



**Ofcom's consultation on the quantity
and scheduling of television
advertising on public service channels**

Sky Response

June 2023

Executive summary

Ofcom's preliminary proposal to relax the PSB-specific regulation of television advertising is unjustifiable and should not be implemented. Instead, Ofcom should adopt the alternative set out in the consultation of leaving those rules unchanged for the time being. It should revisit those rules in 2028.

The proposal to relax the PSB-specific rules on television advertising has clear detrimental impacts on public service broadcasting and viewers. Evidence shows that it would harm the delivery and viewing of accurate, trusted television news, which both Government and Ofcom recognise as being central to UK public service broadcasting. And the amount of advertising to which UK viewers are exposed would increase significantly, by around 850 hours per annum. This would have the greatest impact on older viewers who continue to spend significant amounts of time watching the main PSB television channels.

The proposed changes would benefit the shareholders of one company, ITV. There is little likelihood of money transferred to ITV being spent on more or better content. These gains would come at the expense of other UK broadcasters including, we believe, other public service broadcasters.

In view of its clear, significant detriments, with the benefits flowing entirely to one company, it is extremely difficult to understand why Ofcom considers this to be an appropriate change to regulation.

In part, this appears to reflect significant failures in the evidence and analysis relied upon by Ofcom. The evidence and analysis set out in the consultation in support of Ofcom's preferred option is subject to numerous significant flaws, which render it wholly unreliable as a basis for a well-informed decision on this issue. In particular, Ofcom fails to have regard to many factors that it ought to have regard to in reaching a decision on this issue and has regard to other irrelevant factors.

The fundamental flaws in the evidence and analysis in the consultation include:

- failing to have proper regard to its regulatory duties;
- failing to adopt a coherent, rigorous and effective framework of analysis;
- failing properly to examine and report clearly the detrimental impacts of its proposals on public service broadcasting, viewers and broadcasters;
- reliance on factors, such as "*other regulatory tools*", or higher revenues accruing to some PSBs being invested in more content, as factors that will mitigate or offset the detrimental impacts of its proposals when there is no reasonable basis for such reliance;
- failing properly to balance likely negative impacts of its proposals against speculative, unparticularised and improbable benefits;
- reliance on consumer research that is fundamentally flawed – and, to the extent that it can be relied upon, failing to recognise that, properly interpreted, its results undermine Ofcom's provisional conclusions;
- failing to have proper regard to the existence and role of the PSB Compact; and

- inappropriately downplaying the negative effects of Ofcom's preferred option, typically for spurious or unjustified reasons.

Other than Ofcom's responsibility to deregulate where regulation is no longer needed – which is not the case in this instance – the primary factor that Ofcom relies on in support of its proposals is vague references to improving the “sustainability” of the commercial public service broadcasters, ITV, Channel 4 and Channel 5. This approach is ill-founded and cannot be relied on. Above all, Ofcom fails entirely to recognise that Ofcom itself only recently reviewed the commercial sustainability of the Channel 3 and Channel 5 licences and found that they are sustainable over the next licence period (2025-2034) with the existing rules on advertising in place. It comes as little surprise that ITV has recently applied to Ofcom to renew its Channel 3 licences, stating:

The new licences will enable the company to continue to deliver the very significant PSB contribution that we make to life in the UK for the 10 year period from the end of 2024 when the current licences expire.

The Government recently proposed a number of new measures to ensure Channel 4's sustainability as part of the decision not to privatise the broadcaster, which itself argued consistently against the need for further support.

The COSTA rules are fundamentally about protecting viewers from too much advertising, and the PSB-specific rules recognise the fact that the main commercial PSB channels have a privileged position in the broadcast ecosystem and are the most watched TV channels by viewers, alongside the BBC. They are one of the additional restrictions and obligations borne by commercial public service broadcasters for the benefit of audiences in exchange for significant public benefits.

At this point in time the PSB-specific rules on advertising remain effective, necessary and proportionate.

Introduction

This submission responds to Ofcom's consultation on proposed changes to the PSB-specific rules included in the Code on Scheduling of TV Advertising (COSTA). Ofcom provisionally proposes significantly to relax those restrictions. For the reasons set out below, that proposal would harm public service broadcasting, audiences (particularly older audiences) and a range of broadcasters, while delivering benefits to ITV shareholders. Ofcom should not pursue this proposal and, instead, maintain the current restrictions. It should review those restrictions in 2028.

This submission comprises the following sections:

- Ofcom has failed to have proper regard to its duties
- The analysis, reasoning and evidence put forward by Ofcom for its preferred options are inadequate
- The impact of Ofcom's proposals
- Failure to have proper regard to the impact on the provision and consumption of television news
- Failure to have proper regard to the impact on audiences
- Ofcom's assertions about the impact of its proposals on PSB 'sustainability'
- Failure to address stakeholder responses to Ofcom's call for evidence
- It would be irrational for Ofcom to proceed with its proposals at this time

Annex 1 addresses Ofcom's consumer research.

Ofcom has failed to have proper regard to its duties

As is common practice in Ofcom consultations, Ofcom includes a section that describes the legal duties that are relevant to the issue being considered.¹ There are two notable features of this summary:

- (i) the summary *begins* by citing Ofcom's responsibility to ensure that it does not retain regulation that has become unnecessary; and
- (ii) Ofcom fails in the body of the consultation to refer to its "*principal duty*", set out in Section 3(1) of the Act, to further the interests of citizens and consumers².

This skewed approach colours the entirety of the analysis and consideration of evidence in the consultation: it is plain that Ofcom places significant weight on the

¹ These are set out at paragraphs 4.1-4.2, and Annex 1 of the consultation. All references are to the consultation unless otherwise stated.

² This duty is listed in the Annex to the consultation among a list of all relevant duties.

desirability of removing regulation in this case and inadequate weight on furthering the interests of citizens and consumers.

Ofcom has a significant range of duties and responsibilities placed on it by the Communications Act and consideration of any relevant regulatory issue will always involve the need to make judgements about the weight that should be placed on competing factors. In this case, however, we consider that Ofcom has erred in the weight attached to the desirability of deregulation relative to its principal duty to further the interests of citizens and consumers.

Ofcom also fails to have proper regard to a number of other legal responsibilities in the consultation.

Section 3(4)(a) of the Act requires Ofcom to have regard to the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom. As explained below, Ofcom's preferred option would have a significant detrimental impact on the provision and consumption of television news in the UK, which is a key output of public service broadcasting. Ofcom fails to have proper regard to this impact in the consultation.

Section 3(4) of the Act requires Ofcom to have regard to the needs of persons with disabilities, of the elderly and those on low incomes. As explained below, older viewers will be most adversely impacted by Ofcom's proposals. Although Ofcom recognises this, it attempts inappropriately to downplay this impact.

Finally, section 7 of the Act requires Ofcom to undertake an impact assessment of important regulatory proposals. As has become common practice by Ofcom, it simply asserts that the analysis in the consultation comprises an impact assessment. As explained further below, this is inadequate. In this case, this approach leads to a disjointed and opaque assessment of the costs and benefits of the regulatory options being considered in the consultation, contributing significantly to its flawed conclusions.

The analysis, reasoning and evidence put forward by Ofcom for its preferred options are inadequate

The issues addressed in Ofcom's consultation have the potential to have significant detrimental impacts on public service broadcasting, viewers and broadcasters in the UK. As a result, it would be expected that the quality of analysis, reasoning and evidence put forward in support of Ofcom's preliminary conclusions should be robust. This is not the case. The analysis, reasoning and evidence put forward by Ofcom cannot be relied upon in support of well-founded conclusions on the issues addressed in the consultation.

Ofcom's analysis and reasoning are manifestly inadequate

Ofcom provisionally concludes in the consultation that "*the additional restrictions on PSB channel advertising are no longer justified*". The analysis and reasons put forward in support of this provisional conclusion are both flimsy and unsustainable, and do not support the proposed changes having proper regard to their detrimental impacts.

At their core, the reasons put forward by Ofcom in support of its provisional conclusion are:

- the 'broadcasting landscape' has changed significantly since 2011 when Ofcom last reviewed the COSTA rules;³
- the commercial PSBs are facing "*commercial challenges*" from "*well-funded global streaming services*";
- although the proposals may have an adverse impact on television news, Ofcom has other tools available to it to prevent or mitigate those impacts; and
- while in principle viewers do not want more advertising, they are willing to tolerate it, particularly if additional revenue is invested in content.

This reasoning is unsustainable:

- whilst the broadcasting landscape has changed significantly since 2011, this is a poor justification for changing the rules, given that they continue to form part of the PSB compact and perform an important role in relation to public service broadcasting and audience protection (or, in the terminology used in the consultation, protecting the "*quality of the viewing environment*");
- it is not Ofcom's role to act as a promoter of the financial strength of the commercial PSBs and to seek to increase their revenues to enable them better to compete in the market;
- Ofcom offers no concrete explanation as to how the rules on frequency of breaks and news quotas (its 'tools') would mitigate or prevent the impact of its proposals on television news, and Ofcom must be aware that there are in fact no such tools;
- Ofcom must also be aware that there are no mechanisms via which it can compel broadcasters to invest additional revenue in more or better content. Accordingly, it is wholly inappropriate to rely on such reasoning to argue that

³ Paragraph 1.5.

viewers are indifferent to the increased levels of advertising that would result from the implementation of Ofcom's preferred option.

We discuss these points in detail in the sections below.

More generally, the depth of analysis in the consultation is wholly inadequate, given the significant implications of the proposed change to the COSTA rules. Ofcom purports that the consultation comprises an impact assessment of the proposals. Ofcom's guidance on impact assessment states:

"We apply the principle of proportionality when assessing potential impacts; the depth of analysis should be proportionate to the potential impact of the decision under consideration. Put simply, the larger or more complicated the potential impact, the greater the need for a more detailed impact assessment."⁴

Ofcom, however, has not applied the principle of proportionality in this case. Ofcom's proposals have significant implications for public service content delivery, viewers, citizens and broadcasters (both commercial PSBs and other broadcasters). Yet the depth of analysis of the impacts of the proposed changes is meagre and, as discussed below, in some areas non-existent.

Ofcom's assertion that the entirety of its consultation constitutes an impact assessment, rather than presenting a standalone impact assessment, serves to obfuscate the true balance of costs and benefits of its proposals. There is no clear description of, and weighing of, the costs and benefits of Ofcom's proposals in the consultation. One of the key merits of undertaking a separate, standalone impact assessment is that it both encourages clarity in analysis and makes transparent the judgement being exercised.

Given the importance of this issue Ofcom should include a standalone impact assessment in any final decision.

