



Department
for Culture
Media & Sport

The balance of payments between television platforms and public service broadcasters consultation report

Government Response 5 July 2016

Department for Culture, Media and Sport consultation on ‘Balance of Payments’

Summary of responses – and Government response – to the consultation

About the consultation

Aimed at: The consultation was primarily aimed at the broadcasting sector (both public service broadcasters and commercial broadcasters); pay-TV platforms; rightsholders; and other relevant stakeholders.

Duration: From 26 March 2015 to 30 June 2015

Enquiries (including Media Team requests for this paper in an alternative format) to Media Directorate

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Contents:

	Page
1. Introduction	4-5
2. Overall on responses received	6
3.1.1 Balance of payments: The Regulatory Framework	7-9
3.1.2 Repealing Section 73, Copyright, Designs and Patent Act 1988	10-14
3.1.3 Must Offer/ Must Carry Regulatory Regime: Ofcom's Powers to solve disputes	15-18
4. Electronic Programme Guides	19-25
5. Next steps	26
6. Appendix 1 List of Consultation Respondents/ Organisations	27-28

1. Introduction

2.1 Background

The balance of payments between broadcasters and platforms and issues relating to Public Service Broadcasters' (PSB) prominence on Electronic Programme Guides (EPG) arising from convergence, are both policy areas that have been explored extensively over recent years by this and the previous Government. We are grateful for all the responses and evidence provided by the various stakeholders who have engaged in this process.

In March 2015 the previous Government issued the consultation *The Balance of Payments Between Television Platforms and Public Service Broadcasters*. This had two central themes: supporting investment and growth in the creative industries sector; and supporting reach and discoverability of PSB content for viewers. It focused on three particular issues:

- whether the case had been made for section 73 of the Copyright, Designs and Patent Act 1988 (section 73) to be repealed;
- whether the current 'Must Offer/ Must Carry' regime should be amended or removed to create freer negotiations between PSBs and platforms, and whether Ofcom should have an additional role of adjudicating any potential future commercial disputes where there is consumer harm; and
- whether the current EPG regime is fit-for-purpose (particularly, whether to amend the existing framework to be technology neutral; and whether to extend it to include video-on-demand and High Definition services).

Government has concluded that, as was argued strongly by many stakeholders, the UK broadcast and production sector is a global success story and we must ensure this continues to be the case. This success is rooted in a mixed ecology that features wholly commercial broadcasters, commercial and non-commercial PSBs, a strong independent production sector and a range of platforms all of which give UK audiences an enviable choice of what content to watch and how to watch it.

Taken as a whole, the overall regulatory regime works to support this rich and diverse landscape and stakeholders from all sides of the debate have recognised this. With this in mind, Government has decided that deregulation of the must offer / must carry legislation in the Communications Act 2003 is not desirable and would risk endangering the balance of these relationships. Whilst arguments have been advanced about the potential for money to flow from platforms to broadcasters and from there into new UK commissions, this end result cannot be guaranteed without additional regulation which Government does not regard as proportionate, nor without endangering the principle of universal availability which governs access to licensed PSB services on all major platforms and which is one of the principles of our PSB system. Government considers that the commercial PSBs are fairly compensated

for their licensed PSB channels¹ via the existing PSB 'compact' (EPG prominence and spectrum in return for PSB obligations), an agreement which is underpinned in their PSB licences. Government therefore expects that there will continue to be no net payments between all platform operators and the PSBs for carriage of their licensed PSB channels going forward. If this situation appears to be at risk, Government will consider again whether legislative change is required.

With the objective of zero net fees² in mind, and having concluded that the underpinning regulatory regime can deliver this outcome, Government has decided that section 73 of the Copyright, Design and Patents Act 1988 should be repealed. This should not result in retransmission fees flowing from cable operators to PSBs. A further technical consultation will follow that will consider what transitional arrangements may be required while PSBs, underlying rights holders and platforms adjust to this change in legislation. This will be carried out by the Intellectual Property Office (IPO). Furthermore, section 73 should be repealed because it is harming PSBs through the revenue lost when internet-based companies exploit their content without paying them a copyright fee. Therefore Government intends to bring forward legislation to repeal section 73 at the earliest opportunity.

Government also consulted on various options for updating the regulation of Electronic Programme Guides (EPGs). Discoverability of content is set to become an increasingly challenging area to regulate as convergence and advanced search functions allow viewers a greater range of ways to find and explore content. Government takes the view that at present there aren't sufficient grounds to change the regulations governing prominence for linear PSB channels or extend them to the PSB players.

However, Government will continue to keep the area of regulation in an online context under close review as technology continues to evolve, particularly in light of the fact that some stakeholders raised wider concerns relating to the challenges to the current regulatory system posed by the online world and technological development but which were not the focus of this consultation (e.g. the impact of ad-skipping via personal video recorders or add-skipping software on broadcasters' revenues). On the question of Standard Definition (SD) and High Definition (HD) channel access Government does not think regulation is necessary but expect the industry to work to ensure that providers switch SD for HD feeds in the most prominent EPG slot where the channel is placed as it is clearly in the viewer's interests.

¹ ITV1, Channel 4, Channel 5 only

² In mutual recognition of the respective value carriage fees and payments for content should level each other out.

2. Overview on responses received

We received 39 responses to this consultation.

A summary of the responses received are listed in section 3. These have been grouped into the following:

- broadcasters (PSBs and commercial broadcasters) and related stakeholders
- stakeholder groups for underlying rights holders
- distribution platforms (Virgin, Sky, BT)
- stakeholder groups representing consumers, and private individuals.

The summary of responses are grouped in sections according to the broad issues contained within the consultation:

1. Current market and regulatory framework (Questions 1 to 4)
2. Repealing section 73; Transitional Arrangements; Underlying Rights (Questions 5 to 7)
3. Must Offer/Must Carry; Ofcom's powers to resolve disputes (Questions 8 to 10)
4. Electronic Programme Guides (Questions 11 to 19);
5. Standard Definition (SD)/ High Definition (HD) switching issue (Questions 20 to 21).

