

## PSB prominence, inclusion and fair value: A new deal for the global online era

### Context

In 2019, combined investment in original, homegrown content by UK public service broadcasters (PSBs) was more than £2.5 billion. This highlights the extent to which the UK's PSBs contribute to the wider creative economy as foundational investors — supporting thousands of UK production companies and tens of thousands of jobs all across the country.

But the way we consume media has changed dramatically in the past decade, including the way we watch and discover content. Increasingly, we are a nation of streamers. More than half of UK households now subscribe to video-on-demand services or own a smart TV.

The result is that the leading global technology players and global online platforms have increasing influence over what we see. The companies who make our smart TVs, streaming sticks and set-top boxes (and the technology within them) also control the interfaces which people use to choose TV. This means they control what's on them, what gets recommended to us, and the terms on which all this happens (e.g. data, attribution and monetisation).

Absent intervention, increasingly the content that UK audiences can access most easily will be determined by deals for inclusion and global prominence between a small number of global content providers – Netflix, Apple, Disney – and powerful global TV distributors – such as Google and Amazon. The risk is that PSB content will gradually fade from view, its commercial model undermined and the legitimacy of the licence fee compromised. This won't be because those PSB services are not valued and popular but simply because asymmetric economics mean that global players are able to pay handsomely for prominence.

This matters because the strength of our creative industries depends so heavily on what PSBs do to invest in homegrown ideas, content and talent. UK audiences depend on content that is relevant to, and reflects, their own lives. Democratic debate in the UK rests on mass reach, plural news services that are easy for audiences to find and access.

### **Prominence, Inclusion and Fair Value**

Last year we welcomed Ofcom's recommendations which would give British public service content prominence in the era of on-demand and internet TV viewing. Their aim, building on a well-established regime, was to bring the rules up to date for the digital age, and make sure viewers can easily find PSB content across the full range of ways in which audiences access TV content today.

But in this context, we are also calling on Ofcom and Government to include, within new legislation, provisions to ensure PSB channels and players are included — or “carried” — on all major content distribution platforms, and that they get fair value from their content on those platforms. In simple terms, there is very little point in a new PSB prominence regime if it is not possible for PSBs to get onto the main TV platforms and User Interfaces (UIs) in the first place. Equally, even if PSBs can get onto those platforms and interfaces, if the terms for that inclusion, set by the platforms, are exploitative and do not deliver fair terms for popular and societally important content then the PSB regime will be undermined. Fair terms in this context isn't simply about payment but may also be about access to data, attribution or other benefits.

A world-leading creative economy can no longer afford to rely on a legislative framework left over from a linear age. Instead we need a regulatory environment that will allow PSBs and the whole of our creative sector to thrive in the global, digital era.

The need for change is urgent, but we can build on the approach that is already familiar in the broadcast world. Below we set out our proposals for a regime securing prominence, inclusion, and fair value that would enable PSBs to thrive in decades to come and, most importantly, to continue to deliver for British audiences right across the country. The proposals below would cover PSB TV channels regardless of how they are delivered to consumers (e.g. whether broadcast or streamed) as well as the associated on-demand players (and content) of the PSBs. Whilst the new regime would subsume the existing EPG prominence regime, we would not anticipate any significant changes to the existing approach to regulating the prominence of linear, broadcast PSB channels via EPGs that are already regulated.

### **A regime underpinned by statutory objectives**

The legal framework for PSB prominence, inclusion and fair value should start with five statutory objectives:

1. ***Supporting the delivery of PSB purposes and objectives / PSB licence obligations***
2. ***Ensuring access for audiences to PSB channels and qualifying VOD players*** (the BBC iPlayer in full, the S4C player in full (except where it opts to distribute only through the BBC iPlayer) and 'core' players from the commercial PSBs (ITV, STV, Channel 4 and Channel 5) as per a 'regulated offer' – see below) on all major TV distribution platforms, services and user interfaces
3. ***Guaranteeing the findability and prominence of these PSB services***: ensuring PSBs are as easy to find in connected user interfaces as they currently are in linear EPGs
4. ***Safeguarding funding for UK content*** (defined broadly – i.e. not just market failure genres) shown by the PSBs and from which the platform benefits
5. ***Ensuring the PSBs can have a direct relationship with their viewers and are not disintermediated by platforms***