Ofcom's evidence is both flawed and inadequate

Ofcom prides itself on being an evidence-based regulator. In the current case, however, Ofcom proposes to proceed on the basis of little or no reliable evidence about the likely consequences of its proposals. In doing so it both fails to have regard to relevant considerations and has regard to irrelevant considerations.

Ofcom failed to conduct proper research that might have appropriately informed the key questions it faces

One of the key effects of the proposals being contemplated by Ofcom would be to increase significantly the amount of advertising to which viewers are exposed, particularly during and around peak time news bulletins on commercial PSB channels.

This is particularly important because past research indicates that a significant proportion of viewers are likely to oppose the sorts of changes being proposed by Ofcom. As noted in Sky's response to the call for evidence:

⁴ Paragraph 4.3.

“Ofcom’s own 2020 research exploring audience attitudes to programme standards found that 45% of people think there are already more advertising minutes in an hour than they are happy with on the main commercial PSB channels. A further 38% said they would not want to see any more advertising, meaning more than 80% of audiences would consider an increased amount of advertising as detrimental.”

Similarly, consumer research undertaken by Oliver and Ohlbaum for COBA indicated that 86% of traditional scheduled TV viewers thought that either (a) there are too many ads on TV and should be fewer or (b) there is about the right amount of advertising on TV at present. Among those aged 35+ in the survey this figure increased to 90%.

Audience research aimed at understanding viewers’ preferences in relation to such an expansion therefore has a key role to play in supporting a well-informed decision by Ofcom on this issue. We were comforted by Ofcom’s statements that it was undertaking consumer research following its call for evidence.

It is therefore both astonishing and inexplicable to find that Ofcom has done no proper quantitative consumer research on this issue. Ofcom undertook quantitative consumer research, but focused on a narrow issue that was almost bound to be uninformative for the policy issue that the consultation addresses.⁵

Ofcom offers no explanation in the consultation about why it chose not to ask an appropriate sample of UK viewers about their views on ITV, Channel 4 and Channel 5 being permitted to increase the level of advertising on their public service channels.

Ofcom also undertook qualitative consumer research, interviewing just over 100 UK television viewers. Even the most cursory reading of the report on this research indicates that it is subject to numerous and significant flaws that render it not fit for purpose in reaching a well-informed decision on the policy issue addressed in the consultation. Yet Ofcom places greatest weight on this research in reaching its preliminary conclusion set out in the consultation. In doing so, Ofcom has had regard to irrelevant considerations.

News is of pivotal importance to the decision Ofcom is making, both as the genre most degraded by the proposed change, and as the genre most critical to the public value of commercial PSB. However, neither the qualitative nor quantitative research has been designed to explore audience attitudes in this area. The report on the qualitative research mentions it, though news does not appear to have been part of the stimulus or discussion guide – rather it appears to have come up incidentally and in an unstructured manner in a discussion of one of the advertising options presented to participants.

More generally, there does not appear to have been any discussion about the citizen impact of reduced news consumption (due to news programming being replaced by ad minutage and/or more attractive content) – but this is a critical issue.

Ofcom must remedy the glaring absence of reliable consumer research on the impact of changes in the COSTA rules before taking a final decision on this issue.

⁵ Namely, whether television viewers noticed an increase in advertising during a recent period when broadcasters were able to broadcast more advertising than normal.

Ofcom's provisional view does not reflect the preferences of those in the qualitative research

For the reasons set out in Annex 1, Ofcom's qualitative consumer research is fundamentally flawed and cannot be relied upon.

Without prejudice to this point, Ofcom's provisional view does not reflect the preferences of those in the research. Stripped of extraneous, irrelevant considerations, it is evident that those taking part in Ofcom's research strongly oppose an increase in the level of advertising on PSB channels. As Ofcom indicates:

- interviewees had "a strong negative reaction to the idea of more advertising on PSB channels".⁶ The report describes this several times as a "visceral reaction" to this proposition; and
- while interviewees "often cited wanting fairness in the application of rules, across PSB and non-PSB channels, they were strongly resistant to the idea of more advertising as a consequence of bringing parity".⁷

Ofcom has failed to have due regard to this important finding from its research.

Ofcom relies heavily on the result from the interviews that "any increase in advertising was seen to only be acceptable, and tolerated by viewers, if additional revenue is used to maintain the quality of programme content."⁸ However, as discussed below, Ofcom is well aware that there is no way of linking this proposal to increased investment in content and therefore this proposition cannot be relied upon to mitigate respondents' hostility to an increase in advertising on PSB channels. To do so would be to have regard to an irrelevant consideration.

Failure properly to consider the commercial impact of the proposals

Ofcom's analysis of potential changes to the COSTA rules in 2011 included devoting significant effort to seeking to understand the commercial impact of changes. In the current consultation, however, Ofcom effectively rules out doing so on the basis that it is too hard to do this with certainty. Ofcom states:

*"It is not possible to predict with any certainty what the impact on the market, or particular broadcasters, would be should the stricter rules that apply to PSB channels be removed."*⁹

Ofcom's consideration of this issue in Section 4 of the consultation consists, in essence, of a list of uncertainties that make such analysis challenging, such as how much prices for advertising on PSB and non-PSB channels would fall in response to an increase in advertising minutage.¹⁰

This is a wholly inadequate approach to an important issue.

First, Ofcom is an expert regulator that is well used to tackling complex analysis – analysis which often has as great a degree of uncertainty attached to it as the issue

⁶ Paragraph 3.16.

⁷ Footnote 58.

⁸ Paragraph 3.18.

⁹ Paragraph 1.23.

¹⁰ Paragraph 4.28.

of the commercial impact of changes to the COSTA rules. Ofcom's decision not to undertake this analysis appears to be more an issue of willingness than ability.

Second, Ofcom's statements on this issue set an unreasonable standard for this type of analysis. No-one has argued that Ofcom should be required to predict the effects of its proposals with "certainty".¹¹ The fact that it is not possible to predict effects with "certainty" cannot be an appropriate reason for choosing not to do any analysis at all.

Finally, stakeholders provided Ofcom with significant amounts of evidence about the likely commercial impact of its proposals in response to Ofcom's call for evidence, including detailed evidence by independent experts. Ofcom appears to have ignored all such evidence. We consider that such evidence is a sound basis for forming a view of the likely commercial impact of Ofcom's proposals.

The appropriate framework of analysis

A well-considered, clear and properly specified framework of analysis is critical to reaching sound decisions on important policy issues. The absence of such a framework is a significant flaw in the consultation.

Ofcom's "original purpose" approach is inappropriate

The central question addressed by Ofcom in the consultation is whether the restrictions on advertising on the commercial PSB channels are a "*still a justifiable and proportionate means of achieving their original policy objective*". The consultation concludes that "*our provisional view is that the additional restrictions on PSB channel advertising are no longer justified or proportionate **for achieving their original purpose***" (emphasis added).

The approach of seeking to determine whether the rules continue to achieve their "*original purpose*" is both novel and inappropriate. It formed no part of Ofcom's extensive examination of the COSTA rules in 2011, for example.

It is inappropriate because (a) given the passage of time, it is almost impossible to discern what the "*original purpose*" of the rules was, and (b) what *actually* matters is the role played by the rules *today*, and what the effect would be if they were changed.

The difficulty of discerning the original purpose of the rules is illustrated starkly by the consultation. In order to discern the ITC's "*original purpose*" Ofcom relies on a single line in a single document from over 30 years ago. The full extent of the ITC's statement relied upon by Ofcom reads:

"In the case of ITV, TV AM and Channel 4 the ITC's remit does extend to the value and enjoyment these services provide to viewers and it believes that in some cases more demanding standards than those required by the European Directive remain justified."

¹¹ Ofcom cites stakeholders as supporting its view that the commercial impacts cannot be predicted with certainty. Whilst stakeholders, including Sky, in their responses to Ofcom's call for evidence have stated that it is not possible to predict the commercial effects of Ofcom's proposals with certainty, as noted above, this is an inappropriate standard on which to base an assessment of this issue.

There is no accompanying explanation or reasoning in support of this statement. This is a wholly inadequate basis for examining the merits of retaining the restrictions on advertising on the main commercial PSB channels.

Ofcom compounds the error in this approach by misrepresenting the ITC's statement. The ITC's statement refers to its "*remit*" including the "*value and enjoyment these services [i.e., commercial PSB services] provide to viewers.*" Yet Ofcom instead refers – in quotation marks – to the ITC's rules being intended to "*protect the quality of the viewing environment*". This phrase appears to be entirely of Ofcom's devising.¹²

Moreover, Ofcom is inconsistent in its approach, adopting a range of variations of this objective throughout the consultation, including:

- "*to protect the quality of PSBs*";¹³
- "*to secure quality on these channels*";¹⁴
- "*protecting the quality of viewing on PSB channels*";¹⁵
- protecting "*the quality and perception of quality of the viewing environment*";¹⁶
and
- "*to protect the quality of UK television*".¹⁷

None of these various formulations are an adequate or reasonable benchmark for considering whether or not to retain the current restrictions on advertising on the main commercial PSB channels.

Ofcom sets out what it means by the "*quality of the viewing environment*" at paragraph 4.3 of the consultation. Ofcom states:

"We consider the quality of the viewing environment to comprise the choice and quality of the programmes available, as well as the general viewing environment. This includes the length and number of interruptions."

Elsewhere, Ofcom also states:

*"There are also a number of other factors that are relevant to the quality of both PSB content and the viewing environment. These include levels of programme investment, viewer expectations on interruptions in certain types of programmes and the number of interruptions within a given programme."*¹⁸

There are two fundamental problems with Ofcom's approach.

First, it is both nebulous and circular and, as such, meaningless, as a benchmark for appraisal of significant policy proposals. In particular, it is meaningless to define "*the quality of the viewing environment*" as comprising, in part, "*the general viewing environment*". In the second definition provided by Ofcom it is unclear which factors cited by Ofcom refer to "*the quality of PSB content*" and which refer to "*the quality of ...the viewing environment*".

¹² Ofcom repeats this phrase at paragraphs 1.3, 1.24, 2.5, 2.46, 4.5, 4.8, 4.9, 4.10, 4.34, 4.36, and 5.3.

¹³ Paragraph 1.25.

¹⁴ Paragraph 4.3.

¹⁵ Paragraphs 4.13 and 4.3.

¹⁶ Paragraphs 4.6 and 4.8.

¹⁷ Paragraph 4.36.

¹⁸ Paragraph 1.9.

Second, by framing the objective of its appraisal as ‘protecting the quality of the viewing environment’ this excludes proper consideration of the effect of the proposals on public service broadcasting, discussed further below.