At the end of each section a summary of the UK Government response sets out what action (if any) is needed and why.

Section 5 lays out how the UK Government intends to move forward with the proposed actions outlined in this response.

3. Overall summary of responses and the Government response

3.1.1 Balance of payments: The Regulatory Framework

Introduction

The Government's overarching policy objective is a diverse, vibrant and healthy creative sector delivering a range of high quality content that meets the needs and expectations of UK audiences, including ensuring that Public Service Broadcast (PSB) content is universally available.

Questions 1 to 4 examined how the current framework is working for stakeholders in the context of changing market conditions. In particular, it sought views on whether the changing technological landscape and the changes in the market for TV services since the Communications Act 2003 meant that certain elements of the regulatory environment in the UK were still fit for purpose, or needed to be revised. The questions posed were:

Q1. What are your views on the overall balance of the regulatory framework, and how do you think the balance changes under the different options we have discussed?

Q2. How far does the current PSB compact regulatory framework deliver for the consumer? How would the policy options discussed in this consultation impact the balance of benefits and obligations that accompany the PSB licences?

Q3. Do you think that the changing technical landscape and changes in the market for TV services since the Communications Act 2003 mean elements of regulation may no longer be fit for purpose and should be reviewed (including the EPG regulation)?

Q4. What are your views on recent trends in UK original content investment and how regulation is impacting, or could impact, these?

Summary of Responses

Broadcasters' views

All stakeholders accepted that there should be a regulatory regime. However, the PSBs were of the view that the current regulatory framework does not recognise sufficiently the value that PSB content provides to distribution platforms: Ofcom's 2015 5-yearly report on Public Service Broadcasting notes that in 2014 the main five PSB channels still accounted for just over half of total TV viewing (51%). All commercial PSBs called for a reform to the system that saw funds flow back to the PSBs to enable greater investment in content, arguing that all platforms are now mature enough to bear this cost. ITV in particular argued that the current ecology for PSBs is increasingly under threat from technological innovations such as Personal Video Recorders and other technologies that enable viewers to skip

advert. They argued that this reduces their advertising revenues, and impinges on their ability to invest in original UK content, particularly on costly productions like drama, which could have implications on whether they are able to continue to fund such content going forward. They referenced Ofcom figures, which showed that PSB spend on network originations declined from £2.9bn to £2.4bn in 2013, which is a real terms decline of 17%³ over that period. Ofcom's third review of PSB also reiterated the drop in levels of investment was a concern, although the level of audience satisfaction was stable in drama.

The Commercial Broadcasters Association (COBA) made the point that the substantial benefits of PSB status has underpinned the PSBs' success. They noted that the PSBs have capitalised on the advent of digital television by launching portfolio channels, which have grown above the market rate. In the last five years the PSB portfolio channels have increased their market share from 10.2% to 15.8%, offsetting declines at the main PSB channels and maintaining the PSBs' overall market share of 72.5%⁴. Their success was fuelled by significant advantages through the relationship to a PSB parent, such as cross promotion and privileged access to original content for the subsidiary portfolio channels.

Distribution platforms views

Most of the platform operators believe that the effectiveness of the current regulatory framework is not under threat, and that the PSBs continue to enjoy high viewing shares on both a linear and on-demand basis, and are in the main in a healthy financial position. Sky in particular, made the point that the Ofcom PSB review in 2014 concluded that the delivery of PSB obligations by the commercial PSBs would remain sustainable in the future, and that the commercial PSBs renewed their PSB licences on this basis for a further 10 years.

Virgin Media in their response stated that the UK benefits economically and culturally from one of the most vibrant and competitive broadcasting sectors in the world, where viewers have increasing opportunities to view high quality, UK-originated content. They also made the point that the fears that featured in Ofcom's Second PSB Review⁵ of PSB decline had not materialised.

BT's view was that the overall balance of the regulatory framework to date has been successful due to the fact that PSBs provide valuable content to all TV platforms, and vice versa: platform operators provide valuable distribution and audience reach and prominence to PSBs in return. In BT's view, the foundation of the UK's successful PSB compact is the careful balancing of these two parts.

Stakeholder groups representing underlying rights-holders views

Those rights-holder stakeholders that answered this section of the consultation believed that the existing regulatory framework was working well in the main. In particular, Pact in their

³

http://stakeholders.ofcom.org.uk/binaries/consultations/psb-review-3/statement/PSB_Review_3_Statement.pdf

⁴ Public Service Content in a Connected Society, Ofcom's Third Review of Public Service Broadcasting, section 4.13, page 80.

⁵

response believed that legislation underpins a strong public service broadcasting regime which is hugely valuable public asset, which delivers economic, social and cultural and citizen benefits to viewers and industry stakeholder alike.

Stakeholder groups representing consumers views

Those organisations representing consumers thought that the current regulatory environment was still largely fit for purpose. However, these organisations noted that future policy-making needs to take account that more and more content is increasingly being viewed outside the traditional, linear delivery model, especially via video-on-demand and via other Internet and mobile technology products and services

The Voice of the Listener and Viewer response aligned with that of the PSBs in that it argued that Government should abolish carriage fees for the PSBs on distribution platforms and that the PSBs should be paid for the retransmission of their content by distribution platforms as happens in the United States. They also stated that this extra income to the PSBs should be reinvested in UK originated public service content.

The Government's Response

Having considered the evidence presented by all stakeholders, Government has concluded that the overall regulatory framework is still fit for purpose in mediating the relationship between broadcasters and distribution platforms.

