



## OFCOM PROMINENCE REVIEW SKY COMMENTS ON JOINT PSB POSITION PAPER

### Introduction

1. In December 2018, Ofcom published responses to its consultation on proposed changes to the linear EPG Code and future of the prominence regime. In addition to submitting separate, individual responses to Ofcom's consultation, the PSBs (BBC, ITV, STV, Channel 4, S4C and Channel 5) also submitted a joint position paper setting out their proposed approach to updating and extending the current prominence regime ("Joint Response"). This note sets out Sky's concerns with the specific proposals outlined in the Joint Response.
2. Sky is concerned that:
  - the Joint Response is a clear attempt by the PSBs radically to re-define the prominence regime, moving away from the existing public policy objective of ensuring that PSB programmes are easily available and discoverable to audiences and instead requiring prominence for all services provided by the PSBs, regardless of their nature, and across all methods of content discovery. This is both unnecessary and disproportionate;
  - if implemented the PSBs' proposals would result in an unfair competitive advantage for the PSBs unless a wholesale review of the PSB compact were carried out and additional PSB obligations imposed;
  - the PSBs are seeking prominence for their player apps at the expense of alternative ways of making PSB on-demand content easily available and discoverable;
  - the PSBs' proposals would stifle innovation, lead to homogenisation of user interfaces ("UIs") and diminish the viewer experience; and
  - the proposed requirement for platforms to publish a "UI policy" would be impractical and onerous for platforms to implement.
3. We expand on these concerns in further detail below.

### The PSBs are attempting radically to redefine the prominence regime

4. Ofcom's consultation notes that the public policy objective behind prominence in a linear environment is for PSB programmes to be "*easily available and discoverable to audiences*".<sup>1</sup>
5. The PSBs are now calling for "*significant prominence*" for all PSB linear services and associated on-demand services. This is a clear attempt by the PSBs to redefine the

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<sup>1</sup> Paragraph 1.2 of Ofcom's consultation.

prominence regime, moving away from the current public policy objective, towards prominence for all services provided by the PSBs, regardless of their nature.

6. Further, the PSBs are proposing that Government and Ofcom put in place detailed, prescriptive requirements in order to ensure a right to ‘significant prominence’, across all methods of content discovery.
7. For example, the Joint Response proposes that the law should place a requirement on Ofcom to define ‘significant prominence’ within its guidance, and that Ofcom’s guidance should specify (i) which UI functions in-scope services should be prominent within and (ii) the degree of prominence to be provided, including (but not limited to):

*“Where services are discoverable in their entirety (e.g. VOD app landing pages), in-scope services are **easily discoverable and quick to access**”; and*

*“Where individual pieces of content are discoverable as a result of editorial decisions and/or algorithmic curation, a **substantial amount** of such content should be **immediately visible** and attributable to the relevant PSB, and **quick to access**. The individual content displayed should be chosen by the relevant PSBs from the total catalogue of their in-scope services”. (emphasis added)*
8. However, as explained in Sky’s consultation response, adopting such a prescriptive approach to the regulation of UIs risks leading to poor outcomes and unintended adverse consequences for both consumers and service providers.<sup>2</sup>
9. For example, while a requirement to make the PSB player apps “*easily discoverable and quick to access*” sounds flexible, it is clear from the PSBs’ individual responses that, in their view, ‘significant prominence’ means that their services should be placed in the first four app slots on a UI - leaving no discretion for the platform provider should it wish to follow an alternative approach in order to differentiate itself in the market.
10. Further, a requirement to make a ‘substantial’ amount of PSB content immediately visible and quick to access within areas of the UI such as recommendations and search results would reduce platforms’ flexibility to innovate in this area, and diminish the viewer experience by making it harder for viewers to access the content they want, as described further below.
11. In essence, the PSBs’ proposals seek to ensure that their linear and on demand propositions are always the *first thing* that a viewer sees on any screen frequently used to discover and access content. It is plain that this marks a substantially greater level of intervention in favour of the PSBs than the current prominence regime.
12. The disproportionate nature of the PSBs’ demands was highlighted at the recent Deloitte Enders conference. In response to a question, the Channel Four CEO agreed that PSB apps should be pre-loaded onto the first screen of every iPhone sold in the UK.
13. By contrast, a principles-based approach aimed at securing easy availability and discoverability for public service content would ensure that viewers have easy access to that content without unduly compromising the user experience or consumer choice.

