



SKY RESPONSE TO OFCOM REVIEW OF RULES FOR PROMINENCE OF PUBLIC SERVICE BROADCASTERS AND LOCAL TV

EXECUTIVE SUMMARY

1. Ofcom's consultation addresses two related but separate subjects. The first is whether the prominence regime for public service broadcasting should be extended, in light of the changes in ways that people now find and watch television programmes.
2. The fundamental purpose of the prominence regime is to ensure that public service content is easily discoverable by UK viewers. Accordingly, the need to extend the current regime to new ways of finding and watching TV programmes should depend on good evidence that these new services are resulting – or are likely to result in future – in public service content becoming less discoverable, particularly on those platforms that are used by significant numbers of UK viewers.
3. Ofcom has not presented any such evidence. On the contrary, all the available evidence points to public service content continuing to receive a high level of prominence, and to be readily discoverable via new services, and particularly on those platforms that are being used by significant numbers of UK viewers.
4. The reason for this is straightforward: programmes produced by the UK public service broadcasters are attractive to UK viewers and are watched by millions every day, and there is no reason to believe that this will change in the foreseeable future. For example, as the BBC has highlighted, in 2017 the top two thousand TV programmes watched in the UK were all UK-originated, with the vast majority of those being provided by the public service broadcasters. As a result, any operator providing a new platform or TV service in the UK will want to ensure that its users are able easily to find and watch these programmes. Commercial incentives drive platform providers to ensure that PSB content is easily discoverable, because that is what their users want.
5. This is not a theoretical proposition; prominent placement of public service broadcaster services is observed consistently even where there is no legal or regulatory requirement.
6. Of course, it is important that this issue is kept under review, and Ofcom now has a duty to do so under the Digital Economy Act. However, we consider that proposals for extension of the regime at this point in time are premature and not supported by evidence.
7. In addition to its monitoring role, Ofcom has a significant role to play in encouraging PSBs to work constructively with platform operators to ensure that their important content is not only readily discoverable by users of those platforms, but is also available via the full range of functionality those platforms provide – for example, being included in menus and search results, whether by voice or text, via streaming to other devices and in add-on services such as mobile apps. Ofcom's focus should, therefore, be on ensuring that the PSBs' *content* is readily available and discoverable, rather than public service broadcaster 'player' apps which may act to restrict platforms' ability to surface content in a manner consistent with other available content (and in most instances contain programmes and functionality that are not public service in nature).

8. The second subject addressed in the consultation is a number of proposals for changes to the current Ofcom Code of Practice on prominence for designated public service linear channels. Any such proposals must pass the standard tests for good regulation of being necessary and proportionate, based on sound consideration of robust evidence.
9. Ofcom's proposed changes do not meet these tests. The evidence base for the proposals, and the explanations for why Ofcom believes they are necessary and proportionate, are particularly weak. The proposals in fact deliver little or no benefit to viewers or public service broadcasters, while causing potentially significant disruption. For example, Ofcom's proposal for Channel 4 in Wales is likely to provide only a 0.1% net increase in public service broadcaster viewing share, at most, due to audience cannibalisation from other public service channels. Yet on Sky's platform alone this change would require 140 channels to change EPG number, causing significant costs and disruption as a result. Ofcom has failed to appreciate fully these impacts in its assessment.
10. If, following this consultation, Ofcom continues to believe that changes to the EPG Code are required, Ofcom's objectives can be achieved in a more proportionate way by requiring EPG providers to offer public service broadcasters any more prominent EPG positions that are, or become available over time.
11. More generally, we are concerned about the move away from the 'principles based' approach to regulation which underpins the current EPG Code, towards a more prescriptive 'command and control' approach in the proposed amendments to the EPG Code. We consider that the 'principles based' approach is a superior approach to regulation in this area. It provides appropriate flexibility for operators to determine how prominence is delivered, while ensuring that the objectives of the prominence regime are achieved. Prescriptive regulation is inflexible, and effectively requires Ofcom to be intimately involved in how platforms and services operate and are run. It is likely to restrict innovation, lead to poor outcomes and give rise to adverse unintended consequences for audiences, broadcasters and platforms alike.
12. Retention of a 'principles based' approach to regulation would be particularly important if, contrary to available evidence about the need to do so, the prominence regime were to be extended to new platforms and services. It would be even more difficult to administer and more likely to give rise to adverse consequences for broadcasters and viewers, given the complex and rapidly evolving nature of new platforms and TV services.



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SECTION 1: INTRODUCTION

Sky's approach to content discovery

- 1.1 Sky's services are offered in a highly competitive market environment, in which a large number of scale operators seek to attract customers to their services. Sky considers that ensuring that users of its services are able easily to discover content that appeals to them, from among the wide range of content available via its services, is a central part of ensuring that it remains successful in such an environment. Accordingly, this is a core motivating principle for Sky's approach to content discovery reflected in Sky's corporate purpose: *"To bring better content and innovation to all of our customers, better connecting them to more of what they love."*
- 1.2 Furthermore, Sky's services, and those of its competitors, are subject to rapid change; Sky must constantly seek to adapt its services to ensure that they continue to fulfil consumers' needs, and thereby remain competitive. This means that Sky's approach to content discovery is subject to a process of continuous improvement as Sky seeks to optimise the customer experience.
- 1.3 UK public service content, provided by the designated public service broadcasters ('PSBs') is an important element of the offering on Sky's platforms. Content from the main five public service channels comprises over 50% viewing, and 70% of viewing is to designated public service channels and to the PSBs' wider portfolio channels. Sky's customers want to watch content from the PSBs, and watch a great deal of it. Accordingly, Sky is incentivised to surface this content in order to fulfil its objective of enabling its customers to access easily the programmes that they want to watch.

Relevance of Ofcom's prominence regime to Sky

- 1.4 Ofcom's rules for prominence of public service channels, set out in the Ofcom code of practice on electronic programme guides (the "EPG Code"), impact Sky in the following ways:
 - (a) as a platform operator and EPG provider the prominence regime influences the way that Sky designs and operates its EPG and its dealings with broadcasters, restricting its ability to determine the order in which channels are listed in the EPG; and
 - (b) as a broadcaster with channels available via all platforms subject to EPG regulation, the regime impacts the EPG position of Sky's own channels, which compete for viewers with the PSBs.
- 1.5 Accordingly, Ofcom's proposals to significantly change the way in which the current rules operate is of material concern to Sky.
- 1.6 Similarly, Sky would be concerned if the new prescriptive approach to regulation proposed in the Ofcom's Consultation on proposed changes to the linear EPG Code and future of the

regime (the “Consultation”) fed through into Ofcom’s thinking in relation to the possible extension of the rules for prominence of PSB content to new platforms and services.

- 1.7 Accordingly, Sky’s response to the Consultation comprises the following sections:
- (a) Section 2 describes Ofcom’s duties, focusing on its duties to citizens and consumers, and the need for it to ensure its activities are transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, as well as Ofcom’s better regulation principles which require it to act with a bias against intervention;
 - (b) Section 3 explains why there is no rationale for extending the prominence regime beyond the current scope of the EPG Code;
 - (c) Section 4 argues that if Ofcom believes that further intervention is required, this must be principles-based, of wide-application and focused on PSB content rather than app-based ‘players’;
 - (d) Section 5 describes the changes Ofcom proposes to the EPG Code and sets out why those proposals are unnecessary and should not be implemented;
 - (e) Section 6 explains why the proposals are disproportionate and should not be implemented;
 - (f) Section 7 explains why a prescriptive approach is disproportionate and risks unintended adverse consequences;
 - (g) Section 8 sets out an alternative, proportionate approach to updating the prominence regime;
 - (h) Section 9 includes further comments on the consultation regarding the treatment of PSB HD channels; and
 - (i) Section 10 comments on the transitional period for action should Ofcom conclude that its proposals should be implemented.

SECTION 2: OFCOM'S DUTIES

- 2.1 In section 3 of the Consultation Ofcom sets out the legislative basis for EPG prominence and its current review.
- 2.2 Ofcom notes its principal duty *"to further the interests of citizens and consumers in relation to communication matters, where appropriate by promoting competition"*.¹
- 2.3 However, Ofcom fails to note its general duty to have regard to *"the principles under which regulatory activities should be transparent, accountable, **proportionate**, consistent and **targeted only at cases in which action is needed**"*.² (Emphasis added)
- 2.4 These latter duties are extremely pertinent to the present consultation, as the imposition of unnecessary and/or disproportionate regulation (such as that proposed) risks causing more harm than good, not only for broadcasters and EPG providers, but also for their end-users (i.e. those citizens and consumers whose interests Ofcom ought to be furthering).
- 2.5 Ofcom explicitly recognised these risks when outlining its approach to impact assessments.³ In explaining its approach, Ofcom made a number of key observations - in particular:
- (a) *"The decisions which Ofcom makes can impose significant costs on our stakeholders and it is important for us to think very carefully before adding to the burden of regulation"*;⁴
 - (b) *"One of our key regulatory principles is that we have a bias against intervention. This means that a high hurdle must be overcome before we regulate"*;⁵
 - (c) *"The option of not intervening...should always be seriously considered. Sometimes the fact that a market is working imperfectly is used to justify taking action. But no market ever works perfectly, while the effects of...regulation and its unintended consequences, may be worse than the effects of the imperfect market"*;⁶
 - (d) *"Our bias against intervention means that there must be a clear case for regulation, and the prospective benefits should exceed the costs"*;⁷
 - (e) *"Another option which it will often be useful to consider is the "wait and see" option. This means no new intervention immediately, but a commitment to monitoring the situation and reviewing the position at a later time on the basis of further evidence"*;⁸
 - (f) *"if intervention is justified, we aim to choose the least intrusive means of achieving our objectives, recognising the potential for regulation to reduce competition"*;⁹

¹ Paragraph 3.9 of the Consultation; Section 3(1) of the Communications Act 2003 (the "Act").

² Section 3(3)(a) of the Act.

³ 'Better Policy Making: Ofcom's Approach to Impact Assessment', dated 21 July 2005 (https://www.ofcom.org.uk/_data/assets/pdf_file/0026/57194/better_policy_making.pdf).

⁴ Paragraph 1.1. *Ibid.*

⁵ Paragraph 1.1, *Ibid.*

⁶ Paragraph 1.1, *Ibid.*

⁷ Paragraph 5.24, *Ibid.*

⁸ Paragraph 5.16, *Ibid.*

- (g) *"The benefits for citizens and consumers are potentially largest where markets are open, new entrants can compete against incumbents, investment is encouraged and innovation flourishes".*¹⁰
- 2.6 It is also important to be clear about Ofcom's role in relation to prominence of PSB services. Ofcom's duty under the Act in relation to prominence is to draw up a code "*giving guidance as to the practices to be followed in the provision of electronic programme guides*". Such practices must include giving public service content "*such degree of prominence as OFCOM consider appropriate*".¹¹
- 2.7 Critically, there is no specific duty on Ofcom to ensure that public service channels are listed at or near the top of EPGs, nor that they are listed in the same way across all EPGs. The Act allows Ofcom to exercise its regulatory judgement as to what degree of prominence is appropriate; It must do so while having regard to *all* its duties. This is materially different from an obligation to give prominence *per se*.
- 2.8 Consequently, when considering changes to the EPG Code, and the future of the prominence regime more widely, Ofcom's duties, taken together, require it to specify, evaluate and weigh the costs and benefits of any policy proposal or recommendation, with costs and benefits quantified wherever possible. Only changes that have been shown to be proportionate through this process should be implemented.
- 2.9 As demonstrated below, however, Ofcom has failed to take these steps in relation to the present consultation:
- (a) Ofcom has failed to clearly specify the problem that it is seeking to address;
 - (b) Ofcom's supporting evidence is extremely light, in particular in relation to any future extension of prominence regulation;
 - (c) to the extent that Ofcom has sought to assess the costs and benefits of its proposals, its analysis is fraught with vague speculation, erroneous assumptions, and key data gaps;
 - (d) Ofcom has failed to properly weigh the costs and benefits of its proposals against each other in order to determine whether they are worth pursuing. Indeed, even where it is patently obvious (even by Ofcom's own evidence) that the costs outweigh the benefits, Ofcom surprisingly concludes that its proposal should nonetheless be implemented; and
 - (e) Ofcom has failed to consider any less intrusive means of addressing its concerns.
- 2.10 As a result, Ofcom's proposals risk harming citizens and consumers in a number of ways, including:
- (a) disruption to viewers and broadcasters across numerous platforms, as EPGs are re-organised to afford greater prominence to certain public service channels;

⁹ Paragraph 1.1, *Ibid*.

¹⁰ Paragraph 1.10, *Ibid*.

¹¹ Sections 310(1) and (2) of the Act.

- (b) reduction in diversity between platforms, both in terms of the organisation of their linear EPG, and (should the prominence regime be extended in the future) their user interface more widely;
- (c) compromised user experience;
- (d) reduction in innovation in content discovery; and
- (e) reduction in competition between platforms.

2.11 In the following sections, Sky sets out in further detail (i) how Ofcom has failed to comply with the above duties and policies, and (ii) the resulting unintended adverse consequences, in relation to:

- (a) Ofcom's consideration of any future extension of the prominence regime (Sections 3 and 4 below); and
- (b) Ofcom's proposed changes to the EPG Code (Sections 5 to 9 below).

SECTION 3: THERE IS NO RATIONALE FOR EXTENDING THE PROMINENCE REGIME AT THIS TIME

- 3.1 In this section, we address the questions posed in section 6 of the Consultation, where Ofcom considers how the prominence regime might be adapted to “*protect the benefits to PSB into the future*”.¹²
- 3.2 When considering the future of the prominence regime, it is critical that Ofcom and other policymakers are clear as to the public policy objective they are seeking to secure, and/or the problem that is being targeted. Any proposals for extension of the regime must be evidence-based, and pass the standard tests for good regulation of being necessary and proportionate.
- 3.3 The Consultation notes that the original public policy objective behind prominence in a linear environment was to ensure that “[PSB] *programmes are easily available and discoverable to audiences*”.¹³ There is no suggestion that this should no longer remain the relevant objective in the future.
- 3.4 Therefore the test for whether any extension of the prominence regime is required should be whether changes in the market act to place this objective under threat (and if so whether this can in turn be remedied through proportionate regulatory intervention).
- 3.5 This requires Ofcom to assess two distinct factors:
- (a) the extent to which consumer consumption patterns are changing materially, such that ‘traditional’ methods of accessing content (i.e. via the regulated linear EPG) are no longer pre-eminent; and
 - (b) how available and discoverable PSB programmes are in any new areas of content discovery that are becoming prevalent.
- 3.6 Unless the evidence indicates that *both* of these factors have developed such that the public policy objective of “*easily available and discoverable*” PSB programming is now under threat or likely to come under threat in the short to medium term, no extension of the prominence regime would be justified.
- 3.7 Prevalence of use of platforms and services carrying PSB content must be a key factor in the consideration of any need to extend prominence obligations. The barriers to developing and launching new audiovisual platforms and services today are negligible, which results in the plethora of ways of viewing content that is readily observable. In such a world, there will inevitably be a long tail of devices and services, each working in often quite different ways, many of which have relatively small numbers of users. It cannot be reasonable or proportionate in these circumstances to seek to ensure prominence of PSB content on every type of platform or service. Instead, Sky considers that the focus of consideration should be platforms and services that are used by *significant numbers* of UK viewers.
- 3.8 Ofcom’s report on the discoverability of PSB and local TV services (the “Ofcom Report”) makes clear that whilst consumer consumption patterns are changing, linear TV “*is still at the heart of our viewing experience*”¹⁴ and broadcast content continues to account for over

¹² Paragraph 6.1 of the Consultation.

¹³ Paragraph 1.2 of the Consultation.

¹⁴ Paragraph 3.17 of the Ofcom Report.

70% of viewing.¹⁵ 'Traditional' methods of accessing television content therefore remain pre-eminent.