ITV and Channel 4 submitted detailed analysis⁶ on the value that would flow back to them in the event that regulation was rebalanced in their favour - suggesting a total figure of £121m annual payment from Sky and Virgin Media to ITV and £75m to Channel 4. However, the Government believes that the current regulatory regime including must offer/must carry does not allow for retransmission fees. The Government also disputes some of the assumptions made in this work and does not consider the negotiating scenarios that were assumed are in fact realistic given the strong incentives for the PSBs to negotiate carriage terms. We note that there were no comments from any side on the assumptions set out in the Impact Assessment published alongside the consultation, nor have any parties provided detailed information about how the commercial negotiations around carriage of the PSBs' package of services are conducted.

We are of the view that this consultation has not produced compelling evidence for fundamental changes: no convincing case has been made that a change to the regulatory framework in favour of the PSBs would guarantee an outcome of greater investment in UK-originated content by all the commercial PSBs; and equally, we do not see a case for value to flow in the opposite direction (from broadcasters to platforms) for PSB carriage. We also do not see a need for additional regulation to protect PSBs from technological

⁶ Mediatique study on determining the benefits arising from the supply of PSB channels to pay-TV platforms in the UK' published in December 2014

changes such as PVR technology, because they already have the freedom to negotiate commercially the use of this functionality.

Government remains of the view, set out in the 2013 paper *Connectivity, Content and Consumers*⁷, that it wants to see zero net fees between the main platforms and the PSBs for the licensed PSB channels. This recognises the benefits to platforms, the PSBs and audiences from being able to access award winning, PSB content.

3.1.2 Repealing Section 73 Copyright Designs and Patent Act 1988, Transitional Arrangements; Underlying Rights

Introduction

Section 73 means that cable platforms are not required to provide copyright/retransmission fees in relation to the PSBs' licensed PSB channels. The legislation provides that the copyright in a broadcast of PSB services (and any work in the broadcast) retransmitted by cable is not infringed where the broadcast is receivable in the area in which it is retransmitted. The purpose of section 40 of the Copyright Act 1956, which preceded section 73 Copyright Designs and Patent Act 1988 was to facilitate the retransmission of public service (analogue) broadcasts in areas where aerial reception was poor.

In this section we focussed on whether section 73 is still necessary today, what consequences there will be for underlying rights owners were it removed, and whether any transitional arrangements are needed if it was to be removed.

The questions posed were:

Q5. What do you think the impacts of removing section 73 (CDPA 1988) will be?

Q6. What transitional arrangements, if any, would be needed to accompany removing s73, what form might these take and how long would they be needed for to allow the cable platforms and Commercial PSBs to reorder their commercial relationships?

Summary of Responses

Broadcasters' views

All of the PSBs were in favour of section 73 being repealed. They believed that the removal of section 73 would be a prerequisite for allowing PSBs to receive payments from the cable

⁷ "Connectivity, Content and Consumers", August 2013

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225783/Connectivity_Content_and_Consumers_2013.pdf

networks in recompense for the benefits they bring to them, and which would lead to an increase in investment in UK-originated content.

ITV argued that section 73 should be repealed due to the fact that the provision was designed in a different technological era and the policy purpose for which it was introduced has been achieved. They stated that there was no reason why PSB broadcaster copyright should now be overridden to confer an advantage on one of the world's largest cable operators. ITV stressed that even with a repeal of section 73, the must offer/ must carry regime will remain in place, and as a minimum, the must carry obligation should be brought into effect for cable services⁸.

Channel 4 in their response also agreed with the repeal of section 73, which they also thought was out-dated and harmful piece of legislation that had long since served its intended purpose. They also pointed out that its removal would prevent online services in the UK and abroad from streaming PSB content without payment or permission and would ensure the investments PSBs make in content are protected. Viacom (Channel 5) and the BBC all made similar arguments.

COBA thought that the original intention of section 73 of ensuring the provision of broadcast signals across the UK by facilitating their availability for households that have cable but not DTT was still relevant. They thought that if section 73 was to be repealed, that this would create potential issues. First, there would be a risk of a dispute between cable platforms and underlying rights owners. Second, there would be a potential imbalance in the must offer/ must carry regime for the cable platform, as the must offer requirement is subject to agreeing terms.

Distribution platforms' views

Virgin Media was of the view that the policy rationale behind section 73 is still relevant today. They argued that, as cable infrastructure penetration is currently only at 47%, the technology continues to assist households with poor DTT reception and the exemption from retransmission fees assists them in maintaining broadband roll out. They also pointed to the fact that the historic policy rationale goes back to the Copyright Act 1956 - where there were provisions for exempting the BBC and the then Independent Broadcasting Association (IBA) from retransmission fees, and not the Copyright, Designs and Patent Act 1988, as stated in the consultation.

Tech-UK which represents the UK's electronic communications and future technology sectors raised the issue that repealing section 73 would result in a situation where cable operators would be obliged to pay for the carriage of PSB licensed channels, putting them at a competitive disadvantage versus other platforms such as DTT, satellite and IP-hybrids such as BTs and Talk Talk's platform offerings.

BT in their response agreed that section 73 is out-dated, and pointed to the fact that it is increasingly being used by online content businesses. However, although they were

⁸ Pursuant to section 64 of the Communications Act 2003, the General Conditions applying to providers of electronic communication services and networks require providers to broadcast or transmit the licensed PSB channels if directed to by Ofcom. As Ofcom has not made such a direction, this must carry requirement is not currently effective

supportive of repeal, this was on the provision that must offer/ must carry arrangements were applied to all PSBs and networked platforms, so that the current equilibrium is maintained.

Stakeholder groups representing underlying rights-holders views

The rights-owner community in general were supportive of the repeal of section 73. However they voiced some concerns that the repeal was properly linked with paragraph 19 of Schedule 2 to the Copyright, Designs and Patent Act 1988 - with regard to relevant recognition of rights of performers⁹.

PRS for Music in their response agreed with the repeal of section 73, and argued that any legislation that reduces the scope of rights for rights-holders must be clearly justified, setting out why the loss of rights is outweighed by the public value. They also state in their response that the section 73 provisions were creating unfair market conditions for broadcasters and complexities in the licensing of rights.