The key components underlying these principles would be as follows:

- a. ***Guaranteed access*** for PSB channels and qualifying VOD players (or negotiated expanded offers) to the major TV distribution platforms/UI providers and ***guaranteed supply*** to platforms of these services, for free, according to regulated terms.
- b. ***Significant prominence for PSB channels and qualifying VOD players*** or any negotiated expanded offer, including on all major user interfaces on all major platforms, devices and services in the UK used to consume TV or TV-like content.
- c. ***Clear prior control over content and signal***, ensuring that the PSB benefits from the use of additional functionality by the platform/UI operator which depends on the use of PSB content (ad skipping, recording, overlaying etc). Also ensuring that the full functionality of 'core' players is provided to audiences and (where relevant) the PSB retains the ability to negotiate a broader content and functionality offer beyond the defined 'core' players

- d. **Attribution and real-time data access** to enable personalisation, recommendations, curated features, and advertising in a timely manner [to adult audiences only]

### Defining key terms in law

The legal framework will then need to define:

- **“In-scope Content Services”**: this should be PSB channels and qualifying VOD players. Qualifying VOD players should include any free to view player from the BBC and S4C<sup>1</sup>; and any ‘core’ player provided by a licenced PSB under the concept of a ‘regulated offer’ (see below). Should the PSB and platform agree an expanded service offer through commercial negotiations then this expanded offer should be afforded the same prominence as the ‘core’ offer. The regime might also allow for in-scope services to be offered by one or more PSBs in partnership.
- **“User Interfaces”**: UIs could be defined much as EPGs currently are in the Communications Act 2003 (i.e. a service which consists of— (a) the listing and/or presentation and/or promotion of some or all of the programmes included in any one or more programme services the providers of which are or include persons other than the provider of the UI; and (b) a facility for obtaining access, in whole or in part, to the programme service or services listed or promoted in the UI.) This should be enhanced to cover UIs where a choice of content is available but ‘hidden’ and so not ‘listed or promoted’ in the traditional sense (e.g. voice search). To limit the scope of regulation, whilst most UIs would be caught by this definition, only Qualifying Undertakings (as defined below) would be required to comply with prominence requirements. It is conceivable that there could be more than one undertaking with joint control of a UI.
- **“Qualifying Undertakings”**: Qualifying Undertakings would be those: a) offering one or more User Interfaces (as defined above) and b) with general ongoing control over the design of these UIs, which programmes and/or services are included in the range of programmes or services offered to users, and the manner in which programmes and services are organised in that range. Such Undertakings will include those offering smart TVs / smart devices (e.g. Samsung, LG, Amazon, Apple), pay-TV platforms (e.g. Sky, VM), free / freemium TV platforms (e.g. Freeview Play, YouView) and operator focused more on the UI only (e.g. Google). The following further restrictions might apply to ensure materiality of Qualifying Undertakings:
  - obligations apply only to Qualifying Undertakings used by a significant number of people to consume AV content (to be defined by Ofcom or in law); and/or
  - obligations apply only to UIs used by a significant number of people to consume AV content (to be defined by Ofcom or in law); and/or
  - obligations do not apply to individual UIs (and/or undertakings) with fewer than [XX] thousand active users.

<sup>1</sup> Subject to S4C’s option to distribute through the BBC iPlayer

In the event that a platform or UI offered only linear services or, more likely, only non-linear services, the regime would apply only to the relevant in-scope services.

### **The prominence regime: core concepts**

The law should place **a requirement on Ofcom to set out how it will assess ‘significant prominence’** within its guidance, to ensure that qualifying services are at least as prominent in user interfaces as a whole as linear channels are today within current EPGs. It should require Ofcom’s guidance to specify:

- ***The degree of prominence to be provided***, including (but not limited to):
  - In the UI taken as a whole, viewers should be able to find and access in scope services more easily than other content not covered by the code (including SVOD services, any services provided by the UI operator, and any services paying (or otherwise agreeing terms) for prominence) in line with the principles of EPG ordering.
  - Where services are discoverable in their entirety (e.g. broadcaster VOD apps), in-scope services are easily discoverable and quick to access; and
  - Where individual pieces of content are discoverable as a result of editorial decisions and/or algorithmic curation (including in search, recommendation and personalised menus), a substantial amount of such content should be immediately visible and attributable to the relevant PSB, and quick to access. The individual content displayed should be chosen by the relevant PSBs from the total catalogue of their in-scope services.
  - Where recommendations or search results are based on purely factual criteria which can reasonably be argued to result in returning a single clear programme asset (e.g. “Show me episode 2 of series 3 of X”), PSB prominence would not apply. However, there should be an obligation for PSBs to be treated in a Fair, Reasonable and Non-discriminatory manner where relevant.
- ***Which UI functions in-scope services should be prominent within***, including (but not limited to) all those areas of UIs:
  - ***Positioned by the UI provider as central to the user experience***: This will vary by UI as different providers emphasise different functionality, but is generally likely to include homepages, linear EPGs; VOD player landing pages; search (inc. voice) and recommendations; and / or
  - ***Used by a substantial number of people to access TV or TV-like content***: It is possible that areas of a UI are not prominently positioned but nonetheless have significant appeal to consumers<sup>2</sup>. Such functions are likely to include VOD player landing pages.
  - ***The EPG***

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<sup>2</sup> For example, linear EPGs remain a popular way to access programmes yet a platform might chose to make the EPG much less prominent

- **Whether prominence requirements should apply to access devices:** such as remote controls or voice-led devices which interact with the UI, especially where these devices override the prominence given to PSBs in other areas of the UI.

As part of this regime, Ofcom should:

- be given **sufficient information gathering powers** to carry out its duties in this regard (given UI providers will be unlicensed);
- be responsible for **developing guidance** (a code) for qualifying undertakings who would need to develop their own guidelines, in consultation with the PSBs, as to how they would meet their prominence (and inclusion) obligations overall. Ofcom would need to approve these guidelines having consulted with the PSBs. Ofcom's code should keep pace with market developments. Ofcom should conduct an [periodic / annual] review of inclusion criteria including in-scope services and qualifying platforms [or another review mechanism]; and
- be given **powers of designation** (for in-scope services, user interfaces and qualifying undertakings) and enforcement powers.

#### **The inclusion regime: a PSB-platform deal that helps maintain and strengthen PSB**

The aim of the regime is to ensure access for audiences to PSB channels and qualifying players on all major TV distribution platforms, services and UIs, whilst also ensuring that PSB can continue to flourish and is not undermined by powerful global platforms.

**A regime constructed around negotiated settlements:** The terms on which inclusion of the PSB channels and qualifying VOD players occurs should be negotiated commercially as far as possible (to minimise the need for regulation and to allow platforms and PSBs to design the best outcome for audiences). However, the distribution/platform market is globalising rapidly and is already characterised by significant market power with asymmetric economics between platform and individual PSB. Accordingly, there should be a baseline guarantee of inclusion (by the platform) and supply (by the PSBs) as long as regulated conditions are met. The approach taken to setting conditions will vary according to the PSB.

#### **Compatibility with the BBC's Charter & Agreement and existing regulatory framework:**

The BBC already has existing supply obligations on all its services as set out in the BBC Framework Agreement. These obligations already require the full range of UK Public Services to be made widely available by the BBC. This framework is intended to complement rather than replace that regime. The terms on which the BBC will make its channels and services available are set out in the BBC's Distribution Policy and are the starting point for the BBC's negotiations. The BBC's activities in this area are already regulated by Ofcom.

**S4C's approach to distribution:** S4C's approach to distribution is closely tied to that of the BBC, given that in some instances S4C chooses to distribute its programmes through the iPlayer instead of, or in addition to, its own player. This regime is intended to allow S4C to determine its preferred approach in future. Where S4C distributes through its own player, a tailored version of the "Regulated Offer" would apply to all content offered on a free to view basis.