There is insufficient evidence to justify extension of the prominence regime

- 3.9 At present, whilst there is much rhetoric around the discoverability of PSB content in an on demand world and on new platforms,¹⁶ there is little hard evidence that demonstrates there is a problem that requires a legislative or regulatory solution.
- 3.10 In both the Consultation and the accompanying report on EPG prominence, Ofcom gives some consideration to the location and availability of on demand PSB content. This includes:
- (a) for 'traditional' UK TV platforms, the location of any on demand menu relative to the home page; the location of PSB catch-up content; the visibility of PSBs' logos; the presence and location of recommendations; and
 - (b) for 'traditional' UK TV platforms and a limited number of other connected platforms, the availability of the PSBs' on demand players.
- 3.11 The clear indication from Ofcom's evidence and analysis is that on demand programming from the PSBs is easily available and discoverable across those devices and platforms that it has examined.¹⁷ Ofcom observes a number of variations between how operators present this PSB content, which is to be expected given the competitive market that exists for TV platforms. But there is no evidence presented which suggests that PSB on demand content is difficult for UK audiences to find on a significant or systemic basis.
- 3.12 By its own admission,¹⁸ Ofcom has not carried out a comprehensive analysis of the discoverability of on demand PSB content across platforms that provide access to audio-visual content. In particular:
- (a) Ofcom has not examined data on the current consumption, reach, or awareness of PSB on demand content on any platforms - important proxies for the discoverability of such content;
 - (b) Ofcom has not examined the availability and discoverability of PSB on demand content on smart TVs, or the operating systems of common connected devices such as smartphones and tablets; and
 - (c) Ofcom has not investigated wider drivers of awareness and discoverability of on demand content, for example the significant value the PSBs derive through linear promotion of their catch-up offerings.
- 3.13 Sky has commissioned its own research on the availability of PSB content on connected devices in order to supplement Ofcom's work.

¹⁵ Paragraph 3.18 of the Ofcom Report.

¹⁶ See for example Alex Mahon speech to Parliament on the importance of PSB prominence, 11 June 2018, available at: <https://www.channel4.com/info/press/news/alex-mahon-speech-to-parliament-on-the-importance-of-psb-prominence>; and Tony Hall's speech to parliamentarians on prominence, 11 June 2018, available at: <https://www.bbc.co.uk/mediacentre/speeches/2018/tony-hall-prominence>.

¹⁷ Figure 23 and Figure 24 of the Ofcom Report.

¹⁸ Paragraphs 4.31 and 4.32, of the Ofcom Report.

Figure 1: Discoverability of PSB content on a range of platforms and devices.

When comparing the capability of each platform or system, and in particular their impact on the discoverability of PSB channels, we have asked the following questions:

1. Does the system offer the linear PSB channels in a defined 'channels area'?
2. Does it have catch up content from the PSBs installed as standard from set-up and is it integrated with the main platform software or a broadcaster managed app?
3. If no catch up at launch, does it allow the user to download PSB apps/content?
4. If yes does it feature short-cuts or links (like a backwards EPG) that allow a viewer to move easily between PSB linear and catch up?
5. Are the PSB apps guaranteed, or able to be placed, in prominent position in menus/grids?
6. If no, does the system order players (by Recent Use or Recommendations)?
7. Is PSB content featured in search returns and recommendations?

	1. Linear PSB channels in a 'channels' area	2. Catch-up included at launch	3. App download	4. Backward EPG	5. App prominence	6. Apps ordered by usage	7. PSB data in search & recs
Freeview	Yes	N/A	N/A	N/A	N/A	N/A	N/A
FV Play	Yes	Yes/App	N/A	Yes	Yes	N/A	Yes
Freesat	Yes	Yes/App ⁱ	N/A	Yes	Yes	N/A	Yes
Sky+HD	Yes	Yes/Int	N/A	No	Yes	N/A	Yes
SkyQ	Yes	Yes/Int	N/A	No	Yes	N/A	Yes
Virgin Media	Yes	Yes/Int ⁱⁱ	N/A	Yes	Yes	N/A	Yes
Youviewⁱⁱⁱ	Yes	Yes/App	N/A	Yes	Yes	N/A	Yes
Smart TVs^{iv}	Yes	BBC ^v	Yes	No	No	No	No
Android Smart TV	Yes	No	Yes	No	No	No	No
NowTV streaming stick	No	Yes	Yes	No	Yes	Yes	No
Amazon FireTV OS	No	BBC	Yes	No	No	Yes	Yes
AppleTV	No	BBC, ITV and 5	Yes	No	No	Yes	Yes ^{vi}
Games consoles	No ^{vii}	No	Yes	No	No	Yes	No

Source: Decipher Research report for Sky, October 2018.

- Currently Freesat is in conflict with Channel4 so the All4 app has been delisted from the Freesat app offering.
- On Virgin Media all catch up is integrated into the software except BBC iPlayer which is delivered as a web app.
- Includes BT, TalkTalk and non-aligned Youview.
- Where the Smart TV is used as a primary TV device.
- Newer Samsung and LG models have BBC iPlayer pre-loaded at launch.
- Those apps that have integrated with Apple's TV app can opt to have their programmes discoverable by Apple search.
- On XboxOne it is possible to add on a TV box with channels and access it via a grid menu in the Xbox interface.

3.14 The fuller examination of the availability and discoverability of PSB content on demand or via non-'traditional' platforms reveals a number of points which are relevant to Ofcom's consideration of the future of the prominence regime:

- (a) The vast majority of UK households use platforms that include PSB catch-up content available from launch, and place it in prominent positions in the user interface. Almost 75% of UK households use one or more of the connected platforms of Freeview Play, Freesat, Sky+, SkyQ, Virgin Media and Youview. As Ofcom acknowledges, these platforms make PSB content readily available and discoverable in a number of different ways.
- (b) Availability of PSB content requires agreement from both the platform operators and broadcasters. The one absence of PSB content amongst the main connected TV platforms – the lack of All4 on Freesat – stems from a decision by Channel 4 to remove this service.¹⁹
- (c) An increasing number of newer platforms are including the PSB apps as standard. NOW TV's streaming stick, for example, has all PSB players at launch, BBC iPlayer now comes pre-loaded on a number of Smart TVs, while Apple TV incorporates services from the BBC, ITV and Channel 5 as standard. This trend can be expected to increase given the popularity of PSB content.
- (d) Even when not presented as an integrated solution or a pre-loaded app, PSB on-demand content is easily accessible to download on all platforms and devices, including Smart TVs and OTT services.

3.15 These findings are unsurprising given that platform operators face strong commercial incentives to ensure that PSB content is easy to find:

- (a) First, it is in line with consumer demand. As Ofcom itself has found²⁰, UK viewers have a strong preference for watching content delivered by the PSBs. This is demonstrated clearly by viewing evidence. As Anne Bulford, Deputy Director-General of the BBC, recently stated:

“Last year, all the top shows in this country were British - whether Strictly or Sherlock, Broadchurch or Britain’s Got Talent, One Love Manchester or Blue Planet II. In fact, incredibly, you have to count through around 2,000 to get to the first one from outside the UK.”²¹

The vast majority of these programmes were delivered by the PSBs. Accordingly, it is in platform operators’ commercial interest to ensure that viewers are able easily to find the content that they want to watch. That makes their platforms more attractive to UK users, driving take-up.

- (b) Second, given their strong market position, PSBs are able to demand prominent positions for their content on platform user interfaces as a condition of supply. Sky’s experience is that PSBs are highly adept at using the strength of their content to ensure that it is located in a prominent position.²²

¹⁹ See ‘All4 and 4HD leave Freesat’, Freesat, 20 February 2018, (<https://www.freesat.co.uk/news/all4-4hd-leave-freesat/>).

²⁰ See Figure 4 of the Ofcom Report.

²¹ Speech to the Enders/Deloitte Media and Telecoms conference, 8 March 2018. (<http://www.bbc.co.uk/mediacentre/speeches/2018/anne-bulford-enders>). Even on Sky’s platforms, 93% of the top 500 programmes viewed in the past year were on PSB channels.

²² For example, Sky notes that the BBC is the first broadcaster available on Apple’s TV App.

- 3.16 Any platform offering audio-visual services to UK households that does not carry the PSBs' content and place it in readily discoverable parts of their user interface will operate at a significant competitive disadvantage.

Where the market is delivering, regulation is unnecessary

- 3.17 One of the key principles of good regulation is that it should be targeted at a problem that will not be solved via other means. Yet at various points in the Consultation Ofcom expresses concern that, although the evidence shows that content from the PSBs is currently readily discoverable, regulation might nevertheless still be appropriate because this "may change" in the future. For example:

"The linear EPG is easy to find across all platforms but this may change",²³ and

"While the players of the main PSBs are currently easily discoverable on the main TV platforms there are concerns that this may change in a market that is evolving rapidly."²⁴

- 3.18 Ofcom offers no suggestion or analysis as to why the strong commercial incentives that currently ensure the PSBs are easily discoverable will not continue to hold in the future. Instead it appears that regulation is being considered as a pre-emptive step to guard against unforeseen market developments.²⁵
- 3.19 An assertion that something "may change" in future cannot be a suitable basis for regulation. This is contrary to regulatory best practice, which has as a principle a bias against intervention. Indeed, nowhere is this principle put better than by Ofcom itself when setting out its approach to impact assessments:

*"The decisions which Ofcom makes can impose significant costs on our stakeholders and it is important for us to think very carefully before adding to the burden of regulation. One of our key regulatory principles is that **we have a bias against intervention. This means that a high hurdle must be overcome before we regulate.**"²⁶ (Emphasis added)*

- 3.20 Ofcom should apply this principle rigorously when considering the future of prominence.²⁷

Intervention is not justified for any of the areas Ofcom examines for 'traditional' TV platforms

- 3.21 Ofcom invites views on whether the prominence regime should be extended to include a number of different aspects of 'traditional' TV platforms, including:
- (a) the discoverability of the linear EPG;
 - (b) the prominence of PSB on demand content, including the 'PSB players'; and

²³ Heading 6.7 of the Consultation.

²⁴ Paragraph 6.20 of the Consultation.

²⁵ See Paragraph 1.8 of the Consultation where Ofcom presumes new legislation is necessary to ensure PSBs remain easy to find.

²⁶ See 'Better policy making', *Op. cit.*

²⁷ Sky considers the application of this principle to the proposals for prescriptive regulation of linear EPGs in Section 7 below.

- (c) the prominence of PSB VoD content discovered by routes other than the EPG and PSB players, for example through recommendations and search.

3.22 There is no evidence to suggest that intervention is justified in any of these cases.

Linear EPGs

3.23 As Ofcom readily acknowledges, regulated linear TV guides are already prominent and therefore easily discoverable within platforms' user interfaces – whether accessible as the 'landing page' itself, a short user journey away from such a landing page, or via a dedicated button on the remote control.

3.24 In order to deliver in line with public policy objectives, the linear EPG does not need to be the single most prominent item so long as it is easy to find. Viewers wanting to watch linear content will seek out the TV guide, and providers of platforms and services giving such access will ensure they are easily available.

3.25 The ease of discoverability of the linear EPG is supported by data that Sky has previously provided to Ofcom on user journeys within Sky environments. [REDACTED]

[REDACTED].²⁸ It is clear that audiences have no issues in locating the linear EPG on Sky's platform.

3.26 For so long as linear TV continues to be popular, platform operators such as Sky will continue to face strong incentives to make linear EPGs easily discoverable.

3.27 It is of course possible that these commercial incentives could weaken should linear TV become significantly less popular or relevant. However it is equally apparent that, were that the case, any regulation requiring platforms to give prominence to linear EPGs would in turn have a limited impact in delivering the overall policy objective of making PSB programmes easily available and discoverable to viewers.

PSB on demand content accessed through players

3.28 With the changes taking place in the sector it is easy to be distracted from the extent to which viewing of live television continues to dominate TV viewing in the UK, and the continued dominance of the PSBs' services within that viewing.

3.29 Viewing of live TV has dropped by approximately 20 minutes per day in the past four years.²⁹ But it still remains at a high level (2hrs 54m per day), significantly dwarfing that of viewing on demand (which, as the Consultation notes, accounts for just 9% of total time spent watching audio-visual content on any device).³⁰

²⁸ Sky data: [REDACTED]

²⁹ See Figure 2.1, Ofcom Communications Market Report 2018.

³⁰ Paragraph 6.11 of the Consultation.

3.30 This point is made clearly in a recent Mediatique report for the BBC:

“linear live TV still secured nearly 80% of all viewing in 2016 across all age groups, and more than 90% when PVR consumption is included...”³¹ and

“Within both linear broadcast and catch-up TV, the primary Public Service Broadcaster (“PSB”) services (from the BBC, ITV, Channel 4 and Channel 5) continue to deliver half of all viewing... This is an impressive feat: many households now have access to hundreds of channels, even before considering on demand services, and yet the PSBs have maintained salience.”³²

3.31 Therefore while on demand is clearly a growing method of content consumption, it is still used materially less than other ways in which audiences watch audio-visual content. Notwithstanding this, it remains the case that PSB on demand content is already prominently displayed on UK TV platforms.

3.32 Sky's own experience illustrates this. Sky offers a range of services that include catch-up propositions from the PSBs, where there is no regulatory obligation to provide prominence, such as on the user interface for NOW TV, Sky Go, or catch-up services on Sky+ and Sky Q. In all cases, when permitted by the PSBs themselves,³³ Sky has ensured that the PSBs' services are placed in the most prominent positions (above services from Sky), where our customers can most easily find and access them.³⁴

3.33 Again, the reasons for this are obvious – platforms' decisions on PSB prominence in these areas are based on commercial logic. In the case of Sky, we recognise that our UK customers are attracted by and likely to seek out PSB content. Moreover the PSBs themselves all retain a strong market position and therefore significant bargaining power, meaning they are able to require prominent positioning across the different elements of Sky's service as part of normal commercial negotiations. Ofcom offers no reason as to why this should change.

New methods of content discovery such as recommendations

3.34 The Consultation asks whether the prominence regime should be extended to ensure PSB content can be easily found via recommendations and/or search. This section lacks substantial detail and evidence. For example, Ofcom states that recommendations *“are likely to represent a key route for viewers browsing a user interface to find VoD content”*.³⁵ Nothing is presented to substantiate this assertion.

³¹ 'Content market dynamics in the UK: outcomes and implications', Mediatique, November 2017. Available at: http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/content_market_dynamics.pdf

³² *Ibid.*

³³ Note that BBC has previously restricted Sky's ability to promote BBC content in its user interface and the availability of its content in Sky's companion apps.

³⁴



³⁵ Paragraph 6.23 of the Consultation.

3.35 In practice, recommendations are a nascent method of consumers discovering and accessing content, and are infrequently used in comparison to the more established and most popular methods (such as the linear TV guide and recordings).

3.36 [REDACTED]

3.37 To the extent that viewers visit other areas of the user interface, many of these areas contain content that is purely user driven or where Sky already affords prominence to content from the PSBs. [REDACTED]

(a) [REDACTED]

(b) [REDACTED]

3.38 [REDACTED]

3.39 In any event, given the popularity of PSB content, recommendations are unlikely to materially disadvantage PSBs if they become more successful at driving viewing as:

(a) in the case of editorial recommendations, Sky does not make these decisions in isolation, but instead does so in discussion with broadcasters, including the PSBs, about what content ought to be surfaced where and when. As with other areas of the user interface, we would expect the PSBs' strong market position to give them leverage to negotiate specific promotions for their content; and

(b) in the case of algorithmic recommendations, these serve to ensure that viewers are recommended content that is relevant to them based on recent viewing patterns. This means that for so long as PSBs continue to offer content that viewers want to watch, a significant amount of PSB content will be surfaced within the algorithm-driven recommendations (as well as appearing in user-driven areas such as Recordings and Continue Watching).

