

A Communications Review for the Digital Age

A response to Jeremy Hunt's 16 May 2011 letter from the Commercial Broadcasters Association

30 June 2011

Introduction

- 1 COBA (the Commercial Broadcasters Association) is the industry body for commercial broadcasters that invest in the UK without receiving any public funding or incentives. Its members are Bloomberg Television, BSkyB, Chinese Channel, Discovery Networks, Fox International Channels, MTV Networks, NBCUniversal, QVC, SBS Broadcasting Network, Turner Broadcasting System, UKTV and the Walt Disney Company. Until March 2011, COBA was known as the Satellite and Cable Broadcasters' Group (SCBG).
- 2 COBA very much welcomes the opportunity to submit a response to the Government's review of the communications sector. We are particularly pleased that Government has chosen to conduct this review through a "growth" lens, alongside the consideration of wider public interest aspects, as we believe that our sector can offer much to the growth agenda, creating significant economic and cultural/creative value for the UK, and increasing inward investment.
- 3 At a recent COBA drinks reception, where the Communications Minister Ed Vaizey MP was our Guest of Honour, COBA Chair Dee Forbes (EVP and MD of Discovery Networks Western Europe) announced the findings of research that shows that COBA members are very significant investors in both UK content and UK people. We were encouraged by the Minister's comment that given this level of investment COBA's views are critical in the debate about the future communications policy framework. Dee also used the event to outline COBA's emerging thoughts on the regulatory and policy conditions we believe are necessary if the UK is to derive maximum benefit from our investment and creative contribution. In short those conditions are:
 - an approach to public service content that incentivises investment from all broadcasters;
 - light-touch regulation that benefits the whole market, not just a few players;
 - proportionate regulation to encourage growth;

- “platform-neutral” application of the law, particularly in the area of intellectual property rights, rather than the pursuit of “platform-neutral” regulation;
 - a strong Country of Origin principle.
- 4 In this response we go one stage further in outlining these conditions and look forward to engaging with DCMS further ahead of the proposed Communications Bill.

Our sector and its UK investment

- 5 COBA represents commercial broadcasters that operate from and invest in the UK but are independent of public funding or incentives. Since the 1980s these broadcasters have complemented and competed with the UK’s public service broadcasters (PSBs) and now make up an integral and vital part of the rich broadcasting mix in the UK.
- 6 COBA members operate nearly 300 UK-regulated television channels within the UK and across the EU, including 45 HD channels and 1 3D channel. They commission, acquire and broadcast programming across the full range of genres, including news, sport, drama, arts, natural history, children and young people, entertainment, music and comedy, as well as content for ethnic minorities in their own languages. COBA members broadcast their services across all UK platforms, both free to air (for example Freeview) and pay TV (including Sky, Virgin, BT, Talk Talk and Top Up TV). In addition to these traditional platforms, COBA members are launching new innovative services through VOD, online and mobile platforms, making them more accessible to consumers than ever. Our members’ share of audience reflects this accessibility and according to Ofcom’s 2010 Communications Market Report¹, non-PSB broadcasters have a 28% of audience share in UK multichannel homes².
- 7 A key characteristic of our sector, and one that has traditionally been overlooked in media policy debates, is the significant and growing contribution these broadcasters make in the UK: in people, in content, in channels and the economy as a whole.
- 8 COBA recently commissioned Deloitte to undertake a study into our members’ investment in content. The report³ shows that:
- COBA members’ investment in UK original content (which includes original commissions, co-productions and production across all genres but excludes all rights payments) was £432 million in 2009, an increase of 7.5% from £402 million in 2008. In the same year Ofcom’s data shows that Channel 4 spent £341m and Channel 5 £69m⁴.

¹ http://stakeholders.ofcom.org.uk/binaries/research/cmtr/753567/CMR_2010_FINAL.pdf

² BARB indicates that 94% of television households have access to multichannel TV, a percentage which will be nearly 100% when digital switchover is complete in 2012.

