

YOUR REFERENCE

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DATE

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DIRECT DIAL

By e-mail and by post

BBC Trust
Room 211
35 Marylebone High St
London W1U 4AA

For the attention of the Board of Trustees

Dear Sirs

BBC Local Video Proposal

1. We act for The Newspaper Society.
2. This letter relates to the BBC Trust's supervision of the Public Value Test ("PVT") of the BBC's local video proposal. For the reasons which follow, The Newspaper Society considers that the BBC Trust is failing to undertake the PVT in accordance with its Charter obligations and its Agreement with the Secretary of State dated 30 June 2006.
3. In circumstances where the BBC Trust is to issue its Public Value Assessment ("PVA") and provisional conclusions on 27 November 2008, and Ofcom is due to issue its Market Impact Assessment ("MIA") on the same date, we seek your response to this letter (which is copied to Ofcom) no later than 14 November 2008.
4. The Newspaper Society's rights are necessarily reserved in all respects.

Summary

5. The Newspaper Society considers that, in a manner inconsistent with its Charter and its Agreement with the Secretary of State, the BBC Trust has:
 - (1) failed to provide adequate market information to The Newspaper Society (and, we infer, to other stakeholders);
 - (2) unilaterally and without consultation changed the PVT timetable; and
 - (3) failed in its stewardship to exhibit due independence.

6. We shall deal with each of these issues in turn. Before doing so, we set out below the legal framework.

Legal Framework

7. Clause 26 of the Agreement with the Secretary of State provides that the PVT is to comprise a number of elements. The first two are:
 - (1) the PVA (conducted by the BBC Trust); and
 - (2) the MIA (conducted by Ofcom).
8. Clause 28 of the Agreement with the Secretary of State states that the purpose of the PVA is "to ascertain the likely public value of the proposed change." This includes an assessment of its value to licence fee-payers as individuals, its value to society as a whole through its contribution to the BBC's Public Purposes and its cost and value for money.
9. In its Consultation Paper *How the BBC Trust will consult*, the BBC Trust said that it would seek representations in relation to its public value assessment for 28 days and, once it had reached provisional conclusions, would consult further for (usually) an additional period of 28 days.

The basis for a lawful consultation was summarised by Lord Woolf in the case of *R v North and East Devon Health Authority Ex P. Coughlan* [2001] QB 213, at paragraph 108, where he said that:

"[T]o be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

10. Clause 30 of the Agreement with the Secretary of State provides that Ofcom is to be responsible for providing the MIA, in accordance with a methodology agreed with the BBC Trust. This methodology was published by Ofcom on 22 May 2007 (the "MIA Methodology")¹.
11. Under clause 26(4) of the Agreement with the Secretary of State, the BBC Trust must consider the outcome of the PVA and the MIA and reach provisional conclusions regarding the proposed change. According to section 7.4 of the BBC Trust's published guidance (*Public Value Test (PVT): Guidance on the conduct of the PVT*), "[a]t least one week after the publication of the PVA and MIA reports, the Trust will publish its provisional conclusions."

¹ Ofcom, Methodology for Market Impact Assessments of BBC services, 22 May 2007.

12. Under clause 26(5) of the Agreement with the Secretary of State, the BBC Trust must consult about the provisional conclusions, usually for the further period of 28 days already referred to, before proceeding to a final conclusion. In particular the BBC Trust must be satisfied that any likely adverse impact on the market is justified by the likely public value of the change before concluding that the proposed change should be made.

Failure by the BBC Trust to comply with its obligations

Failures in relation to market information and analysis

Provision of inadequate market information

13. The BBC Trust has failed to provide adequate information to allow The Newspaper Society, or its members, to respond to the MIA.
14. According to the MIA Methodology, the MIA is intended to assess the impact of the proposed service "on other services in the market"². There are two elements to the MIA: (i) identification of the relevant market(s) and (ii) an assessment of the impact of the proposed service on other services in the market(s).
15. The concept of a "market" is well understood, both in competition law and communications regulation³; indeed the definition of "market impact" was not included in the Agreement on the basis that "[m]arket impact is a relatively well-understood concept"⁴. The MIA Methodology acknowledges the relevance of competition law market definition tools in the context of a MIA⁵. The MIA Methodology also states that consideration must be given "to the geographic basis on which the market impact should be assessed e.g. whether a UK-wide assessment would be appropriate or whether a regional or local evaluation is required"⁶. This, again, is standard practice in defining a market, whether in a competition law or regulatory context.
16. As the BBC Trust and Ofcom are aware, there is 20 years of consistent regulatory precedent (including 25 separate Competition Commission inquiries) for the belief that media markets are, in fact, local⁷. This position has been consistently applied to local

² MIA Methodology, para 1.2.