³⁶ Sky data: [REDACTED]

An extension of prominence regulation would be impractical and work against viewer interests

- 3.40 In the Consultation, Ofcom outlines a series of factors that it considers would need to be taken into account when designing any future prominence regime.
- 3.41 As noted above, Sky does not consider that the evidence supports any extension of the prominence regime at this time. It is difficult, therefore, to assess the factors proposed by Ofcom in any meaningful way. Many of the questions Ofcom pose (for example “*what degree of prominence is desirable?*”) will by their very nature have answers that vary depending on the extent to which the overarching public policy objective (of easily discoverable PSB content) is being delivered.
- 3.42 Even if there were a case for considering the extension of the prominence regime, the practicalities of doing so are by no means clear. Moreover, any new regulation would risk running counter to the wider interests of viewers.
- 3.43 Ofcom itself notes the complexity associated with potential regulation in this space. This is perhaps best illustrated by the potential application of prominence regulation to search as a method of content discovery.
- 3.44 In the first instance, it is entirely uncertain what ‘prominence’ as a concept would mean when applied to search. Most search functions, including Sky’s, are designed to operate in a fair and non-discriminatory way, with the key objective being to return the result that is most relevant for the viewer’s search input. Moreover, the search function is frequently used by audiences to access specific programmes, with search inputs referencing specific titles. Yet Ofcom suggests in the Consultation that search could be “*designed to favour PSB content to some extent*”,³⁷ with PSB programmes clearly promoted in a pre-defined box or similar.
- 3.45 The upshot of this could be perverse, with PSB programmes that may only be tangentially related to the user’s search term required to be listed as the first result, and returned above directly relevant shows from non-PSB broadcasters. By way of crude example, a search for *Game of Thrones* on the BBC iPlayer in September 2018 presents as a result an episode of *Celebrity Mastermind* in which John Barley (an actor in the HBO series) takes part. Returning this as a relevant PSB programme, above *Game of Thrones* itself, is unlikely to make for a good viewer experience. This can hardly be said to be in the audience’s interest.
- 3.46 More widely, the objective of functionalities such as search, recommendations and personalisation is to provide viewers more quickly with the content they want to watch. Mandating an approach that required recommendations or search results to be presented that were less relevant for that viewer would, at best, lead to these content discovery methods becoming largely ignored, and at worst could lead to viewer frustration. It would also require a level of micro-management of a diverse range of services, all of which are changing and evolving at pace. This would be completely impractical.
- 3.47 Ofcom itself recognises the viewer impact in the Consultation in the first two principles it sets out which should be upheld in designing any new regime:
- (a) that personalisation should not be inhibited, and

³⁷ Paragraph 6.25 of the Consultation.

- (b) that consumer choice and functionalities which they value should not be inhibited.³⁸

In both cases, Ofcom cites the importance of continuing to allow consumers an active choice in quickly and easily selecting content they prefer to watch.

- 3.48 Sky agrees that these principles should be clearly out of scope of any new prominence rules. But it is unclear why Ofcom does not apply similar reasoning in its principle relating to search, which also clearly delivers in viewers' interests and would be undermined by rules requiring prominence for PSB content.

New prominence regulation would act to restrict competition and innovation

- 3.49 As noted, Sky does not consider that an extension of the prominence regime is currently required given existing market delivery. But even if the public policy objective of easily available and discoverable PSB content were being placed under threat, it does not automatically follow that new prominence requirements would be an appropriate or proportionate response.

- 3.50 Any intervention could only be justified if the benefits it delivered outweighed the costs that it imposed, and would require Government and then Ofcom to conduct full impact assessments. One cost that would need to be evaluated would be the impact on platform competition and innovation.

- 3.51 Technical functionality is an important element of differentiation between platforms. Operators compete on the basis of innovative features and functions, including different approaches to surfacing content to viewers. The absence of a homogenous approach to presenting PSB on demand content should not be viewed as a concern by policymakers, but instead as indicative of an effective competitive market.

- 3.52 Ofcom itself has acknowledged the importance of platform competition and innovation, noting in 2015 that:

*"The benefits of competition to consumers are widely recognised. Effective competition encourages innovation and delivers increased choice and quality to consumers. With the ongoing development of video on demand (VOD) services, it is important to recognise the potential for third parties to innovate in providing services to consumers and the role that competition between third parties plays in driving innovation in service delivery."*³⁹

- 3.53 Sky is acutely aware of the importance of innovation in successfully competing in the market, having invested significant resource to develop a platform which incorporates a wide range of linear and on demand content from different providers via a sophisticated and coherent user interface. The Sky Q user interface incorporates a number of innovative features to assist customers in discovering and accessing the content in which they are interested. Sky considers this to be the best customer experience, a view which is borne out by Sky's research⁴⁰ and the popularity of the Sky Q platform.

³⁸ Paragraph 6.16 of the Consultation.

³⁹ Ofcom letter to the BBC Trust on the BBC Trust's draft distribution framework for BBC services and content, July 2015, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0019/40429/bbc_distribution_framework.pdf.

⁴⁰ See for example the research described in paragraph 4.9 and 4.10 below.

- 3.54 Sky's user interfaces are being continuously developed and updated in order to improve the viewer experience and remain competitive. In particular, the Sky Q user interface is designed to be even more dynamic in order to quickly respond to customer feedback and behaviours. Sky has implemented numerous software downloads for Sky+HD since 2010 and for Sky Q since its launch in 2016. Almost all of these software downloads have involved improvements to the user interface.
- 3.55 As well as seeking to provide easy access to popular content, Sky also seeks to make improvements to its user interface in order to help viewers to discover and explore the breadth of content that is available to them (including that which they have paid for) but which they might not otherwise discover.
- 3.56 It is therefore essential that Sky and other operators retain the flexibility to test different approaches in order to develop the best customer experience. Sky requires the freedom to experiment and evolve its criteria for selecting content over time, based on customer feedback and other data.
- 3.57 In a market that continues to evolve rapidly, there is a clear risk in regulation that quickly becomes outdated and not fit for purpose. An extension of the prominence regime beyond the linear EPG to other methods of accessing content would likely place significant limitations on platforms' ability to innovate and compete on functionality.
- 3.58 Regulation in a rapidly evolving market also risks creating undesirable incentives for operators seeking to remain competitive. For example, if prominence were to be required such that the linear TV Guide was mandated to be the first screen users were presented with when switching on their service, this would serve to penalise platforms (such as Sky's) that continue to carry linear channels, compared to pure VoD platforms. This might encourage operators to cease offering a linear EPG at all, in order to retain the flexibility needed to compete with unencumbered rivals.

Ofcom's role

- 3.59 As set out above, we consider that any decision to extend the prominence regime at this point in time would be premature and not supported by evidence. Forbearing from proposing an extension of regulation would be consistent with Ofcom's principle of acting with a bias against regulation. Of course, it is important that this issue is kept under review, and Ofcom now has a duty to do so under the Digital Economy Act.
- 3.60 In addition to its monitoring role, Ofcom has a significant role to play in encouraging PSBs to work constructively with platform operators to ensure that their important content is not only readily discoverable by users of those platforms, but is also available via the full range of functionality those platforms provide – for example, being included in menus and search results, whether by voice or text, via streaming to other devices and in add-on services such as mobile apps.
- 3.61 Ofcom's focus should, therefore, be on ensuring that the PSBs' content is readily available and discoverable, rather than PSB 'player' apps which may act to restrict platforms' ability to surface content in a manner consistent with other available content (and in most instances contain programmes and functionality that are not public service in nature).
- 3.62 In the short term Ofcom can achieve this through clear statements as to its expectation that PSBs will work with platform operators to ensure public service content is readily discoverable across all platforms used by a significant number of UK viewers to the fullest extent.

SECTION 4: IF PROMINENCE REGULATION WERE TO BE EXTENDED, IT SHOULD BE APPROPRIATELY DESIGNED TO MINIMISE COMPETITIVE IMPACT

- 4.1 Notwithstanding Sky's position as outlined in Section 3, if Ofcom were still minded to recommend to Government that the prominence regime should be extended beyond the linear broadcast EPG, it is imperative that any such extension is applied in a reasonable, proportionate and non-discriminatory manner, so as to minimise its competitive impact.

If prominence were extended, it should follow a principles-based approach

- 4.2 Ofcom and Government should apply a principles-based approach, rather than impose prescriptive rules.
- 4.3 Platform operators and service providers, with years of experience in designing user interfaces, are best placed to afford prominence to public service content in a manner which is consistent with the overall user experience. A principles-based approach affords platform operators flexibility to achieve this balance. Ofcom is not well placed to make the types of judgements required.
- 4.4 Moreover, adopting a prescriptive approach that mandates precisely where PSB content should be placed or promoted on the user interface also risks leading to unintended and/or adverse outcomes for both consumers and service providers. These include:
- (a) reducing the scope for diversity between providers. Any new prescriptive regime that stipulated how user interfaces should be organised and removed the freedom of operators to present information in the way they think best would create a homogenous market. This cannot be in consumers' interest;
 - (b) stifling innovation. Mandating approaches to presenting content is likely to prevent new and inventive methods of surfacing content. This would be particularly damaging at a time when it is become ever more important for traditional platforms to compete against newer market players; and
 - (c) disrupting the viewing experience by making it more difficult for viewers to find the content they are seeking easily and quickly (for example in relation to promoting PSB content through 'Search', as discussed in paragraph 3.46 above).

If prominence were extended, such extension should allow for a variety of competing models

- 4.5 In considering whether prominence should be extended to the PSBs' on demand content, Ofcom makes frequent reference to "*the PSB players*" such as the BBC iPlayer, the ITV Hub, All4 and My5. While these are perhaps most commonly thought of as 'apps', it is critical to recognise that platforms have a variety of different ways of incorporating PSB on demand content into their proposition.
- 4.6 Any extension of the prominence regime must allow for these variations in platform functionality and design. In particular, it should allow for PSB content that has been integrated into a third party platform, such as Sky's hybrid DSat platform, and that sits outside of a PSB's own retail service. Where platforms afford prominence to PSB on demand content as part of an integrated solution, there should be no additional requirement to support or give equal or greater prominence to PSB player apps, as this would not be in consumer's interests. The requirement for prominence of PSB *content* could be delivered in respect of the integrated service.
- 4.7 For example, Sky has an innovative approach to delivering on demand content via its digital satellite platform. Rather than streaming content over a broadband connection, Sky's pull-

VOD service is a progressive download (PDL) service, meaning that when a viewer wishes to watch an on demand programme, they select the programme they wish to view from the user interface and it is then downloaded to the set top box hard drive for viewing. In order to facilitate the best possible user experience, the programme becomes available to view as soon as enough of the programme has been downloaded for the user to be able to start and continue watching the programme from beginning to end without having to wait for the download to catch up (this is the 'progressive' element). This is calculated for each individual download based on the speed of the internet connection and duration of the programme. In this way Sky can guarantee that every user has the same high quality viewing experience, irrespective of broadband speed. Unlike a streaming service, there is no delay through buffering or pixilation when viewing since the content itself is played out from a recording on the set top box.

4.8 In order to deliver this service, Sky ingests its own and third party content into its servers in an appropriate format for playout. Sky has invested significant resources into developing its integrated PDL service because it believes that an integrated approach is more aligned with consumer interests than a standalone non-integrated approach. This approach enables Sky to provide easy access to on demand content from a range of providers through a single, coherent user interface, avoiding the need for users to switch between individual apps, and allowing Sky to surface content in a consistent manner, through menus, search and recommendations, irrespective of the content provider.

4.9 Indeed, Sky's PDL service has been, and continues to be highly valued by customers, as well as successful for the PSBs in delivering incremental viewing. [REDACTED]

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

(d) [REDACTED]

4.10 [REDACTED]

(a) [REDACTED]

41 [REDACTED]

- (b) [REDACTED]
- (c) [REDACTED]
- (d) [REDACTED]
42

- 4.11 Sky's firm view, therefore, is that an integrated approach results in a better viewer experience than switching between individual content provider players.
- 4.12 Sky's integrated approach is also likely to be more beneficial to the wider PSB eco-system than an app-based model. Viewers are more likely to consume a varied range of content from a mix of sources when they can search across different providers as easily as possible and where viewers are taken back to a shared environment at the end of a programme. In contrast apps operate as 'walled gardens' that encourage viewers to stay within that service once a programme has finished. While brands such as the BBC may be strong enough to succeed in such a world, it could have particularly detrimental effects on the smaller PSBs.
- 4.13 Consequently, it is critical that any new prominence regime should not be narrowly designed such that it affords prominence to PSB player apps at the expense of Sky's integrated approach. Indeed, Sky's integrated approach would, in some ways, be better suited to new prominence requirements for PSB on demand content, in that it can make distinctions between catch-up content from the designated PSB channels and that which has aired on commercial portfolio channels. In contrast, PSB player apps frequently include content from non-designated PSB channels (in the case of the ITV Hub, All4 and My5), or indeed third party content (such as the recently announced partnership between Vice and Channel 4 for the inclusion of Viceland content on All4).⁴³

If prominence were extended, such extension should not be limited to 'traditional' platforms

- 4.14 If Ofcom decides to recommend to Government that it extend the prominence regime beyond linear EPGs, it is critical that such recommendation is not limited to so-called 'traditional' platforms such as those of Sky and Virgin Media, but instead covers the range of ways in which UK audiences are already accessing audiovisual content and may do in the future. To do otherwise would risk negatively impacting platform competition (by imposing restrictive regulation on some parts of the sector but not others), and indeed could ultimately harm the PSBs by reducing viewing via those 'traditional' platforms that support linear as well as on demand viewing.
- 4.15 Viewers today are able to access TV content in an increasing range of ways, across a wide variety of platforms and services. Ofcom itself has documented this rise in many of its recent publications.⁴⁴ It would not be appropriate, or consistent with Ofcom's duties, to ignore these newer platforms and services. There is no logic in treating them differently

⁴² [REDACTED]

⁴³ 'Channel 4 and VICE strike major partnership', Channel 4 press release, 5 June 2018, (<http://www.channel4.com/info/press/news/channel-4-and-vice-strike-major-partnership>).

⁴⁴ See for example the Communications Market Report 2018, or 'Public service broadcasting in the digital age', Ofcom, March 2018.

from 'traditional' platforms such as Sky's hybrid digital satellite platform.⁴⁵ The fact that there is an existing regulatory framework in place to regulate EPG providers does not mean that Ofcom should simply ignore other platforms on which PSB and other content may be made available.

- 4.16 Adopting a discriminatory approach risks creating an uneven playing field, as it would serve to make it more difficult for traditional platforms to differentiate themselves in the market and to compete with their newer rivals who would remain unfettered by prominence requirements.
- 4.17 This in turn risks harming PSBs in the longer term, as it could mean that viewers are attracted away from 'traditional', regulated platforms to more innovative, unregulated spaces, which are likely to have significantly less focus on both linear content and on content produced for the UK market, with fewer guarantees that public service content will feature as prominently.

Any extension of prominence must be accompanied by (i) a corresponding guarantee of must offer requirements and (ii) appropriate state aid review

- 4.18 If Ofcom were to recommend to Government that the prominence regime be extended, it could only do so following a review of the existing PSB compact to ensure an appropriate balance of obligations and compensation. This would require:
- (a) the introduction of corresponding 'must offer' obligations for PSB on demand content that benefits from any new prominence regulation; and
 - (b) a state aid review to ensure that PSBs are not over-compensated for the provision of their public service obligations.

Must offer

- 4.19 At present, since PSBs' on demand offerings are not subject to prominence regulation, they are instead important discussion points in negotiations between platforms and public service broadcasters.
- 4.20 This has provided the PSBs with opportunities to exploit their catch-up content commercially, either for a specific value or as a trade-off against other points of negotiation. But it has also meant that some of the PSBs' on demand offerings have been slow to become available on a widespread basis – or in some instances, not become available on certain platforms at all.
- 4.21 For example, as Ofcom is aware, Sky has been unable to agree a distribution arrangement with the BBC for catch-up content across the full suite of functionality available via the innovative Sky Q platform. [REDACTED] BBC content continues to be unavailable from mobile apps, and other areas across the Sky Q user interface.
- 4.22 This illustrates why it would be necessary to introduce a must offer obligation for any content that newly benefited from prominence regulation – platforms are only able to give prominence to content if they are provided with that content in the first place. This is

⁴⁵ For example, an Amazon Fire Stick customer can access much of the same content as a Sky Q customer – watching live BBC content through the iPlayer, on demand content from ITV through ITV Hub, premier league football through Amazon Prime etc.

already the case for linear prominence, with every public service channel subject to a must offer requirement for networks and satellite services.