The appropriate framework of analysis needs to balance a number of considerations

The question that should be addressed in Ofcom’s consultation is whether retaining the current restrictions on advertising on the commercial PSB channels is justified and proportionate. Ofcom actually sets out this test at paragraph 4.1 of the consultation, stating:

“We set out at Annex 1 the legal framework that applies to our analysis of whether it is justifiable and proportionate to retain the stricter rules for PSB channels.”

In answering this question, Ofcom must have regard to the impact of removing those restrictions:

- (a) **on viewers**, having particular regard to Ofcom’s principal duties under the Communications Act to further the interests of citizens and consumers;
- (b) **on television news** having particular regard to Ofcom’s legal duties in relation to the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom; and
- (c) **on the ability of commercial PSBs to fulfil their public service remits**, having regard to the PSB Compact.

We agree that Ofcom should also have regard to the desirability of removing unnecessary regulation, in line with its obligation under section 6 of the Act. However, little weight can be placed on this consideration in this case. The PSB-specific COSTA rules plainly continue to play an important role both in relation to supporting public service broadcasting and protection of viewers from excessive advertising. It cannot reasonably be said that those rules are unnecessary.

The impact of Ofcom’s proposals

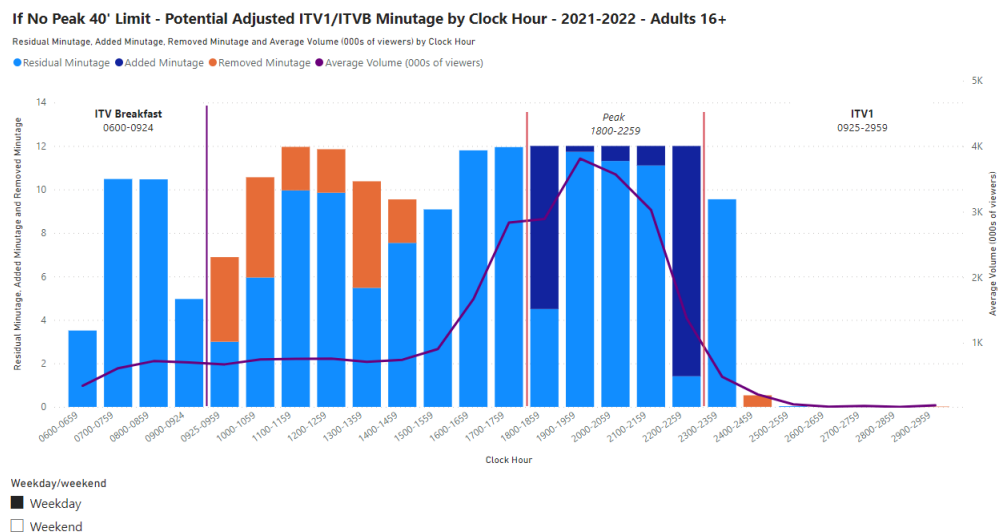
Based on the work undertaken by Ofcom and responses to Ofcom’s call for evidence a number of the key effects of implementing Ofcom’s preferred options are now evident and, we believe, incontrovertible.

The proposals would have an adverse effect on the provision and consumption of television news

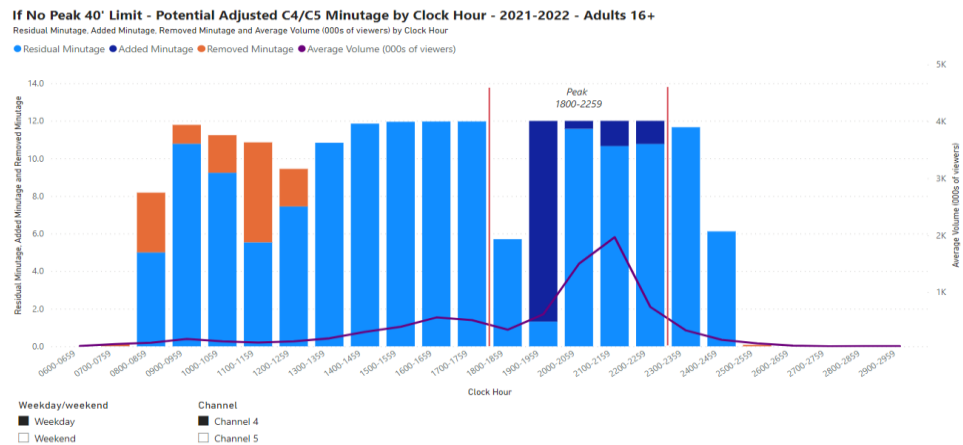
The peak hours (18:00–23:00) are the most attractive from an advertising perspective as these are the hours which attract the highest viewing figures, and hence earn broadcasters the highest advertising revenues. Currently, the PSBs are constrained in the amount of advertising that they are permitted to broadcast during peak periods to 40 minutes.

In order to comply with the 40 minute restriction on advertising in peak hours, the optimal strategy for the commercial PSBs is to run the full amount of advertising they are permitted (12 minutes per hour) in as many of the peak hours as possible, and then carry the residual permitted minutes in the remaining hours. This is shown clearly in Ofcom’s analysis of current viewing and advertising minutage on the main commercial PSB channels set out below.¹⁹

Figure 1



¹⁹ 'Study of total TV viewing, PSB volume & commercial minutage by clock hour and advertising around news in peak on PSB channels' (<https://www.ofcom.org.uk/research-and-data/tv-radio-and-on-demand/tv-research/attitudes-to-advertising-changes/barb-analysis>)

Figure 2


The implication of this is that there are certain periods within peak when it makes commercial sense to run less popular programming. Accordingly, these periods are used to broadcast television news, which has lower viewership than programming such as entertainment programmes.

The consequence of removing the 40 minute restriction in peak hours is entirely predictable: it makes commercial sense for the PSBs to increase advertising significantly in this period. Ofcom's analysis indicates, correctly, that ITV would seek to increase the amount of advertising to 12 minutes per hour across all peak hours, while C4/5 would increase advertising significantly in the 19:00 – 20:00 clock hour. These likely consequences are indicated clearly in the BARB research undertaken by Ofcom, set out in Figures 1 and 2 above, which is not discussed in the consultation.

Enabling the commercial PSBs to schedule more advertising during peak hours on the main PSB channels will, therefore, directly impact on the time available for broadcasting news and also likely impact on viewing of television news.

Accordingly, the increase in advertising minutage allowance during peak hours will have the following effects:

- **Increased advertising volume during news programmes:** the number of advertising minutes during the 6-7pm and 10-11pm ITV weekday evening slots (which are dominated by news and current affairs programming) will increase from an average of 3 minutes per hour to 12 minutes per hour.
- **Reduced news minutage:** the additional advertising will, to a significant extent, displace news programming. Using Ofcom figures for existing and likely ad minutage, we estimate that ITV's weekday evening news minutes will be reduced by 16%. The impact is even sharper on regional news since it currently carries little or no advertising – this will see a 20% reduction in minutes.
- **Reduced news consumption:** Increases in advertising loading diminishes viewing of TV programmes, as evidenced by audience research conducted by Oliver and Ohlbaum for COBA (which found that that 69% of respondents would watch less of the commercial PSB channels if there were

an increase in advertising on these channels)²⁰ and Ofcom's own quantitative research (which found that 6% of the audience responded to increased advertising by changing the channel or turning the TV off).²¹ Accordingly, one of the effects of enabling greater levels of advertising on the main commercial PSB channels would be to reduce viewing of important television news.

- **Reduced news quality:** It is inevitable that reduced news minutage will result in either fewer news topics covered or less-in depth news reports. Either way, this will degrade the quality of the news programming for viewers, which in turn risks driving viewers away from such programming.

Ofcom's proposals will, therefore, have two important effects. First, more advertising in news slots will result in fewer viewers consuming news. Second, the reduction in news minutage (to make way for advertising) will result in less news consumed by those that are not deterred by the increase in adverts. We calculate that Ofcom's proposals would lead to a loss of 258 million hours of news consumption annually across ITV and Channel 4.²²

Another potential impact of Ofcom's proposals is that the PSBs decide to replace some of their news programming during peak with more popular content. News programming typically attracts much lower viewing figures compared with other programming scheduled during peak hours.²³ This means that advertisers will be less inclined to pay for advertising during and around news programming even if additional minutage were to become available.

Giving the commercial PSBs the ability to carry more advertising during peak hours therefore increases the opportunity cost, in the form of foregone advertising revenue, associated with broadcasting news programmes in peak. This would create a strong incentive for the commercial PSBs to reduce the amount of news programmes during the peak viewing period (resulting in further reduced viewing), to be able to carry and monetise more popular programming. If ITV were to act on these incentives this could result in ITV reducing its scheduled national news content during peak by around one hour each day, to the minimum required by its licence quotas. It goes without saying that this in turn would dramatically reduce the amount of news consumed.

The amount of advertising to which UK viewers are exposed would increase significantly, to the detriment of viewers

Implementation of Ofcom's preferred option would result in a significant increase in the amount of television advertising to which UK viewers are exposed. Sky's response to Ofcom's call for inputs estimated this increase at an additional 850 hours of television advertising per annum.

²⁰ Page 3, 'Assessing the Impact of potential changes to TV advertising minutage regulation', Oliver and Ohlbaum (https://www.ofcom.org.uk/__data/assets/pdf_file/0025/248614/COBA.pdf).

²¹ Note that this is as a percentage of all respondents who had watched relevant channels, not simply of those reporting they'd noticed a change.

²² This calculation assumes that (i) ITV and Channel 4 retain their current scheduled news slots in peak but increase the advertising minutage to 12 minutes per hour and (ii) 6% of viewers switch over or switch off as a result.

²³ For example, the average viewing figures for ITV Evening News is 2.7m compared with 4.9m for Coronation Street (Source: Barb: Jan23-Apr 23).

It is somewhat astonishing that Ofcom's consultation fails to recognise clearly that this is a likely outcome of implementation of its proposals, or to provide its own estimate of the likely increase in the level of advertising.

As noted below, Ofcom in the past has recognised that exposure to advertising is the 'price' paid by viewers for commercial free to air television. An increase in the level of advertising is, therefore, equivalent to a price increase for viewers. Unsurprisingly the evidence suggests that most viewers likely to be affected by these proposals oppose them.

The proposals would impact most on older viewers

The consultation places significant emphasis on changes in viewing habits in the UK. Such changes are, however, far less pronounced among older viewers, who continue to watch significant amounts of linear television, often live, and who continue predominantly to watch PSB channels. Increasing the amount of advertising on the commercial PSB channels would, therefore, have a disproportionate impact on older viewers.