³ <http://coba.org.uk/positions-and-reports/item/105-deloitte-report-on-cobas-content-investment>

⁴ <http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/psb-review/psb2010/psbreport.pdf>

- COBA members' total content investment (which includes original commissions, production, co-production, rights and acquisitions across all genres) in 2009 was £2.3 billion, an increase of 8.7% from £2.1 billion in 2008. During the same period the main PSBs and their digital channels' content expenditure decreased by 7%.
 - 70% of COBA members' total content spend, or in the order of £1.6 billion, was invested in the UK in 2009 through fully funded originations, co-funded originations, productions and acquisitions/rights – an increase of 5.8% on 2008.
- 9 These statistics are vitally important because they reveal that it is not solely the PSB broadcasters – the BBC, ITV, Channel 4 and Channel 5 – who invest heavily in UK content. Indeed in 2009, as the figures above demonstrate, COBA members invested more on UK original content than Channels 4 and 5 combined. Further, it shows that while commercial PSBs' investment is stagnant or in decline, COBA members' investment is growing – see for example Sky's recent commitment to increase its expenditure on UK content to £600m over the next three years⁵. This is important both for the economic wellbeing of UK broadcasting and the wider creative industries, but also culturally, given the value that UK viewers place on UK-originated content and because of the importance of plurality and choice in the broadcasting market.
- 10 In addition to our investment in content, our members are also major UK employers – with 22,000 staff in 2011⁶, a figure that would double if freelance and temporary staff were included.
- 11 More widely, Deloitte estimated in a separate report⁷ from 2008 that COBA members generated a value add of over £2.2 billion to the UK economy. Crucially for the growth agenda, much of this investment is inward investment, with many of our members having chosen to base their EU operations in the UK by regulating their channels with Ofcom and taking advantage of the EU's Country of Origin principle to broadcast across Europe.

What conditions are needed for growth?

- 12 As outlined above, our sector has already demonstrated its potential for growth and investment in the UK. As the UK looks to grow the economy as a whole, and the creative industries in particular, we believe that there is yet more potential for COBA members to invest both culturally and economically in the UK. In order for these companies to be incentivised to invest and grow we believe that the following conditions need to be in place.

A new approach to public service content (Qs 10 & 11)

- 13 It is important to recognise that incumbent PSB broadcasters are not the only source of public service content. As demonstrated in COBA's Deloitte research, broadcasters without a PSB licence also invest significantly and increasingly in UK content because it makes commercial sense to do so,

⁵ http://corporate.sky.com/media/press_releases/2011/Sky_announces_increased_support_for_Britains_creative_industries.htm

⁶ Internal COBA research

⁷ See the report at COBA's website: <http://coba.org.uk/positions-and-reports/item/104-deloitte-report-on-scbgs-economic-impact>

not because it is linked to regulatory incentives. This investment increases the choice of UK content available to viewers, alongside the high quality international content which our members make available to UK viewers, which they also value and have shown a willingness to pay for.

- 14 We believe that public intervention, in the form of public service broadcasting licences and the BBC Charter and Agreement, can be justified in areas where the market has struggled (for sound commercial reasons) to provide and where additional incentives are needed to ensure policy outcomes are met. There remain a number of public-owned assets which have considerable commercial value, even as we get closer to full convergence, which can be exchanged for obligations to provide certain content and services. For example, prominent EPG positioning (which retains significant value given the linear schedule's continued endurance), gifted spectrum, and – an area that has not traditionally figured in the PSB licence equation – the highly commercially valuable role that the current PSBs play as gatekeepers of DTT – an area where we believe that greater regulatory oversight is needed to ensure fair competition, given the predominance of that platform.
- 15 It is therefore still necessary to retain PSB licences in order to control the commercial value these assets convey to PSB broadcasters, and to ensure that the benefits they deliver to the UK public in the form of PSB obligations reflect their real market value. Crucially, in issuing such licences – or extending those that already exist – the government must avoid disadvantaging or discouraging other broadcasters from investing in content or other services. The equation that balances the cost and benefit of PSB licences needs to be closely observed over time to ensure that the licence does not cease to be commercially attractive, while equally ensuring that the commercial value does not exceed the cost of providing those services.
- 16 We therefore believe that rather than shoring up the traditional PSB model, by strengthening the notion that UK content is the sole and “core” preserve of PSB licence holders, that the Bill should create a framework that encourages all broadcasters to invest in public service content and that values high quality content regardless of whether it is broadcast by PSBs or by other commercial players.