State aid and review of the PSB licences

- 4.23 Extending the prominence regime would grant additional benefits to broadcasters holding PSB status, and represent a clear transfer of value from commercial broadcasters and/or platforms to the PSBs. It would therefore be incumbent on Ofcom and DCMS to consider whether the additional benefits afforded by regulation resulted in state aid, and whether, as such, it could be justified.
- 4.24 Even the narrowest extension of prominence regulation – to cover those on demand programmes that previously aired on designated PSB channels – would confer new benefits on the commercial PSBs that would necessitate an evaluation of their public service obligations.
- 4.25 A wider extension to include PSB players would deliver significant value to the PSBs for content that is at present purely commercial. For example, in addition to on demand content from its linear PSB channel ITV Hub offers micro-payments and subscriptions. This arguably poses a more fundamental challenge to Ofcom and Government, who would have to carefully examine the extent of these new benefits, as well as considering whether public intervention in support of purely commercial activities was justified on public policy grounds.
- 4.26 ITV noted this argument itself during the BBC Charter Review, stating that *“none of the [commercial PSBs’] on demand services are themselves PSB services and a fair bit of the content has never even been shown on a PSB channel.”*⁴⁶
- 4.27 Extending prominence in this way would, in effect, change the basis on which the commercial PSB system operated, and therefore necessitate a full-scale review of the current PSB regulatory framework.

⁴⁶ Page 14 of ‘BBC Charter Review public consultation: response from ITV plc’, October 2015. (https://www.ofcom.org.uk/__data/assets/pdf_file/0026/99233/ITV-plc-BCA-BCR-Commercial.pdf)

SECTION 5: OFCOM'S PROPOSALS FOR CHANGES TO THE RULES FOR LINEAR EPGs ARE UNNECESSARY

- 5.1 Ofcom is proposing to move away from its current principles-based approach to prominence regulation whereby EPG providers are required to give designated PSB channels “*appropriate prominence*”, to a more prescriptive approach under which EPG providers would be required to list public services channels at specific slots or within specified page ranges specified by Ofcom, as set out in Figure 2 below.

Figure 2: Summary of Ofcom’s proposals to require public service channels to be listed at specific slots or within specified page ranges

Channel	Proposed slot/page range
BBC One	Slot 1
BBC Two	Slot 2
Channel 3	Slot 3
Channel 4	Slot 4 (except on EPGs specific to Wales) First page of EPGs specific to Wales
Channel 5	Slot 5
S4C	Slot 4 on EPGs specific to Wales First 3 pages on UK wide EPGs/Nations outside Wales
BBC Four	First 3 pages
BBC Alba	First 3 pages of EPGs specific to Scotland First 3 pages of UK wide EPGs/Nations outside Scotland
BBC Scotland	First 3 pages of EPGs specific to Scotland First 3 pages of UK wide EPGs/Nations outside Scotland
Local TV	First 3 pages
BBC News	First page of relevant genre/grouping
BBC Parliament	First page of relevant genre/grouping
CBBC	First page of relevant genre/grouping
CBeebies	First page of relevant genre/grouping

- 5.2 Ofcom justifies these changes by its concern that the current principles-based approach has over time “*led to some significant variations across EPG providers and to some designated channels being less easy to discover, depending on the platform and television device used*”.⁴⁷ Ofcom therefore considers a more prescriptive approach to be necessary in order to deliver Parliament’s policy intention to ensure that public service channels “*are easily discoverable*”, which should in turn “*encourage greater consumption of such content*” and help to deliver a range of individual and social benefits.⁴⁸

⁴⁷ Paragraph 4.18 of the Consultation.

⁴⁸ Paragraph 2.10 of the Consultation.

- 5.3 While Sky agrees with the principle that public service channels should be “*easily available and discoverable to audiences*”,⁴⁹ it is important that Ofcom balances this against its duty to have regard to all its duties, including “*the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*”.⁵⁰
- 5.4 Ofcom's proposed requirements are unnecessary and disproportionate for the reasons set out in this and the following section.
- 5.5 Furthermore, Ofcom’s leap to prescriptive regulation also risks resulting in adverse consequences for broadcasters and viewers, as outlined in Section 7 below.
- 5.6 Sky has suggested at Section 8 below a more proportionate way of achieving Ofcom’s desired outcomes.
- 5.7 Ofcom’s proposed changes to the EPG Code are unnecessary for the following reasons:
- (a) in the majority of cases, for the relevant EPGs, public service channels are already listed in accordance with Ofcom’s proposed requirements and there is no evidence that this is likely to change; and
 - (b) the share of viewing attributed to the public service channels remains high, indicating that they are “*easily available and discoverable*” by audiences.
- 5.8 Each of these failures in Ofcom’s analysis is explored in more detail below.

Public service channels are already listed prominently

- 5.9 Under the current regime, EPG providers, including Sky, must afford ‘appropriate prominence’ to public service channels and must ensure that the approach that they adopt to meet this requirement is objectively justifiable.⁵¹ This has resulted in arrangements whereby nearly all public service channels are already listed in accordance with Ofcom’s proposals. Notwithstanding Ofcom’s stated concerns,⁵² there is no evidence that this is likely to change. While the listing of certain channels would not currently comply with Ofcom’s proposals, in the majority of cases channels have nonetheless been given appropriate prominence.
- 5.10 Where public service channels are already listed prominently, and in accordance with Ofcom’s proposals, the imposition of additional regulation is self-evidently unnecessary and contrary to regulatory best practice and principles, as set out in more detail below.

The majority of public service channels are already listed in accordance with Ofcom’s proposed requirements

- 5.11 As noted by Ofcom in its Consultation,⁵³ the main five public service channels are already listed in the most prominent slots across all regulated EPGs. The other public service channels also already have prominent slots across the majority of regulated EPGs. Ofcom

⁴⁹ Paragraph 1.2 of the Consultation.

⁵⁰ Section 3(3)(a) of the Act.

⁵¹ Paragraphs 2 and 3 of the EPG Code.

⁵² Paragraphs 4.16 to 4.21 of the Consultation.

⁵³ Paragraph 5.22 of the Consultation.

itself acknowledges that many of its proposals will not result in any changes to the current listing of PSB channels, because EPGs already meet the proposed new requirements.

5.12 The table at Figure 3 below demonstrates the extent to which public service channels are already listed in accordance with Ofcom’s proposals across the principal four UK platforms.

Figure 3: The extent to which public service channels are already listed in accordance with Ofcom’s proposals

Channel	Ofcom Proposal	Current position on Sky EPG	Current position on Virgin EPG	Current Position on Freeview EPG	Current Position on Freesat EPG
BBC One	Slot 1	✓	✓	✓	✓
BBC Two	Slot 2	✓	✓	✓	✓
Channel 3	Slot 3	✓	✓	✓	✓
Channel 4	Slot 4 (except on EPGs specific to Wales)	✓	✓	✓	✓
	First page of EPGs specific to Wales	✗	✓	✗	✗
Channel 5	Slot 5	✓	✓	✓	✓
S4C	Slot 4 on EPGs specific to Wales	✓	✓	✓	✓
	First 3 pages on UK wide EPGs	✓	✗	✓	✓
BBC Four	First 3 pages	✓	✓	✓	✓
BBC Alba	First 3 pages of EPGs specific to Scotland	✗	✓	✓	✓
	First 3 pages of UK wide EPGs	✓	✗	✓	✓
BBC Scotland	First 3 pages of EPGs specific to Scotland	✓	✓	✓	✓
	First 3 pages of UK wide EPGs	✓	✓	✓	✓
Local TV	First 3 pages	✓	✗	✓	✓
BBC News	First page of relevant genre/grouping	✓	✓	✓	✓
BBC Parliament	First page of relevant genre/grouping	✓	✓	✓	✓
CBBC	First page of relevant genre/grouping	✗	✓	✓	✓
CBeebies	First page of relevant genre/grouping	✗	✓	✓	✓

A detailed version of this table is included as Annex 2.

There is no evidence to suggest that existing prominent slots are at risk

5.13 Ofcom justifies its proposal to “guarantee” existing prominent slots or page ranges on the basis that this will reduce the risk of these channels being moved down EPGs in the future. However, Ofcom’s rationale for this proposal is flawed for the following reasons:

- (a) First, Ofcom has failed to provide any evidence to show that existing prominent slots are, or ever have been, at risk. Indeed, the evidence available points to the contrary:
 - (i) no EPG provider currently proposes changes that would impact such listings, and Ofcom has not suggested that the current regime would prevent it from taking action were a provider to propose making such a change;

- (ii) the popularity of the public service channels (as outlined below) suggests that there is minimal risk of public service channels being moved out of their prominent slots, so long as that is what viewers want and expect, as this would result in a poor viewing experience for platform users; and
- (iii) public statements made by EPG providers suggest that they generally seek to give public service channels greater prominence over time, where possible, for example:
- Digital UK’s current LCN Policy in respect of the Freeview EPG states that Digital UK will offer existing public service channels first refusal on vacated slots;⁵⁴
 - Freesat’s current EPG listing policy suggests that Freesat would first offer any vacated EPG slot to a public service channel, before offering it to any other channel;⁵⁵ and
 - when Ofcom introduced the new regulatory framework for Local TV services in 2012, Sky reserved a number of vacant slots in its EPG for Local TV services. Acknowledging that some of the reserved slots were towards the bottom of the Entertainment genre, Sky noted that “*in the event that any more prominent numbers become available ... Sky will reserve such numbers for local TV channels.*”⁵⁶
- (b) Further, it is unclear how Ofcom’s proposal to guarantee existing prominent slots or page ranges would strengthen PSBs’ “*relative bargaining position with respect to EPG providers in the context of broader commercial negotiations*”. Sky does not use EPG slot allocation to strengthen its bargaining position with PSBs. The listing of public service channels sits outside commercial deals between public service broadcasters (for non-public service channels and content) and Sky’s pay TV services, and is covered by separate, standalone agreements regulated under Ofcom’s EPG Code and EPG Conditions.⁵⁷ Sky would expect other platforms to be similarly constrained in their dealings with the PSBs.⁵⁸

⁵⁴ See section 5.6 of the Digital UK LCN Policy dated 3 April 2017 (http://www.digitaluk.co.uk/_data/assets/pdf_file/0009/86814/Digital_UK_LCN_Policy_v6.0.pdf)

⁵⁵ See paragraph 8.3 of Freesat’s EPG Listing Methodology which states that “*Subject to FREESAT’s obligations to afford appropriate prominence to public service channels in accordance with section 6, where there is a vacated EPG number and subject to section 8.1 above, FREESAT will apply the following order of priority in determining to which channel (including both those which are already on the FREESAT platform and those which have submitted a Launch Application Form in accordance with section 3) it will allocate the vacated EPG number to.*” <https://www.freesat.co.uk/epg-listing-policy/>

⁵⁶ See Sky document entitled ‘Accessing Local TV Services on the Sky Platform’, dated August 2012. https://www.ofcom.org.uk/_data/assets/pdf_file/0013/19210/sky.pdf.pdf

⁵⁷ Continuation Notice to a Class of Persons Defined as the Licensee for the Purposes of the Provision of Electronic Programme Guide Services under Paragraph 9 of Schedule 18 to the Communications Act 2003, dated 23 July 2003.

⁵⁸ While the EPG Conditions only apply to Sky, the EPG Code applies to all broadcast EPGs.

- (c) In the highly unlikely circumstances that an EPG provider were planning to demote a public service channel from an existing prominent slot, then Ofcom could at such point either:
- (i) seek to apply the current EPG Code in order to compel that EPG provider to maintain the public service channel at its existing slot (for example, on the basis that this would be “*the interests of citizens*” and meet the “*expectations of consumers*”⁵⁹); or
 - (ii) seek to amend the EPG Code in order to prevent this.

5.14 Ofcom’s proposal to guarantee existing prominent slots and page ranges is therefore unnecessary, and is contrary to Ofcom’s stated bias against intervention. Additional regulation is clearly unnecessary where EPG providers are already meeting the requirements that Ofcom is seeking to impose, and there is no evidence to suggest that EPG providers are planning to demote public service channels from their current prominent slots.

Where public service channels are not already listed in accordance with Ofcom’s proposed requirements, there are a number of cases where such channels are nonetheless prominently listed

5.15 Ofcom’s consultation suggests that the current flexible, principles-based approach has, over time “*led to some significant variations across EPG providers and to some designated channels being less easy to find depending on the platform and television device used*”.⁶⁰ However, the fact that a public service channel is in a different position on one platform compared to another does not necessarily mean that it is not easily discoverable and highly viewed. Indeed, Sky notes that Ofcom has not carried out any consumer research to establish the extent to which consumers currently find public service channels easy or difficult to discover.

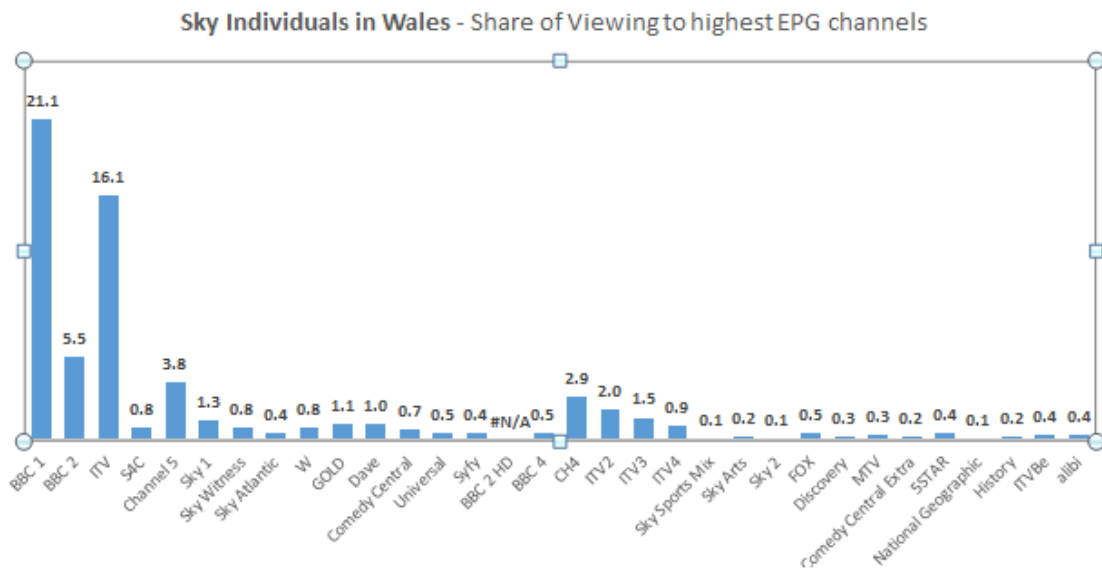
5.16 While the current listing of certain public service channels would not currently comply with Ofcom’s proposals (as outlined at Figure 3 above), there are a number of instances in which such channels are nonetheless prominently listed. For example:

- (a) While Channel 4 is not currently listed on page 1 of the Sky, Freesat and some Freeview EPGs in Wales, it nonetheless receives an appropriately prominent listing on those EPGs (page 3 on Sky and Freesat; pages 1 or 2 on Freeview, depending on the device used). Channel 4 is also viewed at large levels on these platforms in Wales. As demonstrated at Figure 4 below, Channel 4’s share of viewing on the Sky platform in Wales exceeds that of twelve out of the sixteen channels listed above it, indicating that Sky viewers in Wales find it easy to discover and access Channel 4.

⁵⁹ Paragraph 3b of the EPG Code states that Ofcom will “*have regard to the interests of citizens and the expectations of consumers in considering whether a particular approach to listing public service channels constitutes appropriate prominence*”.

⁶⁰ Paragraph 1.13 of the Consultation.

Figure 4: Share of viewing on the Sky platform in Wales of channels with highest EPG listings (%)

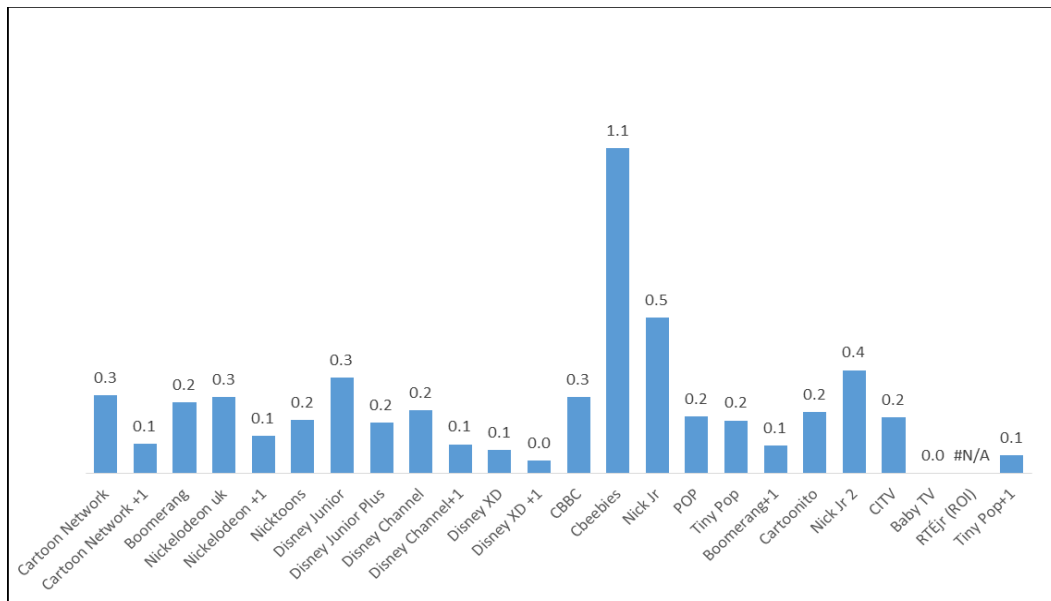


Source: BARB TechEdge, September 2017 to August 2018.