This emerges clearly in Ofcom's consultation. Ofcom states:

"We recognise that older audiences will be exposed to more advertising as a result of our proposed changes because they watch more commercial PSB television than younger viewers and are less likely to have access to alternative providers (for example, SVoDs)."²⁴

This statement draws on Ofcom's examination of viewing data, which states:

Which audience groups could be most affected by a change in advertising rules?

Adults 65+ would be most affected, then progressively down the age groups.

Older viewing to Total TV and to Commercial PSB Channels is highest whether:

- . in Peak (affected by more minutage if COSTA rule 4ii is removed)
- . in Pre-Peak (affected by more minutage if COSTA rule 4i is removed but not rule 4ii).

As you get later in the evening, viewing gets younger - and from 2300 any extra minutage from removing rule 4i but not rule 4ii would affect older viewers less and younger viewers more.

But the dayparts of Commercial PSBs that would see the biggest changes are watched more by older viewers.

In fact, BARB figures provided by Ofcom in the consultation show that two thirds of the audience to commercial PSB channels in the 18:00-19:00 and 22:00-23:00 periods, which is when advertising is likely to increase the most, is aged 55+.²⁵

ITV would benefit significantly at the expense of other broadcasters, including other PSBs

Modelling that Sky has previously provided to Ofcom indicates that, given its position of strength in the market, ITV would gain significantly from Ofcom's proposals at the expense of other UK TV broadcasters.²⁶ The responses of COBA, IPA, ISBA and Paramount (owner of Channel 5) support this view.

²⁴ Paragraph 4.20.

²⁵ Ofcom, 'Viewers' attitudes to advertising changes on PSB channels: Analysis of BARB data'.

²⁶ Sky's modelling was provided to Ofcom in response to its call for evidence.

TV advertising is essentially a zero sum game: revenue gains by one broadcaster are likely to be offset by losses by other broadcasters. This is generally recognised by Ofcom in the consultation – Ofcom refers to a “*redistribution*” of revenue among broadcasters, “*rather than an overall increase in advertising revenue*” arising from its proposals.

Ofcom, however, errs in two respects in its assessment of this issue.

First, Ofcom repeatedly states that the proposals would “*possibly mainly benefit ITV*”. Ofcom has sufficient evidence available to it to determine that this is more than a mere possibility.

Second, Ofcom asserts that the redistribution of revenue that would occur as a result of its proposals would flow from “*non-PSB channels (including the portfolio channels of the PSBs)*” to “*some PSB channels*”. In doing so, Ofcom fails to recognise that there is a significant risk that gains by ITV could come at the expense of Channel 4 and Channel 5 *as well as* broadcasters of non-PSB channels. Paramount’s response to Ofcom’s Call for Evidence, which strongly opposes Ofcom’s proposals, suggests that it envisages being worse off as a result of the proposals.²⁷ The lightness of Channel 4’s response to the Call for Evidence indicates that ITV is the central driving force behind these proposals, and it is the only broadcaster that stands to benefit materially.

Ofcom’s reference to revenue gains by “*some PSB channels*” appears to be a veiled recognition that there is a risk that broadcasters of “*some PSB channels*” – ie, Channel 4 and Channel 5 – may not benefit from Ofcom’s proposals and may, in fact, be made worse off.

There are unlikely to be offsetting benefits to viewers

There is a largely implicit proposition running through the consultation that the clear harmful effects of Ofcom’s preferred option may be mitigated or offset by benefits to viewers in future. Ofcom presents no evidence or analysis in the consultation to support such a proposition. Accordingly, relying on it would be to have regard to an irrelevant consideration.

In particular, Ofcom hints in a number of places in the consultation that viewers might benefit from its preferred option via either increased investment in content and/or “*PSB sustainability*”. For the reasons set out below, this is improbable.

More generally, the adverse impacts of implementing Ofcom’s preferred option are straightforward to identify and have a high probability of occurring. By contrast, any benefits from the proposals for viewers are nebulous and highly uncertain – as is recognised by the highly speculative way in which such potential benefits are described in the consultation. Accordingly, in balancing the potential costs and benefits associated with the proposals greater weight must be placed on the likely detriments than the speculative potential benefits.

²⁷ Paramount’s response to Ofcom’s Call for Evidence is available at https://www.ofcom.org.uk/_data/assets/pdf_file/0030/248619/Paramount.pdf.

Failure to have proper regard to the impact on the provision and consumption of news

As discussed above, a likely consequence of Ofcom's proposals, if implemented, would be an increase in the amount of advertising during periods currently used to broadcast news content, and a reduction in the amount of news content. Ofcom's consultation fails to take due account of these impacts. In doing so, it has failed to have regard to a relevant consideration.

The broadcast of trusted news during peak hours is a critical output of public service broadcasting

The provision of high quality, trusted, accurate and impartial news, and its viewing by UK citizens, is one of the most important functions of public service broadcasting in the UK. As Ofcom has previously noted elsewhere:

"[t]rusted and accurate news' is by far the most valued aspect of PSBs, both to people individually and to society".²⁸

Ofcom's conclusions in its recommendations to Government at the end of its last review of public service broadcasting stated:

*"Our research consistently shows that **high-quality trustworthy and accurate news is one of the most important aspects of public service broadcasting on both a personal and societal level.** PSM providers were considered particularly important for providing dedicated regional news, which the market would be unlikely to produce, a point also made by several stakeholders. Although other sources for local news exist (e.g. local radio, local newspapers, local TV and online), audiences said they continue to place a high value on regional news provided by the current PSM providers.*

...This was echoed by stakeholders who emphasised the importance of the current system providing trusted and impartial news and current affairs.

...It was considered particularly important to counter misinformation given the prevalence of false or misleading information available online."²⁹ (emphasis added)

This view has been re-iterated both by Ofcom's Chief Executive and Chairman who have respectively stated:

"trusted, accurate news is the single most important feature of public service broadcasting for viewers and listeners";³⁰ and

²⁸ Ofcom, 'Public Service Broadcasting: omnibus survey findings', July 2020.

²⁹ Paragraphs 4.4 – 4.6, 'Small Screen: Big Debate, Recommendations to Government on the future of Public Service Media, Ofcom Statement', 15 July 2021. https://www.smallscreenbigdebate.co.uk/_data/assets/pdf_file/0023/221954/statement-future-of-public-service-media.pdf

³⁰ Melanie Dawes speech introducing Small Screen: Big Debate, 5 October 2020 (<https://www.ofcom.org.uk/news-centre/2020/october-melanie-dawes-small-screen-big-debate>).

*“broadcasting has a unique ability to provide a fair, accurate and trustworthy platform for calm, considered voices. Those views are more necessary than ever for a stable society and a strong democracy”.*³¹

Government shares this belief. The Secretary of State’s recent letter to Ofcom regarding the renewal of the Channel 3 and Channel 5 licences states:

*“The COVID-19 pandemic and the ongoing situation in Ukraine have only served to demonstrate the vital role of PSB in providing an important source of accurate and trusted news which helps audiences understand the world around them”.*³²

Analysis also indicates that television news is the single genre for which the costs of provision outweigh revenues generated. Absent regulatory obligations in relation to news it is likely that the commercial PSBs would significantly reduce or cease its provision.

It is somewhat extraordinary, therefore, that Ofcom makes no mention of the centrality of television news to public service broadcasting in the consultation, given the statements quoted above and the fact that Ofcom has just concluded a major review of public service broadcasting in which the importance of news featured prominently. In particular, there is no mention at all of Ofcom’s prior views on the importance of television news to public service broadcasting in the brief description of Ofcom’s review of public service media set out at paragraphs 2.31 – 2.35 of the consultation.

Ofcom’s consideration of the impact of its proposals on television news provision and consumption is manifestly inadequate

Responses to the call for evidence raised concerns that the proposals would lead to a reduction in news content, and that this was a fundamental issue for Ofcom to consider. Despite this, and Ofcom stating that it is *“particularly mindful that ... the rules could lead to a reduction in the amount of news content on PSB channels”*.³³

- (a) there is only cursory, vague and disjointed reference to this critical issue in the consultation. There is, for example, no separate section of the consultation dedicated to this issue, and no separate quantitative analysis as might be expected given its importance;³⁴ and
- (b) Ofcom failed to address this issue as part of its consumer research, omitting the fact that its proposals would result in fewer hours of news programming when asking respondents if they would *“tolerate”* more advertising.

Ofcom’s failure to properly consider the crucial question of what its proposals would mean for audiences to key PSB news content during peak hours is negligent.

³¹ Michael Grade speech: ‘How television can civilise the national debate’, 27 September 2022 (<https://www.ofcom.org.uk/news-centre/2022/how-television-can-civilise-the-national-debate>).

³² Letter from Lucy Frazer to Melanie Dawes dated 29 March 2023.

(Available at <https://www.gov.uk/government/publications/dcms-secretary-of-state-letter-to-ofcom-on-the-renewal-of-the-channel-3-and-channel-5-licences/letter-from-dcms-secretary-of-state-to-ofcom-on-the-renewal-of-the-channel-3-and-channel-5-licences>).

³³ Paragraph 1.18.

³⁴ Paragraph 3.8 of the consultation comprises Ofcom’s analysis on this issue: *“There is potential for broadcasters to increase advertising in these slots if the stricter COSTA rules are removed.”*

Ofcom acknowledges the role the current rules have in protecting those audiences:

*"It does appear that the stricter rules are contributing to shorter interruptions of news programmes shown in the hours between 18:00 and 23:00."*³⁵

Ofcom acknowledges that its proposals will have the greatest adverse impact on news programmes:

"Removal of the stricter rules on PSB channels may be most notable in news programmes. The viewing hours of 18:00 to 19:00, and 22:00 to 23:00 currently include only a few minutes of advertising and so, if the rules were harmonised, they could provide an opportunity for the PSBs to increase minutage and potentially increase associated revenues."³⁶ (emphasis added)

But Ofcom then fails to draw the appropriate conclusion that more advertising will result in fewer hours of news programming or assess the impact on audiences of that consequence.³⁷

Having failed to consider the reduction in news programming in its audience research, Ofcom's focus is the concern audiences might have at more frequent breaks in news, not less news. Ofcom considers that it has other regulatory 'tools' that address those concerns:

*"In our qualitative audience research, it was the frequency more than the length of breaks that viewers considered to be most disruptive."*³⁸

Implicit in this analysis is either (i) a failure to comprehend that the PSBs currently exceed the quotas for news programming, and/or (ii) an acceptance by Ofcom that audiences gain no incremental benefit from those additional hours of news, and/or that fulfilment of the existing quotas represents a maximum audiences should expect from the commercial PSBs. In any event, Ofcom's consultation fails to express any view on this issue and accordingly Ofcom fails to have regard to a relevant factor in reaching its provisional view. For the reasons set out below, its regulatory 'tools' are wholly inappropriate to address the overall reduction in news programming resulting from its proposals.

