Review of the Digital Markets, Consumer and Competition Bill

Written evidence submitted by the Association for Commercial Broadcasters and On-Demand Services (COBA) (DMCCB16)

Introduction

1. COBA is the Association for Commercial Broadcasters and On-Demand Services. It represents a wide range of broadcasters and on-demand services, including leading and niche players.

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.[1]

    - Employment: As part of this growth, the multichannel sector has doubled direct employment over the last decade.[2]

    - UK production: In addition, the sector has increased investment in UK television content to well over £1.1 billion per annum, up nearly 75% on 2011 levels.[3]

4. For further information please contact Adam Minns, COBA's Executive Director, at adam@coba.org.uk or 0203 327 4101.

[1] Ofcom International Broadcasting Market Report 2013
[2] Skillset, Television Sector – Labour Market Intelligence Profile
[3] COBA 2019 Content Report, Oliver & Ohlbaum Associates for COBA

Response

1. COBA and its members welcome the opportunity to provide evidence to the Committee on this matter. Our members include a wide range of content providers in the screen sector, ranging from linear broadcasters to video-on-demand services, often combining the two services within their corporate structure. As such, subscriptions are often key to their business models. Indeed, for many members, subscriptions are the most important source of revenue. As such, the income from these subscriptions is vital to their ability to invest in UK content (across the sector, investment in UK film and TV content is now at a record £6.2 billion[4]), as well as support jobs and infrastructure such as production studios across the entire UK.
2. While supporting the dual aims of the Digital Markets, Competition and Consumer Bill - promoting competition and protecting consumers – we believe the current drafting is overly prescriptive in the area of subscriptions. The proposed measures would require businesses of greatly varying sizes to adhere to overly defined and inflexible rules. In its current wording, this part of the Bill could have an unintended negative impact on our members' businesses and their ability to invest in the UK.
3. The proposed legislation will also directly impact the design of the product itself, such as requiring the introduction of a separate page to house lengthy legal copy. This includes providing detailed explanations about any clauses of the subscription contract that deal with price changes. While we endorse requirements to provide clear, upfront information to consumers, imposing such prescriptive rules will disrupt the customer experience and will not be appropriate for being viewed on mobile or on connected TVs.
4. We are not aware of any widespread concern or issues with how the screen sector treats subscribers currently. COBA members are typically brands with household recognition who greatly value their relationship with their subscribers and act highly responsibly. Yet, according to the Government's impact assessment, the requirements in the Bill will cost UK business £400

[4] https://www.bfi.org.uk/news/official-2022-statistics

million to set up and £1.2 billion overall. This is in part down to the overly prescriptive nature of certain clauses, which will require in some instances companies to build bespoke technical solutions.

5. These costs will also be compounded by the fact that the proposals go materially beyond the requirements of comparable EU-wide subscription laws (in particular, following the updated regime set out in the Omnibus Directive (2019/2161)). This would mean international content services investing significant time and costs to comply with a more onerous UK regime, which is out of step with the rest of Europe and most of the globe. For example, we are aware that consumer laws in Australia are being strengthened, but the operational requirements imposed on subscription providers nonetheless remain far less prescriptive than those in the UK Bill.
6. Specifically, we therefore ask members of the Committee to re-consider the following areas of the Bill, having regard to subscriptions for content-based services:

    a. **Pre-contract information:** The requirements under clause 248-251 and Schedule 20 to provide consumers with pre-contract information are overly prescriptive and may create unnecessary complexity for consumers. For example, some services are already subject to two different pre-contract information requirements, in relation to Ofcom and FCA regulated products, and this would add a third layer of complexity, presenting consumers with lots of information in a way which may not be easily understood. In particular, the requirement for traders to present key pre-contract information to consumers as a separate, standalone step in the customer journey (with very prescriptive requirements about what needs to be included and how this information must be presented) adopts an impractical "one size fits all" approach to product design. It would be more effective to allow traders to retain flexibility in the design of their customer journey, while ensuring that each item of key pre-contract information has been delivered and given appropriate prominence, taking into account the nature of the device and size of screen. Providing simple and concise information at relevant stages of the journey will mean consumers are more

likely to read and understand that information, as compared to standalone paragraphs of legal copy.

b. **Reminder notices:** The clauses requiring businesses to send six-monthly reminders to all customers in rolling subscriptions are overly prescriptive, as are the new cooling-off notices to be sent to customers when a free or introductory offer comes to an end (and on renewal of subscriptions with an annual or longer term). These notice obligations each include detailed requirements on what needs to be included and specify the specific window within which they need to be sent.