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<sup>2</sup> Paragraph 4.4 of Sky’s consultation response.

## Implementation of the PSBs' proposals would necessitate a wholesale review of the PSB compact

14. Currently, the PSBs receive regulatory advantages in respect of their PSB linear services, such as privileged access to spectrum and prominence in EPGs. In return, the PSBs must comply with certain obligations in respect of their PSB linear services, including content obligations and must-offer requirements. This balancing of costs and benefits associated with PSB status is known as the 'PSB compact'.
15. However, as explained above, the PSBs are now calling for 'significant prominence' not only for their PSB linear services but also for "*associated on-demand services provided by a PSB (or several PSBs)*". While "*associated on-demand services*" are not defined, it is clear both from the Joint Response and the PSBs' individual consultation responses (and public statements) that the term is intended to include not only catch-up content from the PSB designated channels, but also the PSBs' player apps, and other services (for example, to date, the BBC has bundled its News and Sports apps with the iPlayer).
16. Such a proposal is problematic because the ITV Hub, All4 and My5 apps are not PSB services; they include a large volume of content from non-PSB designated channels (e.g. ITV2; E4); third party content (e.g. Viceland content on All4); and exclude some PSB content (e.g. no regional news on ITV Hub). 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*".<sup>3</sup> It is unclear whether the BBC and ITV would seek to include Britbox as an 'in scope service'.
17. Accordingly, if these apps (and/or content included within these apps) were to fall within scope of a revised prominence regime, then it would be necessary to review the PSB compact in order to ensure that the benefits received by the PSBs continue to be balanced by PSB obligations.
18. In particular, it would be necessary to ensure that any service or content that newly benefited from prominence regulation was subject to additional public service obligations relating to the nature and arrangement of content within that service.
19. Furthermore, any new content or service benefiting from prominence would have to be subject to a 'must offer' obligation. Sky notes that the Joint Response states that "[t]he degree of prominence offered by EPG operators should not be made contingent on other factors (e.g. prominence should not be reduced unless VOD rights are granted) or require payment by PSBs". To the extent that such assertions relate to supply, such a position is not reasonable. Any new prominence obligations must be accompanied by corresponding must offer obligations.
20. If the PSB demands for a radically enhanced prominence regime were implemented without a review of the PSB compact, this would grant PSB on-demand services a significant benefit without placing any commensurate obligations on those services, thereby placing them at an unfair competitive advantage.

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<sup>3</sup> 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](https://www.ofcom.org.uk/_data/assets/pdf_file/0026/99233/ITV-plc-BCA-BCR-Commercial.pdf))

### Prominence for PSB player apps should not be at the expense of alternative ways of making PSB on-demand content available

21. As noted above, ‘associated on-demand services’ are not defined in the Joint Response but it is clear that the PSBs intend this term to include not only catch-up content from the PSB designated channels, but also the PSBs’ player apps in their entirety. For example, the Joint Response recommends that “[w]here services are discoverable in their entirety (e.g. VOD app landing pages) in-scope services are easily discoverable and quick to access”. Furthermore, the focus of the PSBs’ public campaign has been on prominence for their player apps, and for prominence of individual pieces of PSB content within search and recommendations.
22. Sky is concerned that the PSBs are seeking prominence for their player apps at the expense of alternative ways of making PSB on-demand content available, such as via Sky’s integrated approach (as described in Sky’s consultation response<sup>4</sup>), which continues to be highly valued by customers.<sup>5</sup> It is important to recognise that platforms have a variety of ways of incorporating PSB on-demand content into their proposition and that these represent a key aspect of platform differentiation and competition. Any extension of the prominence regime must allow for these variations in platform functionality and design in order to preserve consumer choice.
23. Indeed, Sky’s integrated approach is in many ways better suited to new prominence requirements for PSB on-demand content, in that it can give prominence to catch-up content from the designated PSB linear channels without at the same time giving prominence to content which has aired on commercial portfolio channels or any third party content that sits within the commercial PSBs’ player apps.