- (b) While CBBC and CBeebies are not currently listed on the first page of the Kids genre on the Sky EPG, these channels receive an appropriately prominent listing on the second page. The channels’ locations are self-evidently no less discoverable than on the Freeview, Freeview Play and EE TV EPGs, which list CBBC and CBeebies at the top of the children’s channel grouping (i.e. already in compliance with Ofcom’s proposals), but on which no genre filters are available, meaning that viewers must navigate some 13 pages to find CBBC and CBeebies via the all channels list.⁶¹

CBBC and CBeebies are ‘destination channels’, meaning that viewers specifically seek them out and are familiar with their channel numbers. This is demonstrated, in particular, by the fact that CBeebies’ viewing share is significantly higher than all of the other channels in the Kids genre, notwithstanding the fact that it is listed on page 2 rather than page 1. Figure 5 below shows the relative share of viewing of the children’s channels on the first three pages of the Sky Kids genre.

⁶¹ As noted at paragraph 4.24 of the Ofcom Report.

Figure 5: Share of viewing of children’s channels on the Sky platform (%)

Source: BARB TechEdge, September 2017 to August 2018.

The share of viewing of public service channels remains high

5.17 It is important to bear in mind that the UK PSBs continue to dominate viewing of content in the home.⁶² Live TV remains a central component of TV viewing and the PSBs’ viewing share remains high.⁶³ Having declined in the past, PSB shares of TV viewing have remained broadly stable since 2013, as demonstrated in Figure 6 below.

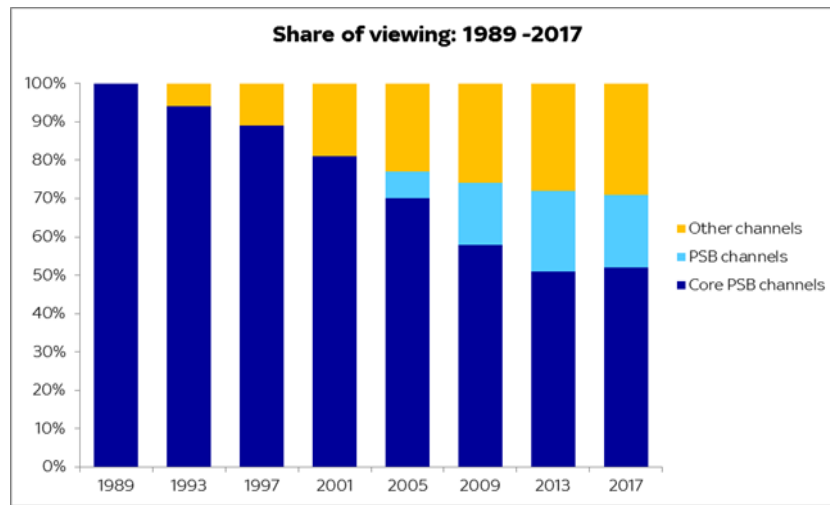
⁶² See Sky’s submission to Ofcom entitled ‘Public Service Broadcasting in a Digital Age, Comments by Sky’, dated 8 May 2018. A copy of Sky’s submission is provided at Annex 1.

⁶³ Ofcom acknowledges that:

(i) “[s]ome 91% of adults watched live TV in an average week in 2017, and, among all individuals, 86% of broadcast TV viewing (on a TV set) was watched live [...] Ofcom research has also shown that traditional live TV is still at the heart of our viewing experience”. Source: Paragraph 3.17 of Ofcom’s report: *EPG Prominence, A report on the discoverability of PSB and local TV services*, dated 27 July 2018 (“PSB Prominence Report”) (https://www.ofcom.org.uk/data/assets/pdf_file/0026/116288/report-psb-local-tv-discoverability.pdf); and

(ii) “Some 91% of adults watched live TV in an average week in 2017, and, among all individuals, 86% of broadcast TV viewing (on a TV set) was watched live [...] Ofcom research has also shown that traditional live TV is still at the heart of our viewing experience”. Source: paragraph 2.6 of the Consultation.

Figure 6: PSB viewing shares since 1989



5.18 Accordingly, it is clear that viewers are not experiencing any difficulty finding and watching public service channels, and the PSBs therefore do not require additional assistance to make their channels more discoverable.

5.19 Further, as previously noted by Sky,⁶⁴ PSBs have a number of key assets and advantages that have enabled them successfully to meet the challenge of increased competition for viewing in the past,⁶⁵ and which remain central to their ability to do so going forward.

⁶⁴ 'Public Service Broadcasting in a Digital Age, Comments by Sky', *Op. Cit.*

⁶⁵ The PSBs have faced major expansions in the quantity of content provided to UK households in the past, first with the arrival of multichannel television in the early 1990s, and again with the introduction of digital television in the late 1990s which gave rise to a large expansion in the number of television channels available in the early 2000s.

SECTION 6: OFCOM'S PROPOSALS ARE DISPROPORTIONATE

- 6.1 Figure 3 above illustrates the reality of Ofcom's proposals: a small number of channels across different platforms moving up a handful of places based on speculative assertions about the possible benefits that might arise as a result, including small uplifts in viewing, and spurious individual, societal and social benefits.⁶⁶
- 6.2 Those benefits are judged by Ofcom to merit certain and measurable costs for platforms and competing commercial broadcasters, and disruption for viewers. Such an outcome is wholly disproportionate.
- 6.3 Such an outcome is also surprising given Ofcom's duty to target regulation only where necessary, and Ofcom's policy (as outlined in Section 2 above) that the "prospective benefits" of regulation "should exceed the costs".
- 6.4 Specifically, this section establishes that where Ofcom's proposals would result in public service channels moving to higher EPG slots, such proposals are disproportionate because they risk causing significant disruption to other broadcasters and to viewers, while only bringing minimal (if any) benefits for PSBs and viewers.
- 6.5 In this section Sky focuses on Ofcom's proposals that are of particular concern to Sky, namely:
- (a) the proposal to require providers with regionalised EPGs to move Channel 4 in Wales to the first page ('the C4 Wales proposal'); and
 - (b) the proposal to require Sky to list BBC children's channels on the first page of its Kids' genre ('the BBC Kids proposal').

The C4 Wales proposal

- 6.6 Ofcom is proposing to require licensed EPG providers to list Channel 4 on the first page of EPGs specific to Wales.⁶⁷
- 6.7 The reasons given by Ofcom for this proposal, however, are weak. They amount to a statement that Ofcom believes that Channel 4's revenues and spending on content may increase by a small amount if this proposal was implemented. Such an assertion is wholly insufficient as a sound basis for a significant policy intervention.
- 6.8 Ofcom has also failed properly to evaluate the costs and benefits of this proposal. Were it to do so, Ofcom would find that:
- (a) the benefits to Channel 4 are so small as to be *de minimis*;
 - (b) any such benefits would be offset to a significant degree by losses of viewers by other PSBs; and
 - (c) the proposal would result in significant costs to other broadcasters and viewers as a result of changes to EPG listings of a substantial number of other TV channels.

⁶⁶ In relation to several of its proposals, Ofcom speculates that the proposal "may", "should" or "would probably" result in "some" benefit. For example, see paragraphs A7.12, A7.57 and A7.71 of the Consultation.

⁶⁷ Paragraphs 5.24 to 5.32 of the Consultation.

6.9 Ofcom's proposal is, therefore, wholly disproportionate and should not be implemented.

The proposal is poorly justified

- 6.10 Ofcom's explanation for this proposal is extraordinarily meagre. It is set out in three sentences in the main body of the consultation,⁶⁸ which appear to be intended to summarise the justification set out in Annex 7 of the Consultation. However, the justification set out in Annex 7 is itself flimsy.
- 6.11 The essence of Ofcom's justification for its proposal is a proposition that moving Channel 4 to the first page of licensed EPGs in Wales would increase viewing of that channel, which would give rise to a number of purported benefits.
- 6.12 At the outset we note that in parts of its justification Ofcom appears to imply that an increase in viewing of Channel 4 should be regarded as a benefit in and of itself, and/or that any such increase in viewing would deliver *"positive individual and social benefits to Welsh citizens and consumers"*⁶⁹. Such propositions are unreasonable.
- 6.13 We do not believe, for example, that it is reasonable to assert that increased viewing of Channel 4 (whether in Wales or elsewhere) can simply be presumed to deliver *"social benefits"*. It is difficult to see how increased viewing of Channel 4 that comprised greater viewing of *The Simpsons, Gogglebox, Location, Location, Location*, or re-runs of *Ramsay's Kitchen Nightmares USA*, for example, could reasonably be said to create any *"social benefit"* at all. The reality is that the significant majority of viewing of Channel 4 comprises viewing of programmes that would readily be found on any commercial television channel, which have limited if any public service characteristics, and it is viewing of these types of programmes that is most likely to increase were Ofcom to mandate that Channel 4 is granted a higher EPG listing in Wales.
- 6.14 Ofcom asserts that two types of benefit would arise as a result of an increase in viewing of Channel 4 in Wales, were its proposal to be implemented:
- (a) an increase in investment in content by Channel 4 driven by the increased revenue as a result of the increase in viewing;⁷⁰ and
 - (b) a kind of 'virtuous circle' whereby more spending on content drives more viewing, which raises more revenue, which can then be spent on more content.⁷¹
- 6.15 We discuss the first of these propositions in the following section. The second of these propositions is without merit. There is no evidential basis to support the existence of a virtuous circle of this type, and it is improbable that it could exist. The flawed nature of the

⁶⁸ At paragraphs 5.31 and 5.32 of the Consultation, which simply assert: *"an upward move to page one is likely to increase Channel 4's share of viewing in Wales. This may raise its advertising and sponsorship revenues and hence its profitability...Ofcom considers that securing greater prominence for Channel 4 in Wales would deliver the policy intent of the prominence regime and our other relevant broadcasting duties."*

⁶⁹ Paragraph A7.8 of the Consultation.

⁷⁰ Paragraph A7.12 of the Consultation, which states that as a result of Ofcom's proposal Channel 4: *"may raise its advertising and sponsorship revenues to some degree, which may also stimulate a small increase in Channel 4's programme investment."*

⁷¹ Paragraph A7.12 of the Consultation, which states: *"the broadcast of new programmes may drive a further small increase in viewing of Channel 4 across the UK."*

first benefit also condemns the second. This theoretical proposition should be disregarded by Ofcom.⁷²

Lack of proper evaluation and weighing of costs and benefits

- 6.16 It is evident from the consultation that Ofcom regards its proposals as important policy interventions, thereby warranting an impact assessment as required by the Act.⁷³ Ofcom's approach to the assessment of the impact of its proposals in the consultation, however, fails to have regard to either (a) standard practice in undertaking impact assessments, or (b) Ofcom's own guidance on how it will undertake such assessments.⁷⁴
- 6.17 The core of any impact assessment is the specification, evaluation and weighing of costs and benefits of a policy proposal, with costs and benefits quantified wherever possible. These elements are almost entirely absent in the consultation in relation to the proposal to require licensed EPG providers to move Channel 4 to the first page of EPGs in Wales. Ofcom has failed clearly to explain the benefits it expects from this proposal, failed properly to evaluate the costs and benefits associated with it, and failed to weigh these against each other in order to determine whether the proposal is worth pursuing.
- 6.18 For example, in relation to the propositions that the proposal will result in an increase in Channel 4's revenue and investment in content Ofcom simply asserts that the proposal:

*"may raise [Channel 4's] advertising and sponsorship revenues to some degree, which may also stimulate a small increase in Channel 4's programme investment."*⁷⁵
(Emphasis added)

There is no evident basis for these (highly qualified) assertions, and they are entirely inadequate as a basis for well-founded policy conclusions.

- 6.19 Ofcom's failure to undertake any proper evaluation of these issues is all the more surprising given that they are issues that are amenable to quantification, as we discuss further below.
- 6.20 Speculation that the proposal "may" raise Channel 4's revenue and content investment "to some degree" or by a small amount cannot be a reasonable or appropriate basis for taking a significant policy decision in relation to the regulation of licensed EPGs.⁷⁶

⁷² Notwithstanding this, even on Ofcom's view the level of additional content investment caused by its intervention would be "small". A view that a small additional investment in content would result in the generation of a virtuous circle of this type is wholly implausible.

⁷³ Ofcom asserts that it has carried out an impact assessment of its proposals at paragraph 2.22 of the consultation. Section 7 of the Act sets out the "important" circumstances in which Ofcom must carry out an impact assessment.

⁷⁴ 'Better Policy Making', *Op. cit.*

⁷⁵ Paragraph A7.12 of the Consultation.

⁷⁶ Ofcom has also failed properly to evaluate the merits of its proposal to require EPG providers to list Local TV, BBC Alba, and (in the case of Virgin media) S4C on the first three pages of the EPG. . Given that, by Ofcom's own evidence at Annex A7.48 to A7.87, any benefit in terms of increased viewing and social benefit is uncertain and likely to be minimal, it would be entirely disproportionate to require EPG providers to list these channels on the first three pages of the EPG, in particular where this would potentially result in a significant number of non-PSB channels being moved down the EPG. Sky notes that a number of its channels (including Sky Two, Sky Arts and Pick) risk being demoted down the Virgin media EPG as a result of this proposal. Further, in the event that Local TV were to re-launch onto the Sky EPG in Scotland, this would result in a large number of channels in the Entertainment genre (from slot 122 onwards) changing channel number in all regions. Sky also notes that there are currently only two simulcast Local TV services on the Sky platform, London Live and Cardiff TV.

6.21 We have undertaken an analysis of the potential uplift in Channel 4's revenue under Ofcom's proposal, and consulted with experts in the advertising industry. Even under the most optimistic assumptions, there would be no increase in Channel 4's revenue. For the purpose of this calculation, Sky has assumed that the combined viewing share of Channel 4 and S4C on Sky in Wales would, at most, match the current viewing share of Channel 4 on Sky in the rest of the UK. Therefore the viewing share of Channel 4 in Wales would increase from 2.75% to 3.83%. Sky calculates that this uplift would lead to an additional 260,000 adult impacts for Channel 4. This would represent an increase in impacts delivered by Channel 4 of around 0.1%, which would make no difference to Channel 4's ability to monetise its airtime. Accordingly, Ofcom's proposal would not make any discernible difference to Channel 4's overall performance or investment in content.

Ofcom fails to have regard to offsetting effects and costs associated with the proposal

6.22 Ofcom's justification for its proposal fails to recognise that any increase in viewing of Channel 4 in Wales is almost certain to be matched by reductions faced by other broadcasters. Television viewing is largely zero sum: gains by one broadcaster are generally matched by losses by others.

6.23 In the case of Channel 4 being promoted to a first page listing on EPGs in Wales the significant likelihood is that most of the viewing substitution would come from the other PSB channels, given their close proximity to Channel 4 in the new listing. As a result, the *net viewing* of content on PSB channels generated by the proposal is likely to be small.

6.24 Sky calculates that if Channel 4 was moved to the first page of its EPG in Wales, BBC One Wales, BBC Two Wales, ITV Wales, S4C and Channel 5 would have a combined 0.98% decrease in viewing share.⁷⁷ This means that the overall increase in combined PSB viewing share as a result of Ofcom's proposal would be tiny – in the order of 0.1%.