Other regulatory tools will not prevent these adverse outcomes

Ofcom appears to reach the view that its proposals will not have a significant impact on the provision and consumption of television news on commercial PSB channels – despite the clear evidence to the contrary – because:

- (a) it proposes to retain *"important safeguards in the existing COSTA rules"*,³⁹ and
- (b) Ofcom has *"other regulatory tools"* available to it that Ofcom can deploy to prevent (or potentially mitigate – it is unclear from the consultation) any such adverse effects.

³⁵ Paragraph 4.11.

³⁶ Paragraph 4.21.

³⁷ Paragraph 4.22 merely notes the existence of the quotas and general obligations to provide news programming without explaining their relevance to the preceding paragraph.

³⁸ Paragraph 4.23.

³⁹ Paragraph 1.19.

In making these assertions Ofcom is, plainly, having regard to irrelevant considerations. Neither the parts of the COSTA rules that Ofcom proposes to retain unchanged nor “*other regulatory tools*”⁴⁰ would prevent or mitigate the effects described above.

The parts of the COSTA rules that Ofcom proposes to retain unchanged would prevent the PSBs increasing the number of breaks during the 18:00 – 19:00 and 22:00 – 23:00 hours. They would do nothing to prevent the increased duration of those breaks.

In terms of “*other regulatory tools*”, Ofcom refers to:

- the news obligations set out in PSB licences:
 - a requirement to broadcast a specified number of hours of news at certain points in the day, which varies by PSB; and
 - a general obligation for PSBs together to fulfil the PSB remit, which includes news and current affairs objectives;⁴¹ and
- the general rule that applies to all broadcasters on the number of interruptions allowed in news programmes.

These are said by Ofcom to be “*supported by our independent monitoring and reporting work, for instance Ofcom’s News Consumption Survey which looks at the consumption and impact of range of news sources including the PSBs, and our PSB Compliance Reports*”.

These considerations are equally irrelevant, for the following reasons:

- The national and regional news quotas contained in each PSB’s broadcast licence would not prevent the commercial PSBs increasing their advertising minutage as described above, and reducing news content, first because the PSBs – in particular ITV – significantly exceed their existing quotas,⁴² and second because these quotas are measured in “slot times” i.e. including advertising breaks.⁴³ For example, ITV would still meet its peak national news quota even if it were to reduce its peak offering to a scheduled slot of 30 minutes and increased advertising minutage during that slot.
- Aside from the national and regional news quotas, the only other news-related licence obligation on the commercial PSBs is a requirement for such news to be of high quality and deal with both national and international matters. This requirement would not protect against the increase in advertising or reduction in news minutage described above.

⁴⁰ *Ibid.*

⁴¹ Ofcom states that the regulatory tools that it considers relevant “*include*” those listed above. However, it is evident that there are no others.

⁴² ITV is required to broadcast 125 hours per year of national and international news during peak hours, amounting to just over 20 minutes per day. Channel 4 is required to broadcast 208 hours per year of national and international news during peak hours, amounting to around 34 minutes per day.

⁴³ See for example the Granada Channel 3 licence which specifies that, for the purposes of the news and regional programming quotas, “*hours/minutes*” refers to the number of hours/minutes per calendar year or per week averaged over a calendar year that would be broadcast, measured in “slot times” (that is, including advertising breaks, programme trailers and presentation material during and at the end of programmes) except for material under 10 minutes in length which is measured in “running times” (that is, excluding advertising breaks, programme trailers and presentation material). (https://www.ofcom.org.uk/_data/assets/pdf_file/0024/74283/itv-north-west-attachment-variation.pdf)

- The PSB remits for ITV, Channel 4 and Channel 5 are set out in Section 265 of the Communications Act and do not include any specific obligations relating to news or current affairs, either as currently drafted or by virtue of any amendments proposed under the draft Media Bill. Ofcom has an obligation to report on the public service remit, including an assessment of the extent to which the PSBs (taken together) provide “*fair and well-informed debate on news and current affairs, a comprehensive and authoritative coverage of news and current affairs in, and in the different parts of, the United Kingdom and from around the world*”.⁴⁴ In addition, the Communications Act places an obligation on Channel 4 to support and stimulate well-informed debate on a wide range of issues in relation to its provision of ‘media content’ (i.e. not limited to its provision of its main public service channel).⁴⁵ However, these considerations are not reflected in the PSBs’ licence conditions and would not in any event prevent the minutage changes described above.
- The general COSTA rule that limits the number of interruptions allowed in news programmes to one break for each scheduled period of at least 30 minutes would make no difference to the amount of additional adverts the commercial PSBs could broadcast each hour during peak, since there would no longer be a limit on the duration of the advertising break.
- Ofcom’s monitoring and compliance activities will help Ofcom assess the extent to which the PSBs are meeting their news quotas, and will help Ofcom measure the impact of any increase in advertising minutage on the consumption of public service news. However, these activities will not prevent the reduction in the availability and consumption of public service news described above.

The stark reality is that, if Ofcom proceeds with its preferred options for changing the COSTA rules, Ofcom would not be able to prevent PSBs increasing significantly the number of minutes of advertising broadcast during the periods currently used to broadcast television news, or reducing the amount of news broadcast during peak hours in order to make way for more advertising and/or more ‘advertising-friendly’ content.

Ofcom inappropriately downplays the impact of its proposals on PSB news

The extent to which Ofcom fails to take proper account of the impact on PSB news is demonstrated by the manner in which Ofcom appears to downplay the impact on news, stating:

*“the disbenefit to audiences from a change in the rules would primarily be felt in a **small number** of hours between 18:00 and 23:00, primarily, the early and late evening or ‘news hours.’”⁴⁶ (emphasis added)*

While Ofcom’s proposals will primarily impact only two hours out of the overall schedule, these hours (i) fall within the peak viewing period which attracts the highest viewing, and (ii) contain the public service content which provides the greatest value to society. As noted above, allowing the PSBs to broadcast more

⁴⁴ Section 264(6)(c), *Id.*

⁴⁵ Section 198A(4)(b) *Id.*

⁴⁶ Paragraph 4.37.

advertising during these hours would have a significant adverse impact on news consumption and the harm to viewers would be substantial.

Accordingly, in view of the importance of the provision of independent, trusted television news to public service broadcasting in the UK, and Ofcom's statutory duties in this area, the failure properly to consider the impact of its proposals on television news is irrational and invalidates Ofcom's conclusions.

Failure to have proper regard to the impact on audiences

Despite the many viewing options available to UK households today, the main PSB channels remain the cornerstone of the UK television system. The commercial PSBs' main channels continue to account for over a quarter of broadcast television viewing. On average, over a million people watch ITV1 every day, with programmes on ITV1 consistently being among the most watched on television. As Ofcom notes elsewhere, *"almost half of all people in the UK watch Channel 3 each week"*.⁴⁷

If adopted, Ofcom's proposals would have a significant impact on television audiences in the UK. As we have previously submitted to Ofcom, Sky estimates that it would increase the amount of advertising on some of the most watched television channels in the UK by around 850 hours a year.

As Ofcom has noted elsewhere:

*"The quantity of advertising programming is part of the price paid by viewers for accessing content. Changes to the quantity of advertising affect, therefore,... via the amount of advertising they are exposed to - the price to viewers."*⁴⁸

Accordingly, it is evident that Ofcom's proposals comprise a significant increase in the 'price' paid by UK viewers for watching television, with that price increase falling particularly on older viewers.

Perhaps the most astonishing part of Ofcom's consultation is the failure clearly to recognise this fundamental impact of its proposals. Nowhere in the consultation is it possible to find a clear statement that Ofcom's proposals will lead to UK viewers being exposed to significantly more television advertising. Nor is there a clear recognition that those viewers who will be most affected by the proposals strongly oppose them.

Other regulatory tools will not prevent this detriment

As in the case of the impact of the proposals on news, Ofcom implies that the impact on audiences can be mitigated (or eliminated) via other regulatory tools. For example, Ofcom states:

"we consider that the range of alternative regulatory tools at our disposal, including statutory requirements and licence obligations, are sufficient to protect the quality of UK television, for both content and the viewing environment".

Unlike the case of news, Ofcom points to no *"statutory requirements and licence obligations"* that might mitigate or eliminate the impact on viewers of the increase in advertising that would occur if its preferred option were implemented. It is plain that there are no such *"statutory requirements and licence obligations"*.

⁴⁷ Page 2, 'Licensing of Channel 3 and Channel 5, A report to the Secretary of State under section 229 of the Communications Act 2003', Ofcom, June 2022. (https://www.ofcom.org.uk/_data/assets/pdf_file/0011/240203/s.229-report-channel-3-and-5-licensing.pdf)

⁴⁸ Paragraph 5.5 of Ofcom's statement 'Regulating the quantity of advertising on television', 15 December 2011. (https://www.ofcom.org.uk/_data/assets/pdf_file/0021/19083/advertising_minutage.pdf)

Ofcom inappropriately downplays the impact of its proposals on viewers

As in the case of the impact on news, discussed above, the focus of Ofcom's attention in the consultation in relation to the impact on audiences is an ill-founded attempt to downplay the impact of the proposed changes. The section entitled "*Impact on audiences*" comprises a series of assertions intended to downplay that impact, in particular:

- viewers are already exposed to the maximum amount of permitted advertising in peak hours much of the time;
- viewers are willing to tolerate more advertising on television;⁴⁹
- viewers would not notice more advertising on television;
- viewers have a greater objection to more frequent breaks than longer advertising breaks; and
- while viewers (particularly older viewers) may be harmed by the likely increase in advertising they will benefit via other improvements in the "*viewing environment*" or protection of "*PSB sustainability*".⁵⁰

A number of these assertions are based on Ofcom's consumer research. For the reasons set out above and at Annex 1, that research is fundamentally flawed and cannot be relied on. To do so would be to have regard to irrelevant considerations.

Other assertions are plainly irrelevant, such as the assertion that viewers are already exposed to the maximum amount of permitted advertising in peak hours much of the time, or that viewers have a greater objection to more frequent breaks than longer advertising breaks. These are irrelevant to the fact that, if implemented, Ofcom's proposals would significantly increase the amount of advertising on commercial PSB channels, to the detriment of viewers.

Other assertions are vague and unparticularised, for example that there will be, or may be, offsetting benefits to audiences. These assertions cannot be relied on.

