicted. In addition to including BBC executives, the board is responsible for the BBC's strategy, which it will no doubt want to see succeed.
9. We therefore ask Ofcom to make it clear that, in fact, there will be an opportunity for third parties to raise concerns with Ofcom if the BBC board decides that a change is not material. Having considered any concerns, Ofcom may of course take the view that they are not relevant or not significant, or were covered by the BBC board's work, but there must be a formal process for raising such issues with Ofcom.
10. We note that a detailed process for third-party stakeholders to raise concerns with Ofcom is set out in Ofcom's accompanying consultation on Assessing the impact of the BBC's existing public service activities (Section 4.3 onwards). A shorter version of this process might form the basis of such a system for enabling industry to engage with Ofcom on proposals to change BBC services.

Materiality

11. Ofcom then sets out criteria for deciding whether a proposal is material. The BBC may impact on competition in a multitude of ways - as Ofcom notes this is a "complex" area - and a small change for the BBC may be significant for others. It should in our view be clearer that impact on competition does not necessarily mean impact on the entire market, but could include a sub sector such as children's broadcasters or even just one or two stakeholders. We note

that this is explicitly stated in Ofcom's criteria for assessing materiality for commercial services – which include “whether the change appears to particularly affect an individual competitor”. We ask for a similar clause to be added to Ofcom definition of materiality for public services.

Competition assessment

12. Finally, it is unclear to us from the consultation paper whether Ofcom always intends to carry out one of either a full BCA or a shorter competition assessment for material changes. We assume that is the intention but would welcome clarity here. Given the challenges in securing data on competition for the public interest test, having Ofcom perform some form of competition assessment is all the more important.