6.25 Accordingly, Ofcom has failed to have regard to a critical fact in putting forward this proposal.

6.26 Similarly, Ofcom appears to fail to appreciate that a consequence of its proposal would be a need to move a significant number of television channels down the listing in Sky's EPG.

6.27 Ofcom has assumed that only seven channels would move down by one slot in Wales in order to promote Channel 4 to the first page of Sky's EPG.⁷⁸ It has failed to recognise, however, that moving channels in this way would result in them having different EPG listings in Wales than the rest of the UK.

6.28 Sky would not choose to operate its EPG in this way. It would result in some of the most important channels in Sky's EPG having two channel numbers – one in Wales, and one outside Wales. This would be undesirable from the point of view of broadcasters and users of Sky's services. For example, broadcasters of those channels would have to include different channel numbers for Wales and the rest of the UK in their advertising.

6.29 The only practical approach that Sky could take in order to preserve channels having the same listings number across the UK would be to move all channels from slot 108 onwards

⁷⁷ For the purposes of this analysis Sky has assumed that the reduction in viewing share is taken proportionately by existing viewing share across the seven other channels on the first page of the Sky EPG.

⁷⁸ See Annex 8, Table A8.1 of the Consultation.

down by one slot in *all* regions. This would result in approximately 140⁷⁹ channels moving down the EPG, [REDACTED].

- 6.30 Ofcom's consultation recognises the costs imposed on broadcasters and viewers when channels move EPG listings.⁸⁰ Given the extent of the moves that Sky would need to make to channels' listings in its EPG as a result of Ofcom's proposal, the extent of inconvenience and cost imposed on broadcasters and viewers would be substantial. Over [REDACTED] households – representing [REDACTED] people⁸¹ – today use Sky's EPG as their primary method of navigating among TV channels.
- 6.31 Given that the expected benefits for Channel 4 (and therefore consumers) of this proposal are expected to be minimal, while the disruption to non-PSB broadcasters and to viewers is expected to be significant, there is no justification for implementing this proposal. Ofcom should not implement this proposal.

There is no justification for treating regionalised EPGs differently from UK-wide EPGS

- 6.32 Finally, it is unreasonable and discriminatory only to require EPG providers who have invested in regionalised EPGs to list Channel 4 on the first page in Wales.
- 6.33 Ofcom's proposals would require Virgin Media to list Channel 4 at slot 104 and S4C on the first 3 pages of the EPG. By contrast, Sky, which provides a separate version of the EPG in Wales, would be required to list both S4C and Channel 4 on the first page, resulting in significant disruption to broadcasters and viewers, as described above. Sky is effectively being discriminated against for regionalising its EPG. If Ofcom decides to introduce a requirement in relation to Channel 4 in Wales, it should be no more onerous than the requirements placed on non-regionalised EPGs (i.e. in Wales, S4C to be listed at 104 and C4 within first 3 pages, or vice versa). Otherwise, Ofcom risks creating perverse incentives for EPG providers to cease regionalising their EPGs, which if played out would result in less prominence for S4C in Wales.
- 6.34 Ofcom's Consultation states that Virgin Media's EPG is not regionalised, but has not explained the basis for this understanding. Sky does not understand how the Virgin Media EPG is able to make different regional variants of ITV and BBC available to different customers at the same channel number if the EPG does not support an element of regionalisation. Before placing less onerous requirements on the Virgin Media EPG, compared to 'regionalised' EPGs, Ofcom should set out on what basis it understands the Virgin Media EPG not to be regionalised, and why Virgin Media is not able to list Channel 4 at slot 104 outside Wales and S4C at 104 inside Wales.

The BBC children's channels proposal

- 6.35 Ofcom is proposing to require Sky (as the only EPG provider for whom the BBC children's channels are not on the first page) to list CBBC and CBeebies on the first page of the Kids genre.⁸²

⁷⁹ Annex 3 demonstrates the expected impact on the Sky EPG line-up. As shown in at Annex 3, the exact number of channels affected would vary from region to region, and would also depend on the EPG line-up at the time that Sky implements the proposed change.

⁸⁰ Paragraphs 5.5 and 5.7 of the Consultation.

⁸¹ Sky internal data.

⁸² Paragraphs 5.42 to 5.49 of the Consultation.

6.36 On the Sky platform, these channels are listed at positions 613 and 614 (page 2 of the Kids genre). These slots were the most prominent available slots within the Kids genre at the time that CBBC and CBeebies launched. As set out in Sky's Listing Methodology, Sky considers that it would generally be unfair and disproportionate to permit a public service channel to take over an EPG channel number which has been allocated to another channel and that accordingly the channels are listed at appropriately prominent positions. This has been the case since launch⁸³

The proposal is poorly justified

6.37 Ofcom considers that its proposal "would ensure that [these channels] are easy to discover across different EPGs and platforms and provide greater regulatory certainty".⁸⁴ Ofcom further considers that moving these channels up to the first page of EPGs "is likely to increase viewing of these channels", which in turn "would be likely to increase the value both children and their parents receive from these channels, as they would probably view more UK-originated educational and entertaining content aimed at their lives and interests". Ofcom also consider that this proposal "could also increase any wider social value that these channels deliver".⁸⁵

6.38 As with the C4 Wales proposal, Ofcom has failed to have regard to either (a) standard practice in undertaking impact assessments, or (b) Ofcom's own guidance on how it will undertake such assessments. Ofcom has failed clearly to explain the benefits it expects from this proposal, failed properly to evaluate the costs and benefits associated with it, and failed to weigh these against each other in order to determine whether the proposal is worth pursuing.

6.39 For example, Ofcom makes a number of entirely speculative assertions with regard to the expected benefit of this proposal, stating that it "**should encourage greater viewing**" and "**should lead to consequent rises in the wider public value intended by Parliament**".⁸⁶

6.40 Speculation that the proposal "should" lead to benefits cannot be a reasonable or appropriate basis for taking a significant policy decision in relation to the regulation of licensed EPGs.

Ofcom has failed to demonstrate any clear benefits

6.41 Indeed, the evidence available points to the opposite conclusion: that Ofcom's proposal will have minimal impact on viewing. Ofcom itself concedes that the evidence of the scale of any increase in viewing as a result of this proposal is "mixed"⁸⁷ noting that BARB evidence (set out at Figure 7 below) shows that the performance of CBBC and CBeebies on Sky is "generally the same or only slightly lower than its performance on Virgin Media and Freeview".⁸⁸ However, Sky also notes that Ofcom's analysis, such as it is, appears not to take account of the significant differences in the numbers of competing children's channels available on each platform and the impact that might have on viewing. There are

⁸³ See section 3.3(iv) of Sky's *Method for Allocating Listings in Sky's EPG* (<https://assets.contentstack.io/v3/assets/blt4c2476c7b6b194dd/bltc436b91e02403a92/5a0eceb61e54c1d54837e202/download?disposition=inline>).

⁸⁴ Paragraph 5.45 of the Consultation.

⁸⁵ Paragraph A7.38 of the Consultation.

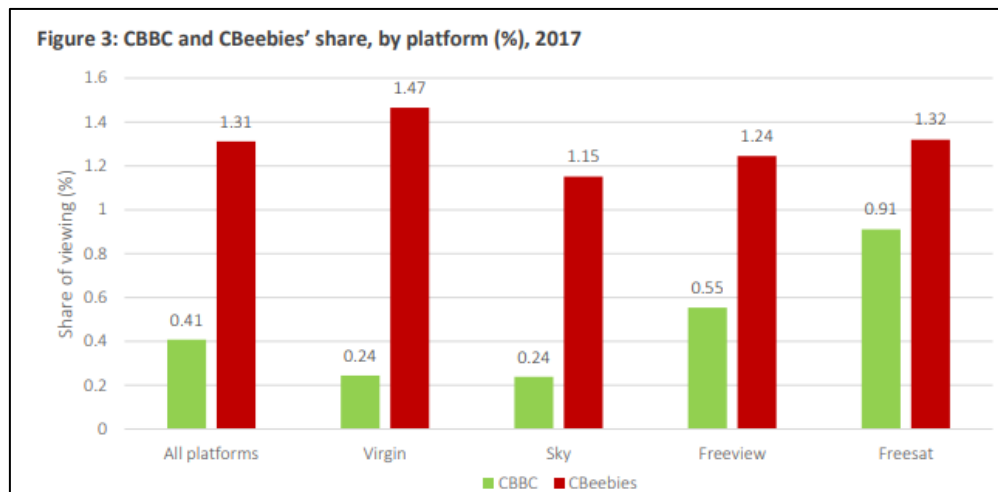
⁸⁶ Paragraphs 5.46 and 5.47 of the Consultation.

⁸⁷ Paragraph 5.46 of the Consultation.

⁸⁸ Paragraph 5.46 of the Consultation.

36 such channels (including SD/HD and +1 variants) on Sky, 26 on Virgin, nine on Freesat and only eight on Freeview (of which half are the BBC's channels in SD and HD versions).

Figure 7: CBBC and CBeebies' viewing share by platform



Source: Figure 3 of Annex 7 of the Consultation

These data suggest viewing would not increase, or would only increase by a small percentage, if these channels were moved to the first page of the Kids genre on Sky's EPG. As noted above, CBBC and CBeebies are 'destination channels', meaning that users specifically seek out these channels using the EPG number, in particular due to the BBC's strong brand and high quality content. This view was confirmed by the BBC's Deputy Director General, Anne Bulford, in response to questions raised by the Culture, Media and Sport Select Committee:

"The children's awareness of children's channels and digital channels is very high and CBeebies and CBBC are the first place they go. So 0 to 6, 95% of them are aware of it; 6 to 12, 89% for CBBC. So I think that is very encouraging. Where the channels are, how we cross-promote them, how we take people to those channels is what is important".⁸⁹

The channels are already easy to discover on the Sky platform

- 6.42 While not listed on the first page of the Kids genre, the channels are nonetheless prominently listed on page two. The channels can be accessed not only by scrolling through the TV Guide, but also typing in the channel numbers (which have remained the same for a number of years and so are well known to viewers) and, on Sky Q, via voice control.
- 6.43 The channels' ease of discoverability on the Sky EPG is borne out by the fact that CBBC's viewing share either matches or exceeds that of all the channels listed above it in the Kids genre, whereas CBeebies viewing share far outstrips that of all the other children's channels in the Kids genre, as demonstrated at Figure 7 above.

⁸⁹ Culture, Media and Sport Committee: Minutes of Evidence, dated 9 May 2014 (<https://publications.parliament.uk/pa/cm201314/cmselect/cmcmds/730-i/131022.htm>). Note that at the time this statement was made, Anne Bulford was the BBC's Managing Director for Operations and Finance.

Ofcom has failed to have due regard to adverse impacts

- 6.44 Ofcom also fails to have due regard to the adverse impacts of its proposal, namely that:
- (a) it risks causing disruption and confusion to viewers, many of whom are children who have learnt their favourite channels numbers by heart. Viewers would need to relearn how to access their preferred channels; and
 - (b) it risks causing disruption to broadcasters as a result of a number of channels in the Kids genre needing to change channel number in order to accommodate CBBC and CBeebies on the first page in that genre. For example, such broadcasters would need to incur marketing costs to re-educate viewers as to their new channel number(s). Indeed, there is a risk that a change in channel number and slot position for CBBC and CBeebies could also result in a drop in viewing for those channels (even if only temporarily).
- 6.45 Given that this proposal is unlikely to result in any increase in viewing for CBBC and CBeebies (and therefore unlikely to result in any consumers benefit), whereas the disruption to non-PSB broadcasters and to viewers is expected to be significant, it would be entirely disproportionate for Ofcom to implement this proposal, and it should not do so.

SECTION 7: A PRESCRIPTIVE APPROACH IS DISPROPORTIONATE AND RISKS UNINTENDED ADVERSE IMPACTS

- 7.1 Sky has demonstrated above that Ofcom's proposals are unnecessary and disproportionate. That assessment is amplified by Ofcom's proposed switch from principles-based regulation to prescriptive management of EPGs. This approach is wholly disproportionate to the alleged harm that Ofcom is seeking to address.
- 7.2 Indeed, even by Ofcom's own evidence the issue that Ofcom is seeking to address is very small (i.e. the channel listings indicated by red crosses in Figure 3 above).
- 7.3 In this section, Sky expands on its view as to why Ofcom should retain a principles-based approach to regulating prominence on EPGs. In Section 8 below, we set out an alternative, more proportionate way of achieving some of the outcomes Ofcom is seeking.

The pitfalls of a prescriptive approach

- 7.4 The legislative framework for PSB prominence does not require Ofcom to adopt a prescriptive approach. Ofcom's duty under the Act is to draw up a code "*giving guidance as to the practices to be followed in the provision of electronic programme guides*". Such practices must include giving public service content "*such degree of prominence as OFCOM consider appropriate*".⁹⁰ There is no specific duty to ensure that public service channels are listed at or near the top of EPGs, nor that they are listed in the same way across all EPGs. Accordingly, Ofcom does not need to adopt a prescriptive approach in order to comply with its duties.
- 7.5 Sky firmly believes that the appropriate approach to prominence regulation is for it to be non-prescriptive (i.e. the current approach), maximising operators' flexibility provided that the right outcomes occur. Prescriptive regulation is inflexible, requires Ofcom to be intimately involved in how platforms and services operate and are run, and is likely to lead to poor outcomes and adverse unintended consequences for audiences, broadcasters and platforms alike.
- 7.6 A prescriptive approach applied to all EPGs risks leading to the following unintended and/or adverse outcomes for both consumers and broadcasters:

Significant disruption to viewers and broadcasters

- (a) First, Ofcom's proposed prescriptive approach would result in significant disruption and inconvenience to viewers and broadcasters, as platforms make changes to accommodate Ofcom's "pages" approach. For example, as noted above, Ofcom has under-estimated the impact on the Sky platform of moving Channel 4 up to the first page in Wales, failing to realise that this would result in approximately 140 channels changing channel number in all regions (not just Wales).

Ofcom also fails to take into account the impact of the launch of any future PSB channels. If any such PSB channel launches, presumably Ofcom would seek to amend the EPG Code in order to require such channel to be listed on a specific page or pages, potentially resulting in a large number of existing non-PSB channels once again being displaced, leading to further broadcaster and viewer disruption.

⁹⁰ Sections 310(1) and (2) of the Act.

Adverse impacts for viewers with additional needs

- (b) Ofcom's proposed 'pages' approach creates scope for unintended consequences such as platforms reducing font size to increase number of channels per page, resulting in viewers with additional needs being disadvantaged.

Reduced scope for diversity and stifling of innovation

- (c) A prescriptive approach reduces the scope for diversity among EPG providers, to the detriment of consumers. When drafting the EPG Code in 2004, Ofcom specifically ruled out a more prescriptive approach on the grounds that a principles based approach would allow for greater diversity, and give Ofcom the flexibility to consider a range of issues when determining whether "appropriate prominence" has been afforded. In its 2004 statement on the *Code on Electronic Programme Guides*, Ofcom stated that:

"Although a number of respondents would like Ofcom to set out more detailed criteria on appropriate prominence, we remain of the view that there are a number of different approaches that could be justified. We believe that broad guidance maximises the scope for diversity, to the benefit of consumers. It will also allow Ofcom to take account of a range of issues that are relevant to the interests of citizens and the expectations of consumers".⁹¹

Ofcom is now effectively seeking to editorialise EPGs, by determining how EPGs should be organised and removing the freedom of EPG providers to present information in the way they think best for consumers. This risks stifling innovation at a time when it is become ever more important for traditional platforms to compete against newer market players.

Relying on the concept of 'pages' is flawed

- (d) A pages approach could be manipulated by EPG providers, for example by changing the number of slots per page, resulting in different levels of prominence for public service channels in terms of actual slot numbers.

A requirement to list a channel on a particular page is impractical for EPG providers such as Digital UK, who do not control the number of slots that appear per page – this is controlled by the device manufacturers. As acknowledged by Ofcom in its Consultation, the number of pages on the Freeview EPG already varies from one device to another.

Further, the ability on Sky Q to scroll through the EPG slot by slot (as opposed to page by page) means that concept of pages becomes meaningless from a viewer perspective.

- 7.7 EPG providers, with years of experience in managing EPGs, are best placed to afford prominence to public service channels in a manner which does not compromise the user experience on that particular EPG. A principles-based approach affords EPG providers flexibility to achieve this balance. Ofcom is not well placed to make the types of judgements needed.