The COSTA rules are fundamentally about protecting viewers from too much advertising, and the PSB-specific rules recognise the fact that the main commercial PSB channels have a privileged position in the broadcast ecosystem, and are the most watched TV channels by viewers (alongside the BBC). Accordingly, this facet of the COSTA rules remains effective and necessary as long as that remains the case.

As viewing gradually shifts from linear and towards VOD, the need for the audience protections on linear content afforded by COSTA (both in relation to PSB and non PSB channels) will become less important over time. However, the 'tipping point' at which COSTA is no longer necessary in any form is still a long way off, and the timing of this will depend on a range of factors including the future of DTT.

⁴⁹ Paragraphs 4.17 and 4.18.

⁵⁰ For example, at paragraphs 2.48, 4.20 and A2.5 Ofcom states "*we accept that older audiences will be more affected by our proposed changes than younger viewers. However, they also stand to gain if PSB sustainability is protected*".

Any additional revenues are unlikely to contribute towards improvements in content

As noted above, there is no guarantee that PSBs will use any additional advertising revenues on new or better content. In the case of ITV and Channel 5, any additional revenues will more likely end being delivered to shareholders. Ofcom acknowledges that “*we cannot be certain of additional revenues being generated, or how they may be used if they are*”.⁵¹

As set out above, ITV is likely to be the main beneficiary of Ofcom’s proposals. Contrary to claims by ITV in its response to Ofcom’s Call for Evidence, it is highly unlikely that ITV would invest any additional revenues in content. If it made sense for ITV to spend more on programming to drive higher audiences and greater advertising revenue, it would have already done so. Instead, given its private ownership, ITV is under strong incentives to return increased revenue (and therefore increased profit) to its shareholders. This is clearly indicated, for example, by the ITV Board’s commitment to investors to grow its dividend over time, using surplus cash for acquisitions or increasing returns to shareholders.⁵²

ITV’s cashflow also suggests that incremental income may be less likely to be reinvested. In 2022 ITV paid dividends of £201m. However, its net debt increased by £209m. In other words, dividends were not funded by operating cashflow, but by increased borrowing. In such a situation, incremental cashflow is likely to be used to avoid even greater borrowing, rather for reinvestment. Indeed, ITV’s submission to Ofcom highlights the hostility of its investors to past announcements of increased content spend, suggesting such increases are unlikely to be repeated.

Without prejudice to this point, if it were established that there is a strong link between revenues and content investment, there is no guarantee that UK television viewers would benefit from more or better content *overall*. Ofcom acknowledges that gains in revenue by some broadcasters resulting from its proposed changes are likely to come at the expense of revenue losses by others. Accordingly, any increases in investment by those gaining revenue are likely to be offset by reductions by broadcasters that lose revenue. If those broadcasters that lose revenue have a higher propensity to invest in content than those gaining revenue, UK viewers would be made worse off. Currently, non-PSB broadcasters in the UK are the fastest growing investors in content. Ofcom fails to recognise or consider this issue in the consultation.

⁵¹ Paragraph 4.17.

⁵² ITV’s ‘Investor Proposition’. (<https://www.itvplc.com/investors/investor-proposition>).

Ofcom's assertions about the impact of its proposals on PSB 'sustainability'

Throughout the consultation Ofcom cites "*sustainability*" as a reason for proposing to relax the restrictions on advertising on PSB channels.

Ofcom appears to use the term "*sustainability*" in two senses in the consultation:

- (i) the ability of the holders of PSB licences sustainably to meet the public service obligations in those licences; and
- (ii) the medium term financial viability of the holders of PSB licences - ITV, Channel 4 and Channel 5 (which is owned by Paramount).⁵³

Neither of these provides an appropriate basis for concluding that the PSB-specific COSTA restrictions are no longer necessary or proportionate: (i) Ofcom itself has recently concluded that the holders of PSB licences are able sustainably to meet the public service obligations in those licences, and (ii) it is not the function or responsibility of Ofcom to seek to bolster the commercial position of ITV, Channel 4 or Channel 5.

We discuss each of these further in the sections below.

The ability of the holders of PSB licences sustainably to meet the public service obligations in those licences

The first sense in which the concept of "*sustainability*" is cited in the consultation appears to be in relation to the ability of the holders of PSB licences sustainably to meet the public service obligations in those licences.

The proportionality of the PSB-specific COSTA rules in relation to sustainability must be considered in the context of the PSB Compact

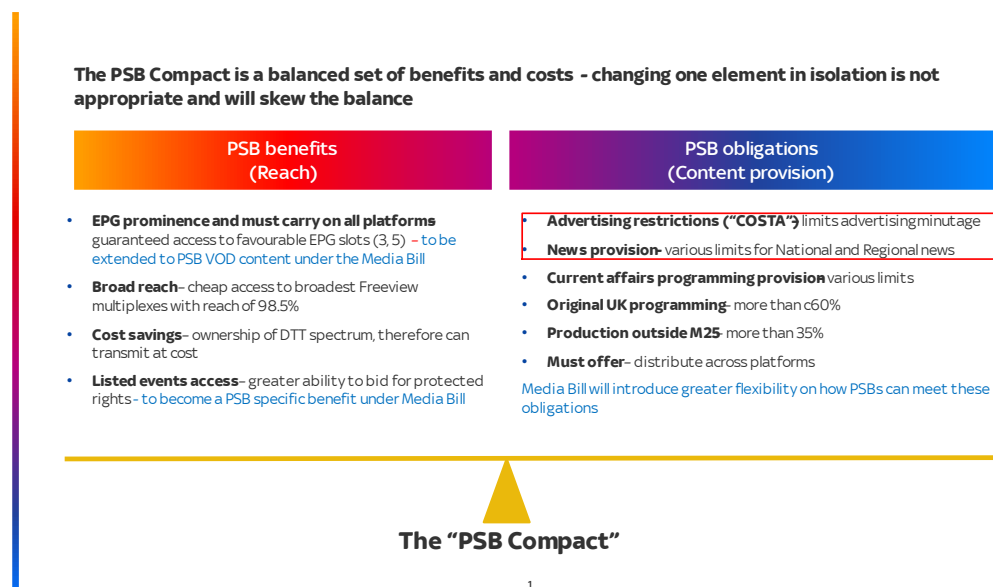
As recognised by Ofcom elsewhere,⁵⁴ commercial public service broadcasting operates in the UK on the basis of an exchange of value: Government provides the holders of the commercial PSB licences a number of commercially valuable benefits, such as prominence and cheap access to valuable spectrum and, in exchange, those operators are required to (a) deliver specific public service broadcasting outputs, and (b) accept restrictions on their business that do not apply to other commercial broadcasters.

This is known as the PSB Compact and is illustrated in Figure 3 below.

⁵³ See, for example, paragraph 1.4, which states: "*we identified the COSTA rules as one of several important areas of regulation that may affect the sustainability of commercial PSBs.*"

⁵⁴ See, for example pages 8 and 9 of Ofcom's report 'Small Screen: Big Debate - a five-year review of Public Service Broadcasting (2014-18)' (https://www.ofcom.org.uk/__data/assets/pdf_file/0013/192100/psb-five-year-review.pdf)

Figure 3: The PSB Compact



Evaluation of changes to the PSB-specific COSTA rules in the context of sustainability must be undertaken by reference to its impact on the PSB Compact. Ofcom fails to do so in the consultation and, accordingly, has failed to have regard to a relevant consideration.

Ofcom fails to have regard to the fact that it recently concluded that the PSB licences are commercially sustainable

The sustainability of commercial public service broadcasting is well trodden ground, familiar to Ofcom. It can be defined as the ability of the holders of PSB licences to meet the obligations of those licences, having regard to the financial costs and benefits of holding those licences.⁵⁵ If there is a net cost to the holders of PSB licences of meeting their obligations there is a risk that those holders would choose to 'hand back' their licences. This is a legitimate concern of Ofcom's, given its statutory responsibilities in relation to public service broadcasting, in particular those under Section 229 of the Act.

Accordingly, it might be appropriate and legitimate to consider relaxing the PSB-specific COSTA restrictions if there were a concern that in future the PSB Compact would become a net cost to the holders of the commercial PSB licences. In such circumstances there would be a risk that holders might hand back their licences, and Ofcom may find it impossible to find alternative broadcasters willing to take up those licences without a reduction in their costs, or increase in benefits of holding them.

This is not the case.

As set out in Sky's response to Ofcom's call for evidence, Ofcom has recently extensively reviewed the commercial sustainability of the Channel 3 and Channel 5

⁵⁵ See, for example, Ofcom's report for the Secretary of State on the 'Licensing of Channel 3 and Channel 5', 29 June 2022 (https://www.ofcom.org.uk/__data/assets/pdf_file/0011/240203/s.229-report-channel-3-and-5-licensing.pdf).

licences, in line with its duty to do so under Section 229 of the Act, and reported to the Secretary of State on this issue. It is somewhat astonishing that, despite (a) the focus on PSB “sustainability” in the consultation, (b) the fact that this was also the focus of Ofcom’s report to the Secretary of State, and (c) this was pointed out to Ofcom in response to its call for evidence, Ofcom has failed entirely to have regard to *its own* extensive analysis of this issue. Ofcom’s report to the Secretary of State is not mentioned in the consultation.

This is a clear example of Ofcom failing to have regard to a relevant consideration.

The analysis undertaken by Ofcom in its report to the Secretary of State indicates that, having regard to imminent reform of prominence rules, in all but the most conservative scenarios, the Channel 3 and Channel 5 licences deliver a net benefit to the holders each year up to 2032, and in all scenarios deliver an aggregate net benefit over the next licence period (2025-2034).⁵⁶

This analysis assessed the licences *with current minutage rules in place*.

Since the publication of Ofcom’s report the Media Bill has been introduced to Parliament which, when enacted will provide public service broadcasters:

- guaranteed availability and prominence on major platforms for PSB on-demand content/apps; and
- greater flexibility for the public service broadcasters on how they meet their PSB remit, including online.

Accordingly, the relevant scenarios in Ofcom’s report to the Secretary of State are those in which the holders of the Channel 3 and Channel 5 licences are made better off as a result of holding those licences. In these circumstances, it can come as no surprise that ITV has recently applied to Ofcom for renewal of the Channel 3 licence, stating:

“ITV now has the confidence to apply for renewal of the Channel 3 licences. The new licences will enable the company to continue to deliver the very significant PSB contribution that we make to life in the UK for the 10 year period from the end of 2024 when the current licences expire.”⁵⁷

Channel 4 raises somewhat different issues. As Ofcom is well aware, its ability sustainably to deliver its public remit is tied to issues such as its specific business model and limits on its ability to raise finance. These issues have recently been the subject of intense examination, with the Government announcing a package of changes intended to ensure the commercial sustainability of Channel 4 in January 2023. Furthermore, Channel 4 is unlikely to be a significant beneficiary of Ofcom’s proposed changes to the COSTA rules.