Light-touch regulation that benefits the whole market (Q1&2)

- 17 The Secretary of State's letter says that the Government aims to pursue a deregulatory approach to achieve growth in the creative industries. Media companies are some of the most highly regulated in the UK, and so COBA is supportive of attempts to reduce the regulatory burden to allow companies to innovate and compete. However, we believe that Government should add a key rider to its deregulatory plans – that any deregulation is true deregulation, not just “re-regulation”; that it benefits all of the players in the market over the long-term and not just specific players in the short-term. If it wishes to grow the creative industries, we do not believe that Government can do so by picking winners and losers by virtue of its deregulatory actions.
- 18 One so-called deregulatory proposal that has been discussed by a number of stakeholders, including the Government – and which does not fulfill the condition of benefitting the whole market equally – is the removal of the CRR mechanism that governs ITV⁸. As we argued when the House of Lords

⁸ Despite being spoken of as “deregulatory”, we note that CRR is not in fact regulation but a merger remedy

Communications Committee investigated the regulation of the television advertising last year⁹, the removal of that mechanism might allow the already dominant player in the market – ITV (which has over 45% market share) – to (further) leverage its continuing and considerable market power, and consequently increase its advertising prices. This would mean that advertisers would have less money to spend with all other broadcasters in the market and those broadcasters would in turn have less money to invest in the UK. While we support the Secretary of State’s previously stated wish not to “micro-regulate” the communications sector, the removal of this mechanism would in fact result in micro-regulation of a different kind, through the distortion of competition law in favour of one particular broadcaster. Such a move might well improve the financial well being of ITV, but would undermine content investment by other broadcasters including COBA members, thereby limiting the sector’s growth opportunities and narrowing the choice of high quality programming available to UK viewers.

- 19 Ofcom is currently undertaking a review of the television airtime sales trading mechanism, with the possibility of a referral to the Competition Commission, and the CRR mechanism is very much part of this review. We are sure that the Government will wait to see the outcome of this process before cementing its policies in relation to the television advertising market. Whatever the outcome, however, we urge the Government to proceed in a manner that allows the whole market to thrive and that does not undermine the independence of the competition regime itself. As the Secretary of State’s letter says “competition in the communications market can be the basis of choice, innovation and value to consumers”. We fully support this statement, and believe that open and fair competition is the best way to achieve the UK’s economic and cultural goals in the creative industries, where necessary by proportionate economic regulation.

Proportionate regulation to encourage growth (Qs 4, 10, 12, 13)

- 20 COBA also believes that regulation needs to be proportionate. We accept that in order to achieve certain public policy goals regulation is sometimes needed but agree with the Secretary of State that where regulation is holding industry back, because it is not proportionate or balanced, it needs to be reassessed. We have interpreted this as meaning proportionate and balanced both in its worth and value to citizens and in its cost to industry.
- 21 In this vein, we support the move in the Public Bodies Bill to no longer require Ofcom to regulate training provision and equal opportunities – while we do not doubt the importance of either of these things, they are both functions that are being carried out elsewhere (such as by Skillset) or by individual companies under existing laws. The cost of industry subsidising the co-regulator, and of the regulatory burden of reporting to it, were therefore neither proportionate nor balanced.
- 22 With this principle in mind there are a number of other regulatory interventions that we believe are disproportionate and imbalanced: access services and European works. Both these requirements originate in Europe, and so the UK is somewhat limited in its ability to remove them altogether. However, we believe that the UK needs to be stronger in defending its principles and must push back against pressure from the European Commission to increase regulation. For example:

⁹ <http://coba.org.uk/positions-and-reports/item/76-the-house-of-lords-communication-committee-inquiry-on-television-advertising-scbg-submission>