Pact in their response considered that the removal of section 73 would mean that producers' works will appear on cable channels. As in the case under the Terms of Trade with PSBs, a secondary commercial use such as this should result in an additional payment to producers for the exploitation of their works.

The British Copyright Council, AGICOA, Equity, the Musicians Union and the British Equity Collecting Society also all agreed with the repeal of section 73 provisions in their respective responses to the consultation.

Stakeholder groups representing consumers

Consumer group stakeholders commented that having different arrangements for specific platforms was not practical and no longer relevant and therefore supported the repeal of section 73. In particular, Voice of the Listener and Viewer in their response agreed with repealing section 73 because this would prevent online content businesses from broadcasting PSB programming without paying the requisite copyright fees going forward.

Transitional Period

Most of the responses on possible transitional requirements believed that there should be some time set aside for this, with the amount of time proposed for the a transition period depending on whether the respondent was representing either a broadcaster or underlying rights owner or a distribution platform operator. For instance, Virgin Media in their response thought that a two years period would not be unreasonable, whilst Channel 4 thought that a minimal time should be set for transitional arrangements.

⁹ <http://www.legislation.gov.uk/ukpga/1988/48/schedule/2>

The Government's Response

The Government has decided to repeal section 73 of the Copyright, Designs and Patent Act 1988, as proposed in the consultation.

Section 73 provides that the copyright in a broadcast of PSB services (and any work in the broadcast) retransmitted by cable is not infringed where the broadcast is receivable in the area in which it is retransmitted. In effect, currently cable platforms are not required to provide copyright/retransmission fees in relation to the core PSB channels.

Today, there are a wide variety of platforms, which ensure that virtually everyone in the UK is able to receive public service broadcasts. Digital television services are now available for 99.9% of consumers through a combination of digital terrestrial television, digital satellite and digital cable platforms. The cable market has now moved from a large number of local providers in the 1980s to one big and a few very small local platforms, and from 130,000 subscribers to over 4.5 million to date. Moreover, the capacity required to carry PSB services on the full digital cable network is negligible compared to the constraints of earlier analogue networks. The Government is satisfied that the objective of ensuring that PSB services (as well as other TV services) are available throughout the UK has been met, and therefore section 73 is no longer required to achieve that objective.

The repeal of section 73 will also have the beneficial effect of closing the loophole used by providers of internet-based live streaming services of broadcast television programmes. Such providers claim that the copyright exemption in section 73 applies to retransmission via the internet. The Government rejects this claim and considers that such online services should not be able to exploit PSB content (including by selling advertising around the service) without any benefit flowing to the PSBs.

This issue has been litigated for some years (ITV and others v TV Catchup) and the case has been referred to the European Court of Justice. The Court will also consider whether section 73 is compatible with EU law. The European Commission has also written a letter of formal notice to the UK also contending that section 73 is incompatible with EU law in the form of the Copyright Directive (Directive 2001/29/EC)¹⁰. The Government considers that it is clear that section 73 is compatible with EU law and will robustly defend these challenges. Notwithstanding this, the Government has decided to repeal section 73 for the reasons set out in this document and we note that this repeal should result in the infraction proceedings being closed.

A number of stakeholders have expressed concern that the repeal of section 73 will result in the commercial PSBs seeking retransmission fees from Virgin Media and that may result in a dispute. They are concerned that this could ultimately lead to PSB services

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

being withdrawn or that any retransmission fees imposed on the cable platform by PSBs could in turn be passed on to cable customers in price rises. Some are also concerned that this will result in an unfair position with cable providers paying retransmission fees while other platforms providers do not.

The Government has carefully considered the consequences of the repeal of section 73 in relation to the regulatory framework for public service broadcasting, the PSBs themselves and the main cable platform provider, Virgin Media. The Government considers that the underlying regulatory framework will continue to ensure a zero net fee position between the commercial broadcasters and Virgin Media. The repeal of section 73 will not affect that position.

This is because the PSBs receive a number of privileges and benefits, including guaranteed access to spectrum and appropriate prominence on EPGs for licensed PSB channels in question, in return for obligations including an obligation that their licensed PSB services are made available throughout the UK free of charge. The PSBs also are subject to quotas for original content, independent and out-of-London production, news and current affairs programming and regional programming.

Furthermore, the 'must offer' licence conditions (made under section 272 of the Communications Act 2003) prohibit the imposition of any charge by the PSBs that is attributable (directly or indirectly) to the conferring of an entitlement to receive their services via the cable network. This means that following the repeal of section 73 the PSBs will not be able to seek retransmission fees from cable providers as this would amount to a prohibited charge.

Commercial PSBs' revenues come primarily from advertising¹¹. Any further payment for retransmission from the cable platform providers where the PSB channels are already broadcast¹² would in effect remunerate the PSBs twice for the same broadcast. This is reflected in the commercial PSBs' arrangements for buying all the underlying rights¹³ for broadcasts via any means to viewers of all platforms.

These arrangements were agreed to and accepted by the commercial PSBs via the licence renewal process which saw all the commercial PSBs accept new 10-year licences for their licensed PSB channels. These licences run from 1 January 2015. The relicensing process considered the costs and benefits of PSB status via a hypothetical auction - the potential flow of funds from the repeal of section 73 was not considered as a part of this process.

¹¹ The parent companies of the licensed PSB channels are diversifying their income streams but all of them are still focused on advertising comprising at least around half of their income stream for the foreseeable future.

¹² In the classic meaning of distribution of TV content via cable, satellite or DTT, not in the internet

¹³ Underlying rights are the rights for certain basic elements which make up a film such as novels, plays, music or the rights of the actors playing in the film.

To conclude, the Government's view is that the repeal of section 73 will not result in new charging arrangements between the commercial PSBs and Virgin Media and the PSB regulatory framework will ensure a zero net fee balance.