⁹¹ Ofcom's Statement on the *Code on Electronic Programme Guides*, 26 July 2004.

SECTION 8: THERE ARE ALTERNATIVE APPROACHES THAT ARE MORE PROPORTIONATE

- 8.1 As noted at Section 2 above:
- (a) Ofcom is under a general duty to have regard to “*the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*”⁹² (emphasis added);
 - (b) Ofcom has a stated bias against intervention, meaning that a high hurdle must be overcome before Ofcom regulates;⁹³ and
 - (c) Ofcom further states that, if intervention is justified, it “*aims to choose the least intrusive means of achieving [its] objectives, recognising the potential for regulation to reduce competition*”.⁹⁴
- 8.2 As noted at Section 5 above, there are only a handful of cases where the current listing of certain public service channels would not comply with Ofcom’s proposals. Even in these cases the justification for requiring EPG providers to move these public service channels into *more prominent* page ranges is weak.
- 8.3 If Ofcom is still minded to act, there are other, more proportionate, ways of achieving some of Ofcom’s aims, while at the same time minimising broadcaster and viewer disruption.
- 8.4 For example, to the extent that the current listing of certain PSB channels would not meet Ofcom’s proposed requirements, this could be addressed to a significant degree by an obligation on EPG providers to promote existing public service channels up the EPG as and when more prominent slots become available. Annex 4 sets out in more detail how this alternative proposal could achieve some of Ofcom’s aims.
- 8.5 In addition, Ofcom could:
- (a) set out its ‘pages’ approach as guidance to EPG providers, putting them on notice as to Ofcom’s expectations as to the appropriate level of prominence; and
 - (b) place a requirement on EPG providers to notify Ofcom prior to allocating any vacant slot that is more prominent than the slot currently occupied by a public service channel within the relevant genre or channel grouping.
- 8.6 This approach would enable public service channels to increase in prominence over time, whilst minimising the unnecessary adverse impacts outlined in Section 7 above. Indeed, as noted above, this is the approach that Digital UK and Freesat already take in respect of the Freeview and Freesat EPGs.
- 8.7 Such approach would also be consistent with the expectations expressed by Government when Local TV services were added to the list of public service channels set out in section 310(4) of the Act:⁹⁵

⁹² Section 3(3)(a) of the Act.

⁹³ See the section entitled ‘Better policy making – Ofcom’s approach to impact assessment’ (<https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>).

⁹⁴ *Ibid.*

*“The Government has discussed EPG prominence with the main cable and satellite providers who are willing to offer genre tabs and yellow button access accordingly and envisage services carried on the pay platforms will largely be in the form of video on demand. However, they will review their EPG policies in light of the relevant legislation that is made and take a view on appropriate prominence. This view has to be consistent with the statutory code on EPGs that Ofcom enforces. **The Government would hope that the highest, vacant LCN would be awarded to the local TV services established under the Government’s proposed framework.**” (Emphasis added)*

- 8.8 Indeed, as noted by Ofcom,⁹⁶ Ofcom’s rationale for proposing a more prescriptive prominence regime stems, at least in part, from Ofcom’s finding in respect of a complaint made by a Local TV broadcaster in respect of the Virgin Media EPG.⁹⁷ Ofcom states that:

“We recognised that there could be possible issues with allowing this much flexibility in January 2014, after we received a complaint from ESTV regarding the slot it had been allocated on the Virgin Media EPG. ESTV considered that this slot did not provide it with what it believed to be sufficient prominence for its local TV service. While we did not uphold the complaint, we noted that the flexibility afforded to EPG providers under our existing Code “may not achieve the policy aims of the legislation”. We added that consequently it may be appropriate for Ofcom to be more specific as to the outcomes which are to be secured in granting prominence to designated channels”.⁹⁸

- 8.9 However, the Virgin Media/Local TV situation could have been avoided if there were a requirement for EPG providers to list public service channels at an appropriately prominent vacant slot. Such a requirement would have achieved a prominent listing for Local TV while at the same time minimising unnecessary disruption to other broadcasters, EPG providers, and to viewers.
- 8.10 Accordingly, before imposing onerous, prescriptive and disruptive new rules on EPG providers, Ofcom should apply its own policies and guidance and consider whether alternative, less intrusive measures could achieve similar objectives.

⁹⁵ *Local TV: Implementing a new framework:* (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/72922/Impact-Assessment_Local-TV_July2011.pdf) at paragraphs 33 to 36 of the Evidence Base section.

⁹⁶ Paragraph 4.19 of the Consultation.

⁹⁷ Ofcom Broadcast Bulletin, Issue number 269, 15 December 2014, page 44 (https://www.ofcom.org.uk/data/assets/pdf_file/0024/47652/obb269.pdf)

⁹⁸ Paragraph 4.19 of the Consultation.

SECTION 9: THE TREATMENT OF HD CHANNELS

- 9.1 Sky broadly agrees with Ofcom’s proposals regarding substitution of SD and HD channels under the EPG Code.⁹⁹ However:
- (a) EPG providers should be entitled to list the non-regionalised HD version of a public service channel at the primary slot in a given region, where the appropriate HD regional variant is not available but the PSB has made such variant available in HD on another platform; and
 - (b) Ofcom should clarify that EPG providers are entitled to list the HD version of commercial public service channels at the higher number without first seeking the broadcaster’s consent.

BBC Channels/Maximising the benefit to viewers of PSB HD content

- 9.2 Ofcom is proposing to ensure prominence for either the SD or HD version of BBC channels rather than both, subject to viewers being able to select the appropriate regional variants of those channels through the primary listing.¹⁰⁰ Sky agrees with this proposal in principle, subject to the following comments:
- (a) Sky observes that, if the BBC were to broadcast HD versions of all of their BBC One and BBC Two regional variants, then this would free up an additional prominent EPG slot (115) on the Sky EPG.¹⁰¹ The BBC does not currently broadcast in HD (i) any English regional variants of BBC One; nor (ii) the Scottish, Welsh and Northern Ireland variants of BBC2.¹⁰² The BBC has also indicated that it has no immediate plans to broadcast the English regional variants in HD.¹⁰³ However, it is clearly in viewers’ interests that the BBC launch HD versions of all of its regional variants to provide HD as standard.
 - (b) Furthermore, if the BBC launches an HD version of one or more of its regional variants on some platforms/services but not others, it is essential that regulated EPGs that do not have access to the appropriate regionalised HD variant be permitted to list the non-regionalised HD version of BBC One at the primary listing (for example, should the BBC make regionalised version of BBC One available via its online iPlayer, but not via digital satellite).

In particular, it is important that the BBC is not permitted to exploit any future availability of HD regional variants on the BBC iPlayer app to drive viewers away from other platforms and towards the BBC’s app.

⁹⁹ Paragraphs 5.67 to 5.70 of the Consultation.

¹⁰⁰ Paragraphs 5.67, 5.68, A6.12 and A6.14 of the Consultation.

¹⁰¹ BBC1 HD is currently listed at slot 115 on the version of the Sky EPG made available in England. BBC 2 HD is currently listed at slot 115 in the version of the Sky EPG made available in Scotland, Wales and Northern Ireland.

¹⁰² Sky notes that the BBC is planning to launch BBC Two Wales HD on Sky in November 2018, and will be closing BBC Two Scotland (SD) in February 2019.

¹⁰³ See paragraph 33 of the BBC’s Distribution Strategy, dated 12 February 2018, in which the BBC states that “*delivering every regional variant of BBC One in HD via broadcast should only be implemented if and when the costs are proportionate to the audience value they would deliver*”. http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/accountability/consultations/bbc_distribution_strategy.pdf

Commercial PSBs

9.3 Ofcom is proposing to clarify in the EPG Code that the commercial PSBs may agree with EPG providers that they can swap non-PSB HD simulcast variants of their SD PSB designated channels, such that those HD variants could occupy the slots to which the SD channels would be entitled.¹⁰⁴

9.4 Sky agrees with this proposal in principle, subject to the following comments:

- (a) Sky considers that where the correct regional variant of the channel is available in HD, and the relevant functionality exists to list the HD version at the higher slot, then EPG providers should be entitled to list the HD version at the higher number *without first seeking the broadcaster's consent*. This would be in viewers' interests and expectations, reflects Sky's current published listing methodology, and would have the added benefit of removing this issue from commercial negotiations that might distort incentives.¹⁰⁵ This approach is also consistent with Government's expectation that industry "*work to ensure that providers switch SD for HD feeds in the most prominent EPG slot where the channel is placed as it is clearly in the viewer's interests*".¹⁰⁶

Sky notes that Ofcom's proposed EPG Code wording at paragraphs A6.12 to A6.14 of the Consultation does not specify that broadcaster consent is required. Accordingly, Sky does not consider that any amendments would be required to this wording. However, if Ofcom decides to implement this proposed change, it would be helpful if Ofcom's accompanying statement could clarify that the broadcasters' consent is not required.

- (b) ITV and Channel 4 do not currently broadcast all of their regional variants in HD and [REDACTED] it is clearly in viewers' interests that the ITV and Channel 4 launch HD versions of all of their regional variants to provide HD as standard.

Furthermore, if ITV or Channel 4 launches an HD version of one or more of their regional variants on some platforms/services but not others, it is essential that regulated EPGs that do not have access to the appropriate regionalised HD variant be permitted to list the non-regionalised HD version at the primary listing.

¹⁰⁴ Paragraph 5.69-5.70 of the Consultation.

¹⁰⁵ See section 3.5 of Sky's Method for Allocating Listings in Sky's EPG (<https://assets.contentstack.io/v3/assets/bltdc2476c7b6b194dd/bltc436b91e02403a92/5a0eceb61e54c1d54837e202/download?disposition=inline>)

¹⁰⁶ *The Balance of Payments between Television Platforms and Public Service Broadcasters Consultation Report*, Government Response, 5 July 2016 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/534872/The_balance_of_payments_between_television_platforms_and_public_service_broadcasters_consultation_report_1.pdf)

SECTION 10: THE TRANSITIONAL PERIOD

- 10.1 Ofcom is proposing to provide a 12 month transition period once the new EPG Code has been finalised.¹⁰⁷
- 10.2 However, there is a risk that 12 months may not be adequate. While Sky considers that it may be able to implement the proposed changes within a 12 month timeline, there is a risk that Sky may not be able to do so should unforeseen circumstances arise.
- 10.3 Sky would first require a period of time to review any new requirements, decide internally how best to implement them, and draft its broadcaster consultation. This process may take a number of weeks.
- 10.4 Sky's consultation with broadcasters would typically run for 6-8 weeks (though could be shortened if the proposals are very straightforward). Sky would then require around 4 weeks to review broadcaster responses. Depending on the responses received, Sky may also need to re-consult on any modifications to its proposals.
- 10.5 Sky would then typically give broadcasters eight weeks' notice of their new channel number(s) in order to allow sufficient time for them to market their new number(s).
- 10.6 There is a risk that this process could only leave a narrow window for EPG providers to implement the changes. This would be of particular concern if the deadline coincided with a major public holiday (such as Christmas or New Year) or a major event (such as the World Cup or General Election). When planning changes to its EPG, Sky typically avoids making any changes that risk de-stabilising the platform at peak viewing times, including Christmas, Easter and other bank holidays. Sky also seeks to ensure that any EPG re-organisations do not coincide with other platform changes, such as software releases.
- 10.7 Sky therefore recommends that Ofcom increase the transition period to 18 months, to allow EPG providers greater flexibility as to when to make the changes, taking into account peak viewing periods and other planned platform changes in order to minimise any risk of disruption to the platform, channels and viewers. However, Sky considers it would be appropriate for Ofcom to require EPG providers to take steps towards implementation (for example, by publishing their broadcaster consultation) within the first six months.

¹⁰⁷ Paragraph 5.71 of the Consultation.

SECTION 11: CONCLUSION

- 11.1 In this response, Sky has demonstrated that it would be both unnecessary and disproportionate to (i) extend the PSB prominence regime and (ii) implement Ofcom's proposed changes to the EPG Code.
- 11.2 In relation to the former, and by its own admission, Ofcom has not carried out a comprehensive analysis of the discoverability of on demand PSB content across platforms that provide access to audio-visual content. Before making any recommendations to Government in this area, it is therefore essential that Ofcom gathers robust and direct evidence on the availability and discoverability of PSB on demand content (including across smart TVs, smartphones and tablets).
- 11.3 Further, any such recommendations should not be limited to "traditional" platforms; should allow for a variety of competing models (not merely mandating prominence for the PSB player apps); and should be accompanied by a review of the existing PSB compact (including must-offer requirements) to ensure an appropriate balance of obligations and compensation.
- 11.4 However, as demonstrated above, all the available evidence currently points to PSB content continuing to receive a high level of prominence, and to be readily discoverable via both traditional and new platforms and services, in particular those that are being used by significant numbers of UK viewers.
- 11.5 Accordingly, while Sky agrees that it is important that this issue is kept under review, and Ofcom now has a duty to do so under the Digital Economy Act, Sky considers that proposals for extension of the regime at this point in time are premature and not supported by evidence.
- 11.6 In relation to the latter, Sky has demonstrated that Ofcom's proposal to move to a much more prescriptive approach to regulation under the EPG Code would result in a number of adverse impacts for broadcasters and viewers, while bringing minimal benefit to PSBs and viewers. If, on reflection, Ofcom continues to believe that changes to the EPG Code are required, it is therefore essential that Ofcom consider less intrusive means of addressing its concerns, such as the alternative solution put forward by Sky in this response.
- 11.7 More generally, Sky considers that the 'principles based' approach is a superior approach to regulation in this area (both in relation to linear EPGs and, even more importantly, any future extension of the prominence regime). It provides appropriate flexibility for operators to determine how prominence is delivered, while ensuring that the objectives of the prominence regime are achieved. Prescriptive regulation is inflexible and is likely to lead to poor outcomes and adverse unintended consequences for audiences, broadcasters and platforms alike.
- 11.8 In addition to its monitoring role, Ofcom also has a significant role to play in encouraging PSBs to collaborate with platform operators to ensure that their important content is not only readily discoverable by users of those platforms, but is also available via the full range of functionality those platforms provide - for example, being included in menus and search results, whether by voice or text, and in add-on services such as mobile apps.

**SKY RESPONSE TO OFCOM REVIEW OF RULES FOR PROMINENCE OF PUBLIC SERVICE
BROADCASTERS AND LOCAL TV**

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ANNEX 1: SKY SUBMISSION TO OFCOM DATED 8 MAY 2018

ANNEX 2: EXTENT TO WHICH THE PSB CHANNELS ARE ALREADY LISTED IN ACCORDANCE WITH OFCOM'S PROPOSALS

Channel	Ofcom Proposal	Current position on Sky EPG	Current position on Virgin EPG	Current Position on Freeview EPG	Current Position on Freesat EPG
BBC One	Slot 1	Slot 101	Slot 101	Slot 1	Slot 101
BBC Two	Slot 2	Slot 102	Slot 102	Slot 2	Slot 102
Channel 3	Slot 3	Slot 103	Slot 103	Slot 3	Slot 103
Channel 4	Slot 4 (except on EPGs specific to Wales)	Slot 104	Slot 104	Slot 4	Slot 104
	First page of EPGs specific to Wales	X Slot 117 (page 3)	Not applicable (not regionalised)	X Slot 7 (page 1 or 2, depending on number of slots per page)	X Slot 120 (page 3)
Channel 5	Slot 5	Slot 105	Slot 105	Slot 5	Slot 105
S4C	Slot 4 on EPGs specific to Wales	Slot 104	Not applicable (not regionalised)	Slot 4	Slot 104
	First 3 pages on UK wide EPGs	Not applicable (not UK wide)	X Slot 166 (page 10)	Not applicable (not UK wide)	Not applicable (not UK wide)
BBC Four	First 3 pages	Slot 116 (page 2) ¹⁰⁸	Slot 107 (page 1) However, Sky notes that Ofcom has assumed that BBC Scotland will replace BBC Four at slot 107 in Scotland, and BBC Four will be demoted to slot 163 (page 9). ¹⁰⁹	Slot 9/10 (page 1/2) However, Sky notes that Ofcom has assumed that BBC Scotland will replace BBC Four at slot 9 in Scotland, and BBC Four will be demoted to at least slot 96 (page 13). ¹¹⁰	Slot 107 (page 1)
BBC Alba	First 3 pages of EPGs specific to Scotland	X Slot 141 (page 6)	Not applicable (not regionalised)	Slot 7 (page 1)	Slot 109 (page 2)
	First 3 pages of UK wide EPGs	Not applicable (not UK wide)	X Slot 161 (page 9)	Not applicable (not UK wide)	Not applicable (not UK wide)
BBC Scotland	First 3 pages of EPGs specific to Scotland	[REDACTED]	Not applicable (not regionalised)	Not yet launched. However, Ofcom has assumed that BBC Scotland will replace BBC Four at slot 9 in Scotland. ¹¹¹	Not yet launched. However, Ofcom has assumed that BBC Scotland would be listed at slot 110 (page 2). ¹¹²
	First 3 pages of UK wide	Not applicable	Not yet	Not applicable	Not applicable

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109 Paragraph A7.21 of the Consultation.