³ See, for example, section 79 and Schedule 14 of the Communications Act 2003.

⁴ Department of Culture, Media and Sport, *A public service for all: the BBC in the digital age*, March 2006, para 5.3.9.

⁵ MIA Methodology, para 3.14.

⁶ MIA Methodology, para 3.11.

⁷ Relevant Competition Commission inquiries include: Century Newspapers Ltd/Thomson Regional Newspapers Ltd (1989); Mr David Sullivan/Bristol Evening Post PLC (1990); Southern Newspapers PLC/Emp plc/Pearson plc/Reed International PLC/Trinity International Holdings plc (1991); Trinity International Holdings plc/Scottish & Universal Newspapers Ltd (1992); Emap plc/United Newspapers plc (1992); Argus Press Ltd/Trinity International Holdings plc (1993); The Guardian & Manchester Evening News plc / Thames Valley Newspapers

newspapers, local radio and other forms of local advertising. There is no justification for a different approach to be taken in relation to local video services. Nor is there any justification for the BBC to be treated differently from commercial providers of local media services. We are not aware that BBC management has so far sought to rebut this.

17. As such, the MIA must lawfully be based on analysis of the various local markets likely to be affected by the BBC's proposal and to have regard to their differences. It had appeared that consultants Human Capital, on behalf of BBC management, accepted that, for local services, "local markets are distinct"⁸ and that (for example) a "news bulletin about Newcastle upon Tyne is not a substitute for one on Newcastle-under-Lyme"⁹.
18. In its report, Human Capital has proceeded, however, to depart from this standard principle of market analysis. It states that it "believe[s] that there is enough commonality across these distinct markets that it is appropriate to analyse market impact generically across them or where appropriate by category (metropolitan / urban / mixed / rural)"¹⁰. This belief is not supported by evidence and is one which The Newspaper Society believes would be wholly wrong for Ofcom to accept in light of prevailing market conditions and the clear regulatory precedent over many years to which we have referred.
19. Following discussions with Ofcom, The Newspaper Society understands that Ofcom is minded to accept the contention that local markets and the different market conditions prevailing in those markets may be ignored. Acceptance of that contention would in The Newspaper Society's view be wrong. If not corrected, not only will Ofcom's MIA be fundamentally flawed but the BBC Trust's decision will be predicated on the basis of a misapprehension.

(1993); Trinity International Holdings plc/Joseph Woodhead & Sons Limited (1993); Johnston Press plc/Halifax Courier Holdings Limited (1994); Daily Mail and General Trust PLC/T Bailey Forman Limited (1994); Trinity International Holdings plc / Thomson Regional Newspapers Limited (1995); Northcliffe Newspapers Group Limited/Aberdeen Journals Limited (1996); Newsquest Media Group / Westminster Press Limited (1996); Mirror Group plc/Midland Independent Newspapers plc (1997); Johnston Press plc / Home Counties Newspapers Holdings plc (1998); Capital Radio plc/Virgin Radio Holdings Limited (1998); Portsmouth & Sunderland Newspapers plc/Johnston Press plc/Newsquest (Investments) Limited/News Communications and Media plc (1999); Trinity plc/Mirror Group plc and Regional Independent Media Holdings Limited/Mirror Group plc Regional Independent Media Holdings/Mirror Group plc (1999); Gannett/Johnston Press/Guardian Media Group (2000); Independent News & Media/Belfast Telegraph & other titles (2000); Newscom/Newsquest/Johnston Press/Trinity Mirror (2000); Johnston Press / Trinity Mirror (2002); Newsquest / Independent News & Media (2003); Gannett / SMG (2003); Vibe Radio Services Limited / Galaxy Radio Wales and the West Ltd (2003); Archant Ltd / Independent News and Media PLC (2004). In addition, there are numerous decisions by the OFT.

⁸ Human Capital, An Independent Preliminary Assessment of the Market Impact of the BBC's Local Video Proposals, Final Report, 11 April 2008, p. 34.

⁹ Ibid.

¹⁰ Ibid.

