



Ofcom's BritBox materiality assessment: Relationship between BritBox and the BBC's Public Service activities.

Virgin Media's Non-Confidential Response

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Virgin Media welcomes the opportunity to respond to Ofcom's BritBox materiality assessment (*'the Assessment'*). We limit our comments to the BBC's "...agree[ment] in the MOU to cross-promote BritBox within its existing regulatory and legal framework as appropriate"¹. We consider that this issue has not been and will not be reviewed by Ofcom ahead of the launch of the service and we have a number of concerns about this apparent "ex post" approach. BritBox is a commercial subscription service in which the BBC only has a 10% minority shareholding, compared to ITV's 90% shareholding. It is unclear to us how the BBC can promote a nearly wholly owned third party commercial proposition via its public services.

We understand that the BBC will shortly be publishing its guidelines on cross-promotion, however, these guidelines will not be commented on or influenced by Ofcom and will only be published after the conclusion of the MOU with ITV on cross-promotion. The absence of prior oversight by Ofcom is concerning, given the potential scale of harm: the BBC will, in effect, "write its own rules", likely to the detriment of competing services and the market in general.

The intended approach will prejudice the objectivity of the guidelines and legitimise whatever cross-promotion arrangements have been agreed between the parties, without regulatory constraint. We do not think Ofcom's intention to intervene only once a problem has been established is a sufficient remedy. This will also mean that any distortion in the market will have already taken place given the significant marketing power the BBC and ITV are likely to leverage at the launch of the service.

In the absence of any information provided on the cross-promotion arrangements between the BBC and ITV, and the proposed lack of ex ante regulation and oversight from Ofcom, there is a significant potential for a conflict of interest to arise. Specifically, the BBC's public service arm would be promoting a third party commercial service, thereby blurring the distinction between the BBC's public services and commercial interests.

The BBC has an unrivalled ability through its large audience share to cross-promote BritBox across its public services and without constraint this could significantly impact other VoD services and create an unfair competitive advantage for the benefit of the BBC and ITV. For example, on its channels the BBC's share of viewing nationally is over 30% and ITV's is over 17%. This dwarfs the share of viewing of all other commercial channels and the other PSBs (Channel 4 at 9.3% and Channel 5 at 6%)². In relation to the iPlayer the BBC has seen a 10% increase of viewing year-on-year with over 17 million individual users per month³.

¹ Para 1.42 of the Assessment

² BARB: BBC Linear (30 day consolidated, avg. Aug '18-Jul '19)

³ BBC's own published data

We set out below our specific concerns with the approach taken in the Assessment to the BBC's ability to cross-promote BritBox:

1. Previous regulation restricts the BBC's ability to cross-promote

The precedent to date, which the previous regulator (the BBC Trust) established, is that the BBC should not promote its commercial services in public service airtime without clear editorial justification.

The BBC Trust's policy stated that:

Cross-Promotion of the BBC's Commercial Services

18. The BBC should not promote the BBC's Commercial Services through its UK Public Services and related Public Service Activities unless there is a clear editorial justification for doing so. An example of where there might be editorial justification for doing so where there is an international series of programmes on a particular issue in which both the BBC's UK Public Services and one of the BBC's Commercial Services are participating.

19. The BBC Executive's Fair Trading Guidelines should give guidance as to when there is clear editorial justification for promoting the BBC's Commercial Services through its UK Public Services and related Public Service Activities"⁴.

It is therefore unlikely under the Trust's rules that the BBC would have been able to cross-promote BritBox. Furthermore, even if the BBC was able to cross-promote BritBox, it is not clear why BritBox should be the only third party commercial venture to benefit from the BBC's unrivalled ability to reach viewers through the cross-promotion regime. To do so would mark a notable departure from practice to date: the BBC has never sought to cross-promote other third party (commercial) facilities via which its content is available – even where it has a commercial interest in that facility. For example, the BBC's content is available (in various guises) on Netflix, iTunes and via UKTV – the latter of which we note is now owned fully by BBC Studios.

Similarly, the BBC has refused to promote the availability of iPlayer on the Virgin Media platform – even though it was one of the first third party platforms to carry the service. The rationale for this position was that the BBC took the view that it was unable to promote a specific partner, as to do so would not be FRND.

2. No benchmarks set regarding the circumstances under which the BBC's cross-promotion arrangements will prejudice fair and effective competition.

The current Ofcom Cross Promotion Code (2006) (*'the Code'*) which applies to all broadcasters, except the BBC, specifically has rules to ensure *'that promotions on television outside programmes do not prejudice fair and effective competition'* (Code, para 3.1(ii)). At a very minimum, the base line for any BBC guidance and regulation on cross-promotion should be equivalent to, and consistent with the existing Code applicable to all broadcasters.

3. Platform and retail TV service neutrality

⁴ Para 18,

http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/fair_trading/fair_trading_policies_framework.pdf

Under s.316 of the Communications Act 2003, Ofcom has the power to include licensing conditions to ensure fair and effective competition and this is enshrined in all broadcasting licences. The Code applicable to the Commercial PSBs (Channel 3, Channel 4 and Channel 5 licensees) incorporates a requirement that cross-promotions that mention a digital retail TV service or Digital TV broadcasting platform treat all major digital retail TV services and platforms in an 'impartial manner'. Although drafted in 2006 to ensure fair competition at the time of switchover, the underlying principles are still relevant and a similar impartiality requirement should be imposed on the BBC's marketing of BritBox to ensure it does not distort the market by only mentioning one set of platforms or retail service.

For the avoidance of doubt, we do not believe that it would be acceptable for the BBC to promote BritBox and follow it with a statement saying "other SVoD services are available" or "other pay TV services are available" (or similar). The BBC should be required to 'name-check' wherever BBC programming is available for pay in the secondary rights market in a similar way it is likely to cross-promote BritBox. This would include naming services such as Virgin Media, Netflix and Sky etc.

4. Cross-promotion relationships

The Code states there is a rebuttable presumption that there are sufficient incentives for the promoting channel to provide free airtime to another channel where the promoting/promoted channel has a 30% shareholding in the other. This is a useful short-hand way of deciding when there is likely to be a strategic incentive to use free airtime compared to advertising airtime. Whilst the BBC does not have advertising time, the 30% rule is a useful to benchmark when it is likely to be in the BBC's interests to cross-promote a service. For example, as we noted previously the BBC has never, to our knowledge, cross promoted UKTV.

5. Regulatory Framework

Based on the above concerns, we consider that Ofcom needs to set limits on the BBC's ability to cross-promote BritBox ahead of the BBC concluding a commercial arrangement with ITV. If the BBC is permitted to proceed without any form of regulatory constraint, not only is this unprecedented amongst all other broadcasters who are subject to the Code but it would also set an unacceptable precedent regarding when and how the BBC can promote third party interests. We consider that at a minimum a cross-promotion regulatory framework for the BBC should cover:

- (i) Under what circumstances can the BBC cross-promote a third party commercial service?
- (ii) Is there a minimum shareholding the BBC has to have in that service? If not, how does the BBC public service ensure it is not distorting the market by selectively entering into commercial agreements and cross-promoting those arrangements with only certain providers?
- (iii) Should the BBC have an obligation to ensure that any cross-promotion arrangements are undertaken on an FRND basis?
- (iv) Should there be an editorially justifiable licence fee payer benefit to any cross-promotional activity the BBC undertakes?
- (v) Should the BBC should have obligations regarding platform and retail TV neutrality (and not just in relation to switchover)?
- (vi) Should information about the cross-promotion arrangements the BBC has entered into be publicly available to ensure scrutiny and parity of treatment?