The repeal of section 73 will have the effect of creating a new market in copyright where one did not exist before. This is because at present, section 73 prevents underlying rights holders (ie the writers, producers, directors etc. who work on a TV programme) from claiming any copyright fees for the retransmission of their work in a PSB channel. Repealing section 73 entitles them to make such a claim. This means that the underlying rights-holders, the PSBs and Virgin Media will need to reconsider their current copyright arrangements. We expect the PSBs, over time, to clear all these rights (as they already do for their portfolio channels), resulting in the zero net fee policy objectives as set out previously. However, it will be necessary to consult on what, if any, transitional arrangements are needed to accompany the repeal of section 73 to allow all parties to manage this change smoothly¹⁴. It is likely that there will be a transition period for licensing, that new licensing arrangements will gradually become the norm, and the impact will be minimal, given the lack of a new revenue stream for PBSs' licensed channels.

Therefore the Intellectual Property Office will be conducting a further technical consultation to ensure that repealing section 73 will not create any unintended consequences with regard to parties directly affected.

3.1.3 Must Offer/ Must Carry Regulatory Regime: Ofcom's Powers to resolve disputes

Introduction

The must offer / must carry provisions in the Communications Act 2003, as set out in the PSB licences and the 'General Conditions', require that PSBs offer their licensed PSB channels for carriage to the major UK platforms, and conversely that platform providers must carry them if directed by Ofcom. This supports the public policy objective of universal access to PSB services.

This section of the consultation considered this regime, including its relationship with section 73, and sought to understand whether it should be removed to allow for freer negotiations between PSB broadcasters and platforms and whether those could be facilitated by giving Ofcom further powers to resolve any disputes.

The questions posed were:

Q7. What would the practical implications be for viewers, including vulnerable

¹⁴ We will also need to consider whether changes to Schedule 2(19) to the CDPA 1988 are required. This sets out the performers' rights in any cable retransmission and mirrors the wording in section 73.

viewers, if commercial PSB content were only available on free-to-view platforms?

Q8. What would be the impact of removing must offer/must carry provisions on:

- a. The universal availability (reach) of PSB content on pay platforms?**
- b. The PSB compact?**
- c. Overall audience experience?**
- d. The net flow of funds between PSBs and pay platforms (including negotiations for other portfolio channels and other services)?**
- e. Investment in PSB content?**
- f. Investment in the creative industries sector more widely?**
- g. Competition between PSB and non-PSB channels?**
- h. Pay-TV subscription prices for consumers?**
- i. or can the policy objective of freer market negotiations be achieved in the existing system?**

Q9. What would the impacts be if the regulatory framework was amended to make the requirement to agree terms stronger?

Q10. We welcome evidence on how changes to the existing regulatory framework would impact other parties in the sector, such as independent production companies, free-to-view platforms or other technical service providers. We also welcome views on other options not discussed here. What evidence is there that a change in a flow of funds would be translated into higher levels of investment?

Summary of Responses

Broadcasters' views

The PSBs considered the strengths and weaknesses of the current regulatory arrangements, with all wanting to see a regime that allowed a fair exchange of value between the providers of popular content (the PSBs) and the platforms, which allow them to meet their obligations of universality.

ITV favoured a 'free market-like' approach. They would like to get as close as possible to a market-based outcome without the risk of market power distorting the result, or of PSB channels being unavailable to the viewers of a particular platform. They said that this would require a form of determination administered or overseen by Ofcom, in the case that agreement over what constituted a 'reasonable' offer could not be reached and a commercial dispute arose, which could end in black-out on TV screens on a particular channel or platform (depending on the party refusing access to their services).

Viacom (Channel 5) assumed that if must offer / must carry was deregulated either commercial terms would be agreed voluntarily between the PSBs and the distribution platforms; or there would be a failure to agree terms leading to one or more of the PSB channels not being carried on the cable platforms. Such a situation would result in a loss of universality, a reduction in the PSB compact, and poorer audience experience as viewers were denied popular content that they wanted to watch.

Given this, Viacom stated that they cannot see that such outcomes would be in anybody's interest. Viewers want access to the most popular channels; the commercial PSBs need

advertising revenue from the widespread distribution of their channels; and the distribution platforms want to have the most popular channels readily available for their customers.

Distribution platforms' views

Sky argued that the deregulatory proposal outlined in the consultation was in no sense 'free market-like'. Rather such an approach would preserve the existing regulatory framework, including all the benefits received by the commercial PSBs, while adding significant additional regulation by proposing to give Ofcom a new role of arbitrating in negotiations between broadcasters and distribution platforms operators. They believed that the proposed regulatory expansion would be complex to administer, contentious and burdensome to all involved (including Ofcom). They further believed that a key effect of introducing a right to appeal to Ofcom at the end of the negotiation would be to make the prospect of a successful outcome unlikely. This is because an appeal to Ofcom at the end of negotiations becomes 'something of a one-way bet'. Either Ofcom agrees that the offer was reasonable, in which case nothing has been lost, or it accepts the proposition that the offer was not reasonable, in which case the appealing party is (potentially) put in a more advantageous position.

Virgin Media agreed that any deregulation could mean that the parties in any negotiation fail to agree, with the associated risk of channels being pulled temporarily off platforms, and the reach of PSB content declining because viewers are either unable or unwilling to get access to these programmes via other means.

BT stated in their response that under current legislative and regulatory framework, carriage costs are a grey area. They argued that carriage and distribution costs of live main PSBs should be recoverable from PSBs by all network platforms, as they are currently by Arqiva and third party satellite transponder and uplink providers. This, BT believed, would ensure efficiency, platform investment and innovation, and thus enable optimal outcomes by all parties: PSBs, platforms, viewers and network users. BT stated that this is particularly important in content delivery over IP, where network optimisation benefits all Internet users, not just traditional TV content viewers.