There is, therefore, no justifiable case that relaxation of the PSB-specific COSTA rules is necessary or proportionate to ensure that the holders of the commercial PSB licences are able sustainably to meet their obligations. On the contrary, Ofcom’s proposals to relax the COSTA rules for PSBs risk overcompensating the PSBs for fulfilling their public service obligations.

⁵⁶ Paragraph 4.40 and 4.79, *Id.*

⁵⁷ <https://www.itv.com/presscentre/media-releases/itv-applies-renewal-licence-0>.

The medium-term financial viability of the holders of PSB licences - ITV, Channel 4 and Channel 5

The other, somewhat vague, sense in which Ofcom refers to sustainability in the consultation appears to relate to the medium-term financial position of ITV, Channel 4 and Channel 5, i.e., the current commercial public service broadcasters. The premise underlying Ofcom's statements in the consultation appears to be that relaxing the PSB-specific COSTA rules will increase their revenue and therefore competitiveness – for example vis-a-vis “well-funded global streaming services”.

If this is Ofcom's intention, it would be a wholly inappropriate reason for Ofcom to consider relaxing the PSB-specific COSTA rules. It is not Ofcom's function or legal responsibility to bolster the financial position of these companies.

Without prejudice to this fundamental point, we are not aware of any analysis by Ofcom of this issue, and none is presented in the consultation. Vague references to PSBs' ability to compete in future cannot be an acceptable or reasonable basis for changes to regulation that would have profound implications for public service broadcasting and UK viewers.

There is, as far as we are aware, no sound reason to doubt the medium term financial health of ITV, Channel 4 and Channel 5. As pointed out repeatedly in the consultation, these broadcasters face a challenging market environment as viewing habits, technology and competitiveness of the sector are changing. But this is nothing new; all UK broadcasters have had to adapt to continuous change in the sector over a long period of time – and have done so successfully. All have strong plans in place for adapting to the changing market environment, for example ITV's 'More Than TV' strategy and investment in its ITVX service.⁵⁸

The proposals are unlikely to improve the financial position of all PSBs

Again, without prejudice to the fundamental point above, the legitimacy of Ofcom's focus on this type of “sustainability” is further diminished by the fact that its proposals would deliver financial benefits to one company, ITV, with a significant likelihood of detriments to one or more of the other commercial PSBs, as Ofcom appears to recognise.⁵⁹ Again, vague references to improving the “sustainability” of public service broadcasters in circumstances in which only one of them would benefit from Ofcom's proposals cannot be an acceptable or reasonable basis for changes to regulation.

⁵⁸ <https://www.itvplc.com/about/our-strategy>.

⁵⁹ As discussed above in relation to the redistributive effects of Ofcom's proposals.

Ofcom has failed to address stakeholder responses to its call for evidence

Where Ofcom is proposing changes to which many stakeholders are clearly opposed, it would be unreasonable for Ofcom to reach its final decision without directly addressing the concerns raised by such stakeholders.

While Ofcom summarises stakeholder responses to its call for evidence, it does so only at a very high level and fails to explain to what extent it agrees or disagrees with the feedback received. It is therefore unclear to what extent Ofcom has relied on the evidence and arguments presented to Ofcom in reaching its provisional view and the reasoning behind this. As a result, it is not possible for stakeholders to fully understand Ofcom's rationale for its proposals, which in turn makes it difficult for stakeholders to engage meaningfully.

Given that Ofcom is proposing to relax the stricter rules for PSBs, we assume that Ofcom has relied to a greater degree on submissions received from ITV and Channel 4, who support the changes, rather than Sky and a number of other stakeholders (including Paramount, owner of Channel 5, and a number of industry bodies) who oppose the changes.

This is disappointing given that Sky provided Ofcom with a detailed commentary on the responses of ITV and Channel 4, explaining why a number of assertions made by these broadcasters were not supported by evidence and should not be taken into account. By contrast, the submissions from those opposed to the proposals (including Sky) contained a significant amount of valid evidence in support of their views, which Ofcom has seemingly dismissed without explanation.

It therefore appears to Sky that Ofcom has considered stakeholder evidence that it ought not to have taken into account, and failed to take into account stakeholder evidence that it ought to have taken into account.

When publishing its statement on its final decision, Ofcom should provide a detailed commentary on stakeholder feedback to the consultation, including whether Ofcom agrees with specific points raised by stakeholders and Ofcom's reasons.

It would be irrational for Ofcom to proceed with its proposals at this time

As set out in this response, Ofcom's provisional conclusion that the PSB-specific COSTA rules are no longer justified and proportionate is fundamentally flawed. The rules have a clear justification, in terms of their benefits to public service broadcasting and viewers, particularly older viewers. And the proportionality of those rules must be viewed in the context of the PSB Compact, which balances the costs of holding a commercial PSB licence, including accepting additional restrictions on advertising, with significant commercial benefits.

On the other hand, the evidence and analysis set out in the consultation in support of a conclusion that the rules are no longer justified and proportionate is both inadequate and fundamentally flawed, and cannot be relied on.

In these circumstances, proceeding with the proposal to relax those rules would be irrational. Instead, Ofcom should adopt the alternative set out in the consultation of leaving those rules unchanged for the time being.

We believe that it is important to set clear expectations about a future review of these rules, and that a further review in five years' time is appropriate for the following reasons:

- it is arguable that the period between this review and the last one, in 2011, was too long and the periodicity should be shortened;
- five years is the period now used for major reviews of telecoms regulation, balancing a range of factors, including the need to provide certainty to market participants;
- as is generally recognised, there is a high pace of change in the audiovisual sector;
- this point would be three years into the next commercial PSB licence period, enabling a better view of whether the issues underpinning Ofcom's assessment of the PSB Compact in 2022 have been borne out; and
- the future course of the UK television sector, including the future of DTT, which is likely to have significant implications for public service broadcasting would be clearer at this point.

Annex 1: Ofcom's consumer research is fundamentally flawed

Ofcom's quantitative consumer research

Ofcom undertook a quantitative consumer survey in four 'waves' during the period 28 September – 1 November 2022. For the reasons set out below, the survey is fundamentally flawed and cannot be relied upon in reaching a final decision on changes to the COSTA rules. To do so would be to have regard to irrelevant considerations.

The survey period was selected by Ofcom as a period when, due to the prior period of national mourning following the death of Queen Elizabeth when commercial TV broadcasters carried no advertising, all commercial broadcasters were permitted to increase the level of advertising on their channels. In essence, the survey focused on a single question: did viewers notice an increase in TV advertising during the recoupment period?⁶⁰

Ofcom fails to identify a relevant sample population

The research undertaken by Ofcom asked viewers whether they had noticed an increase in advertising levels on a range of different types of television channel in the week prior to each survey.

The CMA's guidance on good survey design states:

*"Customer survey research involves **defining a population of interest and then interviewing a sample from that population...***

*"In merger cases **we are often interested in sub-populations**, for example customers from specific geographic areas, or customers from each of the Parties separately, as well as an overall population of interest. **Where such sub-populations of interest exist, these should be clearly set out in advance to inform the sample design**".⁶¹ (Emphasis added.)*

The "population of interest" in this case is those television viewers that watched television at times when there was more advertising than usual. Ofcom's research, however, makes no attempt to identify and survey that group of television viewers.

It should be evident that in order properly to identify the population of interest in this case it is necessary first to consider:

- whether broadcasters increased advertising minutage on their channels in the period covered by each 'wave' of research; and
- if they increased minutage:

⁶⁰ Ofcom states: "The survey ran across four weeks and asked respondents whether they had noticed any difference in advertising on the PSB channels." A footnote states: "Q3: And what do you think about the amount of advertising shown on these channels over the past seven days? Less than usual, More than usual, No change." This approach at least has the virtue of avoiding the excessive complexity associated with Ofcom's qualitative consumer research, discussed below.

⁶¹ CMA, *Good practice in the design and presentation of customer survey evidence in merger cases*, 23 May 2018. Although this relates to survey design in merger cases, the guidance is of broader applicability.

- the dates on which they did so; and
- the day parts during which they did so.

Having established these, the only survey responses that are potentially relevant are those from viewers who watched channels during the survey period on which advertising levels increased at the times of day that those extra minutes were broadcast. Asking people who watched TV channels at times when no additional advertising was shown whether they noticed any increase in advertising is, plainly, pointless and bound to result in a biased (negative) result. Yet this is precisely what the vast majority of Ofcom's consumer survey did.

Proper survey design in this case would have started by identifying (a) channels and times when advertising levels were materially above normal levels, and (b) viewers who were watching those channels at those times, and then asking those viewers whether they had noticed an increase in advertising levels.

Straightforward analysis of BARB data indicates that different broadcasters took different approaches to recoupment. Channel 5, for example, increased advertising significantly *before* the Queen's funeral on 19 September and recouped little thereafter. Views on this increase – the most noticeable of the PSBs' recoupment – were entirely missed by Ofcom's survey, the first wave of which asked about the seven days commencing the 21/22 September.

ITV had a spike soon after the Queen's funeral, with small levels of recoupment thereafter. Channel 4 took a drip-feed approach, spreading small levels of recoupment over a longer period of time. It is unlikely that these small increases would have stood out to those viewers who were watching Channel 4 at this time.

Similarly, it is evident from the data that different broadcasters took different approaches to the timing of the insertion of additional minutes of advertising. For example, in the week ending 29 September ITV added most minutes during the week in the 3-4pm (3 minutes), 6-7pm (3 minutes), 10-11pm (7 minutes) and midnight-1am (6 minutes) periods⁶². By contrast, Channel 5 added 4 minutes in the 1-2pm period, 3 minutes in the 10-11pm period and 2 minutes in the midnight – 1am period.⁶³

More generally, the differences in approach among broadcasters make it extremely important to ensure that those surveyed were watching relevant channels at the times of day when there were significant increases in advertising.

Each wave is a different survey

Consumer research is often undertaken in a number of 'waves', whereby the same survey is run on a number of different dates, and the results aggregated. This helps to produce statistically robust sample sizes. Waves can only be aggregated, however, if the circumstances relating to the survey questions are the same in each case – for example, asking about consumers' preferences in relation to a brand of car, which can be expected to be relatively constant over a reasonable period of time.

⁶² All figures are weekly averages.

⁶³ It is notable that much of this extra minutage is during hours with far less viewing than the 18:00 and 20:00 clock-hours expected to be affected by the proposed rule change and, in some cases, at times when viewing was likely to be low (e.g. the midnight to 1am period). This would make it even less likely that a general sample of the population would have been viewing the relevant channels at these times.