**Requirement for a ‘regulated Commercial PSB Offer’:** For the commercial PSBs, there should be a legal requirement for each to make a baseline “Regulated Offer” overseen by Ofcom: effectively, a standard (and standing) contractual proposal for the inclusion/carriage of In-Scope Content Services (as defined above) on UIs offered by a Qualifying Undertaking. Whilst the Offer might take different forms for different PSBs, as a minimum it might:

- include a baseline offer for the inclusion of In Scope Content Services in UIs for free, with necessary technical modifications at the cost of the platform not the PSB;
- include all programmes recently first broadcast on a public service channel;
- be offered on reasonable contractual conditions, as approved/set by Ofcom. This might cover requirements around delivery, access services, regionalisation etc;
- specify where programme playout should/can occur (e.g. in-app or via native media players) and what will be provided by the PSB to support delivery (e.g. metadata to enable search); and
- apply only in the event that Qualifying Undertakings have made reasonable adjustments in order to carry the service [and potentially limit the number of historic versions of a UI supported].

Beyond this baseline offer, PSBs and platforms should be free to negotiate fair commercial terms on any additional functionality platforms may wish to offer (e.g. downloading to mobile, use of cloud storage, recording or ad skipping of PSB content, disaggregation, metadata usage, overlays, Automatic Content Recognition (ACR), or any other modifications to the service by the platform) or to retain data on PSB viewing which should, as a default, belong to the PSB.

The intent is to guarantee universal provision of PSB content to all audiences whilst avoiding either sweeping mandatory requirements for PSBs to provide their full suite of commercial services to all UI operators nor to place any binding obligations on UI operators to include and make prominent such commercial content.

Given the well-established principle that predominantly commercial activities cross-subsidise commercially-challenging PSB content, the commercial PSBs should be given the option of asking Ofcom to approve a simplified ‘core offer’ which includes all the content offered on their VOD service regardless of whether or where it was first broadcast. In assessing such a request Ofcom might be required to consider the extent to which any market impact was justified by the extent to which such an approach would deliver the statutory objectives above.

**Legal duties placed on Qualifying Undertakings:**

- To carry/include all PSB linear channels, any VOD service with a “Regulated Commercial PSB Offer” in place (or any expanded offer negotiated commercially), and any BBC and S4C free-to-access TV content players.
- A requirement for carriage at a similar quality and quality of service where it is necessary to reach the end user.
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- This obligation should apply to each service in the form described in the ‘regulated offer’ by the PSB (e.g. the service rather than disaggregated programme assets) or any expanded or varied offer negotiated commercially.
- To put in place and implement a prominence policy (approved by Ofcom), in line with guidance issued by Ofcom (in its UI Code) in relation to which UI functions are captured having regard to factors which must include (but are not limited to):
  - whether the UI is positioned by the UI provider as central to the user experience; and
  - whether it’s used by a substantial number of people to access TV or TV-like content
- To place the service in a prominent position in accordance with this prominence policy (this obligation couldn't be waived by either party)
- To carry/include services in the form provided by the PSB without application of recording, ad skipping, overlays or any other modifications (except where this is explicitly agreed with the PSB, but which cannot be a requirement for platform to agree carriage/inclusion)
- Must support the maintenance of a direct-to-viewer relationship by the PSB, in a manner that allows real time identification of viewers, equivalent to that available to the UI operator and other third-party services, to facilitate accurate content recommendations and, where applicable, targeted advertising
- Must make reasonable adjustments to their platforms/UIs in order to carry the relevant service in full.

**Ofcom's role:** to ensure that:

- Commercial PSBs adhere to obligations to make a Regulated PSB Offer (with additional guidance on reasonable contractual terms etc as mentioned above);
- The BBC complies with its supply obligations as set out in the BBC Framework Agreement and Ofcom’s Operating Framework; and
- The Qualifying Undertakings adhere to their obligations as to prominence and inclusion.

In practice either the PSB or the Qualifying Undertaking would have the freedom to insist on carriage/inclusion/offer on the terms of the basic "Regulated PSB Offer" or application of the BBC’s Distribution policy. For commercial PSBs both parties would be free to negotiate a commercial deal for most other elements (though prominence would be non-negotiable). In other words, there is a guarantee of carriage/inclusion for core individual services but with significant flexibility for the parties to negotiate for the application of additional functionality and added value content beyond the more limited content offer to which the ‘regulated offer’ requirements attach.