Stakeholder groups representing underlying rights-holders' views

Pact believes that the removal of must offer/ must carry would remove the easy access to popular channels for consumers. They stress that both the PSBs and the distribution platform operators benefit from the carriage of PSB channels on Sky, Virgin Media and BT Vision. Pact is also of the opinion that if the must carry/ must offer regulations were removed and the availability of PSB channels on distribution platforms were to be subject to the outcome of commercial negotiations only, this could result in possible channel blackouts, which would have a knock-on impact on reach and as a result, an impact on the PSBs' ability to invest in content.

Pact also raised their concern that any changes to the must offer/ must carry regime could start to unravel the whole of the PSB compact, putting at risk effective interventions in the market such as the independent production quota.

Stakeholders' groups representing consumers

The Voice of the Listener and Viewer stated that the existing 'must offer and must carry' rules are designed to ensure universal access to PSB channels on all platforms and if abolished or revised significantly would put the PSB compact at risk. Without the must offer and must carry rules PSB content may not broadcast on all TV platforms which would significantly reduce the reach and impact of the PSBs and ultimately threaten the viability of the UK's public service broadcasting system. Without being subject to any obligation to reach a deal, if negotiations between the PSBs and distribution platforms breakdown, this could lead to a collapse in the PSB compact.

The Government's Response

The Government is convinced that the current regulatory regime of must offer / must carry is a better mechanism for achieving its policy objectives than the deregulatory alternatives and has therefore decided not to deregulate. Deregulation of the 'must offer and must carry' regime is likely to risk unbalancing the relationship between platforms and broadcasters with no clear consumer benefit. For the same reasons, the case has not been convincingly made for completely market-based negotiations: the evidence suggests that such an approach would not deliver the policy goal of universal availability of PSB channels.

In the consultation we said that we saw no benefit in increasing regulation in these areas but were open to receiving submissions on this issue. We do not believe that either must offer or must carry has primacy.

ITV argued that the must carry provisions should be 'switched on' (currently Ofcom need to issue a direction to activate them), or that must offer should be weakened or abolished to ensure proper balance between the PSBs and the platforms. However, whilst Ofcom can activate the provision if the necessity arises, we do not believe that any such alteration of the existing must offer and must carry provisions are required and instead would endanger universal availability and unsettle the PSB compact by, for example, enabling the PSBs to withhold their PSB channels or allow a platform provider not to carry them.

As with the question of repealing section 73, the commercial PSBs have argued for many years that they should be remunerated for the licensed PSB channels that the platforms retransmit. We have considered these arguments, but as already stated in the chapter on section 73 we believe that they are already adequately compensated under the existing PSB licensing framework. Whilst additional income for funding commercial PSBs' public service content is desirable, this is not deliverable by changes to must offer or must carry without major changes to the overall broadcasting landscape.

In any event, there are no guarantees that increased income to commercial PSBs from retransmission fees would flow into funding new UK original content (rather than, for example, increased returns for shareholders).

More powers for Ofcom to resolve disputes

The Government is also not minded to give further powers to Ofcom to resolve disputes between platforms and PSBs. There were a number of responses to the consultation which raised concerns about the dispute resolution regime in place. It is the Government's view that Ofcom already has the powers to enforce the must offer and must carry requirements.

For both the must offer and must carry provisions there are existing enforcement powers for the 'PSB licences' and 'General Conditions' framework which we believe are sufficient to ensure that the process of negotiations can be carried out, and if a dispute arises, can be resolved using the existing powers conferred on Ofcom. Until now Ofcom has never had to intervene because no disputes have arisen between the PSBs and platform operators that have created any real risk of refusal to supply by PSBs or to carry by platform operators, calling for its involvement.

4. Electronic Programme Guides (EPGs)

Introduction

The consultation considered the technical innovations in how viewers can now access broadcast content and sought views on two main options.

First, it asked whether these technological developments meant there was therefore a need to update the existing regulatory regime to maintain PSBs' prominence on the EPG. The three possible alterations that were proposed were making the definition of an EPG technology neutral (that is to extend the scope of the definition to include new User Interfaces); including the PSBs' on-demand players within the prominence regime to reflect the fact that viewers are increasingly accessing PSB content in this way; and thirdly whether it would be desirable and feasible to swap Standard Definition for High Definition services where viewers had a compatible television set.

Second, the consultation offered an alternative, deregulatory, scenario. This explored whether removing the EPG prominence regime entirely would benefit viewers and maximise competition and investment in the sector.

The questions posed in the consultation were:

Q11. Do you think that updating the existing regime to reflect technical innovations and entrenching the PSBs' prominent position would encourage more long term investment in content and services and if so how might this impact be quantified?

Q12. What steps would have to occur to translate the removal of appropriate prominence requirements into more effective competition between broadcasters for audience share and content investment benefits for viewers?

Q13. In order to maintain the current policy objective of PSB discoverability in view

of technical developments, do you believe that the current EPG framework would require updating in order to remain fit-for-purpose?

Q14. If so, do you agree with the three areas we have highlighted for review:

Making the existing framework technology neutral;

- a. Including VoD content, and;
- b. Integrating technologically advanced service (e.g. HD services) into the existing framework? (Detailed options are discussed in the Appendix)

Q15. Alternatively, do you believe that deregulation would provide a productive route to ensure the best quality content is easily discoverable for viewers while also maximising investment?

Q16. What would be the impact of removing the requirement for EPG providers to offer commercial PSBs appropriate prominence on:

- a. Discoverability of PSB content including Local TV ?
- b. The PSB compact?
- c. Net investment in the creative industries sector overall, including investment in content?
- d. The ability of commercial PSBs and non-PSB channels to make medium/long-term investment commitments?
- e. The ability of non-PSB channels to compete more effectively with commercial PSB channels?

Question 17: Do you agree with our proposals to amend the EPG definition in law to make it:

- a. technologically neutral - so that regardless of how the information on the content is communicated to the EPG service it will be within scope of regulation;
- b. Include video-on-demand content?
- c. If not, why not?

Question 18: Do you agree that it is preferable to have the same regulatory system for EPGs for broadcast and video-on-demand services, or do you think it is better to introduce a separate regulatory system for video-on-demand EPGs? If the latter, what should that look like?