- We understand that in response to UK lobbying the Commission's AVMS Contact Committee is likely to place limits on the number of services that are required to meet and report on EU quotas. We applaud the approach taken by DCMS and Ofcom in this regard. However, at the same time, we know that the UK is coming under pressure from the Commission with respect to EU works on VOD services, and that the UK, via ATVOD is currently gathering data in order to defend our own interpretation of the "promot[ion], where practicable and by appropriate means, [of] the production of and access to European works". It is essential that the Government's line – that it is neither balanced nor proportionate (from both a supply and demand point of view) for smaller and niche channels/VOD providers to be required to meet EU quotas – is maintained as and when pressure from the EU increases.
 - On the flip-side, we have recently heard that under (limited) pressure from the Commission, Ofcom is considering abandoning its principle of not requiring UK-regulated companies who broadcast across the EU to provide access services, despite accepting our arguments only 18 months ago that such provision would be neither technically or financially possible for broadcasters, or indeed very much required by non-UK viewers. We believe that, as with EU works, the UK needs to take a stronger line against pressure from the Commission, and to only implement EU directives by the letter and not succumb to pressure to gold-plate EU legislation.
- 23 The DCMS team will be fully aware that COBA (when still called SCBG) wrote on behalf of its members and a number of other VOD providers to Ed Vaizey MP to express concern about the current co-regulatory scheme for VOD services – ATVOD – arguing that it was placing a disproportionate regulatory burden on nascent VOD services.
- 24 Following the letter, we are now in constructive dialogue with DCMS officials to work through the points we have raised and to ascertain whether the problems that exist in the current system are resolvable. We do not therefore feel that this submission is either the right time or place to pursue that detailed and lengthy dialogue. However, we would like to make an important overarching point about co-regulation and the need for proportionality and effectiveness.
- 25 Regardless of our present concerns about ATVOD, COBA remains supportive of self- and co-regulation as means of achieving public policy goals in the communications sectors providing such schemes are implemented correctly and in the appropriate circumstances. In our members' experience, and having reviewed a number of papers on co-regulation¹⁰, it is clear that when co-regulation works best it can be sensitive to business needs; can benefit from industry expertise; be flexible, quick, sustainable and less prescriptive; and promote industry ownership, as well as

¹⁰ BIS/DCMS, Better Regulation, Self- and Co-Regulation: The Advertising Standards Authority <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/s/10-1279-self-co-regulation-advertising-standards-authority>; Hans Bredow Institute for the European Commission, Study on Co-Regulation Measures in the Media Sector 2006, http://ec.europa.eu/avpolicy/docs/library/studies/coregul/final_rep_en.pdf; Ofcom, Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation. Statement, 2008, <http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/statement.pdf>; RAND for the European Commission, Options for and Effectiveness of Internet Self- and Co-Regulation, 2008 http://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR566.pdf

providing the State with the reassurance of back-stop powers that self-regulation cannot provide.

- 26 The price for these benefits is often a slightly higher financial cost to industry. When the benefits of co-regulation are being delivered (as listed above) – as they are through the ASA for example – industry is often willing to pay extra for the scheme that delivers them. COBA’s concerns about the current co-regulatory system boil down to the fact that it delivers few of the benefits and all of the costs.
- 27 We very much hope that constructive dialogue with DCMS and other stakeholders will be able to amend the scheme so that we can balance out that cost/benefit equation or come to the conclusion that a different regulatory approach is needed, given the circumstances. Regardless of the outcome of this process, the Government should by no means be dissuaded from exploring self- or co-regulatory approaches to other public policy challenges.

Prioritisation of “platform-neutral” application of the law, rather than the pursuit of “platform-neutral” regulation (Q 3)

- 28 The Secretary of State’s letter asks whether regulatory convergence across platforms is desirable, and if so what are the issues of implementation. COBA remains open-minded about the desirability of the eventual application of regulation in a platform-neutral way. However, our key point here is that desirability aside, the reality of the market does not yet permit this.
- 29 Communications may be much more converged than at the time of the last Act, but services and consumer behaviour are still at an early developmental stage, while evolving rapidly – it is simply too soon to re-shape radically the way that regulation is applied to content, especially when, despite the rapid uptake on non-linear services, linear television remains robustly popular.
- 30 Even if it were to be theoretically desirable to apply “broadcast style” regulation to online video content (and it is not at all clear that it would be given the different regulatory expectations of viewers in an on-demand environment), the challenges inherent in doing so are significant and well-known, including difficulties in:
- Identifying what content should be regulated – the AVMS Directive already requires “TV-like” content to be regulated. Identifying which services are “TV-like” is already proving challenging and so any extension of this definition would increase the challenge yet further.
 - Identifying who is responsible for the content: unlike linear television, which exists in a closed network, and where broadcasters control the content (hence the fact that they hold the licence), non-linear video often exists in an open environment, the internet. Content is produced by a huge variety of entities – some professional, many more not – and the responsibility for that content is often split between a number of entities – producer, broadcaster, aggregator, platform owner and ISPs. Identifying which of these entities is ultimately responsible for the content is once again another problem that is already facing ATVOD, even within its limited remit.

