

# **Consultation on guidance for ODPS providers on obligations relating to European Works**

**Response from the Association for Commercial  
Broadcasters and On-Demand Services to Ofcom**

**March 2022**

## Introduction

1. COBA is the Association for Commercial Broadcasters and On-Demand Services. It represents multichannel broadcasters in the digital, cable and satellite television sector and on-demand services.
2. COBA members operate a wide variety of services, offering news, factual, children's, drama, music, arts, entertainment, sports and comedy. Their content is available on free-to-air and pay-TV platforms, as well as on-demand.
3. COBA members are arguably the fastest growing part of the UK television industry, and are increasing their investment in jobs, UK content and infrastructure. They make this investment without support from the licence fee or indirect support from statutory prominence.
  - Scale: In the last decade, the sector has increased its turnover by 30% to more than £5 billion a year. This is rapidly approaching half of the UK broadcasting sector's total annual turnover, and has helped establish the UK as a leading global television hub.<sup>1</sup>
  - Employment: As part of this growth, the multichannel sector has doubled direct employment over the last decade.<sup>2</sup>
  - UK production: In addition, the sector has increased investment in UK television content to a record £1.1 billion per annum, up nearly 75% on 2011 levels.<sup>3</sup>
4. For further information please contact Adam Minns, COBA's Executive Director, at [adam@coba.org.uk](mailto:adam@coba.org.uk).

---

<sup>1</sup> Ofcom International Broadcasting Market Report 2013

<sup>2</sup> Skillset, Television Sector – Labour Market Intelligence Profile

<sup>3</sup> COBA 2019 Content Report, Oliver & Ohlbaum Associates for COBA

## Response

**Consultation question 1:** Do you have any comments on our proposed guidance on European works requirements?

### The definition of European Works

1. We agree with the draft guidance's approach to defining European works.

### Exemptions

2. We do not accept that the European Commission's definition of a micro-enterprise reflects the commercial reality of niche services that are part of larger entities, and thereby do not qualify for the exemption. In reality, companies will rarely cross-subsidize between different services, and revenues from other parts of a business may well be irrelevant. In applying the European works requirements to such niche services, policymakers risk going against the stated goal in the consultation paper and the Commission's own guidance of not stifling market development or disincentivising the entry of new market players.
3. We note that in determining whether on-demand services should provide access services last year, Ofcom decided that a degree of flexibility should be built into the regime when assessing applicable costs. While Ofcom sees total turnover as 'the most workable approach', it stated that relevant turnover could be taken into account as well, saying:  
  
'[R]egulations should also enable Ofcom to make exemptions where providers can demonstrate that the requirements would have a genuine effect on the viability of their service (for example where the costs represent a much higher proportion of turnover **relevant** to the provision of on-demand content).<sup>4</sup>
4. We ask Ofcom to consider whether a similarly more flexible approach could be used for European works, while of course not contravening EU guidelines.
5. The inclusion of the exemption on thematic grounds is welcome. This is vital to ensuring a wide range of services can thrive, and in so doing deliver audience choice. We ask Ofcom to clarify that its example of an anime service is not meant in any way to limit the exemption to such services.

---

<sup>4</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0026/221768/Further-Statement-Making-on-demand-services-accessible.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0026/221768/Further-Statement-Making-on-demand-services-accessible.pdf). Our emphasis.

## Calculating European works

6. We welcome the scope for a series containing multiple programmes to qualify as multiple titles under certain conditions. The Commission guidelines suggest that this might occur where a TV series has a comparable budget to a feature film. We ask Ofcom to set out guidance on how this should be approached by companies. As part of a range of options, Ofcom might take into account whether a TV series qualifies for the UK's high-end TV tax credit, which is open only to productions with a budget of at least £1m per hour. However, this should not necessarily exclude productions that do not qualify, which may also be high cost per hour.
7. In addition, the proposed guidance on titles does not appear to capture stand-alone short films that qualify as European under Ofcom's origination rules. Such films can be high value, provide an important platform for new European talent, and may have a theatrical release. We therefore ask Ofcom to clarify how short films that are clearly European are to be classified. We suggest removing 'feature-length' from the definition of a film and widening the definition to: "*Feature, TV film, or theatrically Released Film.*"

## Prominence

8. We welcome Ofcom's assertion that there is no one size fits all approach to prominence. The on-demand world is a complex and developing landscape with different business models and a wide range of services offering audience choice. Service providers should be able to meet this requirement in a way that best suits their service.

**Consultation question 2:** Do you have any comments on our proposed guidance on the steps Ofcom will take to secure compliance?

9. In terms of the approach to the exemption based on audience size, we are concerned that the proposal to require annual reporting is problematic, given that audiences may fluctuate.
10. In addition, we question how Ofcom will calculate audience size in circumstances where, for example, a smaller thematic on-demand service may be included, free-of-charge, to consumers (who may or may not decide to view) as part of bundle of channels and/or services.

11. We also strongly support a phased-in approach over a multi-year period. This would offer a more proportionate approach to what is a significant new requirement, and would be in line with that adopted by other regulators, including the Netherlands.
  
12. By way of example, the phase-in that the Netherlands has adopted requires 10% European Works in year one, 15% in year two, and 25% in year three, with year four fully compliant. The Netherlands requires a service to apply for the phase-in and the percentages can be tailored to a particular service where justifiable.