In the case of Ofcom's research, however, the situations that respondents were asked about differed between each wave – for example, in terms of the programmes available to viewers and the extent to which broadcasters engaged in recoupment in each sample period. As a result, Ofcom in effect ran four independent surveys, the results of which cannot meaningfully be aggregated as Ofcom has done.

Reliance on memory

There are well-recognised problems associated with relying on respondents' memory in consumer surveys.⁶⁴ Ofcom's survey, however, fails to consider such problems.

The survey relies on respondents' memories of (a) which television channels they were watching over the space of a week and (b) their television viewing during that period. Both these raise difficult issues in terms of viewers' ability to provide meaningful answers to the questions put to them. In general, most viewers do not have strong recall of which television channels the programmes they have watched are broadcast on, potentially with the exception of the main PSB channels. Asking viewers to recollect whether they thought that there was more advertising than normal on channels like Dave or Really, for example, during the past week is unlikely to produce meaningful responses.

Perhaps more importantly, respondents were asked to undertake an exercise of recalling the amount of advertising they observed in the previous week and then comparing that level with a 'normal' amount of advertising. Such an exercise is cognitively challenging and, given the well-recognised issues associated with reliance on memory in consumer surveys, little weight can be placed on the results of such questioning.

Ofcom's qualitative research

For the reasons set out below, Ofcom's qualitative consumer research is fundamentally flawed and cannot be relied upon in reaching a final decision on changes to the COSTA rules. To do so would be to have regard to irrelevant considerations. We consider that it should be evident to Ofcom that no weight can reasonably be placed on the results of its qualitative research.

Use of a small sample

The clearest and fundamental problem with this research is the small number of people surveyed – a total of 101 people. There is no sense in which interviews with just over 100 people could be said to generate views that reflect those of either the UK population or, more importantly, the population most affected by Ofcom's proposals. In view of this fairly obvious problem, it is surprising that Ofcom has chosen to place significant weight on the results of this survey.

In essence, both the summaries of discussions among participants and the statements quoted in the report are, at best, anecdotal evidence. Such 'evidence'

⁶⁴ See, for example, H. Ayhan and Semih İşiksal, 'Memory Recall Errors in Retrospective Surveys: A Reverse Record Check Study'. *Quality and Quantity*. 38. (2004).

cannot be relied upon as the principal consumer research in support of a significant policy decision.

The report lists ten criteria that were used to select participants, including factors such as regional representation, an even split of gender, and a range of viewership of PSB channels. Given the small number of participants and this number of criteria it is almost impossible for the sample to be representative of the UK population as intended, or, more importantly as discussed below, representative of those viewers that would be most affected by Ofcom's proposals.

No information is provided in the report about the actual characteristics of participants, which is unusual given their small number.⁶⁵

Failure to select an appropriate sample

As set out above good survey practice requires the proper identification of a 'population of interest' and then interviewing a sample from that population.

Ofcom's qualitative research does not follow this approach. It has not taken proper account of the particular audience segments that are most likely to be affected by a change in ad-minutage on PSB channels.

Ofcom acknowledges in the consultation that "*older audiences will be more affected by our proposed changes than younger viewers*",⁶⁶ but this is not reflected in how Ofcom has designed or used its qualitative consumer research.

The evidence suggests that those most likely to be affected by the proposals are older audiences. Based on the BARB figures Ofcom provides,⁶⁷ of the commercial PSB audience in the clock hours 18:00-18:59 and 22:00 to 22:59, which are the periods in which advertising is most likely to increase the most, 66% is aged 55+ and just 9% are 16-34. In such circumstances, seeking to create a "*nationally representative*" sample of participants is inappropriate, since it gives far too much weight to marginally relevant views. To take a parallel, if you were designing research into consumer attitudes to stair-lifts, you would not include many 18-year-olds in your sample. However, this is effectively what Ofcom has done.

Ofcom's groups were designed to attempt to provide "*a broadly representative cross section of the UK from 16+*"⁶⁸. The effect of this is that we estimate (based on the information provided) that there were fewer than 20 participants who were aged 55+. This is an extremely small sample to represent this age group that would (by a wide margin) be most affected by any change.

As a practical example of the impact of this, of the 73 quotes from participants included in the report, just 19 appear to be from those aged 55+. Thus, the bulk of the report reflects the opinions of those who will be minimally affected by the proposed changes.

A far more appropriate approach would have been to seek a participant mix for the groups that roughly matched the viewing mix.

⁶⁵ The report includes a section entitled "*sample summary*" which provides no useful information on this matter.

⁶⁶ Paragraph 2.48.

⁶⁷ Ofcom, *Viewers' attitudes to advertising changes on PSB channels: Analysis of BARB data*

⁶⁸ 2CV for Ofcom, *Qualitative research: Viewers' perceptions of the Code on the scheduling of television advertising*, 19 April 2023

As noted above, news is of pivotal importance to the decision Ofcom is making. Yet no account has been taken in the selection of the sample to ensure that it includes a sufficient number of participants who watch television news on PSB channels. The report's brief discussion of the issue of the impact of the changes on television news highlights the problem with the selection of participants. In full, it reads as follows:

"Increasing advertising during news programmes (typically broadcast during these peak slots) was generally felt to be acceptable. Viewers felt that the news landscape was very different now and that news stories can be accessed from a variety of sources, not just through the medium of television at a given time. The peak news slots were not viewed as being sacrosanct. However, ensuring that advert breaks were scheduled carefully, and sensitively, was one key consideration that viewers felt strongly about. For example, viewers mention that it would be preferable to avoid showing an advert break in the middle of hard-hitting headlines."

"I like Scenario 4 best as I don't really watch the news anymore. And I don't watch 10-11pm as that's when I'm getting ready for bed."

Post family/Empty nester, 50+, ABC1, Northern Ireland, Regularly"⁶⁹

The quoted respondent doesn't watch news any more – so unsurprisingly they're comfortable with more advertising during the news. This is the only quote in the report relating to the impact on news – i.e., from a person to whom the issue does not matter. Given the mix of respondents (discussed above), many of those feeding into the general conclusions were likely similarly disengaged from this issue.

Reliance on summaries of discussions

The nature of research of this type is that (a) it inherently relies on the interpretation and judgements of the authors in summarising discussions among participants, and (b) it is impossible to verify those summaries in any meaningful way. For example, the report is replete with statements like:

*"**most** [interviewees]... felt the amount of advertising in terms of frequency and length of breaks has remained consistent over time"*

*"**For many**, breaks were not a loved element of the TV experience"*

*"**Some** saw [advertisements] as an annoyance"*

Often, far more generic descriptions are used:

*"Some elements of the rules....felt confusing and required time for **viewers** to understand them"*

*"Based on prior assumptions, **participants** felt that all advertising breaks (regardless of channel) lasted around five minutes"*

*"When discussing what the potential COSTA rule changes could look like, **viewers** considered..."*

There is no way for stakeholders to verify the accuracy or veracity of these statements. For example, does "many" mean 10 of the interviewees, 20, 50, or more? What does "some" mean? When the report refers to "viewers", or "participants", how many of the interviewees held these views?

⁶⁹ Page 29, *Id.*

Furthermore, there is no way for third parties to verify whether or not these statements accurately represent the discussion. Experience tends to indicate that the way in which a group discussion is summarised depends significantly on the person writing the summary.

The interviews are subject to significant bias

It is a basic principle of reliable design in consumer research that it should be aware of, and take care to avoid, the risk of bias. The questioning of the small number of people who took part in this research, however, is subject to numerous, significant biases. As a result no weight can be placed on its findings.

(a) Respondents were given 'one half of the story' on many issues. For example:

- whilst interviewees were told that more revenue might be invested in content they were not told that the result of some broadcasters getting more revenue would be less revenue for others, which might reduce their content investment (whose content interviewees might prefer);
- interviewees were not told that there was no mechanism available to ensure that additional revenue earned by PSBs would be invested in more or better content;
- significant emphasis was placed on the 'funding challenges' faced by PSBs without proper explanation that all broadcasters face such challenges, or that Ofcom had recently concluded that commercial PSBs are able to fund their PSB obligations;
- the PSB compact, and the significant (and increasing) regulatory advantages that PSBs receive compared to non-PSB broadcasters, was not explained to interviewees, which would have been likely to impact their view of 'fairness' (which was a prominent issue in the interviews).

(b) The interviewing process clearly 'leads' respondents, and cannot reasonably be said to be objective. The interviews relied on "*stimulus material*", comprising a variety of explanations and information provided to interviewees. Much of the "*stimulus material*" includes statements and/or propositions that either favour Ofcom's proposal, or which are highly contestable. For example, interviewees who expressed a preference for the rules staying the same were then informed:

"That would mean that PSB channels have less money which could lead to less good-quality programmes, more repeats and less choice..."

It is hardly surprising that on being informed of this – presented as a fact, by an interviewer in a position of authority – interviewees then "*generally agreed*" that this scenario would be "*the most detrimental to their overall viewing experience*". This is plainly not an objective, unbiased interview process.

(c) There is a high risk of other types of bias influencing interviewees' answers, notably affirmation bias (saying what people think the interviewer wants to hear). No consideration is given to such biases in the survey report.

Excessive complexity

The objective of Ofcom's qualitative research should have been relatively straightforward. As Ofcom states, the key purpose of the research was to understand "what audiences might think about changes to advertising on PSB channels" – more specifically, the actual proposals being considered by Ofcom. Yet the survey was (a) both long and complex, and (b) raised a series of complex, unrelated issues that it would be difficult for non-specialists in this area to understand. For example, topics discussed in the group sessions included:

- the role of TV advertising;
- interviewees' knowledge of the regulation of TV advertising. (Unsurprisingly, the report concludes that "viewers had limited awareness of the current rules to regulate TV advertising."⁷⁰);
- funding challenges faced by PSB broadcasters;
- the rationale for proposed changes to COSTA rules;
- the potential impacts of changes to the COSTA rules (which even Ofcom, an expert regulator, states in the consultation are uncertain).

The vast majority of the topics covered in the research were unnecessary and likely to serve principally to distract from a clear focus on obtaining interviewees' views on the key issues at hand.

It is likely that these extraneous topics were addressed as those conducting the survey wished to provide context for Ofcom's proposals. Two points can be made about such a proposition. First, whilst providing some context is plainly appropriate the extent to which the survey focused on these broader issues was manifestly excessive and apt to distract interviewees. Second, if contextual information is provided, and discussion on that information undertaken in such research, it is essential that this is done fairly and objectively. As discussed above, this was not the case in the survey undertaken for Ofcom.

⁷⁰ Page 16.