- Regulating non-UK entities: Even if it can be determined who is responsible, it is highly likely that that entity is based outside the UK, and therefore beyond the reach of the UK regulator.
 - Enforcing regulation: The tools used in linear broadcasting regulation, such as the watershed, guidance and age-restrictions, sanctions held by Ofcom (fines and licence), are in many cases not appropriate or effective to use in an online world.
- 31 Given the challenges listed above, the lack of evidence that greater regulation of the online world is even theoretically desirable and the limited resources able to tackle such issues, we believe that the Government should prioritise tackling illegal content instead of substantially re-framing the regulatory system. In other words we believe that the government should pursue “platform-neutral law-enforcement” rather than “platform-neutral regulation”.

A robust but flexible IP system

- 32 It is often stated that “what is illegal offline, is also illegal online”, but when it comes to the application and defence of the law online, this is very often not the case. We support the ongoing work of Government and other stakeholders in areas such as child protection through bodies like UKCCIS and the IWF in this regard. However, an area where concerted and co-ordinated Government action is also needed to address unlawful activity is in the theft of Intellectual Property. If the Government is serious about stimulating growth in the creative industries, the policy framework must place at its heart a robust but flexible IP regime to protect those who invest in the high quality content that is driving force of the UK’s communications networks.
- 33 The Digital Economy Act went some way towards addressing this gap, and we are pleased that now that the High Court has ruled that challenges its anti-piracy measures are unfounded work can continue towards full implementation. Government must ensure that there are no further delays to the full implementation of the Act. We also welcome the Government’s current initiative to explore the possibility of a voluntary industry process for the judicially-approved blocking of access to websites where, in spite of clear cease and desist requests, IP infringement continues to form a substantial part of their operation, or to cause substantial commercial harm to rights owners.
- 34 As a sector that depends on its ability to invest in, purchase and exploit IP rights, we are still digesting the recommendations of Ian Hargreaves’ recent report on the UK IP system. As usual, key to understanding whether his recommendations will help or hinder the copyright industries, and those other sectors that depend on them, is the way in which they are implemented or not. We look forward to hearing in due course the Government’s response to Hargreaves’ report, not least because this response will outline the Government’s overall policy for IP, including in relation to the Communications Bill. We trust that both the importance and the defence of IP rights in a digital age will be properly captured in this response.

A strong Country of Origin principle

- 35 Many COBA members have taken advantage of the Country of Origin principle in the AVMS Directive to base their European operations in the UK and to broadcast across the EU, thereby creating significant inward investment for the UK. While the UK government has traditionally been

very supportive of this aspect of the Directive, COBA members are increasingly finding the principle coming under pressure from other EU member states who are challenging Ofcom's regulatory authority over UK-based services that are broadcast into their territories. In order for COBA members to continue to be able to base their EU operations here, the UK Government needs to push back on this pressure and to defend the Principle wherever possible.

Summary

- 36 COBA members play a key role in the economic and creative health of the UK, and offer the potential for more growth *if* the right policy framework is in place. In our view such a framework should: value all UK content, regardless of who produces it; deregulate in a way that benefits all players, and not just some; ensure that regulation, where it is necessary, is proportionate; focus on applying IP law in online settings in order to give companies the confidence to invest, rather than pursuing a substantial reworking of the regulatory framework; and defend the Country of Origin principle. We look forward to an ongoing dialogue with Ministers and officials at DCMS as the proposed Bill gets closer to a reality.

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