110 Paragraph A7.54 of the Consultation.

111 Paragraph A7.54 of the Consultation.

112 Paragraph 7.54 of the Consultation.

Channel	Ofcom Proposal	Current position on Sky EPG	Current position on Virgin EPG	Current Position on Freeview EPG	Current Position on Freesat EPG
	EPGs	(not UK wide)	launched. However, Ofcom has assumed that BBC Scotland will replace BBC Four at slot 107 (page 1) in Scotland. ¹¹³	(not UK wide)	(not UK wide)
Local TV	First 3 pages	117 (page 3) X Except in Wales where Local TV is listed at slot 134 (page 5)	X Slot 159 (page 9)	Slot 7/8 (page 1/2)	Not applicable (Local TV is not available on Freesat)
BBC News	First page of relevant genre/grouping	Slot 503 (page 1 of genre)	Slot 601 (page 1 of genre)	Slot 231 (page 1 of grouping)	Slot 200 (page 1 of genre)
BBC Parliament	First page of relevant genre/grouping	Slot 504 (page 1 of genre)	Slot 605 (page 1 of genre)	Slot 232 (page 1 of grouping)	Slot 201 (page 1 of genre)
CBBC	First page of relevant genre/grouping	X Slot 613 (page 2 of genre)	Slot 701 (page 1 of genre)	Slot 201 (page 1 of grouping)	Slot 600 (page 1 of genre)
CBeebies	First page of relevant genre/grouping	X Slot 614 (page 2 of genre)	Slot 702 (page 1 of genre)	Slot 202 (page 1 of grouping)	Slot 601 (page 1 of genre)

ANNEX 3: EXPECTED IMPACT OF THE C4 WALES PROPOSAL ON THE SKY EPG LINE-UP



ANNEX 4: SKY'S ALTERNATIVE, LESS PRESCRIPTIVE APPROACH

A4.1 As noted at Section 8, a requirement to promote public service channels up the EPG as and when more prominent slots become available would address much of what Ofcom is seeking to achieve.

A4.2 Such approach would address Ofcom's concerns to a considerable degree as follows:

(a) On Sky:

- (i) Channel 4 in Wales: [REDACTED]
- (ii) Local TV in Wales: [REDACTED]
- (iii) BBC Alba in Scotland: As Ofcom is aware, Sky reserves slot 117 for Local TV channels. However, no Local TV services currently broadcast on the Sky platform in Scotland. Sky would therefore be able to move BBC Alba to slot 117 (page 3) in Scotland.
- (iv) CBBC and CBeebies: Sky's alternative proposal would not currently enable BBC children's channels to move up to the first page of the Kids genre, as there are currently no vacant slots available. However, as explained above, these channels are already prominently listed on the second page of Sky's Kids genre and there is no evidence to suggest that a more prominent listing would result in increased viewing.

Figure A below demonstrates the Sky EPG line-up based on this alternative proposal

(b) On Virgin Media:

- (i) A requirement to move S4C, Local TV, and BBC Alba and BBC Scotland up into any more prominent vacant slots would not immediately result in promotion of these channels up the Virgin Media EPG, as there are currently no more prominent slots available.
- (ii) However, Sky notes that Virgin Media has been considering ways to simplify its EPG, including moving timeshift channels into a separate number range, or alternatively ceasing to support timeshift channels altogether.¹¹⁴ Either of these changes would create three empty slots on the first three pages and an additional two empty slots on page four.
- (iii) Further, Sky notes that Ofcom is proposing that EPG providers are required to afford prominence to either the SD or HD version of BBC channels, not both. Accordingly, VM could move BBC 1 HD down the EPG, in order to accommodate one of the regional public service channels on the first 3 pages.

(c) On Freeview:

- (i) Channel 4 in Wales: Sky's proposal would not result in Channel 4 being promoted to the first page on Freeview EPGs with 6 slots per page, as there

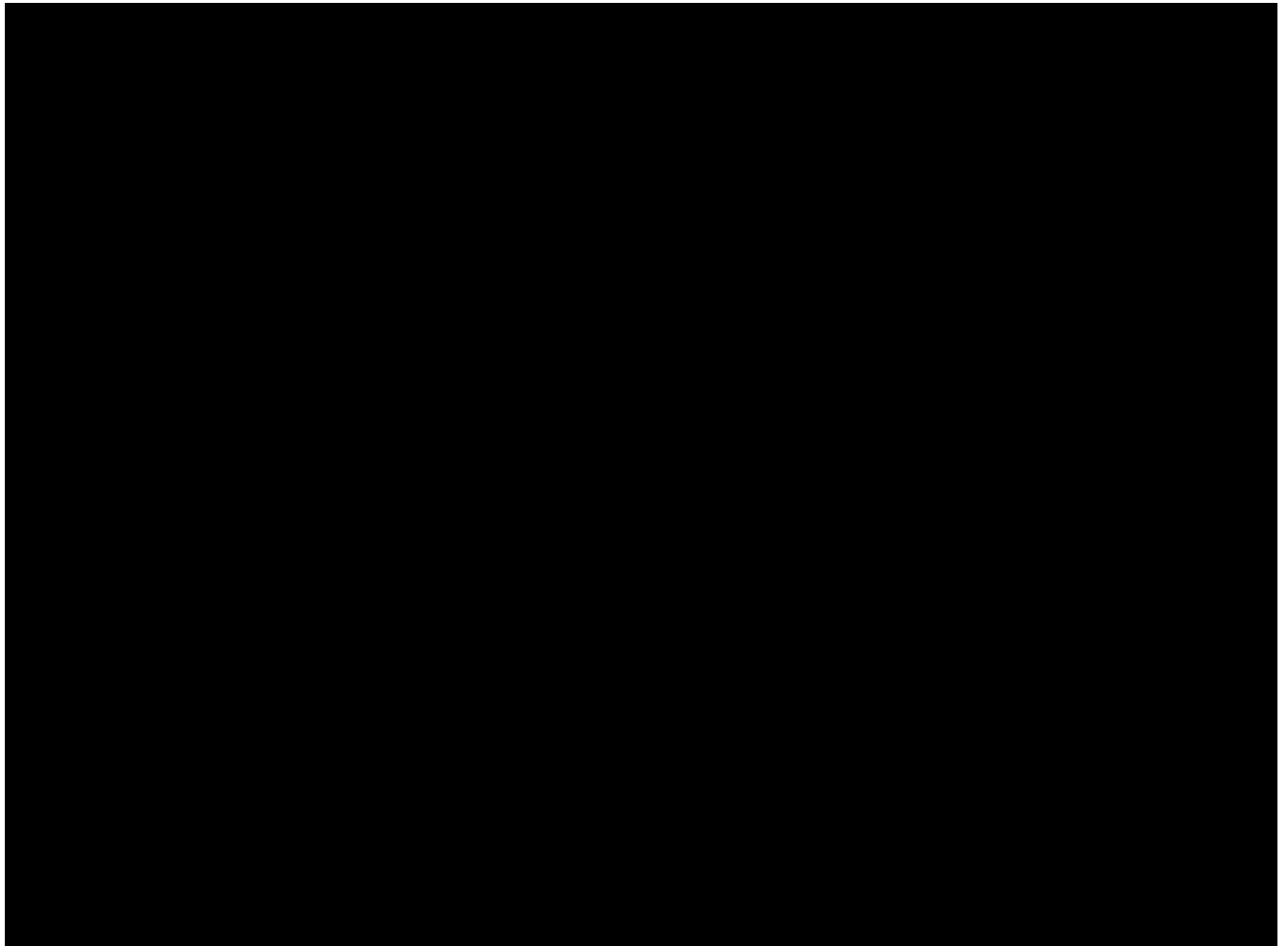
are no vacant slots available. However, Channel 4 would nonetheless remain in an extremely prominent position at the top of the second page.

- (ii) BBC Four in Scotland: Sky's alternative proposal would not result in a more prominent slot for BBC Four when BBC Scotland launches next year; there are no available slots until slot 51 (page 7). However, Digital UK may already have alternative plans for the listings of BBC Four of which Sky is not aware.

(d) On Freesat:

- (i) Channel 4 in Wales: Sky's alternative proposal would not result in Channel 4 moving to a more prominent slot as there are no more prominent slots available. However, Channel 4 is currently listed at slot 120, which in any event is prominent (page 3). Sky also notes that BBC1 HD is currently listed at slot 106 (page one). Accordingly, if EPG providers are only required to give prominence to either the SD or HD version of BBC channels (not both) then this would allow Freesat to move BBC One HD out of slot 106, and move C4 in Wales up into slot 106.

Figure A: Sky EPG line-up based on Sky's alternative proposal



ANNEX 5: SKY'S RESPONSES TO OFCOM'S CONSULTATION QUESTIONS

A5.1 In this Annex Sky provides short responses to Ofcom's consultation questions, referencing relevant passages in the main Sky response.

Q1) Do you agree with our proposals that the main five PSB channels hold the top five slots on EPGs provided UK wide or in the UK outside of Wales?

A5.2 Sky does not agree with this proposal. These channels are all already occupy the slots suggested in Ofcom's proposals across all linear EPGs. The imposition of additional regulation to guarantee something the market plainly already delivers is self-evidently unnecessary and contrary to regulatory best practice and principles. See paragraphs 5.11 to 5.14 of Sky's response.

Q2) Do you agree that on EPGs provided for viewers specifically in Wales BBC One, BBC Two and the relevant Channel 3 service should take the top three slots, with S4C in slot four, Channel 5 in slot five and Channel 4 guaranteed a position on the first page?

A5.3 Sky does not agree with this proposal, which is wholly disproportionate. The benefits to Channel 4 are so small as to be *de minimis*, and any such benefits would be offset by a significant degree by losses of viewers to the other PSBs. Moreover the proposal would result in significant costs to other broadcasters and viewers as a result of changes to EPG listings of a substantial number of other TV channels. See paragraphs 6.6 to 6.34 of Sky's response.

Q3) Do you agree that BBC Four should be guaranteed a slot within the top three pages of all EPGs?

A5.4 See response to Question 1. More generally, Sky considers that Ofcom's prescriptive 'pages' approach is disproportionate and risks unintended adverse impacts. See Section 7 of Sky's response.

Q4) Do you agree that the designated public service News channels (currently BBC News and BBC Parliament) should be guaranteed slots on the first page of the news genre section or an equivalent position within the grouping of news channels on the EPG, as applicable?

A5.5 See response to Question 1.

Q5) Do you agree that CBeebies and CBBC should have guaranteed slots on the first page of the Children's genre or area of the EPG, as applicable?

A5.6 Sky disagrees with this proposal. As with the Channel 4 Wales proposal, Ofcom has not demonstrated any clear benefits and has failed to have due regard to adverse impacts. Moreover the channels are in actuality easy to discover on the Sky platform already. See paragraphs 6.35 to 6.46 of Sky's response.

Q6) Do you agree that S4C, BBC Alba, and BBC Scotland should be guaranteed prominence within the first three pages of UK wide EPGs?

A5.7 See response to Question 3. Additionally, while this proposal would not impact Sky directly, Sky considers that it is unreasonable and discriminatory to require different approaches from EPG providers who have invested in regionalised EPGs. See paragraphs 6.32 to 6.34 of Sky's response.

Q7) Do you agree that local TV should be guaranteed prominence within the first three pages of UK wide EPGs?

A5.8 See response to Question 6. To the extent that Ofcom has been historically concerned as to the treatment of local TV within EPGs, Sky has proposed an alternative approach that is more proportionate which would have addressed these concerns. See Section 8 of Sky's response.

Q8) Do you agree that S4C [S4C is erroneous here as Ofcom propose at Q2 to list S4C at 104 in Wales specific EPGs] , BBC Alba, and BBC Scotland should be guaranteed prominence within the first three pages of relevant Nation specific EPGs e.g. S4C in Wales, BBC Alba and BBC Scotland in Scotland?

A5.9 See response to Question 6.

Q9) Do you agree that local TV should be guaranteed prominence within the first three pages of relevant regionalised EPGs?

A5.10 See response to Question 7.

Q10) Do you agree with our proposals to ensure prominence for either the SD or HD version of BBC channels rather than both?

A5.11 Sky broadly agrees with Ofcom's proposals regarding substitution of SD and HD channels under the EPG Code. However Sky considers that EPG providers should be entitled to list the non-regionalised HD version of a public service channel at the primary slot in a given region, where the appropriate HD regional variant is not available but the PSB has made such variant available in HD on another platform. Similarly, Ofcom should clarify that EPG providers are entitled to list the HD version of commercial public service channels at the higher number without first seeking the broadcaster's consent. See Section 9 of Sky's response.

Q11) Do you agree with our proposals to allow broadcasters to swap HD simulcast variants of their SD designated channels, such that those HD variants could occupy the slots which the SD channels would be entitled to?

A5.12 See response to Question 10.

Q12) Do you agree with our proposal to provide a 12 month transition period once the Code is finalised?

A5.13 There is a risk that 12 months may not be adequate – Sky instead recommends Ofcom increase this period to 18 months. See Section 10 of Sky's response.

Q13) Do you think that the prominence regime should be extended to ensure EPGs themselves can be easily found?

A5.14 Sky does not consider that the prominence regime should be extended to the placement of linear EPGs themselves. See paragraphs 3.8 to 3.26 of Sky's response.

Q14) Do you agree with the broad range of factors for consideration we have identified? Are there other factors that policy makers should consider?

A5.15 Sky does not consider that the evidence supports any extension of the prominence regime at this time. It is difficult, therefore, to assess the factors proposed by Ofcom in any meaningful way. See paragraph 3.41 of Sky's response.

Q15) Do you agree with the principles we have set out? Are there other principles that should be considered?

A5.16 As noted, Sky does not consider that the evidence supports extension of the prominence regime at this time. If prominence regulation nevertheless were to be extended, it should be appropriately designed to minimise competitive impact. See paragraphs 3.47 to 3.48 and Section 4 of Sky's response.

Q16) Do you think that the prominence regime should be extended to ensure PSB Players can be easily found?

A5.17 Sky does not consider the evidence warrants the extension of the prominence regime to PSB players. See paragraphs 3.8 to 3.19 and 3.27 to 3.33 of Sky's response. Moreover if prominence were extended, such extension should allow for a variety of competing models

beyond the PSB's players approach. See paragraphs 4.5 to 4.13. Finally, Sky notes that only any such extension would need to be accompanied by a corresponding guarantee of must offer requirements and an appropriate state aid review. See paragraphs 4.18 to 4.27 of Sky's response.

Q17) Do you think that the prominence regime should be extended to ensure PSB content can be easily found via recommendations and / or search? If so, what key parameters would you set for this aspect of the regime?

A5.18 Sky considers such an extension is not justified, would be impractical and work against viewers' interests. See paragraphs 3.34 to 3.39 and 3.43 to 3.48 of Sky's response.

Q18) Do you think that the prominence regime should be extended to platforms and devices not currently captured by the EPG prominence regime? If so, how do you think the regime could be extended and who should be captured?

A5.19 As stated, Sky does not consider that the prominence regime should be extended based on the current evidence. However if the prominence regime were to be extended, such extension could not be limited to those platforms currently captured by the EPG prominence regime. See paragraphs 4.14 to 4.17 of Sky's response.

Q19) Do you think that the prominence regime should be extended to online services? If so, who should be captured?

A5.20 See response to Question 18.