20. In order to respond to the Human Capital report in this respect and attempt to ensure that the MIA is lawfully conducted according to sound methodology, The Newspaper Society and its members have requested information from the BBC Trust. In particular, information has been requested in relation to:
- the audience and usage figures for the current BBC local sites;
 - the current provision and staffing of the BBC local sites;
 - details of the costs and funding of the proposed new service; and
 - salary levels for staff to be employed under the local video proposals.
21. This information is of critical importance if The Newspaper Society and its members are to be able to test the assumption made by the BBC's advisors that a local video service will have the same impact across the country (and indeed if Ofcom is properly to conduct its market analysis). Despite repeated requests, this information has either not been supplied or, where supplied, has not been in a format adequate for proper analysis.
22. While the Agreement with the Secretary of State allows the BBC Trust and Ofcom to modify the methodology used for a MIA, the scale and scope of the assessment must be "appropriate to the significant change in contemplation and its potential market impact"¹¹. In this case, The Newspaper Society and its members have provided substantial evidence of the severity of the potential market impact. As such, any approach to the MIA which fails: (i) to engage with the relevant local market; or (ii) to consider the impact on those local markets would not comply with the terms of the Agreement with the Secretary of State.
23. In addition, the failure to provide the information requested also prevents The Newspaper Society and its members from making submissions as to the manner in which the BBC's proposal should be modified. The MIA Methodology states that, where potentially adverse market impacts have been identified, Ofcom will look for ways in which the BBC's proposal could be modified to remedy or limit those impacts¹². In this case, The Newspaper Society believes that it is likely that the BBC's proposal will have a different impact in different local markets. If this is correct, Ofcom would reasonably be expected to consider whether it would be appropriate, for example:
- (1) to exclude certain local markets, which are already adequately served, from the proposed service;

¹¹ Agreement, clause 39(3)(a).

¹² MIA Methodology, para 3.30 et seq.

- (2) to adopt a phased introduction of the service, for example, by starting in areas which are currently clearly under-served, with roll-out to other areas dependent on additional market analysis;
 - (3) to propose a methodology for the allocation of greater resources/funding to areas which are under-served; or
 - (4) to pursue some other option, which would limit the impact on the relevant markets.
24. The Newspaper Society has a legitimate expectation that Ofcom will consider such options to remedy or limit the market impact of the proposed local video services.
25. If Ofcom bases its MIA on the flawed methodology of Human Capital, and is not provided with the information requested of the BBC Trust by The Newspaper Society (and the comments on it by The Newspaper Society and other stakeholders), it will have failed to take relevant considerations into account. Any decision subsequently made by the BBC Trust also risks reaching the wrong conclusion, to the extent it relies on the MIA. As such, a flawed MIA will severely compromise the whole PVT process. As we set out in the next section, there will be no opportunity for this defect in the process to be remedied once the MIA has been published.
26. Moreover, the failure to provide The Newspaper Society with the information requested and receive comments cannot in any way be regarded as a proper and lawful exercise in consultation in that it would not, in Lord Wolff's terms, "*allow those consulted to give intelligent consideration and an intelligent response*". This would be contrary to the BBC Trust's obligations to consult under the Agreement with the Secretary of State and be detrimental to good administration generally.
- No opportunity for revisiting the MIA is available, even where it is based on inadequate information or flawed methodology.**
27. The failure by Ofcom to adopt sound methodology and of the BBC Trust to provide adequate market information takes on a special significance in circumstances where the current PVT process envisages that a final MIA will be published with no opportunity for those affected to comment on its findings.
28. A flawed MIA cannot therefore be remedied by allowing later submissions to the BBC Trust. Under the Agreement with the Secretary of State, Ofcom's role is to use its specialist expertise to conduct the market analysis. It is no answer to the failure to provide Ofcom with relevant information to say that the BBC Trust will consider it later. A failure to consider the relevant information as provided for under the PVT process would be unlawful.
29. The defects in the MIA process to date should be remedied in the following three respects:

- (1) Ofcom should undertake to conduct its market analysis in accordance with the standard regulatory methodology in which local markets are treated as local and account taken of their differences;
- (2) the BBC Trust should ensure that the information referred to in paragraph 20 of this letter is provided to Ofcom and stakeholders including The Newspaper Society; and
- (3) Ofcom should issue a draft MIA, in response to which stakeholders, including The Newspaper Society, can make submissions. Ofcom should then be required to consider these submissions before issuing its final MIA.