Question 19: Do you think a change from the current licensing system to a notification system is necessary and preferable? What impact is to be expected from a change from a licensing to a notifications system?

Question 20: Do you agree that there is a technologically feasible solution to create a system that would enable EPG providers to substitute in the highest quality PSB content that each consumer can access (depending on their TV) from the same slot? Does this solution only cover perfect simulcasts in Higher Definition (HD) and Standard Definition (SD)? If not, is it for Ofcom to determine what appropriate prominence is if the channel or programme is not an SD-HD perfect simulcast?

Question 21: If there is no technologically feasible solution, do you think EPG prominence regulation should be extended to HD sub-genre menus?

Summary of Responses

Broadcasters' views

The PSBs all argued that the existing PSB 'compact' continues to deliver benefits for viewers and wanted to ensure that the existing regime remains effective as viewing behaviours change. They all advanced arguments for their video-on-demand (VoD) services to be included in an updated regulatory framework on EPG prominence, together with a technology-neutral definition of an EPG to future-proof their EPG prominence. None of the PSBs were in favour of any deregulation to the EPG regime, arguing that this would not guarantee that the public service content was easily discoverable for viewers, and in a worst case scenario PSBs would lose a major benefit of their licences.

All PSBs underlined that the EPG prominence given to them is a vital pillar of the PSB compact. For commercial PSBs, prominence both ensures that their public service content is easily discoverable and ensures that the PSBs are able to fund content by maximising viewing figures to the channel and thereby increasing the value of their advertising proposition.

The BBC welcomed the proposal to make the best possible quality versions of PSB content easily discoverable: High Definition services having offered audiences increasing value and enjoyment of PSB services. However, whilst recognising the potential benefits of HD substitution, the BBC argued that some PSB services cannot be widely HD substituted at present given the technical complexity and costs in relation to regional variants. The BBC also raised the issue that the challenges resulting in any blanket adoption of a technological solution like HD substitution may be compounded as the individual PSBs and market players are likely to explore higher quality versions of content such as 4K or Ultra High Definition, to different timescales.

Channel 4 further explained that a direct swap for the current HD equivalent would simply revert the regional variants to the London HD stream. This they believed would undermine PSB regional programming and the ability for commercial PSBs to sell regional advertising, which would have a significant impact on revenue and thus the ability to fund public service content. Viacom (Channel 5) thought that it was possible to substitute HD for SD simulcasts. They pointed out that Sky already do this on their platform. They also thought that Ofcom should have the power to determine the appropriate level of prominence for HD simulcasts.

In Digital UK's response they agreed with the sentiment of both the BBC and Channel 4 responses and further explained that the pace of change in how people are watching TV is beginning to accelerate and significant market and technology changes are increasingly exposing limitations of the current framework for EPG prominence. These are highlighted by:

- growing convergence between broadcast services and video delivered over IP networks;
- increasing prevalence of video viewing on connected devices including 'Smart TVs'; and
- Increasing influence of global players on the availability and discoverability of TV content to UK audiences.

Digital UK further explained their concern that as markets for connected TV products mature, the absence of a supportive regulatory framework for player prominence for PSBs may expose that while broadcasters are focused on securing the availability of their content to UK audiences, manufacturers are seeking to develop common approach to content presentation that can work across markets globally. They also made the point that deals between consumer electronics manufacturers and content providers are increasingly taking place at a global level, and gave the example of the recently announced deal by Netflix securing a dedicated Netflix button on all remote control devices from Panasonic, Philips, Sony, Toshiba and Vestel in Europe.

The Local TV Network stated that since the launch of Local TV it has introduced a completely new tier of PSB stations and which creates a number of challenges in ensuring the regulation remains fit for purpose in continuing to deliver prominence for PSB services. The Local TV Network believes that it is vital that the current EPG framework is strengthened and made fit for purpose in the current fast-changing environment.

Coba, however, did not want to see the current regime altered. They argued that PSBs' on-demand services are already easily accessible, and that PSBs already have every incentive to invest in VoD as these services are attracting audiences and generating substantial revenues. They submitted a study from Communications Chambers¹⁵ about the value of PSB privileges which estimated their value including EPG prominence envisaging highly competitive auctions for EPG positions, with a number of non PSB channels interested in purchasing premium slots. In terms of VoD, they noted that there was no need to extend prominence or make the framework technologically neutral. Instead they called for the value to VoD services from their relationship with the PSB to be reflected in the value of the PSB licence, just as the value of PSB linear channels are now included. Finally, Coba raised concerns that if PSBs' HD channels were given prominent positions in the EPG in addition to their SD channels, that that would have profound consequences for the rest of the market.

Distribution platforms views

Distribution platform providers were of the view that there was no need to extend the prominence regime to video-on-demand services or make the existing regulatory framework technology neutral. With regard to PSB licensed HD channels they thought that either the SD or the HD should be given prominence, not both.

Sky made the point that EPG prominence is a significant market intervention, delivering substantial value to the PSBs and prevents platform operators from exploiting the commercial value of their property. They argued that a true commercial negotiation between commercial PSBs and platform operators could therefore only occur if all obligations on both parties were removed (that is including EPG and other obligations).

BT agreed that that the current EPG framework does not adequately reflect the current landscape of TV services and that it is not sufficiently adaptable for the future. Provided that the PSB players were included in the must offer provision, BT supported the proposals to continue appropriate prominence for main channel PSBs; to amend the EPG legislation to

¹⁵ The Costs and Benefits of the C3 Licences, Communications Chambers for COBA, December 2014

make it technology neutral; to afford PSB players appropriate prominence; and to integrate technologically advanced services like HD in the prominence system.

BT also agreed that there are technologically feasible measures to expand the availability of HD PSB content in the most prominent channel slots via 'intelligent source' selection. However, they thought that this would throw up other issues, such as bandwidth capacity issues when a viewer wishes to watch one HD channel while recording others.