### The PSBs’ proposals would stifle innovation, lead to homogenisation of UIs and diminish the viewer experience

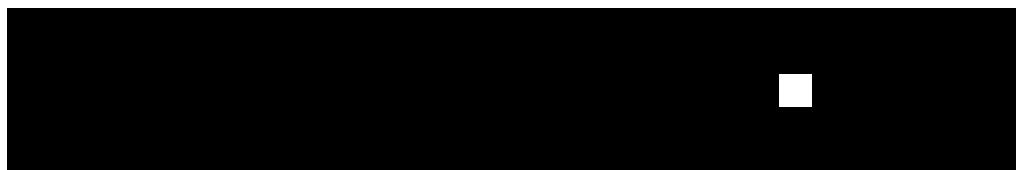
24. As noted above, the Joint Response proposes that Ofcom’s guidance should specify (i) which UI functions in-scope services should be prominent within and (ii) the degree of prominence to be provided.
25. Notwithstanding Sky’s view that there is no rationale for extending the current prominence regime, Sky would not object, in principle, to Ofcom providing broad guidance (as it does today) in relation to any revised prominence regime, should Government decide to amend legislation in this area. However, the detailed recommendations set out in the Joint Response would significantly limit platform providers’ discretion to design their UIs in the way that best meets their customers’ needs, and would inevitably lead to homogenisation of UIs and reduction in consumer choice, as described in Sky’s consultation response.<sup>6</sup>
26. Sky disagrees, in particular, with the introduction of any prominence requirements in relation to:
  - (a) areas of UIs that are “positioned by the UI provider as central to the user experience”, regardless of whether they are used by a substantial number of people to access content. For example, as noted in Sky’s consultation response,<sup>7</sup> [REDACTED]

<sup>4</sup> Paragraphs 4.5 to 4.8 of Sky’s consultation response.

<sup>5</sup> Paragraphs 4.9 and 4.10 of Sky’s consultation response describe the headline findings of consumer surveys commissioned by Sky.

<sup>6</sup> Section 3 of Sky’s consultation response.

<sup>7</sup> Paragraph 3.37 of Sky’s consultation response.



Sky regularly experiments with different rails and changes the order of the rails in response to viewer feedback and other data. Those sections and rails which prove less popular with viewers should not automatically be subject to prominence requirements simply because Sky has ‘positioned them a central to the user experience’;

(b) recommendations and search. As noted in Sky’s consultation response:<sup>8</sup>

- recommendations are a nascent method of consumers discovering and accessing content.



Imposing prominence requirements on recommendations would stifle innovation in this area;

- 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. The Joint Response suggests that “*in search with any ambiguity, where more than one outcome may be presented or served to consumers, prominence rules should apply*”. 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 more relevant shows from non-PSB broadcasters;
- 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 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.

27. The Joint Response also proposes that “*UI operators should be open with consumers and industry about how they decide which content to include in which areas of their UI, and how they choose to promote it*”. However, there is no evidence that consumers expect or need such transparency. Indeed, the user experience would be significantly compromised if on-screen explanations were required, and viewers would be unlikely to access off-screen explanations, making the measure redundant.

### **Publication of a “UI policy” would be impractical and onerous for platforms to implement**

28. The Joint Response proposes that “[t]he regime should amend the existing requirement from publishing an EPG Policy to publishing a UI policy. Policies should be required to set out how UI providers have taken account of the views of the providers of ‘in-scope services’ and Ofcom”.

29. However, a requirement to publish a policy for a platform’s entire UI would be significantly more onerous than the current obligation to publish an EPG policy. A policy for arranging channels within a single linear EPG grid is relatively easy to describe, and changes to such

<sup>8</sup> Section 3 of Sky’s consultation response.

policies are typically infrequent. By contrast, a platform may deploy a wide range of ways of surfacing content through its wider UI, for example via recommendations and search, and via dedicated areas such as “Catch-Up”, “Kids” and “Sport”. For example, on Sky Q, there are currently twelve menus, each one with multiple sub-menus. On the homepage alone there are thirteen rails ranging from “top picks” to “recordings” to “Apps”. The selection criteria vary significantly from menu to menu and rail to rail.

30. Further, unlike linear EPG grids which remain relatively static, platforms’ wider UIs are constantly evolving. For example, Sky makes frequent changes to its UI in response to viewer feedback and other data. As noted in Sky’s consultation response, Sky has implemented numerous software downloads for Sky+HD and Sky Q, almost all of these involving improvements to the UI. It would therefore not be practicable for platforms to publish more than a very high level UI policy, nor to inform or consult with stakeholders each time they change their UI layout, selection criteria or algorithms.

### Conclusion

31. As set out in Sky’s consultation response, there is insufficient evidence to justify extension of the prominence regime at this time. However, if Ofcom is minded to recommend such extension, then any such recommendations should, at minimum, seek to address the concerns outlined in this note.

**Sky**

**April 2019**