The change to the PVT timetable

30. As noted above, according to section 7.4 of the BBC Trust's published guidance (*Public Value Test (PVT): Guidance on the conduct of the PVT*), "[a]t least one week after the publication of the PVA and MIA reports, the Trust will publish its provisional conclusions."
31. At a meeting on 30 September 2008, the BBC Trust and Ofcom informed The Newspaper Society representatives present that the PVA and MIA would be published on the same date as the BBC Trust would publish its preliminary conclusions. Prior to this date, The Newspaper Society and its members had been proceeding on the basis that they would have sufficient time in which to consider the PVA and the MIA and submit comments prior to the publication of the provisional PVT. In fact, The Newspaper Society had already arranged to hold a meeting with its numerous members so as to canvass comments in this short space of time.
32. This issue was raised by The Newspaper Society with the BBC Trust. In an email from Mr Christopher Woolard (BBC Trust) dated 3 October 2008 (00.40) to Mr David Newell (Newspaper Society), Mr Woolard stated as follows:

"PVA and MIA timings - I understand there was some concern about a single day of announcement. Just to give some background - we've been kicking this around with Ofcom for a bit. The process previously has been to publish the PVA and MIA about a week before the provisional PVT. The advantage of this was a presentational one of "separateness" however it was a pretty unsatisfactory experience for Ofcom, the Trust and stakeholders because it created a rather odd week where people had 80% of a story without any conclusions to react to. For future PVTs, including this one we're going for a simpler single announcement, but to reassure you the PVA and MIA are conducted quite independently within the process."
33. In a letter dated 20 October 2008 from the BBC Trust to The Newspaper Society, Christopher Woolard wrote:

"We have noted the concerns that you and some of your members have raised regarding the decision to adopt a single publication date for the PVA, MIA and

provisional conclusions. The Trust retains an open mind as to the timetable for the second stage of consultation and if appropriate would revisit the timescale if needed to ensure more time is available for consultation. Whilst we have published an administrative timetable for the PVT, there will be a specific question for the Trust to consider regarding the timing of the second consultation. I would be happy to put directly to Trustees any points you might wish to provide in writing concerning timing of the second consultation. Until any formal decision is made we will be working towards the current timetable."

34. The Newspaper Society acknowledges the existence of a second stage to the proposed consultation. This will not, however, cure a deficient first stage that has been improperly abridged contrary to expectation and the BBC's own published guidance.
35. The need for a period of reflection between the publication of the PVA and MIA is even more important when The Newspaper Society and its members have reason to believe that the PVA and MIA are being prepared on the basis of flawed methodology, insufficient information and without regard to relevant considerations.

Lack of Independence

36. It is vital for the integrity of the PVT that participants in the PVT process and the public at large have confidence in the BBC Trust and that it is bringing to bear an independent and fair mind, consistent with its regulatory function over the BBC, to the assessment of the local video proposal.
37. Recent comments made by Sir Michael Lyons, Chairman of the BBC Trust at a lunch for the Broadcasting Press Guild on 15 October 2008 lead The Newspaper Society and its members to fear that the BBC Trust has already pre-judged the decision to approve the local video proposal before the conclusion of the PVT. These comments repeat similar comments made by Sir Michael at a lunch with The Newspaper Society on 1 April 2008.
38. At the lunch in October, Sir Michael is reported as saying the following: "There's nobody who can be satisfied with the quality of local news in most parts of the United Kingdom... The local press has nothing like the strength that it once had. It's not the same proposition that it was 15 years ago. Will the BBC make it better or worse? That's exactly the issue to be explored." In other words, Sir Michael's starting point is that local news provision is unsatisfactory. It is difficult to reconcile such comments with the conduct of an objective PVT.

Conclusion

39. By reason of the matters set out above, The Newspaper Society considers that the BBC Trust is acting inconsistently with its Charter and the Agreement with the Secretary of State.
40. In the circumstances we request that the BBC Trust:

- (a) direct BBC management to provide to the BBC Trust and to Ofcom the information requested by The Newspaper Society as described in paragraph 20 above;
- (b) provide The Newspaper Society with a copy of that information on a basis that gives The Newspaper Society sufficient time to respond to it. If need be, The Newspaper Society's existing and long-standing requests for information should be treated as made under the provisions of the Freedom of Information Act 2000;
- (c) in its turn request Ofcom to undertake its market analysis in accordance with the standard regulatory methodology;
- (d) in its turn request Ofcom to issue a draft MIA and to receive comments on it from stakeholders before issuing a final MIA;
- (e) suspend the PVT until (a) to (d) above have occurred;
- (f) reinstate the original process under which there would be sufficient time for consideration between the issuing of the PVA and MIA, and the issuing of the provisional PVT decision; and
- (g) act at all times to ensure that public confidence in the integrity of the PVT is not undermined and therefore to refrain from making comments that could be seen as indicating the BBC Trust is not bringing a fair and open mind to the process.

41. None of these actions could, if carried out, conceivably give rise to prejudice on the part of the BBC Trust and we look forward to receiving your confirmation that they will indeed be implemented.

Yours faithfully,



Clifford Chance LLP

cc: Ofcom