c. **Cooling off:** The unconditional right for consumers to withdraw from a subscription contract within the initial 14-day cooling-off period, and any renewal cooling-off period, risks allowing consumers to "game" the system by signing up, binge-watching TV shows or sports content within the first 14 days, then cancelling their subscription and obtaining a refund. Additionaly, consumers nowadays have many subscriptions and this may result in receiving multiple cooling off and renewal reminders, potentially rendering notices less effective.

    i. Under existing English law, if consumers wish to access and view digital content immediately, they can agree to do so while acknowledging that they waive their right to cancel as a result. This allows consumers to view content they have purchased straight away, while protecting traders against the potential for abuse.

    ii. This risk of abuse is particularly high for live sports and high-end TV, which involve significant upfront investment in production, rights, and marketing, but in respect of which the content is often consumed within a short window - i.e. if those consumers view significant amounts of premium content in the first 14 days, then cancel, the content provider may get nothing at all (or, at most, a nominal amount) in return.

    iii. Similarly, the provision of multiple cooling off periods means a customer could sign up any number of times they wish to view a series or a particular movie, and subsequently exercise their cooling off rights.

iv. Therefore, to provide certainty and to ensure that content providers can continue to invest in and offer premium content, at a minimum the Bill should expressly retain the current legal exemptions which allow cancellation rights to be waived when consumers start to watch content. This point should be set out in primary legislation, rather than left to regulations, given its central importance to the creative economy (Without such certainty, many of our members may need to reconsider the cost and commercial model of their services, which may ultimately lead to higher subscription fees and less consumer choice).

d. **Cancellation by any means:** The requirement that businesses allow customers to bring a subscription to an end via a single communication or by notice given "by any means" is unhelpfully ambiguous and too wide to be practicable. It could be interpreted to mean that consumers could cancel by sending a social media message or tweet. This would be hugely challenging to manage and is clearly disproportionate. There is also a lack of clarity as to whether "bringing a contract to an end" under the Bill entails an immediate cancellation or refers to switching off auto-renew.

e. **Fines:** Finally, the proposed fines for breach of the subscription rules go beyond anything set out in the GDPR in respect of monetary penalties for data privacy breaches, and the baseline penalties under the EU Omnibus Directive for consumer law breaches in Europe. Breaches could attract penalties of up to 10% of annual global turnover of the entire group. This is particularly concerning since the Bill empowers the Competition and Markets Authority to issue such turnover-based penalties without going to court and without providing and out-of-court appeal mechanism for aggrieved traders.

f. **Scope:** We understand that clauses 140 and 141 together define the scope and jurisdictional reach of the Bill's enforcement regime, in essence to enable enforcement using the measures in Part 3 in the event that the collective interests of consumers are harmed no matter where the trader is based. However, we are concerned that, as currently drafted, these clauses would also potentially capture some commercial practices which were alleged to have harmed the interests of non-UK consumers, even when these

commercial practices in no way impact UK consumers. We assume this is not the policy intention, given the CMA would in effect become an international regulatory authority. We would be grateful for clarity on whether Clause 140: Relevant Infringements sets out that the first condition which must be met for a commercial practice to amount to a relevant infringement is that the act or omission must harm the collective interests of UK consumers. If so, c140, paragraph 1(a) might be amended to reflect this.

g. **Implementation:** businesses have no certainty at all as to how long they will have to implement these new requirements given that no transition period is included in the Bill. Similar legislation, e.g. the implementation of GDPR requirements, contained a transition period and businesses were given more than two years to prepare for these changes. Government needs to commit at the earliest opportunity to a similar approach for these requirements given the scope and impact on businesses.

h. **Discretionary powers:** The Bill grants the Secretary of State significant discretionary powers to introduce regulations modifying rules on unfair commercial practices, subscriptions, and enforcement matters (e.g. changing information requirements for subscriptions). While the safeguards included in the Bill provide some level of protection, this will still present challenges for businesses. Statutory instruments receive relatively limited scrutiny compared to a full public consultation, and therefore increase uncertainty and potentially impractical regulations, ultimately hindering compliance and consumer rights.

7. In our view, given the concerns outlined above, primary legislation should take a more principles-based, outcomes-oriented and practical approach with regard to a number of areas related to subscriptions. If necessary, more detailed requirements should be covered in guidance based on consultation with industry. This framework would empower the appropriate regulator to engage with and take account of different business models and commercial concerns relevant to subscription services, to ensure robust protections while not unduly restricting industry from offering content-based services.

8. We also support the policy approach that Government recommended in its response to its "Reforming Competition and Consumer Policy" consultation in April 2022. This set out a more proportionate range of measures. In contrast to the impact assessment for the current Bill, Government indicated that these more proportionate measures would cost £16m to implement.

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