Virgin Media noted that the prominence system is in their view a lost opportunity to sell EPG slots to other channels. Prominence increases viewership and advertising impressions and the revenue thereby generated is, in part, invested in programming. The value of the programming to distribution platforms is derived from the importance that its customers attach to the content.

Stakeholder groups representing underlying rights-holders views

Pact argued that prominence and discoverability are important PSB benefits which must be protected in order to ensure that PSB broadcasters continue to deliver on their PSB obligations, thereby ensuring that Parliament's rationale for this intervention remains relevant. They also thought that it made sense for the regulatory framework to be adapted to meet technological changes to extend to include PSB players and HD services of PSB channels, subject to a full impact assessment. They suggested that, in return, Ofcom might wish to consider how this would fit with the current value of PSB licences.

Stakeholder groups representing consumers views

The Voice of the Listener and Viewer made the point that if commercial PSBs were not offered appropriate prominence on all platforms, they would suffer a loss in audience share and consequently in advertising revenues which would finally lead to a decline in investment in UK original content and the creative industries in general. The Voice of the Listener and Viewer agreed that the EPG framework needs to be technology neutral, and should include VoD content, and if possible integrate the automatic delivery of HD where viewers have compatible TV sets. They were also of the view that if there is no technologically feasible solution to the HD/SD switching issue, then the EPG prominence regulation should be extended to HD sub-genre menus so that PSB channels are more easily discoverable.

The Government's Response

The Government has considered carefully the responses to the two scenarios upon which it consulted - updating the EPG regime in three areas (definition, inclusion of PSB players, SD/HD switching); and wholesale deregulation of EPG prominence.

On the option of removing the prominence regime, Government has looked at the evidence and considers that this would not benefit viewers and would furthermore lead to wholesale disruption in the UK's successful broadcasting ecology. The regulatory framework that supports Public Service Broadcasting in the UK is being challenged by convergence and the emergence of new ways of accessing content that bypass traditional linear EPGs, but there is still evidence that this prominence regime does benefit the PSBs in the way Parliament intended and deregulating it would remove one of the key benefits of PSB status. On this basis, Government will not deregulate in this area.

On the options for updating the EPG regime, the arguments on both sides were strongly balanced and Government has taken into account the practical issues of proportionality and deliverability that need to be considered as part of any decision.

(i) Future-proofing the definition of an EPG: 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 on-demand 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.

(ii) Including PSB players in the prominence regime: All the PSBs argued strongly that their players should be afforded prominence given their increasing popularity as a mechanism for accessing PSB content. At present, on-demand sub menus or UIs are not subject to any prominence requirements. Government understands the concerns raised that some platform providers may be incentivised to place non-PSB players more prominently as part of commercial deals. However, 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.

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.

Therefore, the Government is not minded (at this stage) to make any changes to the current definition of an EPG, and also not to establish a prominence regime for PSB players.

However, given the pace of change in the industry, Government believes there would be some merit if Ofcom were to decide to look to review their EPG Code of Practice to ensure it remains effective.

(iii) The third option for reform that the consultation explored was whether it is desirable, practical and cost-effective to automatically switch the Standard Definition channel (SD) for its High Definition (HD) simulcast where available and receivable by viewers. Stakeholder gave varied responses to this question, mainly stressing that although the aims of the proposal were laudable, there are currently problems in realising the proposed objective of increasing HD take-up amongst viewers, especially around regional variants and associated costs. Consumer groups want an enhanced experience and automatic swapping of SD/ HD versions of PSB channels, as they purchase higher specification TVs.

Government remains convinced that viewers should have easy access to the highest specification version of PSB channels. Ofcom's 2015 Communications Report reported that over 76% of UK households now have HD or higher specification televisions, which supports the opinion that more should be done to ensure these viewers should have easy access to higher specification content automatically where available. Government is mindful of the technical and cost issues for industry and is not looking to increase regulation unnecessarily. Therefore it considers the optimal way for this to happen is via industry voluntarily finding a way to deliver SD/HD switching on the main EPG rather than increasing regulation by placing a requirement on industry to mandate this switch. Government is therefore looking to industry to come up with appropriate technical solutions to overcome these and expects to see action on this, otherwise we will look again at whether regulatory change is required.

On this basis, Government does not believe (at this time) a regulatory intervention is required on the SD/HD switching issue. However we have a very strong expectation that industry players will look to deliver a technical solution.

[1] spectrum and EPG prominence granted in return for PSB content.

5. Next Steps

We will bring forward legislation to repeal section 73. To prepare for the repeal of section 73, the Intellectual Property Office will be running a short technical consultation to understand and address any transitional issues.

We will continue to monitor developments in new content delivery technologies and international developments, including what these mean for the UK broadcasting market and how they affect PSB prominence.

We will discuss with Ofcom the merits (or not) of them reviewing their EPG code of practice.

We will be approaching industry to find a permanent technical solution for High Definition (HD) /Standard Definition (SD) switching on all UK television platforms as soon as practicable.

Appendix 1 List of Respondents/ Organisations

Responders to the DCMS consultation on 'Balance of Payments'

1. AGICOA
2. BBC
3. BBC Alba
4. British Copyright Council
5. British Equity Collecting Society
6. BT
7. Campaign for Press and Broadcasting Freedom
8. Channel 4
9. Coba
10. Compact Media Group
11. Digital UK
12. Equity
13. Independent Film & Television
14. ISM
15. ITV
16. Local TV Network
17. KM Group
18. Made TV
19. Magine TV
20. Music Union
21. NBC Universal
22. PACT
23. PRS for Music
24. QVC
25. S4C
26. Scottish Government
27. Scotland, Ofcom Advisory Committee
28. Simplestream

29. Sky
30. Stokesley Family Law
31. STV
32. Tech-UK
33. The Voice of the Listener and Viewer
34. VIACOM/ Channel 5
35. Virgin Media
36. UK Music
- 37-39. Responses were received from three individuals.



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